



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

Appeal Number: AA/03101/2013

THE IMMIGRATION ACTS

**Heard at Newport
On 12 May 2014**

Determination Sent

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**JOO
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Howells instructed by Jackson & Canter Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Background

2. The appellant is a citizen of Nigeria who was born on 7 July 1979. She came to the UK in June 2009 with leave as a dependent of her husband who was a student in the UK and who had leave valid until 21 April 2010. Subsequently, the appellant's leave was extended in line with that of her husband until 4 March 2013. He unsuccessfully applied for further leave and as a consequence both his leave and that of the appellant expired. On 14 February 2013, the appellant claimed asylum. On 8 March 2013, the Secretary of State refused the appellant's claim for asylum and on 12 March 2013 made a decision to remove her to Nigeria by way of directions.
3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 30 May 2013, Judge B Lloyd dismissed the appellant's appeal on asylum grounds, under the Immigration Rules and under Article 8 of the ECHR. First, he rejected the appellant's account that she was at risk on return to Nigeria because she was a Christian. Secondly, he concluded that the appellant could not succeed under the Immigration Rules (HC 395 as amended) under Appendix FM or para 276ADE based upon her family and private life respectively in the UK. Thirdly, the Judge rejected the appellant's claim under Article 8 of the ECHR which was based, in large part, upon the claim that her (then) three year old son (L) was autistic and that it would not be in his best interests to return to Nigeria.

Appeal to the Upper Tribunal

4. The appellant sought permission to appeal to the Upper Tribunal principally upon the ground that Judge Lloyd had erred in law by failing to grant the appellant an adjournment in order that a further medical appointment scheduled for shortly after the date of the hearing could take place and a report assessing her son's claimed autism could be obtained.
5. In a determination promulgated on 7 August 2013, Deputy Upper Tribunal Judge Birrell concluded that the refusal to grant an adjournment was procedurally unfair and the Judge had failed to take into account the objective evidence relied upon by the appellant supporting the appellant's contention that there was discrimination against persons perceived to be disabled physically or psychologically in Nigeria. As a result, DUTJ Birrell set aside Judge Lloyd's decision in respect of Article 8. No challenge was brought to Judge Lloyd's decision to dismiss the appellant's appeal on asylum grounds and that decision stood.
6. As a consequence, DUTJ Birrell directed that the appeal be relisted for a resumed hearing in order for the Upper Tribunal to remake the decision under Article 8. The appeal was initially listed for hearing on 24 March 2014. However, in the absence of the appellant or any representative, that hearing was adjourned by the Upper Tribunal (McCloskey J, President and Miss E Arfon-Jones, Vice President) out of a concern that the appellant may not have been given notice of the hearing.

7. The appeal was relisted before me on 12 May 2014. It would appear that notice of the previous resumed hearing had not been received and the hearing proceeded before me.

The Upper Tribunal Hearing

8. Mr Christian Howells, who represented the appellant, relied upon a consolidated bundle of documents, a number of which (including medical reports and an expert report) had not been relied upon before the First-tier Tribunal. Mr Irwin Richards, who represented the Secretary of State made no objection to their admission under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).
9. Mr Richards also sought to rely upon a small bundle of background documents concerning Nigeria which had not been before the First-tier Tribunal. Mr Howells did not object in principle to their admission under rule 15(2A) but, as he had not seen the documents prior to the hearing, he invited me to grant a short adjournment in order that he could read and consider the documents. As a consequence, the hearing was adjourned for a little over one hour at the conclusion of which I heard oral submissions from both Mr Howells and Mr Richards.

The Appellant's Case

10. Mr Howells relied exclusively upon Article 8 of the ECHR. He submitted that the sole issue was one of proportionality and the best interests of L. He submitted that in considering L's best interests there were two issues:
 - (1) Would there be educational or medical support for L in Nigeria? and
 - (2) Would there be discrimination (putting it at its lowest) faced by L because of his autism in Nigeria?
11. Mr Howells submitted that on a balance of probabilities if L were returned to Nigeria he would not receive the treatment or support he was receiving in the UK for his autism. Additionally, he would face discrimination and violence because of his autistic condition and the risk that he would be perceived as a witch. Mr Howells submitted that taking into account either of these factors (but certainly both) made the appellant's removal to Nigeria disproportionate even though she would be accompanied by her husband and their second child (S) who was born on 20 July 2013.
12. Mr Howells drew my attention, and relied upon, a number of documents in the appellant's consolidate bundle and some additional documents in the bundle prepared for the First-tier Tribunal hearing. First, he relied upon a number of documents which, he submitted, established L's diagnosis of autism, his needs and that it was in his best interest to continue to receive his current support in the UK: "Statement of Special Educational Needs" page 56 at pages 57, 58, 59 and 61; a report of W Davenport, Specialist Speech and Language Therapist dated 27 January 2014, page 76 at page

77; report of Dr Kate Greening, Clinical Psychologist dated 11 November 2013, page 78 at pages 78, 79, 80 and 81; a letter from Dr Elspeth Webb, Reader and Honorary Consultant in Child Health at page 95. Secondly, in relation to the situation in Nigeria and the perception of autism as an attribute of witchcraft: an expert report of Gary Foxcroft dated 21 April 2014, pages 103, 104, 105 and 106; a report entitled "Report on Accusations of Witchcraft against Children in Akwa Ibom State, Nigeria" by Stepping Stones Nigeria (UK) dated 10 May 2014, page 112 at pages 113, 119, 120 and 121; the *Country of Origin* Information Service report on Nigeria dated 14 June 2014, page 133 at pages 138, 140 and 148-149.

