**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-005246

First-tier Tribunal No: HU/53248/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

11th March 2024

**Before**

**UPPER TRIBUNAL JUDGE OWENS**
**DEPUTY UPPER TRIBUNAL JUDGE WELSH**

**Between**

**ODD**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Unrepresented
For the Respondent: Mr Terrell, Senior Home Office Presenting Officer

**Heard at Field House on 15 February 2024**

## DECISION AND REASONS

**Anonymity Order:**

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We make this order because the appeal concerns the life expectancy of the Appellant and we see no legitimate public interest in the disclosure of his identity as opposed to his circumstances.**

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## Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge S J Clarke ("the Judge"), promulgated on 10 October 2023. By that decision, the Judge dismissed the Appellant's appeal against the decision of the Secretary of State to refuse his claim under Article 3 of the European Convention on Human Rights ("ECHR").

2. At the hearing before us, Mr Terrell, fairly and properly, conceded that the Judge had erred. We agreed with him, concluding that the decision of the Judge involved an error on a point of law. We now set out our reasons.

## Factual background

3. The Appellant is a national of Nigeria. He has been diagnosed as suffering from acute kidney failure and has, since February 2022, been dependent on dialysis. The dialysis is administered three times a week and, on each occasion, is of four hours duration.

## Proceedings in the First-tier Tribunal

4. The substantive hearing at the First-tier Tribunal took place on Monday 2 October 2023. On the Friday before the hearing, the Appellant's then legal representative made a written application to adjourn on the ground the Appellant was too unwell to attend the hearing. The application was refused by a tribunal case worker on the ground that the application not been made at least one working day prior to the substantive hearing. The legal representatives were informed that they would need to attend the hearing and renew the application before the Judge.

5. On the day of the hearing, neither the Appellant nor his legal representative (nor any representative for the Respondent) attended the hearing. The Judge addressed the question of whether to proceed in the absence of both parties [10]:

> "The Appellant applied for an adjournment days before the hearing because he claimed he could not attend, which was refused before the hearing, and the Appellant did not attend. I noted that the Appellant had provided a witness statement and some photographs in support of his appeal. I concluded that it was in the interests of justice to proceed in his absence and that of the Respondent given the Appellant was notified before the hearing date of the refusal of his application and no further attempt was made by the Appellant to participate otherwise in the hearing making it fair to so proceed."

6. Having decided to proceed in absence, the Judge dismissed the appeal. In summary, her reasons were that the Appellant had not demonstrated that he is a seriously ill person [11], appropriate medical treatment is available in Nigeria [12] and the Appellant had not demonstrated a real risk that he would be unable to access that treatment [30].

7. In relation to the accessibility of treatment, the findings underpinning the Judge's conclusion are as follows:

> I note the Appellant came to the UK as a Tier 4 General Student and he had his leave extended in this capacity, and I find that the Appellant had the means and funds to pay for his tuition fees and to house and maintain himself in the UK. The Appellant's leave expires in 2015 and yet he has remained in

> the UK housing and maintaining himself and there is no evidence as to how he managed this, but I find that he has access to funds to do this. The Appellant has family members living in Nigeria including his mother, and the Appellant has not disclosed any evidence as to their means and ability to assist in funding medical care should he need to pay for it" [14].

## Grounds of appeal and grant of permission

8. The grounds of appeal, which we have numbered and partly re-worded, pleaded that:

    (1) The conclusion that the Appellant is not a seriously ill personal is irrational in light of the undisputed evidence relating to his medical condition (Ground 1).
    (2) The Judge failed to give adequate reasons in relation to her finding on the accessibility of appropriate treatment (Ground 2).
    (3) The Judge failed to make a finding on a material matter, namely the life expectancy of the Appellant if treatment is not available and accessible (Ground 3).

9. Permission was granted by Upper Tribunal Judge Perkins. The grounds upon which permission was granted were not restricted.

