Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07593/2016

THE IMMIGRATION ACTS

Heard at North Shields
On the 4th April 2019

Decision & Reasons Promulgated
On 4th June 2019

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

SA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Diwncyz, Senior Presenting Officer
For the Respondent: Ms S. Rogers, legal representative on behalf of the appellant

DECISION AND REASONS

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 her or any member of her 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.

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal (Judge Cox) ("FtTJ") promulgated on the 7th November 2018 allowing her appeal against the decision to refuse her human rights claim. Permission to appeal was granted on the 28th November 2018.

2. Whilst the appellant is the Secretary of State, for ease of reference I shall refer to the parties as they were before the FtTJ.

Background:

3. There is a long litigation history to the appeal. The appellant is a citizen of Nigeria. She claims to have entered the UK on the 19th March 2012 with entry clearance as a visitor with a visa valid until 27th July 2012. In or about 2012, the appellant met her partner in the UK. He was also a national of Nigeria. He had applied for asylum, but his appeal had been dismissed. Her first child, S, was born in January 2013.

4. On 14 April 2014 the appellant claimed asylum. She was considered a potential victim of trafficking and it was later accepted that there were reasonable grounds that she may be a potential victim of trafficking. However, on 25 July 2014 a conclusive decision was made that she was not a victim of trafficking. The claim for asylum was refused on 25 July 2014. Her second child A was born in October 2014 and was diagnosed in November 2014 as having the medical condition of Sickle Cell Disorder ("SCD").

5. Her appeal against that decision was dismissed on 5 May 2015 with the judge making a number of adverse credibility findings based on documentary evidence provided from the appellant and the oral evidence given. Following refusal of permission to appeal by the First tier and the Upper Tribunal, she became appeal rights exhausted on 14 August 2015. She remained in the UK and in December 2015 her third child was born.

6. The appellant submitted further submissions to the Secretary of State on 27 June 2016. The basis of the submissions related firstly to a fear of return to Nigeria due to trafficking and secondly, as a result of her son being diagnosed with sickle cell anaemia whilst in the United Kingdom and the potential threat to his life and complications from the condition if she were to be returned to Nigeria.

7. On 4 July 2016 the respondent served a notice of immigration decision, together with the detailed reasons for refusal letter refusing her claim for international protection and on human rights grounds. An appeal was lodged, and the appeal came before the FtT on 16 January 2017.

The first decision of the FtT

8. In a decision promulgated on 19 January 2017, the FtT allowed the appeal and Articles 3 and 8 of the ECHR. It was recorded at paragraph 11 of the decision that the

appellant had abandoned her asylum and humanitarian protection claim and solely sought to rely upon the diagnosis and medical condition of her son.

9. The reasons given by the judge for that decision can be summarised as follows:

1. The appellant's son, A, born in 2014 had been diagnosed with sickle cell disease. The judge found that his removal from the United Kingdom would amount to a breach of Article 3 of the ECHR.

2. When considering the medical evidence, the judge noted that sickle-cell anaemia was a disease the child acquired from both parents and that the treatment and care of the disease in Nigeria was "on the high side" for poor people and that as at August 2015, he was taking medication to ensure he could make red blood cells appropriately. The judge found that he would be at increased risk of infection. Furthermore, he observed that sickle-cell disease caused children to have painful crises (painful joints, swollen fingers and toes) which would require hospital admission. In May 2015 A was admitted to hospital.

3. The judge placed weight on an Article from the American Journal of preventive medicine dated December 2011, which noted high rates of child mortality being between 50 and 90% amongst African children.

4. The judge accepted that A was being treated by medical professionals for his condition which was life-threatening with serious complications. The judge found that as he was taking medication to assist his red blood cell production, he remained at an increased risk of infection and that this would be more acute in Nigeria as he would have no tolerance for conditions when living there (see [33]). The medical evidence had been unchallenged.

5. The judge found that A would have limited access to medical treatment not only due to cost but also to availability and that there would be an increased mortality rate significantly above that in the United Kingdom (see [34]).

6. The judge applied the decision of R(on the application of SQ (Pakistan) the Upper Tribunal[2013] EWCA Civ 1251 stating that the Article 3 high test of exceptionality did not apply in cases involving children and that the vulnerability of children was also relevant to the scope of the obligation of the state to protect them from such treatment (see [35]).

7. The judge also referred to the decision of Paposhvili v Belgium (application number 41738 of 2010).

8. The judge concluded that on the available evidence that he was not satisfied the relevant and appropriate treatment would be available in Nigeria and that even if such treatment and medication was available, that it would be inaccessible to A therefore the appeal must succeed in relation to Article 3.

9. As to Article 8, the judge reached the conclusion that the best interests of A were to remain in the United Kingdom. A lived with his mother and her partner (whose claim for asylum was refused in 2014) and two other siblings. Thus it was accepted that private and family life had been

established and that if the appellant and A (and other family members) were required to leave the United Kingdom it would interfere with their private and family life but that it would be disproportionate to remove the family given the length of residence and medical treatment. Whilst the judge found that the appellant had made an asylum claim which had been "evidentially unreliable" and in which she was found to have "fabricated evidence", the interests of A should not be prejudiced by the adverse and precarious immigration history of A's mother (the appellant) or his father, whose own claim was rejected having been certified as clearly unfounded (see [39]).

10. The judge did not find that any of the public interest considerations at S117B suggested that the decision to remove the appellant, her partner and children the United Kingdom would be lawful and proportionate (see [40]).

10. The Secretary of State sought permission to appeal that decision and FtTJ Davies granted permission on 1 June 2017.

11. The thrust of the grounds challenged the assessment made of the evidence.

- In particular, the finding made that there would be limited access to medical treatment due to availability and cost in Nigeria. The respondent referred to the letter from Nigeria which was the only evidence that the appellant and her partner could not afford the treatment and that there was no evidence that the cost of treatment would be prohibitive.
- Furthermore, the evidence confirmed that treatment was available in Nigeria. The grounds also challenged the judge's reliance on the decision in Paposhvili, which was stated not to be binding on the UK courts and that the judge had failed to apply binding authority in the form of N v SSHD [2005] UK HL (subsequently affirmed by the ECHR in N v UK[2008] 47 EH RR) and affirmed by the Court of Appeal in GS (India) and others v The Secretary of State the Home Department [2015] EWCA Civ 40.
- In respect of the decision of Paposhvili, it was submitted that the decision did not turn on the observations made by the court in section of the judgement of paragraphs 172 – 193, the turned on the fact that the Belgian authorities had failed to carry out "any assessment of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia" (205).
- As to Article 8, the judge allowed the appeal on the basis of the appellant's and her children's private and family life due to life-saving treatment A was being provided and due to the length of residence of her and the children (see paragraphs 38-39). It was submitted that the judge was in error by relying on illness and treatment in isolation to succeed under Article 8 (applying the decision in GS (India) at paragraph 86). As this only left her length of residence, the particular factual matrix of her having entered in 2012, the children being born in 2014, 2015 and 2013, and her partner and father the children was also resident in the UK following his asylum claim being certified as clearly

unfounded, did not outweigh the interests of immigration control. The judge in this context and failed to apply the provisions of section 117B.