13. Mr Howells also referred me to the "US Department of State Country Report on Human Rights Practices: Nigeria 2012" page 25 of FTT bundle at page 28 in relation to the social stigma and discrimination faced by persons with disabilities; a paper entitled "Autism among Primary School Pupils in Benin Metropolis: Implications for Counselling" page 257 of FTT bundle at page 72 again dealing with the perception of children with autism in Nigeria; a paper from the Refugee Documentation Centre of Ireland dated 13 May 2010, page 189 of the FTT bundle at pages 190-192 dealing with again the perception of children with autism in Nigeria and the issues of discrimination and support provided to them.
14. As regards the law, Mr Howells accepted that the situation of L could not engage the high threshold for Article 3 of the ECHR. Nevertheless, Mr Howells submitted that a number of decisions of the Court of Appeal and the Upper Tribunal made clear that even in a so-called 'health case' an individual could succeed under Article 8 of the ECHR even if a claim under Article 3 was bound to fail. Specifically, he referred me to the Upper Tribunal's decision in Akhalu (Health Claims: ECHR Article 8) [2013] UKUT 00400 (IAC) and the Court of Appeal's decision in R (SQ) Pakistan v UTIAC [2013] EWCA Civ 1251.
15. Mr Howells sought to identify a number of factors in this appeal which, when taken with the evidence which he submitted established that L would face discrimination (at the very least) and an absence of support on return to Nigeria, justified a finding that the appellant's removal (with L) would be disproportionate. First, he submitted that this was not a 'health tourism case' as L had been born in the UK in April 2010 and, as a consequence, had not come to the UK seeking treatment or support. Secondly, L is a child and, unlike the case of an adult, his "best interests" were in play and a primary consideration following ZH (Tanzania) v SSHD [2011] UKSC 4. Thirdly, Mr Howells submitted that the appellant and her husband had always had lawful leave to be in the UK. He submitted that the respondent could not point to anything which would outweigh the effect on L of his return to Nigeria and that this would not be in his best interests.
16. In response to Mr Richards' reliance upon the new evidence admitted under rule 15(2A), and in particular in relation to the printout from the "Patrick Speech and Language Centre", Mr Howells submitted that the

Secretary of State had made no proper enquiries whether this institution could provide, albeit limited to speech and language support, adequate care and support for L. Mr Howells submitted that it was simply not adequate for the Secretary of State to provide a printout from a website and place reliance upon it without further enquiry.

17. Mr Howells invited me to allow the appellant's appeal, based primarily upon L's circumstances, under Article 8 of the ECHR.

The Secretary of State's submissions

18. Mr Richards accepted that it was "fairly easy" to conclude that L's best interests were to remain in the UK and to continue to benefit from the significant investment made in him in this country. Mr Richards did not seek to argue that L would receive comparable services and support for his autism in Nigeria. However, Mr Richards submitted that L's best interests were not determinative of this appeal.
19. First, he relied on the fact that the appellant had come as a dependent of a student whose leave had now expired and she had no expectation of remaining in the UK.
20. Secondly, she had made an asylum claim and, the account upon which she had based that claim, had been rejected by the First-tier Tribunal.
21. Thirdly, Mr Richards submitted that the bundle of documents relied upon by the Secretary of State showed that education and support was available for children with autism in Nigeria even if that support was not comparable to that in the UK.
22. Fourthly, Mr Richards submitted that the expert's report dealing with whether a child with autism would be perceived as a witch was of limited assistance because it did not focus on the situation in Lagos to which the appellant and L would be returned and where the appellant's family lived. Mr Richards submitted that the evidence was largely dealing with the abandonment of children with autism by their families and mistreatment of children as a result. He submitted that there was no suggestion that that was going to happen in this case. Here, he submitted, L had two parents who were striving to do their best for him and there was no reason to conclude that that would not continue in Nigeria. L would, as a result, have the best possible protection from ill treatment or discrimination.
23. Fifthly, Mr Richards submitted that given the evidence that some support was available to children with autism and that L would have the support of his parents, bearing in mind that his parents had no claim to remain in the UK, the appellant's removal was proportionate. Mr Richards relied upon Akhalu where the Upper Tribunal recognised that:

“The counter-veiling public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of healthcare facilities in all but a very few rare cases.” (at [43])

Mr Richards submitted that the evidence did not establish that L would be at any real risk of being harmed or suspected of being a witch given the protection of his family and there was no evidence to show a significantly increased risk of discrimination in Lagos. Mr Richards invited me to find that whilst it might well be in L’s best interest to be in the UK, nevertheless, having regard to all the circumstances the appellant’s removal (with L) was proportionate.

The Legal Framework

24. The appellant relies exclusively upon Article 8 of the ECHR which provides as follows:

“Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

25. The burden of proof is upon the appellant to establish that there are substantial grounds for believing that if returned to Nigeria there is a real risk of a breach of Article 8. The burden is upon the Secretary of State to justify any interference with the appellant’s right to respect for her private and family life under Article 8.2.

26. In applying Article 8, the five stage test set out in the opinion of Lord Bingham of Cornhill in R (Razgar) v SSHD [2004] UKUT 27 at [17] as follows:

- “(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case maybe) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved/”

27. At [20], as regards the issue of proportionality, Lord Bingham said this:

“[it] always involve(s) the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for a careful assessment at this stage.”

28. In this appeal, the appellant does not now argue that she can succeed under the Immigration Rules whether in Appendix FM or para 276ADE. Therefore, in order to succeed under Article 8 the appellant must establish that there are “compelling” circumstances such that her removal would lead to “unjustifiably harsh” consequences (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC)).

29. In determining whether there is a breach of Article 8 in this appeal, I must have regard not only to the rights of the appellant (and indeed of her husband) but also of the rights of her children, in particular L who is now four years old.

30. In that latter regard, the ‘best interests’ of L are a “primary consideration” (see ZN (Tanzania)). Although a primary consideration, the best interests of a child are not necessarily determinative of the issue of proportionality since those interests can be outweighed by sufficiently strong or weighty considerations of the public interest (see ZN (Tanzania)).

31. In Zoumbas v SSHD [2013] UKSC 74, the Supreme Court summarised the applicable principles as follows (at [10]):

- “(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
- (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child’s best interests do not of themselves have the status of the paramount consideration;
- (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
- (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
- (5) It is important to have a clear idea of a child’s circumstances and of what is in a child’s best interests before one asks oneself

whether those interests are outweighed by the force of other considerations;

- (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
- (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.”

The ‘Health’ Cases

32. It was conceded by Mr Howells on behalf of the appellant that she could not succeed under Article 3 of the ECHR in this appeal on the basis of the jurisprudence dealing with Article 3 claims in so-called ‘health’ cases. Those are cases where the whole, or an integral part, of an individual’s claim to remain in the UK is that they will receive (substantially) less favourable healthcare or medical treatment in the country to which they are to be returned. Both the case law of the Strasbourg Court and of the House of Lords imposes a “very high” hurdle, attainable only in wholly exceptional circumstances, in such cases (D v UK (1997) 24 EHRR 423; N v SSHD [2004] 2 AC 296 and N v UK (2008) 47 EHRR 39). In MM (Zimbabwe) v SSHD [2012] EWCA Civ 279, Moses LJ identified the essential principles of the case law as follows at [17]:

“The essential principle is that the ECHR does not impose any obligations on the contracting states to provide those liable to deportation with medical treatment lacking in their ‘home countries’. This principle applies even where the consequence will be that the deportee’s life will be significantly shortened...”

