IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001467
First-tier Tribunal No: HU/56354/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 June 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AOA
(ANONYMITY DIRECTION MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:
For the Appellant: Mr S. McTaggart, Counsel instructed by Nelson Singleton Solicitors
For the Respondent: Mr A. Mullen, Senior Home Office Presenting Officer

Heard at Royal Courts of Justice (Belfast) on 16 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Farrelly ("the judge") dated 19 March 2023 dismissing an appeal brought by the appellant, a citizen of Nigeria born in December 2006, against a decision of the Entry Clearance Officer dated 16 September 2021 to refuse her application for entry

clearance under paragraph 297(i)(f) of the Immigration Rules. The refusal was treated as the refusal of human rights claim. The judge heard the appeal under section 82 (1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The appellant now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Grey.

2. The appellant is a child and therefore it is appropriate to maintain the order for anonymity made by the First-tier Tribunal.

Factual background

3. The appellant's sister, Ms J, resides in the United Kingdom with indefinite leave to remain, having obtained entry clearance in 2017 in order to reside with her British father. The appellant and Ms J share the same mother but have different fathers. I refer to Ms J as "the sponsor".

4. The appellant's case is that her mother and father are both dead and that there are "serious and compelling family or other considerations" which make her exclusion "undesirable", to adopt the language of paragraph 297(i)(f) of the rules. Following the death of her parents, the appellant claims to have resided with the pastor of a church in Nigeria while her sister, the sponsor, went to university and later came to the United Kingdom. The church in which the appellant had been accommodated was burnt down in an arson attack, leaving the appellant with nowhere to go. A member of the public took her in to be part of her household, but she lives in destitute conditions in an outbuilding. The sponsor has been sending her money. The appellant's case is that her current circumstances amount to "serious and compelling family or other considerations" and that it is in her best interests for her to be granted entry clearance to live with her sister.

5. The Entry Clearance Officer refused the human rights claim for a number of reasons. There was very limited information concerning the appellant's present circumstances in Nigeria, and he was not satisfied that the appellant's father had died. It was not clear why Ms J, the sponsor, had chosen to treat the appellant as her dependent relative at this point in time. There was limited evidence concerning her present care arrangements in Nigeria, nor evidence that they were inadequate, or otherwise could not continue. The refusal letter did not take issue with the sponsor's ability to provide adequate maintenance or accommodation for the appellant upon her arrival in United Kingdom.

6. The appellant appealed. The sponsor gave evidence before the judge and was cross examined. An issue arose in cross-examination as to the level of financial support the sponsor had been providing for the appellant. She claimed to be in part-time employment as a carer for 20 hours each week, earning £30,000 per year. She did not provide documentary evidence attesting to her income. There was limited evidence of financial transfers made in favour of the appellant, and nothing predating 2022. The judge asked a number of clarificatory questions on this matter, to which I shall return.

7. The judge did not find the sponsor to be a witness of truth (para. 12). He did not accept that she could earn £30,000 working as a carer for 20 hours a week in Northern Ireland. He said, "she has produced no wage slips and from information in the public domain this grossly exceeds the typical hourly rate here."

8. The appellant had relied on a number of photographs of her claimed destitute living conditions in Nigeria. The judge said that they were an attempt falsely to support her claim. At para. 13 he said:

> "I appreciate I have limited awareness of living conditions in Nigeria. However, the structure indicated has no evidence of occupation save for some slippers and is in such a poor condition it could not be habitable. There is no way of knowing if this is where the appellant really lives. It is my conclusion that this is simply a photograph of a dilapidated building introduced to falsely bolster the claim and that the appellant does not live there."

9. The appellant had provided a death certificate in respect of her father dated 25 August 2020. Her case was that he had died in 2013. An issue in the proceedings was whether the birth certificate was reliable, particularly bearing in mind the delay in obtaining it after her father's claimed death. Mr McTaggart, who also appeared below, had submitted that it was difficult for the appellant to "prove a negative". The sponsor's evidence (see para. 10 of her witness statement) was that it had not been necessary to obtain a death certificate at the time of the appellant's father's death, and it was not until the application for entry clearance was anticipated that the need to obtain the certificate became apparent. At para. 17 the judge accepted that explanation.