12. The appeal came before Deputy Upper Tribunal Judge Doyle on 31 August 2017. In a decision promulgated on 6 September 2017, Deputy Upper Tribunal Judge Doyle found a material error of law and remitted the appeal to be reheard by the FtT with no factual findings being preserved.

13. The reasons given for finding an error of law are set out at paragraph 17 onwards. The Deputy Judge found that the FtTJ erred in law by dealing with the appeal as if it was the appellant's son's Article 3 appeal and that the circumstances of her son were only relevant to the appellant's Article 8 appeal. He therefore found that the judge was wrong to allow the appeal on Article 3 grounds when that was an appeal which was not before him. The Deputy Judge also found that the FtTJ had failed to take into account the adverse credibility findings made in the previous FtT decision where the appellant was found to be an incredible and unreliable witness. Against that background, the judge was in error by unquestionably accepting her evidence that she had no prospects of employment in Nigeria and no family members there. In addition, the judge's finding that medical treatment was not available or accessible was not safe and that the Article 8 assessment was in error by failing to properly apply section 117B public interest considerations.

The second decision of the FtT

14. The appeal was then listed a second time before the FtT on 4 October 2018.

15. In a decision promulgated on 7 November 2018 the FtTJ dismissed the appeal on Article 3 grounds but allowed the appeal on Article 8. It also appears to be the position that whilst the appellant in the last proceedings had not sought to rely upon her asylum claim (based on risk of harm from a family relative whom she claimed had trafficked her to the UK) had provided further material to support her claim on this basis.

16. As to her asylum claim, the judge applied the decision of Devaseelan citing the earlier findings of fact made as his starting point. He noted that the earlier decision had found that no reliance could be placed upon the death certificates" and that there were "discrepancies and contradictions within the appellant's account and also that many aspects of her account were "implausible". The judge had not accepted that her mother and sisters were killed in a road traffic accident nor that her aunt had arranged her to come to the UK for the purposes of being trafficked. Her claim to be at risk of harm from her aunt and associates was rejected. The judge considered the further death certificates and an affidavit but observed that the appellant's advocate did not seek to go behind the judge's findings and that this was an "appropriate concession". The judge therefore concluded that the further evidence was not "cogent or credible and I find that I have no reason to go behind the judge's findings." He therefore found that she was not at risk of serious harm or ill-treatment on return to Nigeria and dismissed the asylum appeal.

17. As to Article 3 (based on A's medical condition) the judge noted the submission made on behalf of the appellant that if the appellant witnessed her son suffering intense pain it would breach her Article 3 rights. The judge concluded that as A was her dependent, there was an issue as to whether his removal would be in breach of Article 3 on medical grounds.

18. The medical evidence relating to A was unchallenged and reliance was placed on the most recent report (p.61 dated 18/9/18). The judge summarised the medical evidence at paragraphs 41 – 44.

19. It was accepted that A suffered from sickle-cell anaemia and that he ahd been hospitalised on approximately five or six occasions, most recently January 2018. It was further accepted that A's current daily medication was 300 mg of hydroxy carbamide, penicillin and Folic acid. Hydroxycarbamide is a type of chemotherapy which is given in low doses to try to encourage the body to make less of the sickle red cells and to make more of the normal red cells. The evidence stated that A required regular blood test to check his full blood count and liver function as the hydroxy carbamide could upset the liver. The report also stated that A was at an increased risk of infection because of his sickle-cell disease and this was because the spleen did not work in children who have SCD. Penicillin is taken daily to try and prevent infections and Foley acid is taken to ensure that the child's body can make enough blood cells. It was also accepted by the presenting officer that the background material demonstrated that in Nigeria A would also need to take a malaria prophylaxis (p79).

20. No challenge was made by the presenting officer to the appellant's evidence that on occasions she had to call an ambulance because a son was in so much pain. The most recent incident occurring two months ago when the appellant called an ambulance for her son and he was given oxygen and pain relief.

21. The following submissions were made on behalf of the appellant:

    (i) The withdrawal of treatment significantly increased the risk that the appellant would have a crisis episode, and this would give rise to a breach of the amended N test.

    (ii) A would be exposed to a serious, rapid and irreversible decline based on the variable availability of A's medication in Nigeria, that the standard of care in Nigeria is generally poor (an example of a person with SCD had to drink saline water lime as no IV tube was available; p118), Nigeria did not have an ambulance service and thus if he had an episode or crisis than the appellant or partner would have to find a way of transporting the child to hospital as a matter of urgency and that the cost was prohibitive and that non-compliance with the treatment or medication was a serious problem (at [45-46]).

    (iii) The background material demonstrated that the treatment SCD was expensive; such a person would require daily treatment; complications can occur which

are likely to significantly increase the cost of treatment (p79) with the average cost of care per hospitalisation per subject Nigeria was a hundred $30 in 2012. The cost of drugs that gone up since the recession and reliance was placed on a small study undertaken on the financial burden of SCD on families in Nigeria in 2014 (pages 93-106) the costs varied considerably depending on the nature of the SCD but the study suggested that over 20% of the families to spend more than 10% of family income on health expenditure and the percentage of income increased significantly if the child became ill during the period of the study.

22. The FtTJ made the following findings of fact in relation to the Article 3 claim:

(i) both the appellant and her partner had family in Nigeria to turn to for support. In this context the judge took into account the earlier findings of fact made which had rejected the appellant's evidence that she had no family members. It had been found that the appellant had not been truthful about a family circumstances in Nigeria. The judge observed that the further documentation that she had submitted with the fresh application was flawed and whilst he had heard oral evidence of the appellant and her partner, given the judge's observations about their credibility, the judge found he could attach " little weight to the evidence" and therefore adopted the earlier judges findings.

(ii) As to employment, the FtTJ's starting point was the earlier finding which rejected the appellants account that both she and her partner would be unemployed. The judge considered the more recent evidence that the unemployment rate in Nigeria had risen and stood at approximately 14.2% of the working population and accepted that this was "relatively high" and that the statistic suggested that "it is higher still for those aged between 25 and 34". However, the judge placed weight on the submission made on behalf of the respondent that that meant 85% of the population are in employment and that both the appellant and her partner had been educated and that her partner had work experience. The judge rejected the evidence of the appellant's partner that after his education for a period of eight years that he had "done nothing". The judge found that that was not credible and that it was possible that he did not find permanent employment but that he undertook work during the eight-year period in Nigeria and that his failure to be honest about simple history damaged the appellant's case. He therefore concluded that both would be employed Nigeria but that it was likely that their employment would be of a casual nature and may not provide financial stability for the family. As such, they would be occasions when they would seek support from family or friends (ss [49-50].