33. Consequently, in GS and EO (Article 3 – Health Cases) India [2012] UKUT 397 (IAC), the Upper Tribunal concluded that there was no breach of Article 3 where an individual with end-stage renal failure was to be returned to his home country where through the lack of medical treatment he would die within a few weeks.

34. The case law, nevertheless, recognises that a ‘health’ case may succeed under Article 8 even where it would fail under Article 3 of the ECHR (see Bensaid v UK (2001) 33 EHRR 10 at [46]). The potential health consequences for an individual would engage that aspect of his or her private life covered by the rubric of “the physical and psychological integrity of [the] person” (see Pretty v UK (2002) 35 EHRR 1 at [61]).

35. In Razgar, Lord Bingham recognised that this category of case included both “health” as well as “welfare” consequences. At [10], Lord Bingham said this:

“...rights protected by Art 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to

an immigration decision, even where such removal does not violate Art 3, if the facts relied on by the applicant is sufficiently strong. In so answering I make no reference to 'welfare', a matter to which no argument was directed. It would seem plain that, as with medical treatment so with welfare, an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state."

36. In my judgement, there is no bright line distinction to be drawn between 'health' cases and 'welfare' or 'social care' cases such as the present. It would be wrong to distinguish between the social care and support that a child such as L, who is autistic, needs and the medical or healthcare *per se* which were the needs of the individuals in the jurisprudence. Although Lord Bingham in Razgar noted that no argument had been made in relation to 'welfare' cases before the House of Lords he nevertheless saw no difference in principle in approach (see [10]). In this appeal, Mr Howells did not seek to sustain any distinction and his submissions were based squarely upon the 'health' cases which he sought to pray in aid on behalf of the appellant.
37. In Razgar, Baroness Hale also considered the application of Article 8 in 'health' cases. Having referred to Bensaid at [56], at [59] Lady Hale noted that:

"Although the possibility cannot be excluded, it is not easy to think of a foreign healthcare case which would fail under Art 3 but succeed under Art 8. There clearly must be a strong case before the article is even engaged and then a fair balance must be struck under Art 8(2). In striking that balance, only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacies of the healthcare available in the two countries. The question is whether removal to the foreign country will have a sufficiently adverse affect upon the applicant."

38. In GS and EO, the Upper Tribunal, though only concerned on the facts of the cases with Article 3, expressed the following observations in relation to the application of Article 8 in a 'health' case at [85(8)]:

(b) However, in principle Art 8 can be relied on in cases of this sort. The removal of the individual would, on the face of it, engage Art 9(1) on the basis of an interference with his or her private life as an aspect of that individual's 'physical and moral integrity' (see Bensaid v UK (2001) 33 EHRR10). Unlike Art 3, however, Art 8 is not absolute and the legitimate aim of the economic well-being of the country would be relevant in determining whether a breach of Art 8 could be established given any financial implications that continued treatment in the UK would entail (see also R (on the application of Razgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368).

(c) It may be that although, in principle, the scope of Art 8 is wider than that of Art 3, in practical terms that in a case like this where the claimant has no right to remain it will be a "very rare case" indeed where such a claim could succeed (see KH (Afghanistan) v SSHD [2009] EWCA Civ 1354 and MM (Zimbabwe) v SSHD [2012] EWCA Civ 279). [1] That reality may

lay at the heart of the majority's view of the Strasbourg Court in N v UK when, having rejected the individual's claim under Art 3, stated that no "separate issue" arose under Art 8 (compare the dissenting Judge's opinion at 1 to 6).

(d) Again we note that in N v UK the minority disagreed with the failure to address Article 8. We see some force in this. If it be the case that the Article 3 threshold is an exceptionally high one because of the absolute character of the prohibition and concerns that Contracting States could be swamped by health tourism claims by people with no prior connection to the state in question seeking to enter or remain to gain access to expensive medical treatment, an Article 8 proportionality analysis might yield a different outcome in other cases, possibly where the claimant had a lawful permission to reside in the host state before the disease was diagnosed."

39. In these cases, whilst the potential application of Article 8 is recognised, nevertheless the judges acknowledge that in a 'health' case it will be difficult nevertheless to succeed under Article 8 either because of the significant threshold to engage Article 8 or, if it is engaged, for the circumstances of the individual to be such as to outweigh the public interest.

40. In Akhalu, the Upper Tribunal, having analysed the relevant case law including Bensaid, MM (Zimbabwe), and GS and EO, concluded at [43]:

"The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the counter-veiling public interest in removal will outweigh the consequences with the health of the claimant because of a disparity of healthcare facilities in all but a very few rare cases."

41. In Akhalu the Upper Tribunal endorsed a holistic approach to proportionality having regard to disparity in health resources but concluding that any such disparity did "not weigh heavily" in an individual's favour but rather spoke "cogently in support of the public interest in removal" (see [45]-[46]).

42. Thus far, the cases I have set out all concerned adult applicants. Mr Howells relied upon the case of SQ (Pakistan) which, he submitted, threw a somewhat different light on the case law when a child was concerned as only then were the child's "best interests" relevant. The case concerned a child who suffered from Beta Thalassaemia, a very serious medical condition for which he required treatment. The evidence was that, although healthcare was available in Pakistan, it was of a significantly lower quality than that available in the UK. The applicant had failed in his Article 8 claim before the First-tier Tribunal and had been refused leave to appeal by the Upper Tribunal. The Court of Appeal was concerned with a judicial review challenge (a Cart challenge) to that refusal of permission to appeal. The Court of Appeal concluded that the FTT had wrongly excluded "health consideration and the discontinuance of the UK treatment" in assessing the child's best interest (see [24]). As a consequence, the Court of Appeal remitted the case to the Upper Tribunal for a rehearing. In

doing so, Maurice Kay LJ (with whom Lewison and Underhill LJ agreed) said this at [26]-[27].

