Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20661/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 January 2020	**On 13 February 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

TEMILOLUWA [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen of Counsel, instructed on a direct access basis
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria born on 27 August 1989. She arrived in the UK as a visitor on 29 December 2006 and on 8 February 2014 submitted an application based on her private and family life in the UK. This application was refused with no right of appeal. She made a further application on 29 September 2017, which was refused with the right of appeal. The appeal came before Judge of the First-tier

Tribunal Burnett for hearing on 30 April 2019. In a Decision and Reasons promulgated on 14 June 2019 the judge dismissed the appeal.

2. Permission to appeal was sought on the following bases:

   (1) Firstly, in finding that there was no family life between the Appellant and her mother and siblings, all of whom were British, the judge erred in his complete failure to have regard to or consider the history of this particular family and the clear evidence of the role played by the Appellant within the family. Given it was and is the Appellant's case, supported by evidence from her mother, from an independent social worker, from numerous testimonials, the Church and her siblings that the relationship that the Appellant has with her siblings is more as a second parent than one of a sibling. It follows that the judge's findings as to whether the Appellant was in a parental relationship with her brothers with reference to section 117B(6) of the NIAA 2002 was further flawed.

   (2) The judge erred in finding it would be reasonable for the Appellant's siblings to leave the UK in that he failed to have regard to the evidence before him and what would indeed be reasonable in the real world.

   (3) Thirdly, the judge's assessment of proportionality was flawed as a consequence and he further failed to have regard to material evidence and factors, in particular: (i) the impact upon the Appellant's family members, her mother and minor siblings; (ii) in failing to take account of the fact that the Appellant had arrived in the UK as a minor; (iii) in failing to consider the significant contribution made by the Appellant to society in the UK and (iv) in failing to take account of the significant difficulties she would face as a young single woman if returned to Nigeria.

3. Permission to appeal was granted by Upper Tribunal Judge Kekić in a decision dated 16 January 2019, on the basis that, "*arguably the judge erred in assessing whether the Appellant had family life with her mother and siblings given their uncommon circumstances. It is also arguable that a number of relevant factors were not considered as part of the proportionality assessment*".

Hearing

4. At the hearing before the Upper Tribunal, Ms Allen on behalf of the Appellant submitted that the judge had failed to consider much of the evidence and issues before him when concluding there was no family life between the Appellant and her mother and her two brothers and that flowing from that error there were further errors as to whether the relationship was akin to a parental relationship, the reasonableness arguments relating to section 117B(6) of the NIAA 2002 and the proportionality of removal of the Appellant. Ms Allen submitted at [43] the focus there by the judge in relation to the Appellant's Article 8 claim outside the Rules was outside the UK, the fact that the Appellant's grandmother was in Nigeria, rather than

to consider the Appellant's relationship with her mother and brothers within the UK and whether they constituted one family unit.

5. Ms Allen submitted the judge failed to consider the history of the family. Although the judge had considered some relevant case law highlighting issues relating to family dependency she submitted that he completely failed to factor those cases into his assessment of the case but rather makes little reference to the evidence. There is a history of domestic violence. The Appellant's stepfather absconded from the family and there are, perhaps as a consequence, close bonds between the Appellant, her mother and her half-brothers.

6. The Appellant's role within the family was an important one. This was attested to not just by the family members but also by Church members and the fact that she is the parental contact in relation to her half-brothers' schooling. Ms Allen submitted the Appellant had effectively stepped into the shoes of the absent parent consistently and full-time. At [48] the judge acknowledged the Appellant has assisted her mother. However, the evidence was more than this. The Appellant was making decisions on their behalf, not just in respect of day-to-day issues. For example, the fact that the two brothers had been sent to school in Nigeria for a brief period was a joint decision taken by her and her mother. She had in those circumstances put her brothers first and acted as their parent.

7. The Appellant was financially dependent on her mother and in the supplementary bundle was evidence of cultural traditions relating to single women in Nigeria. This is not considered or referred to at all in the judge's decision, nor is the report of the independent social worker as to the impact of separation on the remaining family members. There was little consideration by the judge as to the history of the appeal, how the Appellant came to the UK. The Appellant's mother arrived in 2004 and the Appellant visited her during the school holidays in 2004, 2005 and in June 2006 where she remained for six months, returned to Nigeria and then came back to the UK before the end of December the same year. The Appellant was 16 when she first arrived for a longer period of time and is clearly part of the family unit.

8. Ms Allen also sought to clarify the issue as to why no leave was given at that stage, given that the Appellant's stepfather had refugee status. This appears to be because the Appellant's mother married him after the grant of refugee status and was thus a post-flight spouse and returned to Nigeria in June 2007 order to obtain entry clearance, which was subsequently granted.

9. In relation to the judge's finding at [49] that it would be reasonable for the Appellant's half-siblings to leave the UK there is, Ms Allen submitted, little recognition that they are only in school in Nigeria temporarily and that apart from the short nine month period they have lived all their lives in the UK: see [13] of the grounds of appeal. In relation to proportionality, therefore, the relevant factors were not considered and the decision is unsafe. This is addressed at [14] of the grounds onwards. There was little consideration of the actual evidence and impact on family members of separation in light of the Appellant's arrival as a minor aged 16 as a

consequence of the decision taken by her mother that she come to join family members here.