(iii) The judge accepted that the medical treatment would be costly and likely to be a significant expenditure for the family.

(iv) The judge accepted that A had never lived or been to Nigeria. He considered the submission that the country conditions, both environmentally and socially would be likely to increase the risk of infection or an episode. He recorded the background material at [53] as follows:

> "a striking feature of the background material is that it is estimated that only 5% of the children with SCD in Nigeria will live past the age of 10, whilst the UK and the USA over 96% of the children will live beyond the age of 10 (page 76). In my view, this is a staggering difference, especially as it is estimated that 2% of all births in Nigeria are likely to suffer from SCD. Further, the material demonstrates the mortality rate of SCD is higher than HIV/AIDS."

(v) The judge did not accept the treatment would be likely to be withdrawn on returned to Nigeria nor was he satisfied that a would not be able to access any treatment but did accept that there would be occasions where non-compliance would become an issue (see [54]0.

(vi) The judge also accepted that the likelihood of A having an episode is likely to increase which is likely to give rise at the very least to him suffering a high level of pain and may give rise to more serious complications. However, it could not be established when this is likely to occur-A had been hospitalised five or six times between May 2015 and January 2018, but hydroxyurea reduces the frequency of painful crises (page 66) which was supported by the fact that he had not been hospitalised since January 2018.

(vii) It had not been demonstrated that there was a substantial risk of A being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or death if the family would be returned to Nigeria stop whilst the judge considered the special vulnerability of children, he was not satisfied that there would be a "substantial risk of the appellant's sons health deteriorating in the immediate future" (see [57]).

(viii) As the circumstances of A could not give rise to breach Article 3, he rejected the submission that a could succeed on the basis that watching her son suffer would give rise to breach Article 3. He dismissed the appeal on Article 3 grounds.

23. As to Article 8, it was recorded that the presenting officer conceded that the appellant may have established a private life in the UK based on a length of residence of over six years and that her eldest son was now aged five and younger son was receiving healthcare (see [63]). Applying the five-stage test in Razgar, he found them to be satisfied and therefore was required to consider the issue of proportionality (see [66-67].

24. The judge took as his starting point whether the appellant could meet the Immigration Rules (applying Hesham Ali v SSHD [201] UKSC paras 39-43) but found that neither the appellant or her partner was lawfully in the UK and did not meet the definition of partner in Appendix FM. The appellants children (including A) were not British citizens and had not been resident in the UK for more than seven years. They could not meet the requirements under Appendix FM nor under paragraph 276ADE (1) (i)-(v) as to private life.

25. However, the judge recorded that both advocates agreed that the only relevant requirement under consideration was paragraph 276ADE (vi) under which the applicant:
"is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any. Imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".

26. The submission made in behalf of the appellant was that she was relying on her son's medical condition to demonstrate that there would be very significant obstacles to her (my emphasis) integration into Nigeria (see [70]).

27. On this issue the judge considered that whilst paragraph 276 ADE (1) (vi) did not explicitly state that the public interest is a relevant consideration, the Court of Appeal confirmed that the public interest is a relevant consideration when considering similar provisions of 276ADE (1) as confirmed in AM (Pakistan) v SSHD [2017] EWCA Civ 180. The judge therefore applied the same reasoning to his consideration of paragraph 276ADE (1) (vi) and the public interest was a relevant factor.

28. The judge then considered the decision of Akhalu (health claim: ECHR Article 8)[2013] UKUT 00400 and directed himself that in accordance with that decision he must "weigh the appellant (and A's interests) against the public interest in ensuring that the limited resources of the U.K.'s health service are used to benefit those entitled to it". Secondly, in assessing the weight to attach the public interest, he noted that the appellant purported to enter the UK as a visitor and has remained unlawfully in the UK ever since. She had been a failed asylum seeker. Her partner's immigration history was equally poor and thus little weight would be attached to the private life the appellant may have established in the UK (see S117B (4)). He made the observation that "if the issue before me was the appellant's health (assuming at the moment that she was suffering from SCD), then I would have had no hesitation in dismissing the appeal" (see [74]). However, he concluded that the "key factor" in the present case was the appellant's son, A, and that whilst his best interests were not paramount, they were a primary consideration and he cannot be "blamed for the sins of his parents". The judge noted the background material that if he lived in Nigeria there would be a high degree of likelihood that he would not live beyond the age of 10, and that whilst the appellant and a partner may find employment, it would be casual in nature and in light of the cost of treatment and the inconsistent availability of treatment in Nigeria there was a real risk of "non-compliance" especially hydroxyurea. The judge concluded "in my view this is highly material, as the drug significantly reduces the risk of an episode or crises".

29. He therefore concluded at [76]:

> "In my view this is a significant factor in the appellant's favour and go to the heart of the child's physical moral integrity under Article 8. It also follows that the child is removed from the UK is not in his best interests. "

30. The judge then considered the decision in SQ (Pakistan) and AE (Algeria) and observe that in both cases the Court of Appeal remitted the appeal to the Upper Tribunal for a rehearing on Article 8 grounds but that both cases made it clear that it would be "very unusual for a case that had not succeeded in Article 3 grounds to succeed on Article 8 grounds" (at [77]).

31. The judge then gave his final conclusion as follows:

> "78. I have set out above the reasons why are not satisfied that there are substantial grounds for believing that the appellant son would face a real risk of being exposed to a serious, rapid irreversible decline in his state of health resulting in intense suffering or death. Nevertheless, I am satisfied that there are substantial grounds for believing that the appellant son would face a real risk of being exposed to a significant reduction in his life expectancy. On balance, I am satisfied that this outweighs the weighty public interest in the appellant and her family's removal from the UK.
>
> 79. Accordingly, I find that there are significant obstacles to the appellant's integration into Nigeria and find that she meets the requirements of paragraph 276 ADE of the rules."

32. At paragraph [80] the judge then gave consideration to S117B (1) which stated that the maintenance of effective immigration control is in the public interest. The judge purported to apply that to the conclusion that he had reached that the appellant could satisfy paragraph 276ADE (1) (vi) to show that there were significant obstacles to the appellant's integration into Nigeria.

33. The judge stated "in my view effective immigration control includes recognising that those individuals who meet the requirements of the rules ought to be allowed to enter the UK. Especially as the rules are statements of the practice to be followed, which are proved by Parliament, and based on the secretary of state policy is to how individual rights and Article 8 should be balanced against the competing public interests" (paragraph 46 of R(Agyarko)".

34. And at [81] finally concluded;
"81. On balance, I am satisfied that the proposed interference with the appellant and her sons' private life is unnecessary and disproportionate. Their rights outweigh the respondent's legitimate interest in ensuring economic and social order, whilst maintaining a coherent system of immigration control. I attach significant weight to my finding that the appellant meets the requirements of 276ADE."

