Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13383/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 2 December 2019 **On 3 December 2019**

Before

Upper Tribunal Judge Pickup

Between

AOS
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms M Butler, instructed by Wilson Solicitors LLP
For the respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. 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 appellant(s).

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Freer promulgated 2.7.19, dismissing her appeal on human rights grounds against the decision of the Secretary of State, dated 24.5.18, to refuse her application made on 15.12.17 for entry clearance for settlement to join her mother, as the child of a person

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granted refugee status in the UK on the basis of being the victim of human trafficking.

2. First-tier Tribunal Judge Andrew refused permission to appeal on 13.9.19. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Norton-Taylor granted permission on all grounds on 24.10.19, finding those grounds 'strongly arguable'.

3. The grounds submit that the judge had engaged in speculation unsupported by evidence; failed to have regard to several sources of apparently unchallenged expert evidence; failed to consider and/or apply relevant Country Guidance, including HD (trafficked women) Nigeria CG [2016] UKUT 454; and reached an unsustainable conclusion that there was no article 8 ECHR family life between the appellant and her mother.

4. Pursuant to the directions issued by Upper Tribunal Judge Norton-Taylor, on 26.11.19, the respondent has now served, outside the 10 day time limited provided, its Rule 24 response to the grounds of appeal. No objection was taken by Ms Butler.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.

6. The appellant was born on 29.5.98. Her mother raised her in Nigeria, until coming to the UK in 2005, at which time the appellant was only 7 years of age. It was submitted to the respondent and to the First-tier Tribunal on appeal that notwithstanding the fact that by the date of the application in 2017 the appellant had already reached adulthood, there was cogent and compelling of continuing emotional and financial dependency between her and her mother in the UK. It is suggested that in requiring 'credible and compelling proof' of financial support the judge applied the incorrect standard of proof.

7. Amongst the evidence put before the First-tier Tribunal were several expert reports addressing the appellant's circumstances in Nigeria and the sponsor's mental health in the UK. This evidence suggested that bringing the appellant to the UK to be reunited with her mother would likely result in a significant improvement in the sponsor's mental health. On the other hand, if the appeal was to be dismissed the expert would be concerned at a further significant deterioration in her mental health.

8. The Entry Clearance Officer decision did not address the family reunion provisions under paragraph 353D but rather those within paragraph 317 in relation to a dependent relative of a person present and settled in the UK. Applied to the facts of this case, under paragraph 317 the appellant would have to show that she is living alone outside the UK in the most exceptional compassionate circumstances, and is financially wholly or mainly dependent on her mother in the UK, and can and will be accommodated adequately without recourse to public funds in accommodation which the sponsor owns or occupies exclusively, and can and will be maintained adequately without recourse to public funds, and has no other close relatives in her

own country to whom she could turn for financial support. The Entry Clearance Officer concluded that she failed to demonstrate that she was financially dependent on her mother in the UK, and that she has other relatives to whom she can turn for help. In addition, it was not shown that there would be adequate maintenance to support the appellant in the UK.

9. The appellant's representatives accepted that given her age at the date of application, the appellant cannot meet the requirements of paragraph 353D of the Immigration Rules. Neither was it argued that she could meet the requirements of paragraph 317. Instead, they sought entry clearance outside the Rules on the grounds of exceptional circumstances on article 8 ECHR grounds and in application of the Home Office Policy.

10. Crucial to the First-tier Tribunal's article 8 ECHR assessment was whether there continued to be family life between the appellant and the sponsor, despite their long separation since 2005 and given that the appellant was an adult by the date of application. Following the principle established in Kugathas v SSHD [2003] EWCA Civ 31, elements of dependency more than those normal emotional ties to be expected between adult relatives is required to establish family life engaging article 8 ECHR.

11. The sponsor contended that it was through no fault of her own that she was unable to apply to bring the appellant to the UK under the family reunion provisions. The process of obtaining refugee status in the UK took a long time. She argued that had she been able to apply in 2016, before the appellant turned 18, paragraph 353D would have been met.

12. The grounds appear to me to confuse the issue as to whether there was family life between the appellant and the sponsor with issues as to the conditions in which the appellant lives in Nigeria, the relevance of which to an article 8 claim for entry clearance to join her mother is not entirely clear. Many of the arguments advanced in the grounds are more akin to a person seeking international protection against return to Nigeria. Issues are raised as to poor living conditions; being denied medical treatment; whether she could find protection; and whether on return the appellant could take advantage of women's shelters. However, the only right of appeal is on human rights grounds. At the hearing before me, Ms Butler made it clear that she was neither pursuing a protection claim nor article 8 private life.