## Upper Tribunal proceedings

10. We had been notified in advance of the error of law hearing, by a friend of the Appellant, that the Appellant was too unwell to attend. He was no longer legally represented because, we had been informed, he was unable to afford to pay for representation.

11. We therefore considered whether to proceed in absence pursuant to rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Given the communications between tribunal staff and the Appellant's friend, we were satisfied that the Appellant had been notified of the hearing. In assessing the interest of justice, we took into account, in favour of an adjournment, that (i) the Appellant was unable to attend through no fault of his own (ii) he was no longer legally represented and therefore would not be able to advance submissions in support of his appeal and (iii) an adjournment might resolve the difficulties of him attending because the possibility of remote participation could be explored. However, given our provisional assessment of the merits of the appeal, we decide to proceed in absence but kept that decision under review during the course of the hearing.

12. During the course of Mr Terrell's oral submissions, we raised with him what we considered to be a 'Robinson obvious' point, namely that the Judge gave no reasons for reaching her conclusion that it was in the interest of justice to proceed in the absence of the Appellant. Mr Terrell, quite properly in our judgment, stated that, given this was an Article 3 health case he would not take a procedural point on whether we ought to consider a ground of appeal not advanced by the Appellant. Having considered the relevant paragraph of the Judge's decision, he submitted that no reasons had been given and he accepted that this was an error of law.

## Conclusion

13. We agreed with Mr Terrell. The Judge stated at [10] that it was in the interests of justice to proceed in absence because the Appellant had been notified that the

application to adjourn had been refused and he had made no further attempt to participate. However, this reasoning is circular: it amounts to no more than that it was in the interests of justice to proceed in absence because the Appellant was absent.

14. A number of factors, relevant to the assessment of the interests of justice, were either not taken into account by the Judge or, if taken into account, the Judge did not explain why she nonetheless reached her conclusion on the interests of justice test:

(1) Given the medical evidence that the Appellant was undergoing thrice weekly treatment for dialysis, it is likely that his assertion that he was too ill to attend was true and therefore he could not be deemed to be voluntarily absenting himself.
(2) No legal representative had attended and therefore the Appellant was unable to advance a positive case on the substantive issues or make an oral application to adjourn.
(3) In her review document, the Respondent had stated that the Appellant had failed to provide evidence that his mother in Nigeria would be unable to assist him financially on return. However, the Appellant had provided such evidence, namely his own witness statement. The credibility of the Appellant’s account about accessibility of treatment was therefore arguably the key issue in case and a potentially important aspect of such an assessment would be to hear oral evidence from the Appellant.

15. It was particularly important for the Judge to be clear in her reasoning because the earlier written application to adjourn had never been considered on its merits; the tribunal case worker had refused the application on a procedural point relating to the timing of the application.

16. The error we have identified deprived the Appellant of a fair hearing. Such an error is plainly material and taints all of the Judge’s findings. We therefore deal with the other grounds of appeal very briefly.

17. In relation to Ground 1, given the strength of the medical evidence, it is possible that there is a typographical error in the decision and that the Judge actually intended to find that the appellant is a seriously ill person. However, we cannot be sure of this and therefore conclude that the Judge’s finding was irrational. In relation to Ground 2, we conclude that the reasoning is inadequate given that the Judge does not explain (i) why the appellant being able to support himself when he had leave to remain (prior to 2015) assisted her in her assessment of his likely financial means on return to Nigeria and (ii) whether she took into account that the appellant now being dialysis dependent would adversely affect his ability to financially support himself on return to Nigeria. In relation to Ground 3, the Judge was not required to make such a finding given her conclusion on the availability and accessibility of treatment.

**Notice of Decision**

18. The decision of the First-tier Tribunal involved the making of a material error on a point of law and so we set aside the decision.

19. We remit this appeal to the First-tier Tribunal (not to be listed before Tribunal Judge S J Clarke), to be heard de novo with no findings of fact preserved. In

reaching this decision, we apply paragraph 7.2 of the Senior President's Practice Statement and the guidance in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC).

**C E Welsh**
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

**1 March 2024**