“26. What this case demonstrates is that in some cases, particularly but not only in relation to children, Article 8 may raise issues separate from Article 3. In *JA (Ivory Coast) v Secretary of State for the Home Department* [2009 EWCA Civ 1353], an adult succeeded under Article 8 (but not Article 3) in a health case. Sedley LJ emphasised (at paragraph 17) that each of the two Articles “has to be approached and applied in its own terms”. The leading authorities of D and N were distinguishable on the basis that, in both of them, the appellants’ presence and treatment in this country “were owed entirely to unlawful entry”. JA’s appeal was allowed and her case remitted because of the potential significance of the fact that, following her lawful entry and subsequent diagnosis of HIV+, she had been granted further exceptional leave to remain for treatment. Although no separate Article 8 issue arose in D or N, it plainly did in JA.

27. I do not intend to predict or seek to influence the outcome of the present case on remittal. On the one hand, MQ can prey in aid his lawful entry and his status as a child with the protection of the ZH approach. On the other hand, he arrived with his serious medical conditions at an advanced stage and, although not an unlawful entrant, it will be relevant to consider whether his arrival here was a manifestation of “health tourism”. If it was, that would fall to be weighed in the balance. After all, this country is under no international obligation always to act as “the hospital of the world”. The difficult question is whether it would be disproportionate to remove this child in the light of all the evidence in the case, including the medical evidence which, at present, is not as clearly presented as it could be.”

43. As [27] makes plain, the Court of Appeal, whilst recognising the potential application of Article 8 to the applicant, nevertheless was not persuaded that the claim was bound either to succeed or to be lost (see also [25]). The matter was properly to be determined by the Upper Tribunal on the basis of all the evidence.
44. Nevertheless, *SO (Pakistan)* illustrates that even in a ‘health’ case, Article 8 may have (greater) purchase where the applicant is a child.
45. That approach was followed in the more recent decision of the Court of Appeal in *AE (Algeria) v SSHD* [2014] EWCA Civ 653 decided shortly after the hearing in this appeal. That case involved an individual who had a six year old daughter with spina bifida which resulted in her being very severely disabled, with severe learning difficulties and extremely complex needs (see [1]). There also, the Court of Appeal remitted the appeal to the Upper Tribunal to consider the application of Article 8 on the basis that the Upper Tribunal had failed properly to consider the child’s best interests. At [9], Maurice Kay LJ (with whom Black and Lewison LJ agreed) said this:

“What was required was a structured approach with the best interests of [M] and her siblings as a primary consideration but with careful

consideration also of factors pointing the other way. Such factors include but are not limited to the over-staying of the children and their mother and the illegal entry and bogus asylum claim of the appellant father. The latter is no doubt what the UT had in mind when referring to 'the need to maintain immigration control'. Moreover, I do not consider that it would be inappropriate for the future cost and duration of [M's] treatment and care in this country to play a part in the balancing exercise as matters relating to the economic well being of this country, given the strains on the public finances."

46. Again, the Court remitted the appeal to the Upper Tribunal as the "outcome is not self-evident" (see [9]).
47. It seems to me that the decisions in SQ and AE represent no more than an application of the "best interests" jurisprudence as summarised in Zoumbas above. 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 remains to be weighed bearing in mind the clear steer of the Strasbourg and domestic courts that, even under Article 8, the public interest reflected in the economic well-being of the country remains a powerful and weighty factor in 'health' or 'welfare' cases. As both the Court of Appeal in MM and the Upper Tribunal in Akhalu recognised, the Convention imposes no obligation upon a contracting state to provide medical treatment or healthcare (including social care for the purposes of this appeal) when it is not available (or not so well provided) in the country to which the individual is to be removed and so it will only be in a "truly exceptional" or "very rare case" where the public will be outweighed by the individual's circumstances even where that individual is a child.
48. With those principles in mind, I turn to consider the evidence to make findings of primary fact and to apply those findings to the legal framework or Article 8.

Discussion and Findings

49. I deal first with the evidence concerning L's circumstances. He was born on 19 April 2010 in the UK and is, consequently, now just four years old. It is now not disputed that he has been diagnosed with "Autistic Spectrum Condition" (see Statement of Special Education Needs at page 57 of the consolidated bundle). He is currently in a mainstream school but, as I understand it, if he remains in the UK will attend a school for children with special educational needs in the autumn. That is a consequence of the "Statement" dated 18 March 2014. That report (at page 57) notes that since he started attending nursery L:

"has made small steps of progress...he seems more settled, had adjusted to the daily routines and is able to sit for long periods of time on the carpeted area".

50. In relation to his communication and interaction, it is said that:

“L currently shows little communicative intent. His ability to communicate is at a pre-verbal level, with a reliance on the use of vocalisation, simple physical gestures and adult interpretation of his needs. L is reported to respond well to music and songs and will attempt to join in. He presents as having a limited understanding of spoken language.”

51. At page 58, the Statement continues:

“L is totally dependent on adult assistance as he is not able to help with dressing or undressing and is not yet toilet trained. He has a lot of issues around food. He used to use a spoon, but now does not; it is not known whether this is because he can't or because he won't.”

52. L's general health is good, and there are no reported concerns with his gross motor skills, vision or hearing, although he is sensitive to certain noises and to loud noises.

53. In relation to his educational provision the report sets out at pages 60-61 what is required to meet his “needs and objectives”. Mr Howells highlighted 4 of the 22 points made as follows:

“1. L requires access to a broad and balanced educational curriculum, suitably differentiated to meet his special educational needs. This will be delivered in a provision that provides a high level of individual/small group teaching with a high adult to pupil ratio, with staff experienced/trained in managing the needs of children with an autism spectrum condition and with appropriate interventions....

3. L requires daily teaching and consistent use of an augmentative approach to communication (e.g. Picture Exchange Communication System – PECS) across different settings (school and home). ...

18. L requires a carefully planned, graduated and supported transition to Reception class, with all staff to be aware of his needs...

21. L needs continued access to a range of specialists (e.g. speech and language therapy/Autism Support) in order to carry out ongoing assessments of his needs and provide advice and support in addressing those needs.”