35. He therefore allowed the appeal on human rights grounds.

The appeal before the Upper Tribunal:

36. The Secretary of State sought permission to appeal that decision and on 28th November 2018, First-tier Tribunal Judge Hodgkinson granted permission.

37. Thus, the appeal came before the Upper Tribunal. I heard submissions from each of the advocates; Mr Diwncyz relied on the grounds submitted on behalf of the Secretary of State which he stated dealt with all matters arising. He did not seek to make any further oral submissions. Ms Rogers had not provided any Rule 24 response but made oral submissions which I shall incorporate and refer to in my analysis and conclusions.

Discussion

38. There is no challenge made in the respondent grounds against the judge's assessment of the Article 3 claim. Neither is there any counter challenge brought on behalf of the appellant against the dismissal of the appeal on Article 3 grounds. However, whilst neither party challenges the Article 3 assessment, it is important to take into account the judge's reasoning and rejection of the Article 3 claim as it is relevant to the Article 8 assessment.

39. The article 3 claim was based solely on the appellant son's medical condition and on the premise that as he was her dependent, the judge considered that he was duty-bound to consider whether his removal was in breach of Articles 3 or 8 (see [36]).

40. I have summarised the judge's findings of fact and assessment of the Article 3 issues earlier in this decision.

41. The grounds advanced on behalf of the Secretary of State challenge the assessment made on Article 8. They state that the judge failed to apply the decision of the Court of Appeal in GS (India) citing paragraph 111 of the decision, that the disparity medical treatment or the child's medical condition "cannot be relied on at all as a factor that sways the proportionality exercise in favour of the appellant," and that the judge's "key assessment" at [78] where he found that there were substantial grounds for believing that the appellant's son would face a real risk of being exposed to a significant reduction in his life expectancy, and that this outweighed the "weighty public interest in the appellant and the family's removal from the UK" demonstrated that the judge allowed the appeal solely on the basis of the disparity in healthcare/treatment available to the appellant's son on return to Nigeria.

42. Furthermore, it was submitted that the sole basis where the conclusion was reached that "there were very significant obstacles to integration" under paragraph 276 ADE (vi) focused solely on the disparity in healthcare/treatment available to the appellant' son on return and that this was a legal error as it ran contrary to the approach set out in AS v SSHD [2017]EWCA Civ 1284 which made reference to a "holistic assessment of the appellant circumstances upon return". The grounds go on to state that as the focus was solely on the medical treatment available to the appellant's son, the judge erred in law by failing to take into account the "no obligation to treat" principle outlined in GS (India).

43. Ms Rogers on behalf of the appellant submitted that there was no error in the judge's approach and that his assessment went beyond the medical issues. In her submissions she identified those additional factors at [43] that there was evidence that he was required to take the medication and at [52] that the appellant's son had never been to Nigeria and this was not only relevant to his private life established in the UK but also relevant his condition in the country of return both environmentally and socially which would be likely to increase the risk of infection or an episode. Thus, she submitted that those elements took the case beyond Article 3. More significantly, she argued, the appellant was a child, and this was a further consideration which would have a clear impact on the proportionality balance. At paragraph 75 – 76, the judge found that the appellant's son's best interests would be best served by remaining in the UK.

44. She accepted in her submissions that the appellant's son's health was a central issue but submitted that it was not the judge's sole focus and that the case went beyond his medical condition.

45. She further submitted that the decision in GS (India) did not involve a child and that the decision in SQ (Pakistan) confirmed that the threshold to meet for an adult is different to that of a child and that this could form part of the proportionality exercise. She therefore submitted the judge did not make any error of law in his assessment of the Article 8 issues.

46. As to the decision in SL (St Lucia) she submitted that the judge did find that there was an additional element, and this was on the basis that her son's medical condition was a significant factor and expressly considered his life expectancy. The judge took into account the poor immigration history of both the appellant and partner but found that the child's best interests outweighed those considerations.

47. When asked to identify the "additional elements" she stated that the appellant was a child who was born in the UK and that social and environmental factors would be relevant notwithstanding the finding of fact that treatment would be available in Nigeria and the assessment of his best interests.

48. Have carefully considered those submissions in the light of the grounds of challenge, the decision of the FtTJ and the evidence that was before the Tribunal.

49. The challenge is to the Article 8 assessment. The issue for the judge was whether the decision made to remove the appellant (and by implication her family members including her children) was unlawful under Section 6 of the Human Rights Act. In reaching a conclusion on that issue, he was required to take into account the findings of fact that he had made on the Article 3 assessment and was required to consider whether the appellant, her partner or any of the children could meet the Immigration Rules.

50. The judge began his assessment by adopting the well-known five stage test in Razgar and it is common ground between the parties that the appellant (and children) had established a private life in view of their length of residence since 2012 and principally on the basis of the appellant's son receiving medical treatment. The judge noted that there was a low threshold and the consequences of removal engaged Article 8, the decision was in accordance with the law therefore the issue was that of proportionality.

51. In my judgement the FtTJ correctly identified the test at [67] as to whether a fair balance should be struck between the competing public and individual interests involved (see R (Agyarko [2017] UKSC 60). The judge also made a self-direction at [68] that the starting point of the proportionality balance is whether the appellant met the Immigration Rules. At [69] the judge set out why neither the appellant or her partner could meet the requirements of the rules; they were not lawfully in the UK and could not meet the definition of "partner" under Appendix FM. Furthermore, the appellant's children could not meet the rules as they were not British citizens and had not been resident in the UK for more than seven years. That is plainly correct and reflects the Secretary of State's consideration of the Immigration Rules within the decision letter.

52. However, it was argued before the FtTJ that the appellant could meet the requirements of Paragraph 276ADE (1) (vi) under which the applicant:

> "Is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicants integration into the country to which he would have to go if required to leave the UK".

53. The judge therefore considered that paragraph in the context of the appellant (who was over 18 years of age) and whether there would be very significant obstacles to her integration but did so on the basis of her sons' medical condition.

54. I am satisfied that the judge was in error in finding, as he did, that paragraph 276ADE was satisfied on the evidence before the FtT.

55. At [79] the judge found that there were "significant obstacles to the appellant's integration into Nigeria and she meets the requirements of paragraph 276 ADE of the rules" and the reasoning underlying that conclusion was that whilst he was not satisfied that the appellant son would face a real risk of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or death, he was satisfied that there were substantial grounds for believing that her son would face a real risk of being exposed to a significant reduction in his life expectancy. The judge had earlier taken the view that the public interest was a relevant consideration when considering whether paragraph 276 ADE was met. The approach taken demonstrates an error of law as there is no requirement that the public interest should be taken into account in any assessment under paragraph 276ADE, however, that is not material to the outcome.

56. In my judgement, the FtTJ failed to properly take into account the earlier findings of fact made when making the Article 3 assessment and considering those holistically when reaching a conclusion on the issues.