10. The appellant had also relied on a number of newspaper articles which were said to document the arson attack on the church where she had previously been accommodated, including an article in the 5 September 2022 edition of *New Nigerian* entitled *Clash between Christians, Traditional Worshippers Renders 15-yr Old Girl Homeless*. The article named the appellant using her full name. An article in the *Sunday Independent* dated 4 September 2022, *Church Burnt as Traditional Worshippers Clash in Ogun* adopted a similar approach. In relation to those articles the judge said, at para. 16:

> "There are two newspaper articles from Nigeria reporting the arson attack upon the church and naming the appellant as having lived there. Rather surprisingly he gives more detail about her than the Minister. There is a photo the appellant but not the church. Furthermore, the amount of detail it goes into in relation to the appellant, stating that she was an orphan squatting in the church, causes me to doubt the genuineness of the article."

11. The judge said at para. 17,

> "the newspaper articles may be authentic but I question why they highlight the appellant."

12. The judge's remaining findings said that the money transfers were "limited and of recent origin" and were of "limited probative value in relation to the appellant's circumstances". He also said that if the appellant were in the dire circumstances described, he would have expected more evidence of money transfers. Although the sponsor said that she sent money transfers soon as she arrived in the United Kingdom, there was no documentary evidence of that. Further, observed the judge, there was no reason why the sponsor could not have returned to Nigeria to check on the situation of her sister (para. 18).

13. At para. 19, the judge said that the "ultimate issue" was whether there were serious and compelling family or other considerations which made the exclusion of the appellant undesirable. He said:

> "If the appellant were without family or other support and truly sleeping on the floor and living in the building shown in the photographs a strong case would be made out. However, I am not

> satisfied that the appellant's circumstances are as described. I have found the sponsor unreliable in relation to other matters and this called into question her honesty in the account she gives the appellant[']s] circumstances. There is no independent evidence as to her circumstances to which I can attach weight. I have no way of knowing if she has other relatives who can provide for her. Ultimately, it is for the appellant to demonstrate she meets the rules. I find she has not."

14. It is necessary to highlight two remaining features of the judge's decision.

15. First, at para. 14, the judge had said that the duty imposed on the Secretary of State under section 55 of the 2009 act did not apply extra territorially, but went on to state that "however, the spirit of the duty must be adhered to."

16. Secondly, at para 20 the judge noted submissions made by Mr McTaggart that the Entry Clearance Officer had not concluded that the appellant did not meet the other requirements of the rules, namely the maintenance, accommodation, and no recourse to public funds requirements. The judge confirmed that the refusal letter was indeed in those terms.

17. In relation to his assessment under the Immigration Rules, the judge concluded at para. 21 stating:

> "I find the appellant does not meet the terms of the rules in that she has not demonstrated by adequate and reliable evidence her circumstances. I find she has not demonstrated her circumstances are such that she is not receiving adequate care."

18. Finally, the judge said that there were no additional features which required a separate assessment of Article 8 ECHR. He did not accept that family life in the meaning of Article 8 was engaged. He saw no evidence that there was any form of ongoing bond between the appellant and the sponsor. There was little evidence of contact between them in the intervening years that would be indicative of a close bond.

19. The judge dismissed the appeal.

Issues on appeal to the Upper Tribunal

20. There are four grounds of appeal:

21. First, it was unfair of the judge to question the sponsor's UK-based income in the way that he did. That had not been raised by the Entry Clearance Officer in the refusal letter, which had expressly accepted that the appellant met the maintenance and accommodation requirements. The sponsor had not attended the hearing expecting to be required to address that issue. By seeking evidence in relation to it at the hearing, the judge deprived the appellant of a fair hearing. Further, the judge's findings that that the sponsor's claimed level of income exceeded the rate applicable on the local labour market amounted to finding reached by the judge on the basis of his own personal knowledge, not the evidence that was before tribunal. The appellant simply does not know the basis upon which the judge reached that finding, nor what the indicative benchmark salary was that the judge had in mind. Those findings affected the remaining credibility analysis performed by the judge.

22. Secondly, the judge did not refer to the witness statement of the appellant or of Ms L, a friend of the appellant based in Nigeria.

23. Thirdly, while the judge referred to the need to apply the spirit of section 55, his operative analysis was silent as to what the appellant's best interests were. The judge failed to have regard to the statutory "*Every Child Matters*" guidance, thereby contravening *CAO v Secretary of State for the Home Department* [2023] NICA 14.

