Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14311/2016

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 21 September 2017	**On 25 September 2017**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D D
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: In Person (assisted by Mr Forbes, McKensie Friend)

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, D D, is a female citizen of Nigeria who was born in 1985. She appealed to the First-tier Tribunal (Judge Phull) against a decision dated 14 December 2016 of the respondent to refuse her application for asylum and humanitarian protection. The First-tier Tribunal, in a decision promulgated on 13 March 2017, allowed the appeal on asylum and human

rights grounds (Articles 2, 3 and 8 ECHR). The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appellant appeared in person and I found that she was able to understand the proceedings. She was assisted by a McKensie Friend, Mr Forbes of Lifeline Options. I am grateful to him for his assistance.

3. In essence, there are two issues before the Upper Tribunal. First, the Secretary of State challenges the judge's reasoning for concluding that the appellant and her children (she has three sons, two of whom were born in the United Kingdom) to be at real risk of persecution and Article 3 ill-treatment in Nigeria. The appeal before the First-tier Tribunal focused upon the condition of the child S who was born in 2012. S suffers from autism. Following the child's diagnosis of autism, the father of the child abandoned the appellant and her children. The judge found that the appellant had a genuine fear of returning to her home village in Nigeria. It was the appellant's contention that, on account of her son's autism, the family would suffer discrimination at such a level as to amount to persecution. There was evidence before the Tribunal that children suffering from autism are sometimes accused of being witches or of possessing supernatural powers. The respondent has acknowledged the genuine nature of the appellant's subjective fear but refused the asylum application in part on the basis that the family could relocate without undue hardship to another area of Nigeria (more particularly, Port Harcourt, where the appellant had previously lived.) The respondent submitted that Port Harcourt is a modern city (one of the largest ports in Nigeria) where there was "no prevalence of child witchcraft accusations". The judge noted that,

> "The respondent refers to the Encyclopaedia Britannica in relation to Port Harcourt and said it was considered to be a modern and forward thinking city. I find that paragraph 21 of the refusal letter refers to the commercial activities and commerce of the city of Port Harcourt. It does not deal with autism. But while the respondent may be right that the city is modern I find the objective evidence does not support the respondent's claim that the city is forward thinking on the issues that the appellant fears e.g. autism as witchcraft, abominable. There is no evidence that Port of Harcourt has banned child witchcraft accusations or that there are facilities in place that deal with the perpetrators of such atrocities against children because there is nothing in the respondent's documents to satisfy to a reasonable likely likelihood that the public attitudes in Port Harcourt are any more enlightened than in any other parts of Nigeria."

4. The difficulty with this analysis is that, as Mr Mills submitted, it both appears to cast the burden of proof on to the respondent and, notwithstanding any clear evidence, accepts that child autism would be regarded in Port Harcourt (where the appellant might otherwise reasonably relocate) with such suspicion that the family would be exposed to the risk of persecution. I fully accept that the appellant appears in person and that her resources and ability to obtain expert evidence has been strictly limited. There is some evidence in the appellant's bundle

taken from the internet (www.autismaroundtheglobe.org) which mentions that "in many parts of Nigeria today, particularly in rural areas, people with autism are thought to be possessed or evil". However, the mere fact that the country material referred to in the refusal letter relating to Port Harcourt makes no mention of autism was not enough, in my opinion, to entitle the judge to reach a firm finding that the family would be at risk of persecution in that city.