54. In his report Mr W Davenport (dated 27 January 2014) at pages 76-77 of the consolidated bundle assesses the speech and language needs of L. He concludes that:

“77. L has been diagnosed as having ASD. In accordance he has specific difficulties in the areas of social communication, social interaction and flexibility of thought and behaviour. He needs an environment that supports his learning needs; highly structured, calm and visually supported. His difficulties are specific and need school based Speech and Language Therapy delivered by a Speech and Language Therapist specialised in ASD working as part of a multi disciplinary team”

55. Dr Greening, a Clinical Psychologist in her report dated 11 November 2013 at pages 78-81 of the consolidated bundle reports that L's father told her that:

“L “displayed ‘deep stress and anxiety’ during the moves to and from Liverpool. He found the moves very unsettling and appeared afraid and anxious. L is said to be very clingy with adults, and does not like to be left alone at night. His father has to lie beside him until he has fallen asleep, and he is said to continuously check to see if his dad is still there. His sleep is poor, and he wakes up a lot during the night crying and shouting.”

56. Mr Howells referred me to passages in Dr Greening’s report noting L’s “lack of social engagement” and that he does not “appear to use language to communicate”. At pages 80-81, Dr Greening concludes as follows:

“L will continue to require one-to-one support to encourage his development and engagement with other children and help him achieve his full potential. L’s parents will greatly benefit from being enrolled on the Early Bird course, which will offer a unique opportunity to help them understand L’s autism, and develop strategies for interacting and communicating with him.

L will certainly benefit from being nurtured within a stable home and school environment, therefore moving L and his family to Nigeria is likely to significantly impede his development, as it is unlikely that L will receive the support and understanding that he undoubtedly needs.”

57. Mr Howells relies upon the impact that moving L to Nigeria would have given the experience when he moved from Liverpool previously.
58. Mr Howells also relied upon the reports’ comments that L requires one-to-one support and Dr Greening’s conclusion that his development is likely to be significantly impeded if his family returned to Nigeria as it is unlikely that L will receive the support that he needs. Dr Greening does not give any basis for her conclusion about support which would be available in Nigeria and, I also observe that, there is nothing to suggest from her report that Dr Greening has any specialist knowledge about the provision of care for autistic children in Nigeria.
59. That final observation by Dr Greening is also made by Dr Elspeth Webb in her letter dated 14 May 2013 (at page 95 of the consolidated bundle).

“In terms of the implications of being returned top (sic) Nigeria for a child like L; children with Autism do a great deal better with appropriate early intervention in respect of promoting communication, behaviour and social interaction. These interventions are not available in Nigeria; in fact I think it is doubtful that the condition of Autism is generally recognised in that society, certainly outside of a few medical psychiatric communities. Therefore repatriation will definitely have a detrimental impact on the severity of his autism in later childhood and adulthood.”

60. Again, Dr Webb provides no source for her statement about the availability of support for L in Nigeria and again nothing in her letter suggests that she has any expert knowledge of its provision in Nigeria.
61. The day-to-day life of L’s family is set out in the appellant’s witness statement dated 28 April 2014 (at pages 13-18 of the consolidated

bundle). There, L's mother sets out at paras 8-19, the daily life of the family. At paras 10-16 the appellant says this:

- "10. I have been asked by my legal representative to describe my son's routine and behaviour. My son is very unpredictable. Like wakes up at different times in the morning. My husband sleeps on the same bed with L. L will not sleep on his own. His is prescribed the medication ciradin to help him sleep. L goes to bed in the evening at eight clock. My husband goes to bed with him. Once L falls sleeps my husband returns down stairs. L has to sleep with the light on. It takes around one hour for L to fall asleep.
11. I have to make sure everything in L's bedroom is in the same place. If something has been moved, L screams. I try and keep everything in the house in the same place which is difficult because of S. Sometimes I notice L looking house around the and the rooms. I know he is restless and something has been moved. I start to panic because I know something is out of place and I had to look around the house or the room to try and work out what has moved. Until the item is back in place L is restless, screams and cries.
12. When L wakes up in the morning sometimes he cries for hours. My husband baths L in the morning and provides his breakfast. I have to make at least 3 different types of food because L is so unpredictable. I make L Weetabix, custard and toast. Sometimes L will not eat any of these foods. L will only eat biscuits if there are no cracks in the biscuits. After breakfast (if he eats it) L plays on his own with his toys. Like likes toys with lights. Barnados have provided L with toys. L now accepts S but it has taken along time. I leave the TV on whilst L is playing because he likes cartoons. No other children come and play with L at the house. We have tried to bring other children to the house but L runs away from the children and cries. Sometimes whilst he is playing L will start to scream. L will run to me or my husband and grabs us. He keeps looking around as if somebody is there.
13. L attends play school in the afternoon for 2 hours and 30 minutes. My husband takes L to playschool. L does not play with other children at the play school and he does not interact with other children. L eats his food on his own and he is not allowed to eat with the other children. L cannot cope with the other children and when the other children walk over to him, he runs away. L does not like enclosed spaces and screams when he feels enclosed. My husband collects L from play school.
14. Before L returns home I start to make a number of meals hoping he will eat. I make cook L the following meals chips, baked beans, fried rice, and jollofu rice. L prefers the fried rice but he only picks the vegetables out the rice. My husband feeds L because he will not feed himself. L sometimes eats his tea and sometimes he refuses. L will not drink water but he will drink juice. L also has a drink call paediasure plus which is prescribed by the specialist at the hospital. L was losing weight so he was prescribed the supplement.
15. After his tea L watches cartoons on the TV. I am unsure if he actually understands the cartoons but he tries to copy the characters in the mirror. Ls favourites cartoons are Mr Tomba,

Bonny and Bob the Builder. This is the only time I have peace when L watches the cartoons. We are not allowed to distract L whilst he is watching the cartoons. From seven o'clock we try to change the channels and my husband takes L for an evening bath. My husband gives L his tablets which are crushed in his juice.

16. L has to wear a nappy because he cannot go to the toilet on his own. The health visitor referred L to a potty trainer specialist but he refused to be potty trained. When L sees the potty he screams and puts the potty on his head. L does not like new environments or crowds. L will not go out to restaurants or go out shopping. I do the shopping on my own because it is so difficult. Sometimes I have taken L to the park with my husband. I would never take L alone because I cannot cope. When he starts to scream I cannot calm him down. When L goes out he has to be in open areas. If there are people around he starts to cry and scream. I have taken L on the bus when it is quiet. When the bus becomes crowded we have to get out the bus because L screams and cries. It is rare I take L out because it is such an ordeal for the family."

62. At para 19, the appellant concludes as follows:

"I feel if I am forced to return to Nigeria, L will suffer greatly as he will be perceived as a witch because of his behaviour, L has a place at [] school and I do not believe L will obtain this specialist support on return to Nigeria. L cannot cope with mainstream schools and he has been assessed to attend a specialist school."