24. Fourthly, the judge's reasons concerning the weight he ascribed to the appellant's father's death certificate, and the newspaper articles, were unclear. Mr McTaggart submitted that it would not be clear to the reader of the decision whether the judge accepted those documents as reliable, or placed some lesser weight on them.

25. Mr McTaggart expanded upon the grounds of appeal in submissions, relying on his helpful skeleton argument dated 9 May 2024.

26. Mr Mullen submitted that the judge's findings concerning the absence of evidence, and the lack of credibility to the sponsor's evidence about her financial circumstances, went to the issue of the extent of the appellant's current dependency on the sponsor. It was open to the judge to reach those findings. In relation to his analysis of the photographic evidence, the judge was entitled to make the observations that he did, and there was no challenge to the judge's at para. 13 concerning the inhabitable nature of the appellant's claimed living arrangements. Mr Mullen accepted that, in principle, just because the sponsor had lied about one matter she would not necessarily have to be taken to have been lying about all other matters. Properly understood, however, the judge reached findings of fact that he was entitled to reach, having considered the entirety of the evidence, in the round. Overall, the evidence concerning the sponsor's claimed financial support for the appellant to Nigeria was limited. Nothing turned on the judge's failure to recite all items of documentary evidence before him.

Issue (1): the appellant enjoyed a fair hearing before the judge

27. The requirements of fairness may require a judge to raise with the parties an issue that has not previously been ventilated: see McCloskey J (as he then was) in *AM (Fair hearing) Sudan* [2015] UKUT 656 (IAC), headnote para. (v).

28. As to what amounts to a fair-hearing, the requirements of fairness are multi-faceted, and context-specific. The overriding objective of the First-tier Tribunal is to decide cases fairly and justly. Where a judge raises an issue that had not been raised by either party, and which the affected party was not expecting to have to address, it may be unfair to hold that matter against the party in question without providing an opportunity to respond to the query as raised, whether at the hearing, or in due course.

29. It is clear that the issue of the sponsor's means was ventilated between the parties at the hearing. In his summary of the presenting officer's cross-examination at para. 7, the judge recorded that the sponsor was asked about her income, and that she claimed to earn £30,000 annually, but that she was unable to present payslips. The sponsor had also claimed to have supported the appellant since her arrival in the United Kingdom, which had been in 2017, with very little documentary evidence to support that claim.

30. It follows that the issue as to the sponsor's level of income, and her ability to have provided the claimed levels of financial support to the appellant in Nigeria from the United Kingdom, was an issue that had been ventilated between the parties at the hearing. No unfairness arose on that account.

31. I also consider that this issue was raised by the refusal letter, and that any clarificatory questions asked by the judge did not unreasonably or unfairly take the parameters of the disputed issues at the hearing beyond the scope of the matters raised by the refusal letter. As Mr Mullen submitted, while the refusal letter accepted that the appellant's *UK-based* accommodation and maintenance requirements could be met by the sponsor, it did *not* accept the appellant's claim to be dependent upon the sponsor *in Nigeria*. In turn, that meant that the sponsor's UK-based financial means were a relevant consideration for the judge to take into account when assessing the extent of the claimed relationship of dependency between the appellant and the sponsor, and the levels of support previously provided. As summarised above, the refusal letter stated that the appellant had "provided very limited information" about her present circumstances. It said:

> "It is unclear whether your sponsor played any role in your upbringing prior to her arrival in the UK, or why you have chosen to join her as a dependent relative now. The documents provided do not demonstrate your present care arrangements in Nigeria, or that they are inadequate to your needs or [that] there is any reason as to why they cannot continue."

32. Mr McTaggart's submission, however, was that the judge's additional questioning went further than the parameters of the dispute identified by the parties, thereby rendering the hearing unfair. I reject this submission for the following reasons.