5. I agree also with Mr Mills that the judge's analysis of sufficiency of protection [26] is inadequate. The judge found that a report before her "confirms that police are corrupt and can be easily bribed and failed to take necessary steps to protect the child accused of witchcraft". Because the appellant has failed to obtain any evidence to show the likelihood of witchcraft allegations occurring in Port Harcourt or a similar substantial centre of population in Nigeria it is extremely difficult to conclude that, because the police generally in Nigeria may be easily bribed, the police in Port Harcourt would be unable or unwilling to offer the family protection should they require it. Even the judge acknowledged [24] that there was "a functioning police force operating in Nigeria and that ongoing improvements are being made to its services". This is a classic instance, in my view, of a judge confusing an absence of evidence with evidence of absence; there is simply not enough evidence either way to show that Port Harcourt would not be safe or that the police in that city would or would not offer protection to the family against witchcraft allegations. Since it is for the appellant to prove her case before the Tribunal, it is apparent that she failed to do so notwithstanding the low threshold of the burden which she had to discharge.

6. I turn to the second part of the appeal. At [30] *et seq* the judge considered the appellant's private life under paragraph 276ADE of HC 395 (as amended). At [31], the judge found that there would be "very significant obstacles to the appellant's integration into Nigeria with her child who has autism. S spent his entire life in the UK with support through an education care plan". The judge reiterates her findings regarding the "societal views about autism and witchcraft" and makes the unequivocal finding that the appellant and her children would not have family members in Nigeria to whom they might turn for support. At [32], the judge considered the best interests of S under Section 55 of the Borders, Citizenship and Immigration Act 2009. She concluded there would not be in S's best interest to be removed to Nigeria. At [33], she found that, "for all these reasons I found the appellant's claim under paragraph 276ADE also succeeds". She makes it clear in the summary of the decision, that she is here allowing the appeal under Article 8 ECHR.

7. Mr Mills submitted that the judge's reasoning in respect of Article 8 was tainted by the same errors which had been shown to exist in her asylum/Article 3 analysis. He accepted, however, that the consideration of whether the family would face very significant obstacles to their integration in Nigeria differed materially from the appropriate tests in the asylum/Article 3 analysis. Paragraph 276ADE(vi) provides that an

appellant such as in this instant appeal who is aged 18 years or above and has lived continuously in the UK for less than 20 must show that there would be "very significant obstacles to the appellant's integration into the country to which she would have to go if required to leave the UK".

8. I consider that Mr Mills is correct to identify a distinction in the evidential requirements required by paragraph 276ADE and in the asylum appeal/Article 3 appeal. There is, in my opinion, a considerable difference between a young family with a single mother returning to live in a country where it has not been proved that, on account of her one child's autism, the family would be reasonably likely to suffer persecution and ill-treatment and, for the purposes of the analysis on Article 8 grounds, the same family returning without an adult male member to a country where the autistic child has never lived, where he might receive little, if any, assistance medically and where it is evident (even on the basis that the limited evidence in this case) that his education and the integration of the family as a whole will be hampered by societal attitudes towards the child's autism. Whilst not obviously relevant in the context of the asylum appeal, the lack of any family members in Nigeria is, in my opinion, a significant feature with regards Article 8 ECHR. So far as integration in Nigerian society is concerned, I would accept (as did Judge Phull) that a lack of family support, coupled with the child's autism, are bound to make matters very difficult for the appellant mother.

9. I find, therefore, that whilst the judge erred in concluding that the appellant and her family would face persecution and Article 3 ill-treatment, it is difficult, even on the basis of the limited evidence before the Tribunal, to conclude that her findings in respect of Article 8 ECHR were perverse or inadequately reasoned. For that reason, I set aside the asylum and Article 3 ECHR decisions and remake those dismissing the appeal. However, I do not propose to interfere with the judge's findings in respect of Article 8 ECHR; I agree with the judge that the appellant satisfies the provisions of paragraph 276ADE.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 13 March 2017 is set aside insofar as the appeal concerns asylum and Articles 2/3 ECHR. The Secretary of State's appeal against the First-tier Tribunal's decision allowing the appeal on Article 8 ECHR grounds is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 22 September 2017

Upper Tribunal Judge Clive Lane

No fee is paid or payable and therefore there can be no fee award.

Signed Date 22 September 2017

Upper Tribunal Judge Clive Lane