Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39029/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 6 April 2015	**On 14 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MS AA
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bazini of counsel
For the Respondent: Ms Pal a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. This appeal is subject to an anonymity order made by the First-tier Tribunal. Neither party invited me to rescind the order. Pursuant to Rule

14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. This is an appeal by the appellant who is a citizen of Nigeria born on 27 February 1979.

Immigration History

3. The appellant was granted leave to enter the United Kingdom on a 6 month visit visa valid until 4 February 2005. She was granted further leave to enter on a 2 year visit visa valid to 14 December 2008. Leave to enter for a further 2 years until 24 November 2010 was granted but the appellant was refused entry on landing in the UK on 2 December 2008. She was granted temporary admission subject to reporting conditions which were later suspended. The appellant applied for a Family Member residence stamp on 17 July 2009. This was refused on 19 October 2009. She applied for a non-EEA residence card on 27 July 2011. This application was refused on 28 October 2011 because the marriage was considered to be one of convenience. The appellant made an application for leave to remain on Human Rights grounds on 21 December 2011 which was refused on 13 November 2012 with no right of appeal. Further representations were received by the Secretary of State on 8 April 2013 giving rise to the decision appealed against the respondent refused the application on 3 September 2013.

4. The appellant appealed against the respondent's decision of 3 September 2013 to the First-tier Tribunal.

The First-tier Tribunal Judge's Decision

5. The appellant's appeal was dismissed by First-tier Tribunal Judge O'Keeffe ('the judge') in a decision promulgated on 9 March 2015. An

application was made at the start of the hearing for an adjournment because the appellant had applied for a child arrangement order in respect of her niece, M, who was in long term foster care. The judge refused to adjourn the hearing after a short adjournment for more information. The hearing proceeded and the judge dismissed the appeal on Article 8 grounds.

Permission to appeal

6. The appellant applied for permission to appeal. Permission to appeal was granted by First-tier Tribunal Judge Heynes who indicated that '*an arguable error of law is disclosed by the application in refusing an application for an adjournment pending a first hearing of the application of a Child Arrangement Order*'.

7. At the hearing I heard submissions from Mr Bazini on behalf of the Appellant and Ms Pal on behalf of the respondent.

Discussion

8. The grounds of appeal, which are lengthy, assert that the judge erred in law by i) failing to grant an adjournment, and ii) failed to grant a period of discretionary leave.

9. The grounds assert that the findings of the judge in relation to the delay in initiating proceedings, the reason for that delay (legal aid funding), the history and extent of the appellant's involvement with the Local Authority dealing with M's care and placements and her attempts to gain access to M are flawed. The grounds also assert that various reports written by the Local Authority should not have been relied on by the judge and that the judge had failed to take into account a special guardianship report. In summary the grounds argue that the bundle of documents before the First-tier Tribunal judge, amounting to 580 pages, illustrates that the appellant had a realistic prospect of the family court

making a decision that will have a material impact on the relationship between the appellant and M.

10. At the hearing Mr Bazini handed up a number of documents from the family court in Stoke on Trent. Mr Bazini was not suggesting that I take these into consideration as they were not before the First-tier Tribunal judge. However, if I were to find a material error of law they might assist in determining the appropriate course of action. Mr Bazini also asked me to note that the court had asked the appellant to file full details of her immigration status by 20 August 2015.

11. Mr Bazini referred me to the case of Mohammed (Family Court) Proceedings – outcome) [2014] UKUT 419 (IAC). His submissions were that the judge had penalised the appellant for a delay in obtaining legal aid to und the family court proceedings which were beyond her control. This was plainly a material error. The judge had not applied the correct test when making the decision not to adjourn. As set out in the headnote in Mohammed the test is '*whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and the parent facing immigration measures…'.* The question the judge should have addressed was whether there was a realistic prospect that the decision will have a material impact not who was to blame for the delay. He submitted that the witness Ms O on the day of the hearing indicated that the prospects were good. The judge failed to take into account the special guardianship report confirming that the plan was to introduce contact between M and the appellant. The judge failed to take into account the numerous emails after the order was made in 2011, failed to take into account the 30/40 trips to social workers, the assessments made and the constant contact between the appellant and the Local Authority. Mr Bazini argued that the factors set out by the judge in respect of the position from paragraph 32 in the decision relate to a consideration of article 8 these factors had nothing to do with the judge's consideration of whether there was a

realistic prospect in relation to the family court proceedings as the judge had already refused the adjournment before considering those issues. In any event Mr Bazini submitted that the analysis of the judge is flawed as even in 2012 it is evident that the Local Authority were saying that something might happen in the future and certainly some contact was being considered. Mr Bazini referred to p196 of the bundle where it is stated that there had been no decision to deny the appellant access to her niece but contact has to be carefully planned and at 197 the report states that it is advisable that contact be gradual. The summary concluded that the appellant is currently being assessed. Further at p242 of the bundle the plan was to slowly introduce the appellant by providing photographs. In summary Mr Bazini's submission was that the judge had not taken into account the assessments and the plan for gradual contact to take place. The judge did not address her mind to the correct legal test.