57. The judge had made findings of fact, which have not been challenged by the appellant) that the appellant and a partner had retained family ties Nigeria; both had close family members in Nigeria who would be able to support and provide assistance to them. The judge had expressly rejected the adults claims that they would not be able to find employment. In this context, the decision letter had made reference to the appellants qualifications obtained in the UK and that they would be of assistance in re-establishing life in Nigeria.

58. In relation to the medical condition of the appellant's son, the judge reached a finding that there was medical treatment not only available in Nigeria but also that the appellant would be able to access that treatment (see [54]), although whilst he did find that there may be occasions when non-compliance was an issue, that the appellant could not establish when this was likely to occur. The judge made reference to the evidence that her son had been hospitalised five or six times between May 2015 and January 2018 but that any crises had been reduced because he had been receiving hydroxyurea (see [56]).

59. Neither advocate made reference to the case law relevant to the issues of integration and "very significant obstacles" save that Mr Diwncyz relied upon the grounds which cited the decision in AS V SSHD [2017] EWCA Civ 1284.

60. In the decision of SSHD v Kamara [2016] EWCA Civ 813, Lord Justice Sales in considering a foreign criminal's "integration" into the country where he is to be deported, stated at [14] that the idea "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

61. The decision relied on in the respondent's grounds, AS v Secretary of State the Home Department [2017] EWCA Civ 1284 at paragraphs 58 and 59 where, giving the lead judgment, Lord Justice Moylan held:

> "58. I do not consider that Mr Buley's categorisation of some factors as "generic" is helpful. Consideration of the issues of obstacles to integration requires consideration of all relevant factors some of which might be described as generic. What Mr Buley identified as "generic" factors, as referred to above, can clearly be relevant to the issue of whether there are very significant obstacles to integration. They can form part of the "broad evaluative judgment" as is specifically demonstrated by the reference in Kamara to "good health" and "capable of working".

> 59. I also reject Mr Buley's submission that, following Kamara, whether someone is "enough of an insider" is to be determined by reference to their ties or links to the country. This is to turn what Sales LJ said in Kamara into just the sort of gloss which he expressly warned against. It is clear, to repeat, that generic factors can be of significance and can clearly support the conclusion that the person will not encounter very significant obstacles to integration."

62. In Treebhawon [2017] UKUT 00013 (IAC) the Tribunal found that mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of very significant obstacles.

63. That decision was the subject of further discussion in the decision of Parveen v SSHD [2018] EWCA Civ as follows:

> 8. Since the grant of permission this Court has had occasion to consider the meaning of the phrase "very significant obstacles to integration", not in fact in paragraph 276ADE (1) (vi) but as it appears in paragraph 399A of the Immigration Rules and in section 117C (4) of the Nationality Immigration and Asylum Act 2002, which relate to the deportation of foreign criminals. In *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, [2016] 4 WLR 152, Sales LJ said, at para. 14 of his judgment:
>
> > "In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported … is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."
>
> 9. That passage focuses more on the concept of integration than on what is meant by "very significant obstacles". The latter point was recently addressed by the Upper Tribunal (McCloskey J and UTJ Francis) in *Treebhawon v Secretary of State for the Home Department* [2017] UKUT 13 (IAC). At para. 37 of its judgment the UT said:
>
> > "The other limb of the test, 'very significant obstacles', erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context."
>
> I have to say that I do not find that a very useful gloss on the words of the rule. It is fair enough to observe that the words "very significant" connote an "elevated" threshold, and I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval". But I am not sure that saying that "mere" hardship or difficulty or hurdles, even if

> multiplied, will not "generally" suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant".

64. When applied to the factual circumstances of this appeal, the judge plainly did not carry out a holistic assessment because had he done so, and on the basis of the findings of fact made he would not have reached the conclusion that there were very significant obstacles to the appellant integration given her prior length of residence, the retention of linguistic and cultural ties, which were not in issue, that she had remaining close family members in Nigeria, that she had previously been educated there as had her partner and that she could re-establish life there by undertaking employment.

65. In the light of those findings of fact which were not taken into account by the judge, I do not accept the submission that the finding it [78] which made reference to the appellant's sons life expectancy could by itself meet the test of whether there were "very significant obstacles" to the appellant's integration given that the judge had also expressly found that there was treatment available to the appellant's son, and the same medication that he was taking United Kingdom would be available and that he would be able to access that treatment.

66. I am therefore satisfied that the Secretary of State has demonstrated that the judge fell into error in reaching that conclusion.

67. However, it is submitted on behalf of the appellant by Miss Rogers that the error was not material to the outcome. I do not accept that submission. When reaching his conclusion on proportionality, the FtTJ at [80] made reference to "those individuals who meet the requirements of the rules ought to be allowed to enter the UK (or in this case remain in the UK) and at [81] concluded that in considering the balance of proportionality that the judge stated that he "attached significant weight" to his finding that the appellant meets the requirements of 276 ADE." Therefore, as he attached significant weight to this in the proportionality balance, which the appellant cannot meet on the evidence that was before the judge, his overall assessment of proportionality was flawed.

68. I therefore set aside the decision.

<u>The re-making of the decision:</u>

69. Ms Rogers on behalf of the appellant did not seek to submit any further evidence on behalf of the appellant given that the circumstances had not changed for the appellant, her partner or importantly her son and his medical condition. She confirmed that he was receiving the same care as set out in the report at page 61-62 and that there had been no further admission to hospital (the last one in January 2018 as referred to by the FtTJ). Mr Diwnycz on behalf of the respondent agreed with Ms

Rogers that it was not necessary for any further evidence to be provided and that the Tribunal had before it all the relevant evidence to re-make the decision.

70. I therefore heard submission from the advocates. Mr Diwncyz relied on the decision letter which made reference to the medical condition of the appellant son and the country background material which supported the respondent submission (and the judge's finding) as to the availability of medical treatment in Nigeria for sufferers of SCD. In the light of the findings of fact made, he submitted that even taking into account that the appellant's son is a minor child that it had not been demonstrated that they were any compelling circumstances or that it would be unjustifiably harsh for the family to return to Nigeria.

71. Ms Rogers on behalf of the appellant relied upon the evidence that had been provided before the FtTJ as outlined in his determination at paragraph 8 and the bundle of documentation which contained the updated medical report and background material.

72. She submitted that whilst there was no challenge to the decision reached on Article 3 grounds, that the additional factor that was relevant in the Article 8 assessment was that the appellant's son was a child and that the decisions in SL(St Lucia) and GJ (India) were not considering the circumstances of a child.

73. As to whether there were "very significant obstacles to the appellant's integration, she sought to rely on her previous submissions. Whilst the judge found that they could obtain employment, this was like to be casual work and the demands from the financial cost of the treatment would be likely to impact on the family and the other two children. She further submitted that there was no ambulance service and therefore if he needed immediate treatment, he would not be likely to access it and the evidence that related to the percentage of life expectancy was a relevant consideration in the proportionality balance.

