Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10419/2019 (P)

THE IMMIGRATION ACTS

Decision under rule 34	**Decision & Reasons Promulgated**
On 2 November 2020	**On 3 November 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

JOSEPHINE ONYEBUCHUKWU KERRY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of Judge of the First-tier Tribunal Hussain ('the Judge') sent to the parties on 2 December 2019 by which the appellant's appeal against a decision not to grant her leave to remain on human rights (article 8) grounds was refused.

2. The appellant relies upon undated grounds of appeal filed with her appeal notice on 4 May 2020 and supplementary grounds of appeal filed by email on 8 June 2020.

3. Upper Tribunal Judge Keith granted permission to appeal on all grounds by a decision sent to the parties on 6 August 2020.

Rule 34

4. This decision is made without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules').

5. In light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed at rule 2(1) of the 2008 Rules, and also at rule 2(2)-(4), UTJ Keith indicated his provisional view that it would be appropriate to determine the following questions without a hearing:

   (i) Whether the making of the First-tier Tribunal's decision involved the making of an error of law, and if so

   (ii) Whether the decision should be set aside.

6. The parties were requested to inform the Tribunal if, despite the directions, a hearing was required. The time limit for such objections has passed and neither party raised an objection to the Tribunal's provisional view.

7. The appellant's legal representatives filed short submissions by means of email correspondence, dated 12 August 2020. The respondent has not filed submissions.

8. I have considered whether it is appropriate to consider this appeal under rule 34. In undertaking such consideration, I am mindful as to when an oral hearing is to be held in order to comply with the common law duty of fairness and also as to when a decision may appropriately be made consequent to a paper consideration: *Osborn v. The Parole Board* [2013] UKSC 61; [2014] AC 1115. In the circumstances, being mindful of the importance of these proceedings to the appellant and to the overriding objective that the Tribunal deal with cases fairly and justly, I am satisfied that it is just and appropriate to proceed under rule 34.

Anonymity

9. The Judge did not issue an anonymity direction and no request for such direction has been made in the written submissions before me.

Background

10. The appellant is a national of Nigeria and is aged 47. She was issued with entry clearance as a visitor on 14 March 2007 and subsequently entered the country. She overstayed.

11. An application for an EEA residence card as the spouse of an EEA national was refused by the respondent on 13 September 2016 and the appellant's appeal was dismissed by both the First-tier Tribunal and the Upper Tribunal.

12. On 27 February 2019 the appellant was served with notice of her liability for removal from this country. By means of an application dated 15 March 2019 the appellant sought leave to remain on human rights (article 8) grounds. She relied upon being a carer for an aunt who has cancer and a cousin with Down's Syndrome. The respondent refused the application by a decision dated 29 May 2019. The respondent concluded that the appellant did not meet the requirements of paragraph 276ADE(1) of the Immigration Rules ('the Rules') and that exceptional circumstances did not arise.

Hearing before the FtT

13. The matter came before the Judge sitting at Taylor House on 16 October 2019. The appellant was represented. The respondent did not attend.

14. The appellant gave evidence and relied upon her witness statement. Her 'aunt', or more precisely her second cousin, "EO", gave evidence and detailed her medical condition. She confirmed that she was in remission but continued to suffer pain from chemotherapy. She explained that she struggled to undertake tasks such as cooking and that on very bad days she could not get out of bed. Also before the Judge were various documents including two letters from medical practitioners concerning EO dated 29 April 2015 and 7 March 2019.

15. By his decision of 2 December 2019, the Judge dismissed the appeal. He reasoned, *inter alia*, at [32] - [34]:

> "32. I have no reasons to doubt that the appellant's aunt suffers from the conditions described above. I am also prepared to accept that the appellant supports her, although I am not clear of the extent of that support. The reason I am not clear is because, firstly, the appellant does not live in the same household as her aunt and secondly, as was observed by the Secretary of State, there appears to be no reference in any of the medical reports to the appellant playing any role in her aunt's care. That is surprising because, given the disabilities she appears to be experiencing and given that the household includes another person that may have some other disability, it is highly unlikely that there has been no social services involvement. If there has been a social services involvement, then there is likely to be a care plan. That care plan would describe the role played by the appellant.
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> 33. The only care plan that there is produced goes back to December 2013, presumably when the appellant [sic] was discharged. That makes no mention of the appellant being assigned any role in supporting her aunt.
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> 34. In the absence of clear evidence as to degree and extent of support provided by the appellant to her aunt, it is difficult to gauge the extent of the private life that exists between the appellant and her answer."

