Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10577/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th February 2020	**On 16th March 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

IAU & Others

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Knorr, Counsel instructed Central England Law Centre
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal ("F*t*T") made an anonymity direction and it is appropriate to continue that direction. Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellants are all nationals of Nigera and are a family unit, comprising of mother, father and their two children. Each of their claims for leave to remain in the United Kingdom on human rights grounds was refused by the respondent for the reasons set out in decisions dated 29th August 2019. The appellants appealed to the F*t*T and their appeals were dismissed on Article 3 grounds but allowed on Article 8 grounds, by First-tier Tribunal Judge James ("the judge") for the reasons set out in a decision promulgated on 18th February 2018.

3. For the purposes of this decision it is sufficient to note that taking the totality of evidence before her into account, the judge found that the decision to refuse leave to remain amounts to an interference with the eldest child's physical and psychological integrity and thus an interference with his private life. The judge found that the interference is disproportionate to the legitimate aim, and is not outweighed by the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. The respondent does not challenge the decision to allow the appeal on Article 8 grounds.

4. Insofar as the Article 3 claim is concerned, the judge stated at paragraph [32] of her decision:

> "In regards to Article 3 submissions (fully addressed in the skeleton argument submitted), I am not persuaded that the threshold of article 3 in these circumstances are met in applying the case of N v SSHD [2005] UKHL 31 and N v United Kingdom (2006) 47 EHRR 39. Not least because the medication for dealing with [VU]'s epilepsy is available in Nigeria, there are reduced costs in both the private and public sector for this medication, and as stated above I do not find that the parents coming from an educated and financially secure family background in Nigeria, would not have the support of their extended families and social networks to aid them upon their return with their two children."

5. What follows at paragraphs [33] and [34] of the decision, is a consideration of the Article 3 claim based upon the health of the eldest child [VU]. The judge concluded at paragraph [50] that there is no breach of Article 3.

6. The appellant advanced four grounds of appeal. They were summarised by Ms Knorr before me as follows. First, the judge misdirected herself in law by applying the line of authorities relating to Article 3 and medical care (i.e. N -v- SSHD), but that was not the claim being advanced by the applicant. The applicant relied upon the decision of Mr Justice Collins in JA (Child – risk of persecution) Nigeria [2016] UKUT 00560 and claimed that the particular vulnerability of [VU] as a child who suffers from epilepsy and would therefore be viewed in a negative manner in Nigeria, should have been considered and the judge should have assessed whether the treatment, including discrimination, to which he would be subject, reaches the minimum level of severity needed to attract the protection of Article 3. Second, the judge's approach to the evidence was not procedurally fair. The credibility of the appellants had not been challenged. The judge rejected the evidence concerning the risk posed by the second appellant's family, although that evidence was not challenged by the respondent who was unrepresented at the hearing, and the appellant's were not given any opportunity to address any concerns that the judge had about the evidence. Third, the judge erred in the assessment of the expert report of Ms Nwogu and finally, the judge failed to take into account relevant matters by failing to take into account the discrimination that [VU] might face in Nigeria on account of his health. The appellant claims that all these factors were relevant to the assessment of the Article 3 risk that [VU] is exposed to, and, unsurprisingly, none of those factors were properly addressed by the Judge, because the judge erroneously focused upon an Article 3 claim on health grounds.

7. Permission to appeal was refused by First-tier Tribunal Judge Lever on 15th May 2019 and by Upper Tribunal Judge Macleman on 2nd July 2019. The appellant's issued a claim for judicial review of the decision of Upper Tribunal Judge Macleman refusing permission and permission was granted by Lieven J on 19th November 2019. Lieven J observed that the consideration of the Article 3 claim by the First-tier Tribunal judge

focuses entirely on the N v UK line of cases although that does not appear to have been main part of the argument advanced by the appellants in the skeleton argument that was before the FtT.

8. Mr Kotas on behalf of the respondent acknowledges, rightly in my judgment, that the judge has not addressed the claim that was being advanced on Article 3 grounds, but confined her consideration to whether there would be access to medical care. He accepts that in reaching her decision, the judge failed to have regard to the wider evidence that was before the First-tier Tribunal regarding the treatment to which [VU] as a vulnerable child who suffers from epilepsy, may be subjected to in Nigeria, and whether that treatment reaches the minimum level of severity required to establish an Article 3 claim. He accepts there was evidence before the Tribunal of epilepsy being associated with social stigma and discrimination and the judge failed to engage with that evidence and its potential impact upon the access to education, and the risk of discrimination and corporal punishment.

9. Mr Kotas accepts that there is also an issue of fairness in respect of the judge's conclusions, in circumstances where the appellants were present at the hearing but were not given any opportunity to address any concerns that the judge may have regarding the evidence relied upon. He acknowledges that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal to be set aside.

10. I have carefully considered the lengthy decision of the First-tier Tribunal Judge and I accept the decision of the F*t*T judge to dismiss the Article 3 claim is infected by an error of law and should be set aside. I am satisfied that the judge failed to address the Article 3 claim that was being advanced on behalf of [VU] in particular, and simply treated the claim as an Article 3 claim on 'medical care' grounds. As to disposal, although my provisional view was that the decision upon the Article 3

claim should be remade in the Upper Tribunal, I am persuaded by the submissions made by Ms Knorr and Mr Kotas that the appropriate course is for me to remit the matter to the First-tier Tribunal.

11. First-tier Tribunal Judge James refers in her decision to the claim for asylum that was made by [VU] in April 2018. I was informed by the parties that a decision has not been made by the respondent upon that application. Ms Knorr informed me that in a reply to a pre-action protocol letter challenging the delay in reaching a decision upon that asylum claim, at the end of December 2019, the respondent assured the appellant's representatives that a decision would be made upon the asylum claim within three months. A decision is therefore expected by the end of March 2020. Ms Knorr submits the asylum claim made by [VU], is closely aligned to the Article 3 claim, and if [VU] is granted refugee status, there may be nothing further to be gained by pursuing this appeal. If however, the asylum claim is refused by the respondent, there will be an appeal against that decision and it would be inappropriate for the Upper Tribunal to be considering the Article 3 claim at the same time as the First-tier Tribunal is considering an asylum appeal, based upon essentially the same facts, circumstances and evidence. Both Ms Knorr and Mr Kovats submit that in the circumstances, the appropriate course is for the decision to be remade in the First-tier Tribunal, but with the matter to be listed for a case management hearing before the First-tier Tribunal in mid-April so that if there is an appeal against a refusal of the claim for asylum made by [VU], that appeal can be linked to this appeal and the asylum and Article 3 claims can be heard and determined together. If [VU] is granted refugee status, the appellants can confirm at the case management hearing whether there is anything further to be gained by continuing this appeal.

Decision:

12. The decision of First-tier Tribunal Judge James to dismiss the appeal on Article 3 ground is set aside, with no findings preserved insofar as they

are relevant to the Article 3 claim. For the avoidance of doubt, the decision to allow the appeal on Article 8 grounds stands.

Signed Date 28th February 2020

Upper Tribunal Judge Mandalia