



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/03614/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 11 December 2018**

**Decision & Reasons
Promulgated
On 31 January 2019**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**RTSY
(Anonymity Order Made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Okunowo of Counsel

For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born in 1975. She has two children, a son born in Nigeria in 2002 and a daughter born in the UK in 2004 during a visit by her mother.
2. In an application made on 17 July 2015 the appellant applied for leave to remain on human rights grounds (Articles 3 and 8) with her children as dependents. The basis of the application was the family circumstances, in particular, the physical and mental health of her daughter who has epilepsy and cerebral palsy with severe learning difficulties. The daughter

was also exposed to degrading or inhuman treatment within her community in Nigeria. There were lacerations on her body, she having at a young age been cut with a knife to “exorcise evil spirits.”

3. The application was refused on 13 December 2017 on the basis that there is treatment for cerebral palsy in Nigeria where the family had spent much time, and there was no evidence the daughter was subjected to exorcism rituals. In any event they could relocate. It was reasonable to expect them to leave the UK.
4. She appealed.

First tier hearing

5. Following a hearing at Taylor House on 14 May 2018 Judge of the First-tier Tribunal Monson dismissed the appeal.
6. His findings are at paragraph [29] ff. Medical evidence of multiple scarring had been provided which was consistent with the account of the daughter having been the victim of an exorcism ritual between the ages of two and six years.
7. However, that claim was undermined by the fact that the issue of scarring was only raised in 2015. It was not relied on in an appeal against an earlier decision to refuse leave in 2012. Further, not only had the appellant not claimed asylum in 2011 when she said she had come to the UK in fear of her husband’s family, but she had voluntarily returned to Nigeria with her children on earlier occasions. In any event there was a sufficiency of protection from the authorities and they could relocate.
8. Turning to the other limb of Article 3, namely medical treatment the evidence was that the daughter had been diagnosed with epilepsy when they returned to Nigeria after the child’s birth. There was no reason to suppose she did not receive adequate medical treatment there in the first seven years of her life.
9. Further, it was a reasonable inference that having obtained various visit visas despite on her own admission having overstayed for five months in 2004, the ECO must have been satisfied that the appellant was sufficiently affluent and settled in her family circumstances in Nigeria.
10. Moreover, the medical evidence did not support the proposition that the daughter’s condition had significantly got worse since arriving in the UK in 2011. Her problems are chronic rather than acute. As she becomes more mature the challenges in providing her with day to day care become more onerous. She needs the full-time care of her mother at home as she has always done.

11. Turning to Article 8 under the Rules neither child had accrued seven years residence at date of application or indeed at the date of the hearing.
12. As for Article 8 outside the Rules, turning to proportionality most of the appellant's residence in the UK has been as an overstayer thus unlawful. Accordingly, little weight was given to her private life. As for the best interests of the children such were to remain with their mother in the UK. However, (at [44,45]) in light of his findings on the Article 3 claim it was not "*overwhelmingly*" in the daughter's (and son's) best interests to remain here. He also found that the children were not "*qualifying children,*" that the appellants were overstayers and that their "*continuing presence in the UK is a very significant burden on the UK taxpayer,*" further that they failed to return to Nigeria after an appeal was dismissed in 2012. He concluded that the proportionality assessment fell on the side of the respondent.
13. The appellant sought permission to appeal which was refused but granted on 7 November 2018 following reapplication to the Upper Tribunal.

Error of law hearing

14. At the error of law hearing before me Mr Okunowo made three points. First, the judge appeared to accept that the daughter had scarring on her body inflicted as part of an exorcism ritual but failed to make a finding as to whether Article 3 was engaged by that finding. Further, he had erred in stating that the appellant did not raise the issue of her daughter's scarring until 2015. An assessment, which was before him, indicated that the appellant reported the scarring in 2012.
15. Second, the judge misunderstood and underplayed the extent of the significant health issues. It was not in dispute that the daughter received treatment for her epilepsy in Nigeria. The judge appeared to have confused the treatment of epilepsy with the treatment she received and is ongoing in the UK for cerebral palsy and severe learning difficulties. The judge failed to appreciate that medical personnel in Nigeria were not able to diagnose her cerebral palsy. The condition was only diagnosed in the UK in 2012 therefore to conclude that there was treatment for a condition that the authorities could not diagnose lacked detailed reasoning.
16. Third, the judge failed to have adequate regard to the fact that the children, who came to the UK in June 2011, by the date of the hearing were only one month short of being "*qualifying children*" (section 117D, Nationality, Immigration and Asylum Act 2002).
17. Mr Kandola's response was that there was no error in the judge's finding of no risk on the basis of exorcism. Second, any error in the judge's understanding of the medical situation was not material. The daughter's conditions are chronic not acute. Under the jurisprudence they could not succeed under Article 3. Third, the judge had noted the length of time the

children had been in the UK but did not find it determinative. It was a matter for him. He was entitled to find that the compelling public interest factors prevailed.