33. First, the judge's clarificatory questioning was entirely appropriate in light of the oral evidence that had been given. The extent to which the sponsor was able to support the appellant over the period claimed was a live issue in the proceedings. She claimed to earn a relatively substantial salary, but had provided no documentary evidence. She had also claimed to have supported the appellant since her arrival in the United Kingdom in 2017, but the documentary evidence of only went back to 2022. By asking the clarificatory questions that he did, the judge provided the sponsor with an opportunity to provide additional evidence as a means of addressing his concerns about the evidential gaps in her oral evidence. On the material before this tribunal, the judge's clarificatory questions were as much about giving the sponsor the opportunity to make good the evidential gaps revealed under cross-examination as they were about clarifying the existence of those evidential gaps. The difficulty for the sponsor was that, when asked to provide the further clarification which naturally flowed from the matters as ventilated between the parties, she was unable to do so. It is not unfair for a witness to be asked a question which is relevant to the issue upon which they are giving evidence simply because the witness does not have a satisfactory answer to that question.

34. The judge was plainly live to the fact that the Entry Clearance Officer had not raised concerns about the sponsor's ability to provide UK-based accommodation and maintenance for the appellant: see para. 20. This underlines the distinction between the scrutiny of the appellant's dependence upon the sponsor while she was still in Nigeria (which was in issue) and her prospective arrangements upon being admitted to the UK (which was not in issue).

35. Secondly, if Mr McTaggart had concerns about the parameters of the judge's questioning at the hearing, it would have been open to him to have raised it with the judge at the time. For example, Mr McTaggart could have applied for permission to rely on post-hearing evidence pertaining to the sponsor's claimed

income levels, or even invite the judge to desist in asking the questions, and to ascribe no significance to the answers given by the witness. Not only did Mr McTaggart not raise this with the judge at the time, but there was no application to the judge to rely on post-hearing evidence, or otherwise invite the judge to ascribe no significance to the sponsor's answers on these points. The fact that Mr McTaggart did not adopt such a course strongly suggests that the hearing did not have the appearance of being unfair at the time, despite the matters that the judge sought to clarify.

36. At the hearing in the Upper Tribunal, I asked Mr McTaggart whether the evidence was available at this stage, with a view to admitting it under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, either at the hearing or after the hearing. Mr McTaggart resisted this suggestion, stating that it would not make a difference in light of the remaining grounds of appeal. In my judgment, even if the judge had exceeded the boundaries of the legitimate parameters of the dispute before the First-tier Tribunal (which I find he did not), this concern would only amount to a material error if the judge had found against the sponsor in relation to a matter that, had the sponsor had the opportunity to address, an adequate answer or documentary evidence could have been given.

37. Thirdly, no unfairness arises from the fact that the judge expressed a sceptical view as to the claimed level of the sponsor's income. On any view, salary of £30,000 is high for a part-time job as a carer working 20 hours each week. Bearing in mind the ease with which such a claim could be substantiated, namely through the provision of payslips and bank statements, no unfairness arose from the judge's conclusion that that claimed level of income exceeded that which would be payable ordinarily for such a role in the area.

38. For these reasons, this ground of appeal is without merit.

Issue (2): no unlawful failure to have regard to evidence

39. It is trite law that a judge does not need to refer to all evidence that he or she has considered. The judge was sitting as an expert judge of a specialist tribunal. The evidence which Mr McTaggart submits that the judge failed to take into account provided very little additional detail over and above that which was explored before the tribunal in depth. For example, the appellant's own statement was four paragraphs long, and less than half a page of A4 in total. It endorsed the sponsor's evidence (which the judge, of course, considered in depth), and concluded with a plea to the judge that he should allow the appeal to allow her to "escape" Nigeria. Nothing turns on the judge not having expressly referred to this evidence. Of course, in principle, it provided a degree of corroboration to the evidence of the sponsor, but the extent to which the judge would be bound to refer to such documentary evidence is a matter of weight which the judge was pre-eminently best placed to assess.

40. The statement of Ms L was also very brief. She explains that she was the person who obtained the "documentation relied upon in this application proving the appellant's birth and also the death of her parents." The statement continued that it was "quite a common thing" in Nigeria for such certificates to be issued "many years later". In my judgment, nothing turns on the judge not expressly addressing this document. The judge stated at para. 17 that the reason given for the delay in obtaining the certificate was due to the need to make the application. The judge plainly had the evidence of Ms L in mind when he said that "I accept this explanation as reasonable". Again, the extent to which the judge

took this written evidence into account was a matter of weight which, barring irrationality, was a matter for the judge.

