



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

Appeal Number: IA/27554/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 28 November 2017**

**Decision & Reasons
Promulgated
On 08 January 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**RUTH ONYANGO AWINYO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chakmakjian, instructed by Mondair Solicitors

For the Respondent: Mrs Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Ruth Onyango Awinyo was born on 6 January 1979 and is a female citizen of Kenya. She appealed against the decision of the Secretary of State dated 17 July 2015 refusing her leave to remain to the First-tier Tribunal (Judge O'Rourke) which, in a decision promulgated on 14 December 2016, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.
2. I was grateful to Mr Chakmakjian, who appeared for the appellant, who told me that the appellant did not seek to re-open the question of

asylum/Article 3 ECHR in the appeal before the Upper Tribunal. Judge O'Rourke did not find that the appellant had been trafficked as she had claimed but did find that, "even if she has been trafficked, there was no evidence of any risk to her in Kenya as a consequence." Mr Chakmakjian told me that he was not seeking to argue that the appellant would be re-trafficked on return to Kenya. He did, however, seek to amend the grounds of appeal by adding a ground challenging the judge's decision on the basis that he failed to consider or properly consider the appellant's account of having been trafficked. The relevance of that amendment, Mr Chakmakjian told me, was that a proper finding as regards trafficking would have an impact upon the Article 8 ECHR proportionality assessment.

3. I did not give permission for the ground to be amended but, for reasons which are detailed below, this is a matter which may need to be looked at again in the First-tier Tribunal. Permission has been refused in the First-tier Tribunal granted by Upper Tribunal Judge Plimmer in the following terms:

"It is arguable that as the decision under appeal was a refusal of a human rights claim, the First-tier Tribunal was obliged to determine for itself whether or not the appellant's removal to Kenya would constitute a breach of Article 8 given the acceptance of the genuineness of her relationship (albeit one found to be more recent and perhaps less developed than described by the appellant)."

4. The appellant claims to be in a relationship with a Mr Nyajure. Indeed, the appellant claims to be engaged to Mr Nyajure and to have been living with him for a number of months. The judge analysed the evidence regarding the relationship and concluded:

"... on balance, therefore, I consider the relationship does seem to be genuine but may be relatively more recent and perhaps less developed than described by the appellant."

5. At [19], the judge found that there were not "sufficiently compelling circumstances in this appeal to justify consideration of Article 8 outside the Rules."
6. In the preceding paragraph, the judge refers to "relatively recent relationships [which the appellant] has developed in the UK ..." The judge goes on to refer to "church membership" in Kenya and the relationships which the appellant might form upon return to her country of nationality. It is not at all clear whether she is referring in that sub-paragraph to the relationship with Mr Nyajure. Further, it is also not clear exactly how the judge considered that relationship; she appears to have accepted that it was genuine but does not say exactly how recent it was formed and what the judge meant by being "less developed than described by the appellant." The judge needed to make unequivocal findings in relation to the relationship and, having established a sound factual matrix, he should then have considered whether family life existed for the purposes of Article 8 ECHR and, if it did, whether it would suffer a disproportionate

breach by the appellant's removal to Kenya. These issues are all alluded to in the decision they are not the subject of unequivocal findings and conclusions. I agree with Judge Plimmer that a proper Article 8 assessment should have been made; at [19] the judge appears to have considered that there was some threshold criteria which had not been crossed in the appellant's case. Mrs Fijiwala, for the respondent, argued that the judge had (as the First-tier Judge who refused permission indicated) considered the Article 8 assessment "through the lens" of the Immigration Rules. I cannot say that I agree. The judge should have adopted a properly structured approach to Article 8 as I have indicated above. His failure to do so has vitiated the decision and I set it aside.

7. There will need to be a new fact-finding exercise which is best conducted before the First-tier Tribunal. Whilst I set aside the judge's findings, I bear in mind that Mr Chakmakjian's indication to me at the Upper Tribunal hearing that no issues that now arise in this appeal as regard the risk of the appellant returning to live in Kenya. The focus of the First-tier Tribunal hearing should, therefore, be in respect of Article 8 ECHR. Since I have not preserved the findings of the judge in respect of Article 8, then the question as to whether the appellant was trafficked and the impact that a positive finding of trafficking may have as regards the evidence and assessment of Article 8, are matters which may be left to the First-tier Tribunal. To that extent, the amended ground of appeal may be of relevance on remittal.
8. On remittal, the Tribunal will also need to consider in greater detail the medical evidence relating to the appellant. Judge O'Rourke found that the threshold in *N* [2005] UKHL 31 had not been crossed in respect of Article 3 ECHR. That appears not to have been argued before him or, indeed, before the Upper Tribunal. I do consider, as regard the Article 8 ECHR analysis, that more thorough findings in respect of the medical evidence (including the expert evidence - Maxine Cranstoun Counselling) should be made.

Notice of Decision

9. The decision of the First-tier Tribunal which was promulgated on 14 December 2016 is set aside. None of the findings of fact shall stand although asylum/humanitarian protection/Article 3 ECHR will no longer be argued; the decision will be remade in respect of Article 8 ECHR only. The appeal is returned to the First-tier Tribunal (not Judge O'Rourke) for that Tribunal to remake the decision.
10. No anonymity direction is made.

Signed

Date 3 January 2018

Upper Tribunal Judge Lane