



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/07348/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 6 November 2017**

**Decision & Reasons Promulgated
On 27 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[N O]

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: Ms J Victor-Mazeli

DECISION AND REASONS

1. This is an appeal by the SSHD against a decision of First tier Tribunal Judge Malone, who in a decision promulgated on 12 September 2017 allowed her appeal.
2. The Respondent, to whom I shall refer as the Claimant, is a national of Nigeria born on [] 1974. The Claimant made an application for entry clearance as a Tier 4 Migrant on 28 February 2011 and was granted entry clearance on 1 March 2011 valid until 14 April 2014. She thus entered the UK lawfully on 23 March 2011. After her leave lapsed on 14 April 2014 the Appellant has remained unlawfully and she was detected by UK Border

authorities on 25 May 2017 and detained. On 6 June 2017 the Claimant claimed asylum, underwent a screening interview on 12 June, made further representations on 22 June, but failed to attend her substantive asylum interview on 6 July 2017. The application was refused on 18 July 2017 and the Appellant appealed against that decision on 31 July 2017.

3. The appeal was listed for hearing before First-tier Tribunal Judge Malone on 30 August 2017. At the outset of the appeal the Claimant's representative informed the judge that the Claimant did not intend to pursue her asylum and Article 3 claims, but her appeal was based solely on Article 8 family and private life. In a decision promulgated on 12 September 2017 the judge allowed the appeal.
4. The Respondent on 25 September made an in time application for permission to appeal to the Upper Tribunal on the following grounds.
5. Firstly, that the thrust of the appeal was Article 8 outside the Rules as Counsel effectively conceded that the Appellant did not meet the requirements of the Immigration Rules.
6. Secondly, that the judge had failed to consider the appropriate Immigration Rules regarding adult dependent relatives.
7. Thirdly, that in applying the case of Agyarko [2017] UKSC 11 at [56], [57], [61] and [70] the judge had applied the wrong test in that she found at [61] that the Claimant had demonstrated compelling circumstances justifying being granted leave to remain in the UK on the basis of her relationship with her sister
8. Fourthly, that in considering the matters set out in Section 117A to D of the NIAA 2002, the judge failed to properly apply those factors, i.e. financial independence as opposed to dependence on her sister, and considered irrelevant factors such as the fact that the Claimant has not had recourse to public funds. The judge failed to engage with the fact that the Claimant's status in the UK has always been precarious and failed to apportion any weight to that, nor identify why the Claimant's circumstances are sufficiently strong to outweigh the public interest.
9. Fifthly, in failing to identify what, if anything about the Claimant and her sister being upset by her removal (paragraphs 59 and 61) would amount to very compelling circumstances - *cf* Agyarko (*op cit*).
10. Sixthly, in erroneously comparing the Claimant's living standards in the UK against those in Nigeria;
11. Seventhly, no arguments in relation to Article 3 and the risk of destitution for a lone woman was put forward on the part of the Claimant, thus it was not open to the judge to make a finding that the Claimant would be destitute on return to Nigeria.

12. Eighthly, the judge failed to adequately consider the evidence to the required standard of proof, namely the balance of probabilities.
13. Ninthly, the judge failed to adequately identify or explain why he was willing to accept the evidence of the witness, the Claimant's sister, over the evidence of the Claimant herself at [13] of her decision where she held:-

"The Appellant gave her evidence in a faltering and largely incoherent manner. I am uncertain as to why that was, but I formed the view that she was not attempting to deceive me. Ms. Berlinski gave her evidence clearly and, in my judgment, candidly. She was an impressive witness".

This ground of appeal further asserts that there were clear contradictions between the evidence of the Claimant and that of her sister:-

- (a) The Claimant claimed in cross-examination it was villagers who took control of her property in Nigeria after she left - *cf* [21] whereas her sister stated it was their uncle who forced the Claimant out of her house - *cf* [26].
 - (b) The Claimant claimed she had no family in Nigeria, whereas her sister stated there were extended family members in Nigeria [18] *cf*. [23].
 - (c) The Claimant stated in cross-examination that she worked as a carer and did not mention any unpaid or voluntary work, whereas her sister claims that the Claimant "*did more evangelical work than paid job*" - witness statement at [10].
14. Tenthly, that the judge contradicted herself having accepted that the Claimant obtained a graduate diploma level 6 in Business Management, but at the same time finding she is essentially ill-educated *cf*. [58], and in accepting that the Claimant's sister has been providing her with financial support in the UK: witness statement at [24] but was unable or would be unable to continue this financial support if the Claimant returned to Nigeria, despite neither witness offering any or any adequate explanation for this, and the judge simply accepted the witness's evidence she would not be able to afford accommodation in Nigeria, absent any evidential basis or providing any reasons for that conclusion.
 15. Eleventhly, it was asserted that the judge failed to adequately consider or even understand evidence before him including a purported assertion by the SSHD's representative that the Claimant could sleep in a church on her return, that, as to the issue of whether or not Joseph, the uncle, had died, inadequate reasoning for the Claimant's use of what are considered to be false identities, the judge stating at [46] that he did not believe it is in her nature, and at [45] in failing to provide proper or adequate reasons for being unwilling to make an adverse credibility finding against the Claimant in respect of the fact that she made an asylum application.