74. She submitted that when looking at the proportionately balance in the round, it all centred upon the position of the appellants son as a child and that whilst he was of a young age and that it could not impact on him in the same way as it would as a child of 11 or 12 it could possibly be said it was more acute given his age as a young child. She therefore submitted that notwithstanding the poor immigration history of the adult family members, as found by the judge, the best interests of the child outweighed those public interest considerations and that it would be disproportionate for the removal of the appellant and her family members in the light of her son's medical condition.

Article 3

75. In **N** [2005] UKHL 31 the court considered the issue of Article 3 specifically in relation to a sufferer of HIV and AIDS. The House of Lords established that the threshold in Article 3 cases is high. In **GS (India)** [2015] EWCA Civ 40 the court held that a person whose life will be drastically shortened by the progress of natural

disease if removed to his home state did not fall within the paradigm of Article 3. As discussed in the error of law decision the case of **Paposhvili v Belgium** [2017] Imm AR 867 was considered by the First-tier Tribunal. Mr Paposhvili's claim was dismissed by the European Court of Human Rights by a majority by reference to the test in **N v United Kingdom** [2008] 47 EHRR 39 under which the category of exceptional situations in which Article 3 would prevent removal to another country with lesser standards of healthcare was confined to "deathbed cases". On the evidence at the time Mr Paposhvili was stable and was not at imminent risk of dying and the court considered that although there were limits on treatment available in the country to which he would be returned the appellant was not without resources which might help.

76. The Court of Appeal in **SL (St Lucia) v Secretary of State for the Home Department** [2018] EWCA Civ 1894 considered the subsequent progression of the jurisprudence as follows:

> "21. The application was referred to the Grand Chamber. The effect of its judgment was considered by this court in AM (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 64. First, of course, the court emphasised that the position in domestic law was authoritatively settled in favour of the criteria in N. In N v Secretary of State for the Home Department [2005] UKHL 31; 2005 2 AC 296, the House of Lords case which was endorsed by the European Court. But, in any event, in AM (Zimbabwe) Sales LJ (with whom Patten LJ and I agreed) considered that, in substantive terms, Paposhvili 'only intended to make a very modest extension of the protection under Article 3 in medical cases'" (see [39]). He said (at [28]);
>
> > 'So far as the ECtHR and the [ECHR] are concerned the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where ' **substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy**' (paragraph 183). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the remaining state (even with the treatment available there) to being defined by the imminence (i.e. likely 'rapid' experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that stage of the treatment which had previously been available in the removing state".

77. There has therefore been only a 'modest extension' to the test, from imminence of death in the removing state even with treatment to the imminence of intense suffering or death in the receiving state occurring because of the lack of treatment previously available in the removing state.

78. The FtTJ did not find that the appellant's son's circumstances (medical condition) gave rise to a breach of Article 3 for the reasons he set out at [54]-[59]. There has been no challenge to that assessment by either party and the findings made by the judge and summarised previously remain preserved.

79. In essence, the issue therefore relates to Article 8. The basis of the Article 8 claim is that that there are very significant obstacles to the appellant's integration to Nigeria based on her son's medical condition and thus it would be disproportionate to remove the appellant, her son and other family members.

80. I have considered and applied the five-stage test set out in **Razgar**. I remind myself of what was said in **GS (India) [2015] EWCA Civ 40**, that a person whose life will be drastically shortened by the progress of natural diseases if removed to his home country did not fall within the paradigm of Article 3. The court went on to hold that if the Article 3 claim failed, Article 8 could not prosper without some separate or additional factual element which brought the case within the Article 8 paradigm. The core value protected by Article 8 is quality of life and not its continuance. That meant that a specific case must be considered under Article 8.

81. I must identify whether Article 8 is engaged in respect of private life, it not being contended that it was engaged in respect of family life. In the light of the agreement of the advocates before the FtT that Article 8 was engaged on the basis of the appellant's length of residence in the UK since her entry in 2012 and that of her partner. There is little evidence as to the nature of their private life and it did not form part of the FtTJ assessment nor in the submissions made to the Upper Tribunal. In so far as the evidence in the witness statements refer to involvements with the church and friendships made, as the respondent submits, those aspects of her private life can be maintained from Nigeria. What is relied upon is the private life established in the UK by the appellant's son in the context of his medical condition and the treatment he receives in the UK.

82. There is no challenge to the medical reports filed in relation to the appellant's son. As set out in those documents, the appellants son was born in October 2014 and by November of that year he was diagnosed as suffering from sickle-cell disease ("SCD"). This is commonest inherited disorder of haemoglobin in children resulting from the inheritance of abnormal haemoglobin genes from both parents. The background material estimates that between and 50,000 and 300,000 children are born every year with the condition in Africa. Nigeria is the country with the highest burden of disease where 2% of all new-borns are born with the disorder (see p94 AB).

83. The course of the disease varies widely with some children exhibiting severe manifestations requiring frequent hospital visits and admissions. In the case of the

appellant's son he has been admitted to hospital. The FtTJ made reference to the number of admissions being between 5 to 6 times between May 2015 and January 2018. The documents make reference to an admission in May 2015 where he was examined before being discharged and given medication Amoxicillin (Annex E). Thereafter he was admitted in March 2016 and diagnosed with viral URTI and was sent home with no follow-up care required. There was also admission in April 2016 and was discharged with medication being taken. The most recent medical report (page 61) written by the consultant haematologist makes reference to the most recent admission in January 2018 when he had a chest infection and aplastic crisis (he stop making red cells) and as a result of that began on hydroxyl carbamide treatment to reduce the likelihood of any such further events in the future. That treatment is a type of chemotherapy given in low doses which is supplied by the hospital and is monitored. He therefore requires blood tests to check the blood count and liver function.

84. The medical evidence is accepted by the FtTJ also made reference to being at an increased risk of infection because of SCD therefore he needs to take daily penicillin as well as antibiotic prophylaxis to prevent infection and also takes folic acid. His current medication is set out at page 61.

85. It is also accepted that the background material demonstrates that in Nigeria the appellant's son will also need to take Proguanil which is a malaria prophylaxis (see page 79).

86. Ms Rogers confirmed that there had been no change in his circumstances since the report at page 61 and significantly that he had had no further crises or admission since that identified in January 2018.

87. The material before the FtTJ demonstrated that the medication and treatment required for SCD was available in Nigeria. The decision letter set out excerpts from the country information and guidance Nigeria: medical and healthcare issues (May2 2015) at paragraph 2.11.1 which demonstrated that there was inpatient and outpatient treatment by a paediatric haematologist, blood transfusions were available, clinical admissions in the case of SC crisis and antibiotic therapy. The folic acid and hydrocarbomide necessary for prevention of sickle cell crises were available in Nigeria.

