Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/10004/2018
PA/10028/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2019	**On 11 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

J A
V A
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss M Chowdhury, Counsel instructed by Stuart & Co
For the Respondent: Mr Kotas, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by J A and V A, an anonymity direction having been granted by the First-tier Tribunal, against a decision of Judge Freer (the judge) to dismiss their appeals on asylum and human rights grounds as well as their claims for humanitarian protection. I found there to be no material error of law in the decision of the First-tier Tribunal for the reasons given below.

Background

2. The appellants come from Nigeria, but they were in fact born in the UK. However, they spent much of their childhood in Nigeria. They claim to have entered the UK in 2001. They applied for further leave to remain on the grounds of long residence in July 2012 and on the basis of Article 8 in 2014. On 2 November 2016 they applied on the basis of ten years' private or family life in the UK. It appears that the first appellant VA first made an asylum claim which was made in November 2016 and that the second appellant Mr JA applied for asylum in February 2018. The respondent gave reasons for dismissing the first appellant's appeal on 31 July 2018 and the second appellant's appeal in a lengthy letter of 3 August 2018. Both appellants appealed these refusals and their conjoined appeals were heard by the judge on 14 September 2018. The judge gave lengthy his decision to dismiss the appeal is an all grounds argued before him.

Basis for the asylum and human rights claims

3. I found it quite hard when I came to this case to ascertain the precise basis of their application for asylum and human rights protection in the UK, but it is essential background to those applications that they both suffered from various medical issues which were addressed in the First-tier Tribunal decision. The appellants claim to fear abduction by their father or father's family as the children's mother had been accused of witchcraft. The respondent did not accept that these assertions. However, the respondent also concluded that such threats as had been made did not amount to a "Convention reason" falling within the UN Convention relating to the status of Refugees. The judge dismissed the appeal finding that there was no persuasive evidence that anyone had been involved with which is the green with the respondent that in any event this would not amount to a "Convention" reason.

Permission to appeal

4. The basis of the application for permission to appeal to the Upper Tribunal is set out in the grounds of appeal drafted by Miss Chowdhury, who represents the appellants before the Upper Tribunal. The first ground asserts that the findings in relation to asylum are confusing, pointing out that the health issues that the appellants suffer from would be in danger of becoming public knowledge if they were returned to Nigeria. This would have a bearing on their asylum claim because it is possible that they may be accused of witchcraft if their mental health issues were discovered. It is submitted in the grounds that the analysis by the First-tier Tribunal is confusing. The second ground states that in relation to the approach and reasoning in relation to their qualifications to remain in the UK, the judge's approach was also confusing and poorly analysed.

5. In granting permission in this case Upper Tribunal Judge Gill highlighted two points. She considered that it was arguable that the reasoning in relation to paragraphs 46 and 51 went against the decision of the Supreme Court in **HJ (Iran) [2010] UKSC 31** but she was less persuaded that the other ground which she highlighted (that it was arguable that the judge might have taken into account irrelevant considerations in weighing up the possibility that the appellants might otherwise qualify for leave to remain in the UK) was meritorious. However, Judge Gill decided to grant permission on all grounds. All grounds were fully argued by Miss Chowdhury before the Upper Tribunal.

Discussion

6. The grounds criticise the judge's decision for its lack of coherent reasons, but it was incumbent on the appellants to show that their claim for asylum in the UK would have given rise to Convention reasons if their claims were accepted as being genuine. It would seem difficult for them to argue that they were members of a "particular social group" as they did before the FTT. Judge Gill referred to the case of **HJ (IRAN)**. In that case it was successfully argued before the Supreme Court that a homosexual asylum seeker could not reasonably be expected to tolerate the need to act discreetly in relation to his sexual activity and matters relating to his sexual identity in the wider sense upon his return to his home country (the 'reasonably tolerate' test). The applicants argued that it was contrary to the Convention for the person claiming refugee status to have to show that there was no way of pursuing his sexual orientation without exposing himself to the risk of persecution.

7. However, in order to establish membership in a "particular social group" the applicant must share an innate characteristic or common background that cannot be changed or share a characteristic or belief is so fundamental to his identity or conscience that the person should not be forced to renounce it. Numerous examples been established over the years including former victims of trafficking, perceived collaborators and even family members but in this case the judge simply observed that the appellants would to be bound to disclose their past health issues and unlike sexual preferences these are not generally issues people would wish to ventilate publicly. Therefore I am not satisfied that it is correct to equate the two.