13. It is clear from [34] of the decision that the judge read the entire file and has taken everything into account in the round, whether or not specifically mentioned. The judge is not required to provide a précis of the evidence or to resolve every factual issue, provided it is clear that all relevant information has been taken into account. The decision must provide cogent reasoning open to the judge on the evidence to support the findings and conclusions reached.

14. The judge outlined a number of factors relevant to both consideration within the Rules and outside the Rules on article 8 ECHR grounds. The judge found that there was no modern means of communication between the appellant and the sponsor; she

has no access to a phone. There was no evidence of any direct communication and, of course, they have not seen each other since 2005. Neither was there any evidence of financial support by way of documentary evidence of receipts for money transfers, and any money that was sent was sent to the sponsor's brother. The judge found that the appellant had lived with her uncle and received financial support from him.

15. Further, it was not proposed that the appellant live with the sponsor, who does not live in accommodation which she occupies exclusively, but that the appellant be housed with an uncle she does not know in accommodation at a different location to the sponsor. This would not have met the accommodation requirement under paragraph 317.

16. It follows from the above, that the appellant could not succeed under the Immigration Rules on any basis. This much was conceded on the appellant's behalf. At the hearing before me Ms Butler repeated the concession but relied on article 8 family life and on the Family Reunion Guidance.

Family Reunion Guidance

17. The First-tier Tribunal Judge gave consideration to the Family Reunion Guidance, which addresses exceptional circumstances for persons over the age of 18, but pointed out that the appellant does not live alone.

18. The policy at p30 provides:

> "Where an application for family reunion under Part 11 of the Immigration Rules is received from a family unit of a refugee or someone with humanitarian protection, and includes a child or children who are over 18, the child or children who are over 18 must be refused under the Immigration Rules. The caseworker must go on in every case to consider whether there are exceptional or compassionate circumstances, including the best interests of other children in the family, which warrant a grant of leave to enter or remain outside the Immigration Rules on Article 8 grounds. These could be that the applicant would be left in a conflict zone or dangerous situation and become destitute on their own; have no other relatives that they could live with or turn to for support in their country; are not leading an independent life and the rest of the family intend to travel to the UK. See Exceptional circumstances or compassionate factors for further information."

19. The exceptional circumstances section provides:

> "There may be exceptional circumstances raised in the application which make refusal of entry clearance a breach of ECHR Article 8 (the right to respect for family life) because refusal would result in unjustifiably harsh consequences for the applicant or their family. Compassionate factors are, broadly speaking, exceptional circumstances, which might mean that a refusal of leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but not constitute a breach of Article 8.
>
> "It is for the applicant to demonstrate as part of their application what the exceptional circumstances or compassionate factors are in their case. Each case must be decided on its individual merits. Entry clearance or a grant of leave outside the Immigration Rules is likely to be appropriate only rarely and consideration should be given to interviewing both the applicant and sponsor where further information is needed to

make an informed decision. The following examples may lead to a grant of leave outside the rules:

"an applicant who cannot qualify to join parents under the rules because they are over 18 but all the following apply:

- their immediate family, including siblings under 18 qualify for family reunion and intend to travel, or have already travelled, to the UK;
- they would be left alone in a conflict zone or dangerous situation;
- they are dependent on immediate family in the country of origin and are not leading an independent life;
- there are no other relatives to turn to and would therefore have no means of support and would likely become destitute on their own."

20. Although the appellant may live in difficult and even harsh circumstances in Nigeria, the judge found little to support the contention of family life between the appellant and the sponsor, or exceptional circumstances justifying granting entry clearance to the UK when the Rules cannot be met.

21. At [56] of the decision, the judge was not satisfied that bringing the appellant to the UK would cure the sponsor's mental health issues and observed that increased responsibility would probably increase the stress. However, those findings contradict the expert evidence and may border on speculation by the judge without evidential support.

22. The grounds also complain at [17(d) & (e)] that at [59] of the decision the judge stated that it did not follow that the sponsor was barred from the whole of Nigeria, "or perhaps any of it forever." The judge also suggested that the appellant circulating amongst Yoruba people in London would put her at risk of trafficking. It is submitted that these matters were not in evidence and the finding relating to the return and relocation of the sponsor in Nigeria is contrary to the grant of international protection to the sponsor.

23. In its Rule 24 response, the respondent accepts that the First-tier Tribunal Judge made findings contrary to the expert and factual evidence and it is accepted that the judge did err in law in these findings (ground two) and in relation to the Kugathas family life considerations (ground four).