88. It was submitted on behalf of the appellant that the background material demonstrates the availability of the medication Nigeria varied (see page 67 of the bundle). However as noted by the judge, that relied on a chart published in 2013 and did not include information in respect of the appellant's home state but showed that there was availability of medication including Hydroxyurea across Nigeria including the main cities.

89. No reference was made to the material set out at page 110 of the appellant's bundle. This was a research article concerning prescription audit in a paediatric sickle-cell

clinic in south-west Nigeria. The article assessed the pattern of drug prescription in children with SCD attending paediatric outpatient clinics. It concluded that there was a high rate of antibiotic prescription, a low use of opioid analgesics and non-prescription of penicillin. However, the use of Hydroxyurea had contributed significantly to the reduction in morbidity and mortality in the quality-of-life patients with SCD.

90. Ms Rogers submitted that Nigeria did not have an ambulance service. The judge made no specific finding in relation to this submission at [46]. However, given that there must be a large number of incidents which require urgent hospitalisation by members of the population in Nigeria, the absence of an ambulance service does not demonstrate that such treatment cannot be achieved.

91. I would accept that the evidence is broadly consistent that the medical treatment is expensive but as the material sets out (pages 93 – 106) the cost varies considerably depending on the nature of the SCD.

92. The FtTJ accepted that the likelihood of the appellant's son having an episode is likely to increase but that the appellant had not established when this is likely to occur. Given the treatment of hydroxyurea which reduces the frequency of painful crises, this has meant that the appellant's son has not had an episode since January 2018. This treatment is available in Nigeria and forms the main component of preventative medication (see page 110).

93. The issue of life expectancy was raised on the evidence before the FtTJ. He made reference to the "striking feature" of the background material in which it was estimated that only 5% of the children with SCD Nigeria will live past the age of 10, whilst in the UK and the USA over 96% of the children will live beyond the age of 10. The judge made reference to this as a "striking feature" and it was this which he found to be the "key factor" (see [53] and [75]. That evidence was set out at page 76 on the bundle and it was the evidence which the judge based his conclusions on and was the central reason for his decision. The evidence reads as follows:

> "But with good medical care, people with SCD can live to adulthood but with a decreased life expectancy. Although there is no recent data on sickle cell disorder in Nigeria, it is estimated that only 5% of the children with SCD live past the age of 10 in Nigeria, compared to over 96% surviving into adulthood in the United Kingdom and the United States."

94. The source of that "background evidence" was a newspaper article in the "Vanguard". There was no information before the FtTJ as to the source information for the conclusion in that newspaper article that only 5% of children live beyond the age of 10. There was no source documentation referred to in that article to support that assertion. Furthermore, within the same document is referred to there being " no recent data" to even support the estimate given.

95. I would accept that the general thrust of the material suggests there is a high rate of child mortality, but the evidence does not establish what that is in terms of years nor

does it support the statement made in the newspaper article, which can, in the circumstances, only be given little weight.

96. There is also other relevant evidence. At page 14 of the appellant's bundle, the doctor was asked to provide a prognosis but was not able to do so as it was not possible to predict with a child as young as the appellant's son. It made reference to there being limited data on SCD and survival from within Africa and this is consistent with the other material in the bundle that there is lack of reliable data and up to date information. Reference is made to a study in Benin and that it was possible to reduce the mortality rate (see page 44). That material demonstrates that because the data is of some age, it does not she light on how the burden of SCD mortality might have changed over time based on medical care and that public health had improved, including the use of hydroxyurea.

97. As set out by the FtTJ, given the low threshold Article 8 is engaged and I am further satisfied, given that low threshold, that the respondent's decision may interfere with the private life established in the UK. Such decision is in accordance with the law as the appellant cannot meet the requirements of the Immigration Rules and is for the legitimate purpose of the maintenance of immigration control.

98. There is no ground of appeal in respect of the Immigration Rules. However, I have considered the appellant's appeal through the prism of the Immigration Rules. Appendix FM was not pursued by the appellant. For the reasons set out in the decision letter, the appellant nor her partner could meet the requirements of Appendix FM either as a " partner" or as a " parent" in the light of the factual circumstances that none of the members of the appellant's family are British Citizens, are settled or in the case of the children, have been resident in the UK for 7 years.

99. In respect of paragraph 276ADE(1)(vi), although Mr Diwncyz accepted that in considering whether there were very significant obstacles to the appellant's integration I had to consider all the factors including the appellant's son's health, it is the respondent's submission that all the factors referred to in the decision letter, including the appellant's extended family in Nigeria, and her contacts there together with the evidence that there was treatment available in Nigeria for the appellant's son, did not suggest that there would be very significant obstacles.

100. Ms Rogers submits that the test is satisfied and highlights various factors in her submissions; whilst the judge found that they could obtain employment, this was like to be casual work and the demands from the financial cost of the treatment would be likely to impact on the family and the other two children. She further submitted that there was no ambulance service and therefore if he needed immediate treatment, he would not be likely to access it and the evidence that related to the percentage of life expectancy was a relevant consideration in the proportionality balance.

101. I would accept that in considering the issue of whether they were "very significant obstacles to the appellant's integration" that her sons' medical condition may be a relevant factor. However, I cannot accept that is the only consideration when considering paragraph 276 ADE for the reasons that I set out earlier when reaching the conclusion that the judge had erred in law on this issue. By only considering the medical condition, this does not provide the holistic assessment of the likely circumstances that the appellant would be facing on return to her country of nationality.

102. Even if I accepted that earnings in Nigeria may well be lower than what might be earned in the UK, there was no adequate information or evidence to support the appellant's claim, either before the FtTJ or the Upper Tribunal that her family would be unable to assist both the appellant and her partner in reintegrating including in assisting them, if such was necessary, in accessing treatment and/or medication for the appellant's son. The adults concerned have lived the majority of their lives in Nigeria and in the light of the FtTJ findings, have close extended family there, as well as the likelihood of friends. I am satisfied, and it was not argued to the contrary, that both of the adults continue to have social, cultural and family ties there. I take into account that the appellant's son was born in the UK and has not visited or lived in Nigeria, but there is no evidence that he would not be able to access education or would not be able adapt to life there with the support, guidance and assistance of his parents. Whilst the submissions made on behalf of the appellant rely on the medical condition of the appellant's son, in the light of the FtTJ findings that medical treatment is available for him and that the medication he currently is prescribed is also available which he can access through his parents(see [54]), I am not satisfied that it has been demonstrated that the appellant herself meets the requirements of paragraph 276ADE of the Immigration Rules on the basis of her sons' medical condition or on a consideration of the relevant factual circumstances set out above. The fact that the appellant does not, in my assessment, meet the requirements of the Immigration Rules is relevant to my consideration of the appellant's human rights appeal.