8. In so far as the judge decided that the appellants did not qualify as members of a "particular social group", I am satisfied that he was entitled to do so and that these appellants do not fall within a particular social group as they do not appear to share common characteristics. Thus, even if the credibility of the appellants' claim had been accepted by the FTT in full they would have found it difficult to satisfy the Refugee Convention. I am satisfied that, in so far as the judge rejected the appellants' claim that they formed part of a particular social group, he was entitled to do so. He

was entitled to reach the conclusion he reached as to the appellants' asylum claim.

9. In relation to the appellants' protected human rights, they appear to have relied on articles 3 and 8 of the European Convention on Human Rights (ECHR). Their claim as partly based on "health-based" medical issues. They both allege that they suffered from depression, but the judge found there to be a form of treatment that could be received in Nigeria. He also noted the high level of qualifications they had and thought that some of their fear may be related to their return to Nigeria itself but was not justified by the facts- in other words it was not necessarily established that there would be a long -term adverse impact on the psychological state of the two appellants to return them to Nigeria. It is also claimed that the first appellant had a major depressive disorder and relied on medical evidence which painted a picture of more serious ill-health including diabetes. There was evidence from Dr Khoo that it was necessary to continue the first appellant medications without any interruption.

10. The test for medical cases has recently been reviewed in the case of *Paposhvilli v Belgium* [2016] ECHR 41738/10 and in later cases before the English courts and tribunals. It is clear from those cases that it is not simply a case of comparing the availability of treatment in an advanced Western country with less developed systems elsewhere. The effect on health of removal must be immediate and substantial. A particularly high threshold will need to be surmounted if an applicant is to succeed under article 3. There is not an obligation on the respondent to provide them with a particular level of healthcare. But, in any event, it is clear on the evidence that there in fact was quite extensive healthcare provision within Nigeria, although, this was likely to come at a greater economic cost and it may be less straightforward to access those services in Nigeria. I am satisfied that the judge did have in mind the high threshold to be surmounted both for the asylum claim and an Article 3 claim.

11. Article 8 was more complex, given that these appellants have been in the UK for a long period of time. Based on their evidence, this was since 2001. But, the judge could not just decide the case based on the long period of residence in the UK. For much of that period there had been precarious, for example, in relation to the first appellant, removal directions had been set as long ago as 2016. The judge properly referred to the factors pertaining to the public interest in section 117B Nationality, Immigration and Asylum Act 2002. He had regard to the fact that neither appellant had formed a relationship in the UK, both had acquired significant skills here and although they had close family members in the UK, the judge was satisfied that they could be reasonably returned to Nigeria, having regard to the fact that their main language is English. Although they have not lived in Nigeria for a large part of their lives, they are now adults and although their health needs had to be taken into account, they are not such as to tip the balance in the appellants' favour. As far as one can see, there are no consequences of such gravity that require the respondent to

grant the appellants leave to remain in the UK outside the Immigration Rules. There would be no threat their moral and physical integrity of the appellants in the short term if they were returned to Nigeria. Ground three of the grounds of appeal to the Upper Tribunal asserts that the first appellant's loss of medication for a "highly unusual condition" amounted to an insurmountable obstacle "when deciding the appellant 1's case under paragraph 276 A.D.E the Immigration Rules". However, whilst it is accepted that judge had to have regard to the requirements of the Immigration Rules, he dealt fully with this issue as I have explained above (see for example paragraph 75 and in the following paragraphs of his decision). In particular, the judge commented on the lack of up-to-date evidence but noted the absence of an assertion that such treatment would be unavailable in Nigeria. In short the judge was not satisfied that the appellants had shown that any medication required would not be available, in equivalent form at least, in Nigeria. Having regard to those factors the judge was entitled to come to the conclusion he came to on article 8 based on the evidence and submissions made.

10. As a postscript to that I should say that I did not find all the judge's language appropriate or helpful and I do not think it was necessary for the judge to go into such matters as suggesting alternative bases for claims which the appellants may or may not have. No doubt the appellants, who appear to be intelligent individuals, will take legal advice on their immigration status on the grounds argued before the FTT. However, the judge was entitled to reach the decision that he did.

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 6 March 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 6 March 2019

Deputy Upper Tribunal Judge Hanbury