Consideration

18. I reserved my decision.
19. I agree with Mr Kandola.
20. On the issue of risk from exorcism rituals it does appear that the scarring on the daughter's body was mentioned in an assessment letter from the Disabled Children's Service in 2012 rather than first disclosed in February 2015. It also appears that the judge (at [29]) found that the account of the scarring being inflicted at a young age as part of an exorcism ritual was consistent with the medical evidence. However, the judge went on to find against credibility that the appellant had failed to claim asylum on that basis in 2011 when she claimed to have come to the UK in fear of her husband's family and that she voluntarily returned to Nigeria with the children on earlier occasions and that such adversely affected the claim of risk. Further, and in any event, there would be a sufficiency of protection and, if necessary, they could relocate. These were conclusions open to the judge on the evidence.
21. On the medical issues it is undisputed that the daughter suffers from cerebral palsy and epilepsy. The judge noted **AM (Zimbabwe) v SSHD [2018] EWCA Civ 64** which decided that the ECHR in **Paposhvili v Belgium [2016] ECHR 1113** had not ruled that on the medical evidence adduced it would have been a violation of Article 3 to remove Mr Paposhvili to Georgia, rather that Belgium would have violated the procedural aspect of Article 3 had they removed him without consideration of his medical condition. Whilst **N v SSHD [2005] UKHL 31** was binding authority up to Supreme Court level, the Court of Appeal opined that **Paposhvili** relaxed the test only to a very modest extent. The applicant would have to face a real risk of rapidly experiencing intense suffering to the Article 3 standard because of their illness and the non-availability there of treatment available to them in the removing state or face a real risk of death within a short time in the receiving state for the same reason. The boundary had simply shifted from being defined by imminence of death in the removing state even with treatment to the imminence of intense suffering or death in the receiving state occurring because of the lack of treatment previously available in the removing state.
22. As indicated the daughter has two chronic conditions. The judge set them out at some length in his decision. As he found (at [34]) the daughter had received treatment for her epilepsy when in Nigeria. Whilst the judge did not specifically mention treatment for cerebral palsy I do not find that to be material. He did find that in coming here on visit visas the appellant must have satisfied the ECO that she was "*sufficiently affluent and settled*

in her family circumstances as to have an adequate incentive to return to Nigeria with her children ...” I take that to be a reference to the ability to access specialised centres for children with cerebral palsy which the respondent referred to in the refusal letter.

23. The finding that the appellant has funds and a support network was one open to him on the evidence.
24. His finding that the appellant cannot satisfy Article 3 on medical grounds was unassailable.
25. As for Article 8, in **GS (India) and Ors [2015] EWCA Civ 40** it was held that if the Article 3 claim failed, Article 8 could not prosper without some separate or additional factual element which brought the case within the Article 8 paradigm: the core value protected being the quality of life not its continuance. That meant that a special case must be made under Article 8. Although the UK courts have declined to state that Article 8 could never be engaged by the health consequences of removal from the UK, the circumstances would have to be truly exceptional before such a breach could be established (per paras [45], [85 - 87] and [106 -111]). Underhill LJ said this: *“First, the absence or inadequacy of medical treatment, even life preserving treatment, in the country of return, cannot be relied upon at all as a factor engaging Article 8: if that is all there is the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the ‘no obligation to treat’ principle.”* [111]
26. More recently in **SL (St Lucia) v SSHD [2018] EWCA Civ 1894** the Court of Appeal commented that they were unpersuaded that **Paposhvili** had any impact on the approach to Article 8 claims. An absence of medical treatment in the country of return would not of itself engage Article 8. The only relevance would be where that was an additional factor with other factors which themselves engaged Article 8.
27. Whilst the circumstances of a child may (though not must) more readily engage Article 8.1, in assessing proportionality and taking into account as a primary consideration a child’s best interests the public interest must be weighed bearing in mind that, even under Article 8 and in cases involving children, the public interest reflected in the economic wellbeing of the country remains a powerful and weighty factor in “health” or “welfare” cases.
28. In this case the judge was clearly alert to the fact that the daughter and the other child were minors. He correctly noted that they were not *“qualifying children.”* The fact that a case may be a “near miss” in

relation to satisfying the requirement of the Rules does not show that compelling reasons exist requiring the grant of leave outside the Rules.

29. He properly considered the children's best interests but weighing the various factors (at [45]) concluded that the public interest in removal outweighed the rights and interests of the appellant and her children. In that regard he noted that the appellants' status, which initially as visitors had been precarious, had since about 2012 been unlawful. Also, their failure to leave despite the dismissal of their appeal against a decision to refuse them leave made in respect of an application made in 2012. Further, that their continuing presence is a "*very significant burden on the UK taxpayer.*"
30. Such was a conclusion which for the reasons he gave was one which was open to him on the evidence.
31. Whilst a different tribunal might have reached a different conclusion I do not consider that the judge's decision shows material error of law.

Notice of Decision

The decision of the First-tier Tribunal shows no material error of law. That decision dismissing the appeal shall stand.

An anonymity order is made. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. Failure to comply with this order could lead to contempt of court proceedings.

Signed

Date 24 January 2019

Upper Tribunal Judge Conway