10. The Appellant has no experience of living in Nigeria as an adult and little prior experience, given she previously lived with parents and then at a boarding school. Ms Allen submitted the evidence is she would have difficulties even getting onto the employment ladder were she to be returned. The Appellant has undertaken substantial voluntary work in the UK but this is not addressed or factored in by the judge. She submitted that taken altogether, this undermined the judge's conclusions.

11. In her submissions, Ms Everett asserted that the judge had factored in the evidence before him and come to sustainable conclusions in relation to the argument that there was family life. She submitted the judge was entitled to find the Appellant had not taken on a parental role. He was entitled to consider the fact that the two boys are now at boarding school in Nigeria and to reach the conclusions he did. Ms Everett drew attention to the fact that the judge had correctly directed himself in relation to the judgment in *AP (India)* [2015] EWCA Civ 89 at [45] and also at [46] to [50]. No error had been shown in relation to the reasons given in respect of this.

12. Ms Everett acknowledged that all cases are fact-sensitive but there was nothing perverse about the reasons provided by the judge. She submitted the older one gets the more one has to demonstrate to show that there is an extant protected Article 8 family life and more evidence of dependency is needed. She submitted that, regardless of the history of the Appellant, there was nothing to demonstrate the judge fell into error in his consideration. He found the Appellant did have the ability to reintegrate into Nigeria and still had existing ties there. She asked that I uphold the determination.

13. In reply, Ms Allen submitted that there was no grappling with the actual evidence that was there. The Appellant's immigration history was clearly important as showing that family life continued and that she had arrived as a minor and she submitted this was not properly engaged with by the judge: see [60] of the skeleton argument and [57] of the decision.

14. I found a material error of law in the decision of First-tier Tribunal Judge Burnett and agreed that the decision needed to be set aside and remade *de novo*. I now give my reasons for so finding.

Findings and reasons

15. I consider that the First tier Tribunal Judge materially erred in law in his analysis of whether or not there is family life between the Appellant and her mother and half siblings. At [47]–[50] the Judge held:

"47. …Although the family has been through some difficult times in the past, I consider that there is nothing beyond the normal emotional ties between the appellant and her mother.

48. Likewise, I consider that there is nothing beyond the normal emotional ties between the appellant and her brothers…. I acknowledge and find that the appellant has assisted her mother over the years with the care of her brothers. As an older sibling, that is common in many families. I do not consider that her relationship with them amounts to a "parental relationship."

49. … On the basis of the facts as presented to me, I find that the Appellant cannot meet the requirements of section 117B(6). I also find that the relationships she has with her mother and brothers amounts to private life within the Convention and not "family life."

50. I find that the appellant does not have "family life" in the Convention sense with her relatives in the UK. There is a close bond which has been demonstrated on the oral evidence and documents presented to me."

16. I find that it is unclear from the Judge's findings why he considered that the Appellant does not have family life with her mother and half-siblings, in light of the evidence before him, which was not disputed by the Respondent. This evidence was that the Appellant has resided continuously with her mother since her arrival in the UK in December 2006 at age 16. Her twin half brothers were 18 months old at the time. Her mother's relationship with her stepfather broke down following domestic violence and he left the family home and they were rendered homeless in 2013. The Appellant's evidence, which was supported by that of her mother, an independent social worker, the boys' childminder and various friends, was that she is seen as the boys' second parent and that is her role within the family. In light of this evidence I find that more was required by way of reasoning as to why the Judge found that the Appellant did not have family life with her mother and siblings. The fact that her brothers were temporarily absent at boarding school in Nigeria for 9 months cannot properly materially impact on whether family life was established, as such ties cannot easily be broken by such an absence.

17. Further, whilst the Appellant's then representative sought to rely on the judgment of the Court of Appeal in *AP (India)* [2015] EWCA Civ 89 at [45]-[47] which the Judge sets out at [45] of the decision and reasons, I find that he failed to apply that judgment. It is clear from the subsequent jurisprudence on the point that what is required is a "*careful consideration of all the relevant facts*" *cf.* Lord Dyson M.R. in *Gurung* [2013] 1 WLR 2546 at [45] and see also *Rai* [2017] EWCA Civ 320. I find that the Judge failed so to do in this particular case.

18. I find that the remaining grounds of appeal are also made out, in that the Judge's finding that the Appellant did not qualify for consideration under section 117B(6) of the NIAA 2002 and his assessment of proportionality are unsustainable, following his erroneous assessment of whether or not there is family life between the Appellant and her mother and siblings.

19. For the reasons set out above, the decision and reasons of the First tier tribunal Judge must be set aside and the appeal needs to be remade. Given that the grounds of appeal sought only to challenge the Judge's findings in respect of Article 8 of ECHR,

outside the Immigration Rules, his findings relating to paragraph 276ADE(vi) of the Immigration Rules stand as they are unchallenged. I remit the appeal for re-making on the issue of Article 8 and proportionality only.

Notice of Decision

The appeal is allowed to the extent of being remitted for a hearing *de novo* confined to consideration of Article 8.

No anonymity direction is made.

Signed *Rebecca Chapman* Date 10 February 2020

Deputy Upper Tribunal Judge Chapman