63. I will return to the issue raised by the appellant concerning L being perceived as a witch shortly. For present, however, it is clear that L is autistic and has a number of behavioural, social and learning difficulties. At present, these are managed within his family by his loving mother and father and, at least for the present, in a mainstream although he is scheduled to attend a school for children with special needs in the autumn.
64. Mr Richards readily accepted that the provision of care for L is better in the UK than it would be in Nigeria. However, he did not accept that support and care for autistic children was not available in Nigeria. He relied upon the short bundle of documents admitted under rule 15(2A). At page B2-B3 is a news article entitled "Managing Children with Autism" dated 6 April 2013. That article recounts the story of an autistic child of 9 years of age who attended Zamaar Institute in Abuja in Nigeria. That school exists, according to its director, "to meet the needs of children with special needs such as autism, down-syndrome, speech defects, amongst others". The father of the child explains that his daughter "has improved as a result of behavioural and communication skills. She has learned from the school...."
65. The director notes that:

"Some of our children are getting lost in the cracks. Their needs are not being met. For instance, a child with learning difficulties in a mainstream school who is accused of being dumb and stupid will lose his self-esteem and we will probably lose the child. What we offer is such that children

with learning disabilities can come here and benefit. What we offer is to teach in a way that the child will learn.”

66. Further, at C1-C5 is a document describing “The Nigerian Autistic Society” which it is stated is: “dedicated to tackling autism in Nigeria”. It is a non-governmental organisation founded in Abuja, Nigeria in 1993. It sets out its purpose and functions as follows:

“It is made up of parents, friends, professionals and students dedicated to the education and welfare of autistic people and to raise the visibility of autism and broadens services for individuals who have autism and related disorders of communication and behaviours in Nigeria.

The Autistic Healing School is at AJ’s playgroup foundation, which is dedicated to early childhood development Institute, encouraging autistic and communication-handicapped children at Abuja, FCT, Nigeria.

Also, the Institute provides Day care, Nursery and Primary education for non-handicapped children.

People with special needs have separate facility for training but are encouraged to attend our music nursery rhymes at our multipurpose Hall.”

67. The document goes on to set out the service offered including: “self-help, rehabilitation, music therapy, sports, computers, agriculture and recreation”.
68. Finally, at pages D1-D17 is a document relating to the “Patrick Speech and Language Centre” in Lagos, Nigeria. The document states that the centre is:

“A unique centre for children with Autism Spectrum Disorders, Asperger Syndrome and other related developmental disabilities.

69. The Centre was established in 2006 and has facilities: “to provide services such as Behavioural, Occupational and Speech Therapy.” The Centre has been: “at the forefront of increasing awareness about Autism Spectrum Disorders in Nigeria”. The document sets out the centre’s core objectives as follows:

- to provide specialised educational services for developmentally challenged, hearing and speech impaired children.
- to help as many children as possible join regular schools where they can learn under normal school syllabus.
- create community awareness towards the rehabilitation of the intellectually disabled.
- Help the society.

70. I do not accept Mr Howell’s criticism of the Secretary of State in relying upon this documentation. Both the appellant and respondent have had a full and fair opportunity over the course of the passage of this appeal through the First-tier Tribunal and subsequently through the Upper

Tribunal to submit any material relevant to the issues which I have to decide.

71. In his report Gary Foxcroft, the Executive Director of Witchcraft and Human Rights Information Network (dated 21 April 2014) notes at para 10 that L's:

“ability to access his right to education in Nigeria will be further reduced as such children are rarely allowed to attend school due to the stigma of being perceived as a witch. According to UNICEF, children accused of witchcraft typically have had ‘little or no schooling with most children staying at home, or going out and begging. For all of them, their situation does not improve over time. Those that may have attended school initially have to drop out in order to earn money to feed themselves’”.

72. At para 11 Mr Foxcroft continues by saying:

“My experience of having worked with teachers from a large number of schools in Nigeria has shown that there is very little understanding of conditions such as autism among the majority of teachers and, as yet, I have failed to meet any teacher who has the skills needed in order to effectively meet the needs of such children.”

73. Whilst it may be the case that mainstream schools in Nigeria would lack the facilities and resources to provide specifically for L, that is something that could be equally levelled at mainstream schools in the UK. Both Dr Webb and Dr Greening expressed views that L's development would be impeded if he returns to Nigeria. As I have already indicated, they appear to have no expert knowledge of the provision of education and support for autistic children in Nigeria and provide no supporting evidence for their views. In my judgement, it is clear that despite a level of discrimination against autistic persons in Nigeria, the evidence to which I have referred and which was relied upon by the Secretary of State, demonstrates that some provision is provided for the education and care of autistic children and, in particular, I note that the Patrick Centre is based in Lagos to which the appellant will return and where she has family. It is not clear whether the services of the Centre are free or a charge is made. No evidence of that was presented by either party. However, I see no reason to doubt that the appellant and her husband, given their educational background and (as I understand it) the appellant had her own business before coming to the UK, could establish themselves in work so as to resource L's attendance at, for example, the Patrick Centre. I do not, therefore, accept Mr Howell's submission that L would return to an environment where he would be unable to obtain any support or education tailored to his own specific needs. As Mr Richards readily acknowledged, it may well be that that provision would not be at the level he would receive in the UK, but there is provision for autistic children in Nigeria and I am satisfied that it would be available to L on his return. I make those findings bearing in mind that it is accepted by Mr Richards that it is no doubt in L's best interests to remain in the UK and to continue to benefit from the social, educational and other support he receives in the UK which will be at a greater or higher level of provision and so “better” for him.

74. Turning now to the issue raised by Mr Howells on the basis of the background evidence and expert report of Mr Foxcroft, Mr Howells submitted that L on return to Nigeria would, as a result of his autism, be perceived as a witch and would be at risk of violence and/or discrimination. Mr Howells first relied upon the expert report of Mr Foxcroft beginning at page 103 of the consolidated bundle. At para 6 of his report (pages 105-106), Mr Foxcroft says this:

“The fact that Nigerian children with disabilities such as autism are particularly at risk of being accused of witchcraft is well established and the wide-ranging stigma and denial of their fundamental human rights that they may suffer due to such beliefs has been documented in numerous reports and papers.

Such is the level of concern in Nigeria about the abuses of human rights that take place due to the belief that autism is a sign of witchcraft, the Health Minister - Onyebuchi Chukwu - recently lamented that some individuals end up being “locked in cages and fed like animals” and felt the need to publically state that autism “is not witchcraft”.