12. Ms Pal submitted that at paragraph 43 the judge referred to several decisions. The judge set out what the court should consider and had proper regard to the family court and had regard to the special guardianship report making reference to the findings in that report. The judge specifically notes that she was not referred to any specific positive findings in that report. The judge considered a number of letters from the Local Authority where their findings were that it was not in M's best interests to have contact. The appellant had not seen the child since 2010. All these factors led the judge to form the view that the family court proceedings would not a have a material impact on the outcome of the appeal. Ms Pal submitted that as things have moved on since the appeal hearing it was always open to the appellant to make a further fresh application in light of the Family Court Orders.

13. I take Mr Bazini's point that the judge made a decision on the adjournment at the beginning of the hearing but I do not agree that the only reason for refusing the adjournment was based on the delay in

obtaining legal funding. The judge clearly indicated when refusing the adjournment that she had taken into account the fact that the care proceedings had concluded in April 2011, that that the appellant had not provided a valid reason as to why an application had not been made from April 2011 to January 2015. These factors are pertinent to whether there is a realistic prospect of the family court proceedings having a material effect on the relationship between M and the appellant. It has to be remembered that the judge will have read all the papers prior to the hearing so will have been aware of the factors identified later in the decision when making the decision to refuse the adjournment. In the instant case the relationship is also relevant – this is not a parent and child relationship. It is between an aunt and niece, a niece that had been in the care of the Local Authority for nearly 4 years. In drawing attention to this I do not wish to diminish the strength of feelings that the appellant has for her niece. However, it is a factor that weighs in the assessment of how realistic the prospect of a material impact was to be evaluated.

14. The judge referred at (paragraph 43) to the number of cases including Mohammed and identified the correct test. The judge has identified a number of factors and made findings adverse to the likelihood of the family proceedings having a material impact on the appeal. I have not set out all the relevant factors but have identified some of the salient ones namely:

- The appellant accepted in evidence that she had not seen M since 2010 (para 33)
- The appellant told the judge that she had been positively assessed in respect of M but the judge found that the reports provided did not support that assertion (para 33)
- On 4 February 2011 a letter sent from the social worker indicated that the appellant seemed reluctant to provide information so an assessment could be completed to see whether the appellant could be a carer for M.(para 334)

- An adoption report noted that extensive efforts have been made to gain information from the appellant…she has been unwilling to provide even basic information.(para 36)
- On the evidence before the judge she found that the appellant was aware of the care proceedings in respect of M and provided insufficient information to enable the Local Authority to evaluate her as a potential carer.(para 37)
- In a report from Silvina Gioseffi in May 2012 it was stated that it was clarified to the appellant that there had not been any decision to deny access to M but it was paramount to consider M's needs whilst introducing a family member with whom she had had no contact for a long period of her life (para39)
- A special guardianship assessment concluded that due to M's significant and complex emotional needs there were too many known risks for a placement with the appellant to be an option. (para 40)
- The judge considered the large number of emails submitted in evidence which appeared to her to mainly to be concerned with the practicalities of the assessment. She said that she was not referred to any specific positive endorsement of the appellant within those emails (para 40)
- A letter dated 12 March 2013 from the appellant's solicitors setting out – *the local authority have stated that consideration was given to contact taking place but they did not think contact was in M's best interests as you did not appear a significant figure and by your own admission you had only had sporadic contact with M throughout her life. When M was shown a photo of you she did not recognise you or your name* (para 42)
- The judge stated that she could find anything on the evidence provided to support the appellant's assertion that she had been assessed positively and that her immigration status was a stumbling block to her application. Although the evidence demonstrates that the appellant instructed solicitors in connection with a proposed application for contact the judge was not provided

> with a satisfactory explanation as to why the appellant did not make a formal application until January 2015. (para 44)

15. I have taken into consideration the submissions made by Mr Bazini and have considered the bundle of evidence that was before the First-tier Tribunal judge. I accept that the appellant has been making efforts to make contact arrangements with M and that the special guardianship assessment relied on does indicate that contact was at that stage in contemplation. However this was in 2012 and there has not, at the time of the hearing (and still has not to date), been any contact. I consider that the number of visits (30/40) purported to have been made to social workers is not supported by the evidence and has been significantly overstated. I consider that the judge clearly did take all the evidence onto account and did address her mind to the correct legal test. It is clear from RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC) that the factors that the judge considered were relevant to an assessment of the realistic prospect of a material impact test. The headnote at 2 sets out:

> 2. In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?

16. These were factors that the judge noted from the evidence. It was recorded that the appellant had had no contact with M since 2010, that the proceedings were initiated shortly before the appeal, there had been considerable delay in initiating the proceedings, the appellant only had sporadic contact with M throughout her life and the Local Authority had placed M in long term foster care.

17. Even if it is arguable that at the beginning of the hearing the judge did not take into account the test on the relevance of family proceedings before refusing the adjournment the error would not have been material.

The judge did refer to the correct test and had in mind the prospects of the family court proceedings in making a material difference to the outcome of the appeal. The grounds with regards to the evidence are essentially a disagreement with the findings of the judge on the material issues.

18. The refusal to adjourn the proceedings was not a material error of law.

Conclusion

19. There was no error of law such that the decision of the First-tier Tribunal should be set aside.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed P M Ramshaw Date 12 August 2015

Deputy Upper Tribunal Judge Ramshaw