16. It was finally asserted that whilst the judge is entitled to make findings of fact based on the evidence before her, in this particular case the judge had failed to properly engage with the evidence, had made selective findings without adequate consideration or explanation, and that was a material error of law.
17. Permission to appeal was granted by First-tier Tribunal Judge O'Garro in a decision dated 28 September 2017 on the basis:-

*"3. In light of the guidance given in **Agyarko**, as to how to deal with an Article 8 case outside the rules, I find that the decision raises an arguable point of law and indeed all the other grounds raised are arguable".*

Hearing

18. Mr Bramble sought to rely upon the grounds of appeal . He noted essentially that the case was based on the Claimant relying on a family life with her sister, Ms Berlinski, outside the Immigration Rules. He submitted that the judge had not properly applied the decision of the Supreme Court in Agyarko at [57]:

"The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control".

19. In relation to Section 117B of the NIAA 2002, Mr Bramble submitted that the judge had given undue weight to the fact the Claimant has not had recourse to public funds and had not engaged correctly with Section 117B(3) in relation to financial independence, nor the precariousness of the Claimant's leave in the United Kingdom. Essentially, Mr Bramble submitted, the judge at [54] of her decision had simply paid lip service and that the reasoning therein was not sufficient when dealing with the matter as a whole.
20. Mr Bramble submitted the judge has not set out sufficiently the differences in the accounts as between the Claimant and her sister. He submitted that the judge had further erred in finding that the Claimant met the criteria set out in 276ADE(vi) of the Rules where the judge found:-

"The Appellant's future I have identified above constitutes 'very significant obstacles' to her integration into Nigeria. She was not integrated in Nigeria before she came to this country. She had essentially been ostracised. Her removal would therefore unlawfully infringe her qualified protected right to enjoy private life here".

He submitted that this clearly was inadequate and unclear reasoning so as to justify her conclusion in this respect.

21. It was notable that it had not been argued on behalf of the Claimant that she would be at risk as a lone woman returning to Nigeria - see FB [2008] UKAIT 00090. In relation to [14] of the grounds of appeal ultimately Mr Bramble decided not to rely on this, given it was based on information which was not in the form of a witness statement and was effectively evidence as to the Presenting Officer's view as to what had happened at the appeal hearing.
22. In her response and in the absence of a Rule 24 response, Ms Victor-Mazeli took me through the judge's decision and his findings of fact. She submitted that those findings were open to her and that she was entitled to make them. She had regard to Kugathas and found that there was something more than normal emotional ties that existed between the Claimant and her sister and that this was clearly reasoned by the judge. She submitted that the judge was entitled to find that the Claimant was not attempting to deceive her in her evidence. The issue as to whether it was the villagers or Joseph that made her leave the home was essentially not material, given that Joseph was behind this action and thus there was no discrepancy, and that the extended family referred to by the Claimant's sister in evidence (12b) of the grounds of appeal) were not considered by her to be family.
23. In relation to the assertion at 12c) the Claimant stated in evidence recorded at [17] that she cleans the church on a voluntary basis.
24. In relation to [55] of the judge's decision, Ms Victor-Mazeli invited me to find that there were no inconsistencies as between the Claimant's account and that of her sister. These were different people giving evidence and different people come across differently.
25. She submitted in relation to the judge's finding at [46], "*I am also unwilling to make a finding that the Appellant has used deception. I do not believe it is in her nature*". The judge was entitled to reach this finding as it was based on the Claimant's demeanour and the manner in which she gave her evidence at the hearing before her.
26. At [13] to [16] the judge found that the Claimant had taken the English language test but had failed it, and she was entitled to take this into account in deciding that the Claimant's sister would be unable to continue supporting her financially in Nigeria and that adequate reasons are provided for this finding at [60]. Ms Victor-Mazeli submitted there was no material error of law in the judge's decision, which was well-reasoned and it was clear why the judge had reached the conclusions he did.

Decision

27. I find there are errors of law in the decision of First-tier Tribunal Judge Malone and I have concluded that those errors are material for the following reason.

28. It is clear from [13] of the decision, in light of the judge's finding, "*The Appellant gave her evidence in a faltering and largely incoherent manner*" that she was not particularly impressed by her evidence. The judge went on to hold at [13]: "*I am uncertain as to why that was, but I formed the view that she was not attempting to deceive me*". The difficulty with this finding is that it is not possible to tell why or how the judge formed the view that the Claimant was not attempting to deceive her, despite the fact that her evidence was provided in a faltering and largely incoherent manner. I consider the judge's reasons in this respect are not entirely clear or logical.
29. It is the case that there are inconsistencies between the Claimant's account and that of her sister, the most glaring of which was the Claimant's evidence reported at [21] that her grandmother with whom she lived before coming to the UK had died on Christmas Day 2010. The evidence of the Claimant's sister, Ms Berlinski, recorded at 27, is that her grandmother died in 2009 on Christmas Eve. The judge commented on this as follows at [44] holding:

"Having heard the evidence given by the Appellant and Ms. Berlinski, and having had a chance to reflect on it, I am satisfied that I should accept Ms. Berlinski's evidence in its entirety. There was a minor inconsistency as to precisely when their grandmother died, 2009 or 2010. I am satisfied she died in 2009, but was buried in 2010. Nothing turns on this discrepancy".