24. However, the respondent does not accept that there was any material error of law in the First-tier Tribunal Judge's consideration of the Family Reunion Guidance. It is pointed out that as the appellant is outside of the UK, her circumstances and human rights (family life) are only relevant insofar as they affect the family rights of the sponsor in the UK. For example, it is argued on behalf of the appellant, relying on the medical evidence, that the effects on the sponsor's mental health of no reunion with the appellant would amount to unjustifiably harsh consequences for the mother, as a member of the appellant's family within the jurisdiction of the UK whose human rights are affected. Ms Butler argues that the circumstances of the appellant are within the Guidance and also that there is family life between the appellant and the sponsor that engages article 8 ECHR.

25. The respondent takes the point that the appellant is outside the UK and her circumstances in Nigeria are not directly relevant to a human rights claim for entry clearance. Article 1 of the ECHR applies to those within the jurisdiction of a Contracting Party but, obviously, the appellant is not within the jurisdiction of the UK. The respondent relies on the decision of the Court of Appeal in SSHD v Abbas [2017] EWCA Civ 1393, where the issue of territoriality was addressed in relation to an article 8 case involving private life. The Court pointed out that "In article 8 cases involving family life, even though the spouse or child seeking entry to the territory of a Contracting Party will be outside that territory, members of the family whose rights are affected are undoubtedly within it. That provides the jurisdictional peg. I have already indicated why that does not read over to private life claims, so no analogous argument relating to jurisdiction can succeed. No other argument to suggest that the respondent and his family were within the jurisdiction of the United Kingdom when making the application for entry clearance could prosper in the face of the decisions of the Grand Chamber of the Strasbourg Court in Bankovic v Belgium (Admissibility) (52207/990 (2007) 44 EHRR SE5 and Al Skeini."

26. It is not clear that the authority relied on greatly assists the respondent's case. On the facts of that case, the Court of Appeal found that the UK had no obligation on private life grounds to grant entry clearance to the applicant to visit an elderly relative in the UK in the circumstances where there was no family life within article 8 ECHR. In the present case the issue is not in relation to private life but whether or not there is family life between the appellant and the sponsor sufficient to engage article 8 and whether refusing entry clearance, including the effect on the sponsor's mental health, amounts to a disproportionate interference with the sponsor's right to respect for family life. However, the case does emphasis that it is the human rights of the family member in the UK that is potentially relevant. To that extent, the effect refusal of entry clearance may have on the sponsor's mental health may be a relevant consideration in the overall article 8 assessment.

27. As held in Khan v United Kingdom (2014) 58 EHRR SE15, the interference with the family life of one is an interference with the rights of all those within the ambit of the family whose rights are engaged. Beoku-Betts v Secretary of State for the Home Department [2009] AC 115 held that the rights of all family members, and not only the person immediately affected by a removal decision, must be considered in the article 8 balance. All of the above begs the question whether there is family life between the appellant and the sponsor which engages article 8 ECHR.

28. However, I accept there are clear errors of fact and law in the decision which bear upon the article 8 ECHR family life assessment. In his submissions to me, Mr Kotas frankly accepted that the judge had erred in the family life assessment, in the ways described above. Mr Kotas did not resist Ms Butler's argument that the erroneous findings were so critical to the family life assessment that it was so undermined and flawed that it was in material error of law. He continued to resist the grounds relating to the Guidance but Ms Butler indicated that she did not directly rely on this as a ground of appeal, only in support of the article 8 family life considerations.

29. I bear in mind that a tribunal must not use article 8 as a general dispensing power (see Patel v SSHD [2014] AC 651, per Lord Carnwath at paragraph 57). However, having considered the matter carefully, including the submissions of both parties, I accept Ms Butler's submissions as to material errors the First-tier Tribunal's article 8 family life assessment. For the reasons set out above, I am satisfied that there was such error of law in the making of the decision of the First-tier Tribunal that it cannot stand and must be set aside to be remade.

Remittal

30. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal. I accept Ms Butler's submissions that this is a heavily fact sensitive issue and that up to date evidence will be required before the tribunal can remake the decision, so that the case should be remitted. Mr Kotas also considered the matter appropriate for remittal to the First-tier Tribunal.

31. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

32. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

Upper Tribunal Judge Pickup

Dated **2 December 2019**

Consequential Directions

1. The appeal is remitted to the First-tier Tribunal sitting at Taylor House;
2. No interpreter will be required;
3. The appeal is to be decided afresh with no findings of fact preserved;
4. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judges Freer and Andrew;
5. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
6. The First-tier Tribunal will give such further or alternative directions as are deemed appropriate.

Signed *DMW Pickup*

Upper Tribunal Judge Pickup

Dated **2 December 2019**