41. This facet of the grounds of appeal therefore is without weight.

Issue (4): sufficient reasons given concerning the death certificate and newspaper articles

42. The judge set out a range of considerations both for and against the reliability of each newspaper article and the appellant's father's death certificate, recalling that that was an assessment to be conducted in the round, by reference to the entirety of the materials before the tribunal (as to which, see the judge's reference to *Tanveer Ahmed* [2002] UKIAT 00439 at para. 17). For example, the judge's concerns about the focus of the newspaper articles on the appellant's circumstances, at the expense of the broader narrative concerning the church and its minister, were concerns that he was entitled to have. While the judge accepted that the newspapers may be authentic, he was entitled to question why they appeared to focus on the appellant. The judge was plainly concerned that the articles may have been written to order in order to assist with the appellant's application to the Entry Clearance Officer. The judge accepted that the explanation for the date of the father's death certificate was reasonable; that was a factor in favour of the appellant, but he also had significant credibility concerns about her remaining case (e.g., para. 13).

43. I accept that it would have been helpful for the judge to have been clearer in relation to his concluded findings on those points. However, read as a whole, I consider that the judge gave sufficient reasons in relation to the appellant's father's birth certificate, and the newspaper articles. The "ultimate issue" identified by the judge at para. 19 related to the appellant's present living conditions in Nigeria. The evidence simply did not demonstrate that she lived in the destitute conditions that were claimed. There has been no challenge to the judge's findings at para. 13 concerning the uninhabitable, derelict, roof-less and overgrown buildings in which the appellant claimed to live, which were plainly open to the judge. That being so, and bearing in mind the concerns the judge raised about the newspaper articles' excessive focus on the appellant rather than the broader circumstances of the claimed arson attack, the reasons given by the judge on this issue were tolerably clear, and, therefore, sufficient. As to the appellant's father's death certificate, even if the judge had accepted that it was a genuine document, and that her father had sadly died in 2013, that would not have affected his overall findings, in light of the remaining reasons that he gave.

Issue (3): assessment of the appellant's best interests sufficient

44. It is convenient to deal with this ground of appeal at this stage, since the findings of fact reached by the judge provided the foundation upon which any assessment of the appellant's best interests should have been based.

45. The judge directed himself concerning the need to consider the welfare of the appellant as a primary consideration. He plainly had the point in mind. I accept, as did Judge Grey when granting permission to appeal, that the judge did not reach express findings concerning the appellant's best interests.

46. Of course, assessment of a child's best interests must be conducted against the real-world backdrop of the family circumstances. In these proceedings, the appellant had not persuaded the judge that her circumstances in Nigeria were as she claimed them to be. The judge raised a series of legitimate credibility concerns about the documentary evidence on which she sought to rely, and the

evidence of the sponsor. He concluded, at para. 19, that he was "not satisfied that the appellant's circumstances are as described." He added that there was no independent evidence of her circumstances to which he was able to attach weight, and that the appellant had not demonstrated that she met the requirements of the immigration rules. That being so, it would be artificial to expect the judge to have conducted a thorough "best interests" assessment on the basis of the appellant's claimed circumstances, for the factual matrix upon which such an assessment should be based was simply not clear to the judge, on the basis of the material before him.

47. As Judge Grey observed when granting permission to appeal:

> "…it is likely that the judge's assessment of the best interests of the appellant is in the maintenance of the status quo in light of his findings in respect of the credibility of the appellant's account and failure of the appellant to demonstrate that there were serious and compelling family or other considerations which would make her exclusion undesirable. As such, any omission in respect of these findings would not be a material error."

48. I agree. On the findings of fact reached by the judge, that conclusion was the only conclusion rationally open to him. Accordingly, it was not an error such that this tribunal should interfere with the decision of the judge for the judge not to have dwelt on this issue in any further depth.

49. This ground is without merit.

Conclusion

50. Drawing the above strands together, I conclude that the judge was entitled to reach the findings of fact he did, for the reasons he gave. He had the benefit of considering the whole sea of evidence, and heard the sponsor give evidence. The individual components of his analysis were rationally open to him, and his overall conclusions were sound. He did not err in his approach to the sponsor's evidence, particularly when assessed alongside the matters he set out at para. 13.

51. This appeal is dismissed.

Notice of Decision

This appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law such that it should be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 June 2024