The stigma of having autism is primarily linked to the belief that there is a supernatural explanation for the character traits exhibited by children with autism. Such character traits include challenges with communication; repetitive behaviours; social challenges and a number of associated medical conditions. In particular it is therefore believed that such traits are linked to witchcraft and that the child sufferer may be possessed or be a witch.

Beliefs in the existence and powers of witches have a long and diverse history and are found across Nigeria. Such beliefs have commonly - although by no means always - resulted in persecution, social rejection, discrimination and violence towards those who are believed to be witches. Indeed as Chineyemba highlights, ‘Urban and rural dwellers are entrapped in the deep rooted fear of witches... society is organized around an intrinsic fear of witchcraft... it is enshrined in communal consciousness’.

The stigmatization of children as witches in Nigeria, however, is a relatively recent phenomenon, being considered to have only become widespread in the early to mid-1990s. Children with disabilities such as autism are considered to be at particular risk of witchcraft accusations, as such conditions are considered to be evidence of witchcraft. Mental and physical disabilities remain misunderstood and feared in both children and adults within Nigeria and this contributes to the reasons why children with such disabilities are likely to be accused of witchcraft.

These findings have been corroborated by my personal experiences of having worked with hundreds of children who have been accused of witchcraft in Nigeria, many of whom exhibit signs of autism and have been abandoned by their families due to the belief and subsequent stigma that they faced. These signs include those outlined in Master L’s development assessment by Dr Kate Greening, which highlight that his “development appears to be significantly delayed and this delay appears to be across all areas of his development, including social communication” and that “L’s presentation is in line with a diagnosis of an autism spectrum disorder”.

75. At paragraphs 8-9, Mr Foxcroft states what he believes would be the consequences of L being accused of witchcraft as follows:

8. Should Master L be accused of witchcraft due to his disabilities then I believe that there is also risk that he may receive the following treatment from ordinary Nigerian citizens:

- physical attacks
- verbal attacks
- attempts to ostracise him and his mother from the community where they live
- public disgrace

The above potential treatments are on the more moderate spectrum of the forms of abuse that could take place. Research carried out by the charity that I co-founded - Stepping Stones Nigeria - of cases of child witchcraft stigmatisation in Nigeria also highlighted that children accused of witchcraft may suffer other forms of human rights violations. This includes being:

- chained and imprisoned
- subjected to starvation
- forced to participate in 'exorcisms' which can have a lasting negative psychological effect on the child
- denied access to medical treatment
- denied access to education

The specific rights that are often violated in cases of child witchcraft stigmatisation include:

- The right to life
- The right to freedom from torture
- The right to freedom from violence, abuse and neglect
- The right to education
- The right to the highest attainable standard of health
- The right to an adequate standard of living, including sufficient food, water and shelter.

9. Such is the severity of the level of risk of children posed to disabled children following an accusation of witchcraft, the UN Special Representative to the Secretary General on Violence Against Children - Marta Santos - issued a statement on this at the Human Rights Council in March 2014. In her statements she notes that: "The growing reality of children being accused of witchcraft reveals a serious pattern of discrimination, social exclusion, violence, abandonment and sometimes even murder of innocent children. Vulnerable children, such as those with disabilities.....are often the target of witchcraft accusations. Beyond branding a child as a witch, in itself a form of psychological violence, these accusations often lead to physical

attacks against these children and other extreme human rights violations”.

According to Ms Santos: “This in turn leads to the abuse and neglect that accused children face. Overall, “to be labelled a witch...is tantamount to being declared liable to be killed with impunity”.”

76. In that report, Mr Foxcroft refers to the “Stepping Stones” organisation and Mr Howells relied upon its report of May 2011 at pages 112-128 of the consolidated bundle. That report notes that children who are accused of witchcraft suffer significant abuses of their rights (page 113). The report sets out at pages 119-120 harsh consequences visited upon children who are accused of witchcraft. At page 120 the report notes that:

“Children who have been stigmatised as witches are frequently abandoned or rejected by their parents and/or community.”

77. I interpolate that there is no evidence to suggest that L will be abandoned by his parents who clearly have (and will continue to have) his best interests at heart and support him.

78. At page 120-122 of the report, there is reference to the “long-term discrimination facing a child stigmatised as a witch”. The report gives examples of being denied access to treatment, to education, participation in the local community and of being abandoned. The report states that:

“There is far-reaching social stigma and exclusion stemming from witchcraft stigmatisation. The child becomes isolated from their family and community, becomes unable to socialise with their peers and is unable to experience the usual enjoyments of childhood. This may have a long-term negative psychological effect on the child.”

79. Mr Howells also drew my attention to passages in the *COI Report* for June 2013. Under the heading “Witchcraft” at paras 24.24-24.28, the report highlights the dangers of children being accused of witchcraft. At para 24.29 quoting from the Stepping Stones Report of December 2009, the *COI Report* refers to the potential witchcraft stigmatisation of children with autism as follows:

“It is clear that the child witchcraft stigmatisation and abuse both results from and is causative of mental and physical disabilities....Certain medical conditions, because they are not properly understood, are often considered to be evidence of witchcraft. For example, there is a high prevalence of autism in Nigeria, yet this condition is not widely acknowledged. In consequence, the particular behaviour autistic children is often interpreted as witchcraft....Accusing a child of witchcraft can also lead to the onset of mental illness and physical disability. Some children are permanently damaged by the abuse that they have suffered. They may be so traumatised from the extent of their pain that they never fully recover. By way of example, Stepping Stones Nigeria has previously found children in a distressed state at a church where they were chained up. They had been deprived of food and were manifesting signs of mental illness. Stepping Stones Nigeria has also witnessed cases of physical disability due to child witness stigmatisation, including a child who was found roaming the streets after having a nail driven into her head.”