30. I do not consider that the judge had provided adequate reasons for essentially not taking an adverse credibility point in relation to the Claimant. The evidence of the two witnesses varied both as to the year and to the actual day of the date of their grandmother's death. The Claimant was at the time living with her grandmother and therefore, in my considered opinion, the judge is required to do more than simply accept her sister's evidence on this issue, given that the sister was at that time living in the United Kingdom. The judge has further failed to explain why nothing turns on this discrepancy.
31. At [45] the judge considered the fact that the Claimant had made an asylum claim and then withdrawn that claim, holding:

"I am not prepared to make an adverse credibility finding in respect of her saying that she was fearful of 'my family'. She claimed that Joseph died before she left Nigeria, a claim Ms. Berlinski was unable to challenge. She simply does not know whether he is alive or dead, as she has ceased all contact with him".

I find this is not a satisfactory or sustainable finding. The judge again provides no reasons as to why he is not prepared to make an adverse credibility finding, and for why he accepted the evidence of Ms Berlinski that she does not know whether Joseph is alive or dead, as opposed to the evidence of the Claimant that Joseph died before she left Nigeria. This is,

in my considered view, a crucial point given that Joseph was in essence the reason why the Appellant and her sister decided that the Claimant should leave Nigeria and travel to the UK in order to study because Joseph, her uncle, evicted the Appellant from the property in which she had previously lived with her grandmother, so this is material not only to the history of the case, but also as to the circumstances pertaining if the Claimant were to be returned to Nigeria, and the judge's finding at 58, "*Were she to be removed to Nigeria, I fail to see how she would be anything other than destitute*". I find that that is not a sustainable finding.

32. At [54] and [55] the judge held as follows:-

"54. I bear in mind that, since about April 2013, she has been present in the United Kingdom unlawfully. Mr. and Mrs. Berlinski knew that the Appellant had no status.

55. I find that the Appellant is a very worthy individual. When she was allowed to do so, she took employment as a carer for her permitted hours. When her leave expired, she stopped working. She has dedicated herself to the Catholic Church. She cleans her local church three or four times a week. She is responsible for the laundry being done. She sings in her choir and, on special occasions, at the Cathedral in Southwark. She has no convictions. She is now aged 43 and has done nothing in this country but good works."

33. It would appear that the judge has erroneously found in favour of the Claimant on the basis of her work for the Catholic Church. It is simply not the case that the Claimant has done nothing in this country but good works. As a matter of fact, given that she was studying whilst she had leave to remain, and secondly, whilst the judge stated at [54] that she had bore in mind the Claimant had been in the UK unlawfully, she does not factor that aspect of the case into her consideration of the Claimant's case as a whole. Ultimately, the points made by the judge at [55] are at best marginal to a proper legal assessment of either her ability to meet the Immigration Rules or the proportionality of her removal.

34. There is merit in the grounds of appeal, in particular the point made in relation to [59] that the judge had not identified anything that would really demonstrate a compelling circumstance justifying leave to remain on the basis of family life outside the Rules, other than the fact it would cause the Claimant and her sister upset and distress.

35. Further, in relation to [60] the judge failed to provide reasons why it was that she found that Mr and Mrs Berlinski would be unable to fund the Claimant and run two households, given that the Claimant is entirely supported by her sister and her sister's husband in the United Kingdom, and therefore more was required to explain why this financial support could not continue if the Claimant were to be returned to Nigeria.

36. At [63] of the decision the judge further found that the Claimant met the criteria set out in paragraph 276ADE(vi) of the Immigration Rules, finding that there were very significant obstacles to her integration into Nigeria on the basis: “*She was not integrated in Nigeria before she came to this country. She had essentially been ostracised*”. I find that this finding is also insufficiently reasoned, given that the Claimant was born and grew up in Nigeria from her birth on 30 March 1974 to her admittance to the UK on 23 March 2011, so for almost 37 years. In these circumstances, even if after the death of her grandmother on either Christmas Day 2010 or Christmas Eve 2009, there was a period of ostracisation by her uncle Joseph, that does not sustain a finding that the Claimant was not integrated in Nigeria prior to her arrival in the UK.
37. For these reasons, essentially because a lack of adequate clear and proper reasoning on the part of First-tier Tribunal Judge Malone, I find material errors of law in her decision. These errors, in my considered opinion, run throughout the entirety of her decision and conclusions, such that none of them can be properly preserved. I therefore remit the appeal for a hearing *de novo* before the First-tier Tribunal, not before Judge of the First-tier Tribunal Malone.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Rebecca Chapman

Date 24.11.17

Deputy Upper Tribunal Judge Chapman