16. I observe that the Judge considered the provision of care and the ensuing relationship between the appellant and EO solely through the lens of

private life and not, additionally, as family life. The latter was advanced by the original grounds of appeal filed with the First-tier Tribunal.

17. As to the appellant's private life the Judge reasoned, at [35] - [39]:

> "35. The appellant undoubtedly has a private life in this country which would comprise relationships and associations she has built up here over the 12 years that she has lived here. It is interesting the appellant says that she came to this country as a visitor but then overstayed here for reasons beyond her control without explaining what those were. That said, the appellant clearly has been here for a substantial period which requires recognition.
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> 36. On balance, I am prepared to find that the appellant has established a private life in this country.
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> 37. In assessing the proportionality of her removal, I have to take into account the public interest considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. In so doing, I note that the appellant's private life was developed at a time when she was unlawfully here. Whilst the appellant speaks English, there is no evidence presented as to her financial independence. She said that she is currently in a relationship but gave no further details as to the immigration status of her partner. I assume that the partner may not be lawfully here, otherwise the appellant would have rushed to regularise her status on the basis of that relationship.
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> 38. Looking at the evidence in the round, I find that the interest of immigration control in this case outweighs any negative impact on the appellant of being removed from this country. In relation to any adverse consequences to her aunt, there are clearly available provisions within the state structure to support persons like the appellant's aunt. Whilst that support may not be as good as the support the appellant will provide, in my view, it is sufficient to ensure that there is no undue harshness suffered by the aunt and her daughter.
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> 39. In view of the above, I find that the appellant is unable to succeed in this appeal."

Decision on error of law

18. I am satisfied that the decision of the Judge contains material errors of law which require the decision to be set aside.

19. A primary concern is to the approach taken to the evidence of the appellant's aunt, EO. The Judge accepted that EO suffered from the conditions described and was prepared to accept that the appellant supports her, but he found that he was not clear as to the extent of the support. In reaching such conclusion he relied upon the appellant not living with EO and her not being referred to in any medical report as playing any role in EO's care. Such approach failed entirely to engage with the evidence provided by both women as to the appellant assisting with basic household chores including cooking and cleaning, as well as bathing

and personal hygiene. Evidence was also provided as to the appellant shopping on behalf of EO and her daughter and accompanying EO to hospital appointments. There is no reference to this evidence in the Judge's decision. The absence of such consideration fatally undermines the Judge's assessment. Whilst the appellant has a significant hurdle to cross to establish familial dependency, as confirmed by the Court of Appeal in *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31, [2003] I.N.L.R. 170, natural justice dictates that the evidence presented is lawfully considered.

20. A further concern is that on at least two occasions the Judge engages in speculation as to circumstances arising in this matter. Firstly, at [32], he speculates as to why there is no mention of the appellant in the medical letters before him. Secondly, in the same paragraph he speculates as to whether or not there has been social services involvement with EO. I observe that it is unfortunate that the Judge did not ask questions of the appellant and EO on these issues when they were giving evidence before him. Such approach has unfairly denied the appellant and her witness the opportunity to address concerns that troubled the Judge.

21. Such material errors go to the heart of the appellant's claim, namely her relationship with EO, and adversely impacted upon the consideration of her article 8 appeal both under and outside the Rules. Upon considering the decision in the round I am satisfied that the decision of the Judge must be set aside.

Remaking the decision

22. As to the re-making of this decision I note the fundamental nature of the material errors identified. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, in particular paragraph 7.2, and conclude that the effect of the errors has been to deprive the appellant of a fair hearing before the First-tier Tribunal.

23. Consequently, I set aside this decision and remit it back to the First-tier Tribunal at Taylor House.

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 2 December 2019 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

25. This matter is remitted to the First-tier Tribunal at Taylor House for a fresh hearing before any Judge other than Judge Hussain. No findings of fact are preserved.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan Dated: 2 November 2020