



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

Appeal Number: IA/13330/2014

THE IMMIGRATION ACTS

Heard at Field House

On 30 January 2015

Decision & Reasons

Promulgated

On 9 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS AFOLAKE KABIRAT YISA

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: Mrs R Spio-Aidoo, R Spio and Co Solicitors

DECISION AND REASONS

1. Ms Yisa, the Respondent to this appeal to the Upper Tribunal is a national of Nigeria. Her date of birth is recorded as 27 May 1982.
2. Ms Yisa claimed to have entered the United Kingdom on 17 May 2001. On 12 August 2009 application was made for an EEA Residence Card based on her marriage to a German national. On 3 September 2010 a decision was made to refuse that application because the German identification card

was said previously to have been reported lost or stolen. On 6 July 2012 Ms Yisa made application outside the Immigration Rules on compassionate grounds. That application was refused on 24 July 2013 on the basis that she did not meet the Immigration Rules. That was followed by application for judicial review. That was refused. On 21 January 2014 Ms Yisa was served with the Form IS151A. On 5 May 2014 her representative submitted a request to the Secretary of State inviting consideration pursuant to Article 8 ECHR. On 7 March 2014 a decision was made to refuse the application and to give directions for removal pursuant to Section 10 of the Immigration and Asylum Act 1999. Ms Yisa appealed. Her appeal was heard by Judge of the First-tier Tribunal Phillips sitting at Taylor House on 8 October 2014.

3. Ms Yisa advanced a case based on a fear of her family in Nigeria. It was her case that she had fled because she was at risk of female genital mutilation ("FGM"). It was also her case that her family were intent, at one time, on her marrying an elderly man and consequent upon the decision that she made to leave Nigeria, would now would be at risk were she to be return. It was still further her case that when she arrived in the United Kingdom she did so with the help of an agent who was desirous of her turning to prostitution. Ms Yisa did not, at any time claim refugee status; she was in fear of being returned were she not believed. The application made in 2009 on the basis of her marriage to a German national was one in which, on her case her husband deserted her about three months after the marriage but now she was in a relationship which began in July 2010. Her current partner is a British citizen who has lived in the United Kingdom for twenty four years. He hales from Nigeria and has returned for visits on three occasions. It was part of her case, in addition to those other factors mentioned, that she could not return to Nigeria because her husband would be at risk because of his own family problems concerning a Kingship dispute.
4. Having heard submissions from both parties, Judge Phillips allowed the appeal on human rights grounds.
5. Not content with that decision, by Notice dated 12 November 2014 the Secretary of State made application for permission to appeal to the Upper Tribunal.
6. The Secretary of State submitted that there were no sufficient insurmountable obstacles to family life between Ms Yisa and her partner continuing in Nigeria noting that Ms Yisa's partner had returned to Nigeria on at least three occasions when he had been able to re-establish contact with his mother and brother. In those circumstances the Secretary of State submitted that it was not open to Judge Phillips to find any continuing risk.
7. As to Article 8 generally, the Secretary of State pointed alternatively to those factors which, by Section 117B of the Nationality, Immigration and Asylum Act 2002, Judge Phillips was to have regard and entirely

reasonable to expect Ms Yisa to return to Nigeria and make application to return to the United Kingdom from there.

8. On 16 December 2014, Judge of the First-tier Tribunal Cruthers granted permission. The basis upon which permission was granted was as follows:

“The grounds on which the Respondent [Secretary of State] seeks permission to appeal complaint primarily that the finding as to there being insurmountable obstacles to [Ms Yisa] and her partner continuing their family life in Nigeria is a flawed finding. Bound up with the complaint just referred to, [Secretary of State] asserts that for Article 8 purposes it is reasonable to expect [Ms Yisa] and her partner to continue their family life in her country of nationality [Nigeria] - especially given the immigration history of [Ms Yisa]...”

9. Ms Everett took a very realistic approach to this appeal. It was of note that Judge Phillips accepted the evidence with which he was presented and indeed to a very high standard since he used terms such as, “I do not have any reason to doubt the evidence...”. Still further it is of note at paragraph 37 that Judge Phillips said:

“I note that the credibility of [Ms Yisa] and her partner was not challenged...”

10. Ms Everett questioned whether it was correct to say that there were no credibility issues but she quite properly accepted that that was not a matter that had been raised in the grounds. Further and of some significance in considering the merits of the appeal before me, was the fact that the Secretary of State had relied in the grounds on the fact that Ms Yisa’s partner had returned to Nigeria on three occasions without any apparent consequence. That was relied upon in support of the assertion that there was no impediment to Ms Yisa and her partner returning to Nigeria. What appears to have been overlooked however was that at paragraph 20 of the Decision and Reasons was reference to evidence given by Mr Odukoya that when he had returned to Nigeria he had done so in disguise. As I have already said, credibility is said not to have been challenged and that statement by the judge is not something which is now challenged in the grounds bringing the matter before me. Ms Everett accepted in the course of submissions that it may well be that the author of the grounds had overlooked what was said at paragraph 20 but in any event on the issue of credibility, given the standard of proof which the judge applied, Ms Everett again accepted that there was little that she would have been able to say with respect to the positive findings made.
11. Once it was accepted that there was a finding that Ms Yisa would be at danger were she to return to Nigeria and that the same was true of her partner, the eventual findings of Judge Phillips, in my judgment, become unimpeachable. Mr Odukoya is a British citizen who is in work. It is not suggested that Ms Yisa was in anyway a burden on the state.

12. Judge Phillips reminded himself of the guidance in the case of **Shahzad (Article 8: Legitimate Aim [2014] UK UT00085; Nagre v Secretary of State for the Home Department [2013] EWHC 720; Gulshan (Article 8 - New Rules - Correct Approach) [2013] UK UT640; Huang [2007] UK HL11; SS (Nigeria) [2013] EWHC Civ 550; Beoku-Betts [2008] UK HL39 and Chikwamba [2008] UKHL 40**
13. In my judgment reading the Statement of Reasons, there is no basis for saying that Judge Phillips did not direct himself appropriately. He made a finding that the established family life of Ms Yisa and her partner could not reasonably be expected to be enjoyed outside the United Kingdom given that Nigeria was not an option. He accepted there was the remaining risk and went further to say that although Ms Yisa had not claimed asylum, he nevertheless came close to finding that she was a refugee.
14. The evidence which was given before the First-tier Tribunal came not only from Ms Yisa and her partner but also from the uncle of Mr Odukoya. The judge had regard to all the material facts including those which were adverse to a positive finding such as the poor immigration history but still having carried out the balancing exercise as he was required to do made a finding which in my judgment was entirely open to him. The finding was neither irrational nor perverse.
15. For the avoidance of doubt therefore the finding that there were insurmountable obstacles to family life continuing outside the United Kingdom was a finding that was entirely open to the judge so that the finding that the appeal succeeded under the Immigration Rules was open to the judge. Even if there had been suitability requirements, not met under the rules, any error would not have been material because it was open to the judge, on the facts of this case, to look to the position outside of the Immigration Rules having regard to the wider application of Article 8 given the significant findings that were made with respect to the risks to both Ms Yisa and her partner.
16. Ms Everett again conceded that on the facts of this case, without conceding the appeal itself, that this was a case in which the judge was entitled to look to the wider application of Article 8 though she still invited me to allow the appeal. As it was I detect no error of law in the approach taken and in reality the grounds amount to a disagreement with the findings of fact.

Decision

The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal is affirmed.

Signed

Date

Deputy Judge of the Upper Tribunal