80. I accept on the basis of this evidence that there is some discrimination both in relation to children with disabilities (such as autism) and the connected risk of being accused of witchcraft. I note, however, that the Stepping Stones report for May 2011 concerns the Akwa Ibom State in the Niger Delta region of Nigeria. L will not return with his parents to that area of Nigeria but rather to the city of Lagos where his mother's family live. Although the appellant says in her witness statement that she has not told her family about L, there is no reason to believe that their response to him will be any different from that of the appellant and her husband, namely to care for him within the family and to seek to provide, as I have already indicated, through the educational and other support available to children with autism the services offered in Lagos. There is, in my view, no prospect of L being abandoned by his parents nor is there any evidence to show that his wider maternal family will reject, or fail to care for, him. I accept that there is a risk that he may face some level of discrimination in Nigeria because of his autism but he will do so in the context of his caring immediate and wider family. The evidence also shows that there are organisations dedicated to raising awareness of autism and to promote the interests of individuals with autism and their families, for example the Nigerian Autistic Society. I do not accept that there is any real risk, given that he will not be abandoned by his family, of him being accused of being a witch and suffering any of the violence of exclusionary consequences postulated by Mr Foxcroft. His report does not, in my judgement, focus on the situation in Lagos which is important. Also, it is plain to me that the risk may arise if a child is abandoned by their family but, as I have already indicated, I am satisfied that there is no prospect of that occurring for L. I am not satisfied that there is a real risk that L will be perceived as a witch and subject to ill-treatment as a consequence.
81. I now turn to apply these findings to my assessment of the appellant's claim under Article 8 of the ECHR. I have taken into account all the documentary and other evidence to which I was referred and I apply the legal principles and framework set out above at paras 24-47.
82. I accept that both the appellant's private life and that of her family, in particular L will be interfered with if returned to Nigeria. I accept that, whilst there will be care and support available for L in Nigeria, it will not be of the same level as in the UK. Likewise, there is some discrimination against those with disabilities and this may have some impact upon L in the future. I did not understand Mr Richards to suggest that Article 8.1 was not engaged on the basis of the interference with L's moral and physical integrity. The crucial issue in this appeal is whether that interference is justified under Article 8.2.
83. There is no doubt that the interference is in accordance with the law and for a legitimate aim, namely the economic well being of the country or in order to prevent disorder (see Shahzad (Art 8: Legitimate Aim) Pakistan [2014] UKUT 00085 (IAC)). The crucial issue is the assessment of proportionality.

84. First, it is accepted by Mr Richards that L's best interests are to remain in the UK with his parents. That is a "primary consideration" but one that can be outweighed if sufficiently weighty consideration of the public interest apply.
85. Secondly, the appellant, her husband and their two children (L) have no lawful basis for being in the UK. The appellant came as the dependent of her husband who was a student. He no longer has leave as a result of an unsuccessful application to extend his leave and therefore has no basis for remaining in the UK. Further, the appellant can have no legitimate expectation of remaining beyond the period of her (and her husband's) temporary leave.
86. Thirdly, for the reasons I have given above, whilst I accept that L's return to Nigeria will not be in his best interests, I am satisfied that there will be available educational and other support for his autism although that support will not be of the level he would receive in the UK (see especially para 73 above). I accept that L's autism may give rise to some discrimination in Nigeria but I do not accept that there is a real risk that he will be perceived as a witch and suffer serious consequences as a result (see especially para 80 above).
87. Fourthly, I accept that the appellant (and through her L) did not come to the UK in order to obtain the social, educational and other support L now receives. The appellant came as a dependent of her husband and L was, of course, born in the UK.
88. Fifthly, I accept that the immigration status of the appellant should not necessarily reflect upon L. It remains the case, however, that as Judge Lloyd found in his determination in the First-tier Tribunal that the appellant had invented her asylum claim in order to seek a better life (as she perceived it) in the UK.
89. Sixthly, it is clear from the case law that a breach of Article 8 cannot be established simply on the basis of a disparity in health or, as in this case, social and educational care (welfare) provided in the UK (on the one hand) and in the appellant's home country, Nigeria (on the other hand). That remains, however, a factor to be taken into account. However, it will only be in a "very rare" case that the public interest in the economic well-being of the country will be outweighed by the individual's interests (whether that of a child or adult) where the central part of the claim is the disparity in the provision of those services or support. That applies in a case such as this involving a child, as it does where the claimant is an adult. As Maurice Kay LJ pointed out in AE (Algeria) at [9] it would not be

"inappropriate for the future cost and duration of [the child's] treatment and care in this country to play a part in the balancing exercise as matters relating to the economic well-being of this country, given the strains on the public finances."

90. In FK and OK (Botswana) v SSHD [2013] EWCA Civ 238 Sir Stanley Burnton also made the point about the importance of the economic well-being of the country and the burden on the public purse (at [11]):

“...the maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense (as was the second appellant). All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8.2.”

91. There is no doubt that L, if he remains in the UK, will be entitled to a range of state provision to meet his educational and other (welfare) needs with the consequent burden that will place upon public resources.
92. I must strike a balance between the rights and interests of L and his parents and the public interest. The effect of L's autism on both him and his family is evident from the evidence of his parents and those involved with his care and it is accepted that it is in his best interests to remain in the UK. I fully take that into account. Nevertheless, having regard to all the evidence and matters I have set out above, I am satisfied that L's best interests are outweighed by the weighty public interest of the economic well-being of the UK as set out in Article 8.2 of the Convention and reflected in the case law to which I have referred.
93. In reaching that conclusion, I take into account the fact that education and other support is available to him for his autism in Nigeria (in particular in Lagos to which he will return) even though the support may not, as Mr Richards candidly accepts, be on a parity with that which he enjoys (and would continue to enjoy) in the UK. I also take into account that disability (including autism) attracts a level of discrimination in Nigeria but I do not accept that there is a real risk that L will be perceived as a witch. Nevertheless, the evidence shows that organisations exist to support individuals (and their families) with autism, including specific educational needs and more generally to promote awareness, for example the Nigerian Autistic Society. I also note the effect that change has on L as evidenced by his move from Liverpool. I take into account that he will return to Nigeria with his mother and father and to the city of Lagos where the appellant's family live. There is no basis in the evidence for concluding that he will be abandoned or rejected either by his parents or the appellant's family in Nigeria. This is undoubtedly a tragic case but I am satisfied that the public interest outweighs the best interests of L and the rights of his family.

94. For these reasons, I am satisfied that the appellant's removal would be proportionate and she has not established a breach of Article 8.

Decision

95. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Article 8 involved the making of an error of law. That decision is set aside.
96. The decision to dismiss the appellant's appeal on asylum grounds and under the Immigration Rules stands.
97. I remake the decision in respect of Article 8 of the ECHR. I dismiss the appeal on that ground.

Signed

A Grubb
Judge of the Upper Tribunal

Date: