



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33275/2015

THE IMMIGRATION ACTS

Heard at Field House
On 11th April 2018

Decision & Reasons Promulgated
On 16th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

BRENDA [W]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lewis (Counsel)
For the Respondent: Mr N Bramble (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Jessica Pacey, promulgated on 4th October 2017, following a hearing at Taylor House on 14th

September 2017. In the decision, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Nigeria, who was born on 14th October 1983. She appealed against a decision of the Respondent Secretary of State dated 6th October 2015 refusing her application for leave to remain in the United Kingdom on the basis of her family and private life, under Article 8, as well as her medical claims under Article 3 of the European Convention of Human Rights.

The Appellant's Claim

3. The basis of the Appellant's claim is that she had arrived in the UK as a student on 13th February 2004 and thereafter made a series of applications for extensions of stay which were granted, before she was eventually refused indefinite leave to remain as a dependant of her mother on 21st November 2008, and began to live in this country without leave to remain. She was arrested on suspicion of being an overstayer and served with notice of removal. She stated at the time that she was fit and healthy, and had never attempted self-harm, and had not acted on thoughts of suicide and was not taking medication. The judge referred to this at paragraph 4 of the decision.
4. At the hearing before Judge Pacey there was a psychiatric report from Dr Dhumad, dated 6th September 2017, and he stated that the Appellant's presentation, "in my opinion, is consistent with a diagnosis of moderate depressive episode" (see paragraph 8 of the decision). The judge went on to state that her condition was likely to deteriorate if she were to be removed to Nigeria and that there was a risk of suicide which was high (at paragraph 8).
5. Evidence before the judge was also given by the Appellant's mother, [TD], and she stated that she had taken care of her daughter from the age of 1 and had taken her to live with her paternal family (paragraph 12).
6. The evidence before the judge was that the Appellant's mother would not be able to cope if the Appellant was removed to Nigeria because the Appellant's mother herself could not go to Nigeria with her daughter as she had a job here and she would suffer mentally. She had last been to Nigeria only last year for eight to ten weeks and the trip had been paid for by a friend as a treat. She had also visited in 2004 and 2011 (paragraph 11).
7. The judge went on to record that the Appellant had chosen herself not to take anti-depressant medication and the judge's view was that "There is no rational clinical reason for her mother's objection to Ads" (at paragraph 27). The judge observed of the Appellant's mother, who worked in a care home, that:-

"I accept that she has seen the adverse effects at her workplace but it is well known that many, many people take anti-depressants while leading normal lives, and

suffering no adverse side effects. She is not a qualified doctor, still less a trained psychiatrist” (paragraph 27).

8. The third witness who gave evidence before the judge was a Mrs [O], and she stated that the Appellant’s mother was “a strong believer that God will take control” and that this was a reason why the mother had taken a view to the Appellant taking anti-depressants, because she was fearful that these medicines would have an adverse effect upon the Appellant, and that ultimately she should simply place her faith in God. The judge held that, “If that is so and this is a tribunal of law, not of theology, then she must reasonably believe that God would also take control if the Appellant returned to Nigeria” (paragraph 28).
9. The judge went on to apply the case law in **Paposhvili v. Belgium** (application number 41738/10) and inferred from this that suffering which flowed from naturally occurring illness could attain the minimum level of severity required by Article 3, but only in very exceptional circumstances. The judge held that no such medical exceptional circumstances had been established by the Appellant. She was not, on the expert evidence before the judge, seriously ill and there was treatment for her mental health issues available in Nigeria, as was established by the objective evidence (paragraph 30).
10. The judge went on to say that there was a lack of categoric evidence as to the absolute diagnosis of any suicidal ideation on the part of the Appellant. The Appellant had herself chosen not to avail herself of medication that would be available to her in the UK to alleviate, if not cure her condition, namely the anti-depressants (paragraph 31).
11. Finally, the judge gave consideration to the application of Section 117B and observed that the Appellant’s leave expired on 31st May 2007, over ten years ago, and the Appellant had said:-

“... in her witness statement that she had been able with help to escape the abuse and move to the UK as a student. It is unclear from this whether she had ever intended returning on completion of her studies, given that she also said she could never return to Nigeria because of what happened to her before she left” (paragraph 35).
12. It did appear from the witness statement, as recounted by the judge (at paragraph 35) that the essence of her claim was that she had fled Nigeria, in the guise of a student to the UK, in order “to escape the abuse” that had been vested upon her by her father. There was, however, no finding by the judge in relation to this.
13. The judge went on to deal at length with the case law relating to students, and in particular to the case of **Rhuppiah [2016] EWCA Civ 803**, which is to the effect that the relevance of precariousness of immigration status had an impact upon Article 8 right to remain in the UK, insofar as a fair balance has been struck between the rights of the individual and the general public interest, and in this case, given that the Appellant had overstayed, and likely never intended to return, the balance of probabilities did not fall in her favour.

14. The judge ended with the suggestion that, "I note that it is argued that the Appellant requires the support of her mother, because of her mental health issues, triggered by her experiences in Nigeria" (paragraph 40), however no finding was made on this.
15. The judge dismissed the appeal.

The Grounds of Application

16. The Grounds of Application state that the judge had failed to deal with the abuse visited upon the Appellant. The Appellant's mother had been totally unaware of the abuse to which her daughter had been subjected by her father. It was only after the Appellant came to the UK to see her mother as a student that she became aware of the horrific conditions that had been subjected to her while she was living with her father's family. This was disclosed over a period of time and gives rise to a very significant level of guilt at having, what she felt, to have abandoned her daughter to such an ordeal (see paragraph 4 of the Grounds). The Grounds go on to say that it was this background that led to "a level of very real dependency between them" (paragraph 4). The Grounds also state that the Appellant had received treatment for her psychiatric treatment and a report from a consultant psychiatrist was provided in which it identified the Appellant as posing a high level risk of suicide should she be returned to Nigeria (paragraph 5). The grounds further state that the judge made no reference to the impact of removal upon the Appellant's mother (paragraph 7). Moreover, the Grounds state that the ties which existed between the Appellant and the mother were clearly significant and given the tragic circumstances in Nigeria that had been suffered by both the Appellant and her mother, the relationship went beyond "normal emotional ties" (paragraph 8).
17. On 29th January 2018 the Upper Tribunal gave permission to appeal, after the First-tier Tribunal had refused it on 13th December 2017, and the Upper Tribunal did so on the basis that the judge had failed to take account of the Appellant's personal history when reaching her findings on family life and did not adequately consider the risk of self-harm and failed to consider the impact of the Appellant's removal upon her mother.

The Hearing

18. Appearing before me, Mr Bramble, appearing as Senior Home Office Presenting Officer, began by saying that having spoken with Mr Lewis who appeared for the Appellant, he was prepared to concede that there was an error of law in Judge Jessica Pacey's decision. He submitted that the essence of the claim was that the Appellant had been subjected to abuse by her father when she had been left behind by her mother who had come to the UK. Yet, there was no finding in relation to this aspect at all. The judge did not say whether she disbelieved the claim of abuse or whether she believed it. This was important because the mental health issue arose precisely because of the claim of ill-treatment. Moreover, the expert report from Dr Dhumad, as a psychiatric report, was central to this claim. The judge had rejected that report in circumstances which were questionable. There had to first be a credibility finding in relation to what the Appellant was alleging. Only then could the report have been rejected in the manner that it was. The judge had simply failed to grapple with the credibility issues.

These matters are important, submitted Mr Bramble, because the Appellant was being required to return back as a lone female to Nigeria and if she indeed had been a victim of sexual abuse then that return may well be disproportionate and unwarranted. Moreover, the sexual abuse, if it did occur, may well have brought mother and daughter together, in the manner that was witnessed by the judge below. A finding had to be made on this aspect. There was none in this case.

19. Mr Lewis for his part, welcomed the decision by Mr Bramble to concede that there was an error of law. He submitted that the judge had misunderstood, had been unsympathetic to the reasons for why the Appellant was not on anti-depressants. The fact was that her mother, [TD], worked in a care home. She had seen the effects of anti-depressants on people who were resident there. She was very concerned that her daughter should not suffer in the same way. It was not she who had said that "God will take control". That statement was made by the third witness, Mrs [O], and accordingly neither the Appellant nor her mother could be visited with that statement. Furthermore, not only was it the case that the allegation of sexual abuse had not been determined by the judge, but the impact of the removal had not been assessed upon the mother by the judge.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCA 2007) such that I should set aside the decision. My reasons are as follows.
21. This is a case where the claim, as made by the Appellant, was fundamentally based upon the fact that, although she had come to the UK as a student ten years ago, she had done so because she has seen this as a method by which she could flee the domestic abuse of her father and come to the UK. She had subsequently then confided in her mother. The mother had felt guilt at leaving her daughter behind. The judge had the witness statement of the Appellant before him addressing this very question. However, the judge subsequently then became distracted by the fact that the Appellant had overstayed and that there was a public interest in students not abusing the student scheme and returning back to their countries at the end of their studies. The judge was also arguably distracted by the Appellant refusing to take anti-depressants for reasons that had been expressly explained by the Appellant's mother.
22. Whatever the position, the core reason of why there is an error of law here, is that the judge did not determine the issue of whether the Appellant had been subjected to physical abuse. The focus of the judge was essentially on there being a poor immigration history. This prevented the judge from dealing with abuse. This is clear from the statement that, "She said in her witness statement that she had been able to with help to escape the abuse and move to the UK as a student" (paragraph 35). There was no finding made of whether she had been abused.
23. In the same way, the last paragraph of the decision observes that, "it is argued that the Appellant requires the support of her mother, because of her mental health issues, triggered by her experiences in Nigeria" (paragraph 40). Not only is it the case that

the experiences in Nigeria are not determined either in the Appellant's favour or against her by the judge, but there is no finding also as to what the impact of the removal would be on the mother.

Decision

- 24. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to Taylor House to the First-tier Tribunal to be determined by a judge other than Judge Pacey. The listing of this appeal is not to be undertaken without consultation with Mr Lewis's clerk, given that he is now handling this matter on a purely pro bono basis, and the telephone number for those clerks is 020 7993 7600, and the date is to be set only after Mr Lewis's ability is confirmed by his clerks to the listing office. There are to be three witnesses and the matter is to be listed for one-and-a-half hours.
- 25. This appeal is allowed only to that extent.
- 26. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

14th May 2018