103. I now turn to the best interests of the appellant's son. I have applied the general principles when considering the interests of a child in the context of an Article 8 evaluation. These have recently been summarised by Kitchin LJ in TA (Sri Lanka) v SSHD [2018] EWCA Civ 260 at [22] as follows:
"In particular, the respondent has an overriding obligation to have regard to the welfare of a child in the exercise of her various statutory functions. The best interests of a child are therefore an integral part of the proportionality assessment under Article 8. In carrying out that assessment it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before determining whether those interests are outweighed by the force of other considerations. In carrying out that evaluation, the best interests of the child must be a primary consideration although not necessarily the only primary consideration. It necessarily follows that the best interests of a child can be outweighed by the cumulative effect of other considerations; but no consideration can be treated as inherently more

significant than the child's best interests. Ultimately the decision maker must carry out a careful examination and evaluation of all relevant factors with these principles in mind. The question is whether, having regard to the foregoing, there are compelling circumstances which justify the grant of leave to remain outside the immigration rules."

104. I have considered his best interests in the light of his circumstances and in particular his medical condition which I have summarised above. In terms of his private life, and on the light of his very young age, he has not established a private life beyond that of his parents and siblings. Thus, given his young age, his best interests would be to remain with his parents, wherever that might be. However, I would accept that in the light of his medical condition that his private life includes the medical treatment and care he had in the UK. In my assessment of the medical evidence, his reduction in life expectancy has not been established evidentially although I accept the high rate of mortality in general terms. In addressing his best interests in that context, I would conclude that it would be in his best interests to continue to remain in the UK where he could access all forms of treatment and obtain a high level of care. As the respondent submits the best interest's assessment is not determinative and is a primary consideration and not the only consideration.

105. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act apply the public interest considerations at section 117B of the Act. These are as follows:

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to-
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

106. By section 117 A (2) I am obliged to have regard to the considerations listed in section 117B. The public interest in the maintenance of effective immigration control is engaged on the factual circumstances of this appeal. There is no dispute that the adult appellants have remained in the United Kingdom without leave following the expiry of the visit visa in July 2012. Her claim for asylum as a potential VOT was rejected and her appeal against that decision was dismissed by the FtT in 2015. She became appeal rights exhausted on 14 August 2015. Her partner also has no leave to remain in the United Kingdom. Against that background, little weight should be given to the appellant's private life established at a time when her immigration status and those of her dependents were either precarious or unlawful (see S117B (4) and (5)). The economic interest is also engaged as there is no evidence that the appellant or her family members are financially independent, and they are likely to continue to access the publicly funded services of health and education. Although the appellant speaks English that is no more than a neutral factor.

107. There is no dispute on the factual circumstances that S117B (6) does not apply as none of the children are British citizens nor have they been resident in the UK for seven years.

108. In considering Article 8 and the public interest consideration applicable in all cases I have I have applied the 'balance sheet' approach. The Supreme Court in Hesham Ali (Iraq) v Secretary of state for the Home Department [2016] UKSC 60 SC and R (Agyarko) ; R (Ikuga) [2017] UKSC 11 confirmed that the question to be determined is whether a fair balance has been struck using the structured approach to proportionality. I have reminded myself that there are situations where private life might be accorded more than little weight. I have taken into account as an additional factor, to be weighed in the balance with other factors, that the appellant's son, who is a minor is receiving medical treatment here in the UK and that it is submitted on the appellant's behalf that his mother seeks to remain on the basis that given his condition it would be disproportionate to return the family unit to Nigeria, their country of nationality.

109. Turning to the final proportionality question I have considered all aspects of the appellant's private life. This includes his medical conditions of SCD and the high level of treatment that he clearly is obtaining in the UK.

110. I am satisfied that any interference with the appellant's private life is proportionate, taking into account as I do in my findings that the appellant's claims are principally in relation to the circumstances of her son's medical condition. For the reasons I have set out, whilst the availability of treatment may not be of a level he is receiving in the UK I am not satisfied it has been established that he will not be able to access treatment which he requires. I am further satisfied that on the findings of the FtTJ, that the appellant has the support and assistance, both financially and socially, of her partner (who has not leave to remain in the UK) but also has a network of family and friends who can assist them if necessary in Nigeria. The FtTJ found that both the appellant and her partner had the prospects of obtaining employment in Nigeria. Whilst he found it likely to be casual employment, that did not take in to account the point made in the decision letter that the appellant had obtained qualifications whilst in the UK and that this would assist her in re-establishing the family unit in Nigeria. In any event, as the judge found, the appellant has close family members to whom she could derive support which could include financial assistance.

111. As for Article 8, in GS (India) and Ors [2015] EWCA Civ 40 it was held that if the Article 3 claim failed, Article 8 could not prosper without some separate or additional factual element which brought the case within the Article 8 paradigm: the core value protected being the quality of life not its continuance. That meant that a special case must be made under Article 8. Although the UK courts have declined to state that Article 8 could never be engaged by the health consequences of removal from the UK, the circumstances would have to be truly exceptional before such a breach could be established (per paras [45], [85 - 87] and [106 -111]). Underhill LJ said this: "*First, the absence or inadequacy of medical treatment, even life preserving treatment, in the country of return, cannot be relied upon at all as a factor engaging Article 8: if that is all there is the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle.*" [111]

112. More recently in SL (St Lucia) v SSHD [2018] EWCA Civ 1894 the Court of Appeal commented that they were unpersuaded that Paposhvili had any impact on the approach to Article 8 claims. An absence of medical treatment in the country of return would not of itself engage Article 8. The only relevance would be where that was an additional factor with other factors which themselves engaged Article 8. Ms Rogers has identified the "additional factor" as the appellant's son is a minor.

113. Whilst the circumstances of a child may (though not must) more readily engage Article 8(1), in assessing proportionality and taking into account as a primary consideration a child's best interests, the public interest must be weighed bearing in mind that, even under Article 8 and in cases involving children, the public interest reflected in the economic wellbeing of the country remains a powerful and weighty factor in "health" or "welfare" cases.

114. It is not the case on the particular factual matrix here that there is no available treatment or that the appellant's son would not be able to access treatment in Nigeria. Nor has it been established that there is a significant reduction in life expectancy on the evidence before the Tribunal for the reasons I have set out earlier.

115. In addition, there are other public interest factors relevant to the adults concerned which must also weigh in the balance. They were set out in the decision of the FtTJ and summarised earlier in my consideration of the section 117 public interest factors.

116. Taking into account all the evidence, including having fully considered the medical evidence relating to the appellant's son and placing weight upon his circumstances as a minor child and the special vulnerability that being a child brings to the Article 8 assessment, I am not satisfied in the round, that this amounts to exceptional or compelling circumstances or that the refusal of leave would result in unjustifiably harsh circumstances such that refusal of leave to remain would be disproportionate on the particular facts of this appeal.

Notice of Decision

117. The decision of the First-tier Tribunal contains an error of law such that it is set aside. I substitute my decision re-making the decision dismissing the appellant's appeal on all grounds.

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 the appellant or any members of her 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 Upper *Tribunal Judge Reeds*

Date 25/5/2019

Upper Tribunal Judge Reeds