



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10179/2017

THE IMMIGRATION ACTS

Heard at Liverpool Civil & Family Court Centre
On 27th June 2018

Decision & Reasons Promulgated
On 8th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

NAOMI KALUNDA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Hashmi (Counsel)
For the Respondent: Ms H Aboni, (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge G. R. J. Robson, promulgated on 11th January 2018, following a hearing at Bradford on 9th November 2017. In the determination, 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 Kenya, and was born on 21st September 1991. She appealed against the decision of the Respondent Secretary of State dated 12th September 2017, refusing her application for asylum and humanitarian protection under paragraph 339C of HC 395.

The Appellant's Claim

3. The essence of the Appellant's claim is that she cannot return to Kenya because there was a ritual within the Kamba tribe, to which she belonged, which involved female circumcision. Her father was very forceful in insisting that she should have this procedure undertaken. She did not know anyone, but if her father suddenly became aware that she was in Kenya, they would force her to have female circumcision. Second, she had a boyfriend by the name of [DN], with whom she had been in a relationship for thirteen months, and he was the recipient of a residence permit, although a Kenyan citizen, and now had indefinite leave to remain, and he was adamant that he would not accompany her to Kenya, were she to be removed there, such that this would impact upon their life in the UK together. She herself had settled in this country and made friends. She had her sister, who had two sons and a girl, and she would like to see them grow up because they were now quite close. She had initially stated that she was 13 when she came to this country and was now 26 years of age and had lived her entire adult life in this country.

The Judge's Findings

4. The judge heard evidence from the appellant and from [DN], who explained that they were living together, had future plans, which were to get married and to start a family, and he would not be able to support the Appellant were she to return to Kenya (paragraph 70). He maintained that were she to lose her appeal they would simply continue appealing (paragraph 71).
5. The judge held that in this human rights appeal, it was for the Appellant to show that her human rights would be interfered with by her removal, and the circumstances have judged against the situation as at the time of the hearing (paragraph 76). The judge did not make reference to paragraph 276 (vi) ADE, in terms of whether the Appellant was able to show that she would face significant obstacles integrating into life in Kenya. Second, the judge also held that, "I record this is not an asylum application as the persons whom the Appellant fears are not state actors but rather her father and her father's family" (paragraph 84). Third, the judge held that the Appellant had delayed in making an asylum application on the basis of fear of having to undergo FGM (paragraph 91). Finally, the judge stated that

"... there is no significant difference in what the parties said that they plan to do but what is clear from the partner, whose evidence I accept in this regard, was that he himself would not be able to go with her, nor would he be able to support her were she to go back to Kenya" (paragraph 99).
6. The appeal was dismissed.

Grounds of Application

7. The grounds of application are confined to an Article 8 appeal and it is contended that the judge erred in considering whether the Appellant would face significant obstacles integrating in Kenya if removed, and the judge did not provide a reasoned decision in his finding that there would not be very significant obstacles to the Appellant's return (at paragraph 101). This was an Appellant who came to the UK when she was only 13 years old. She had lived continuously in this country ever since that time, save for two weeks when she returned back to Kenya to attend her grandmother's funeral, so that in the circumstances, she would face significant obstacles to integrating in Kenya, as she does not have any friends there and is estranged from her own country. The Appellant did therefore meet the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules.
8. On 5th February 2018, permission to appeal was granted by the Tribunal.

Submissions

9. At the hearing before me on 27th June 2018, Ms Hashmi, appearing on behalf of the Appellant, submitted that the Appellant's private life was specifically addressed in her witness statement (at page 6) when she explains how, having arrived aged 13 years in the UK, she cannot now go back. Second, at paragraph 99 of the determination, the judge states that the Appellant cannot meet the financial threshold requirements, but this fails to take into account that the Appellant arrived at the age of 13 and has been living here, and if this is in any event true, it only establishes that the Appellant would not be able then to re-enter, having lived here all her adult life. Third, the judge was wrong to say that the Appellant has not been able to establish a private life, because none of her friends, nor her sister, nor her nephew (who had written that he and his siblings would be very sad if their aunt were taken away from them) had seen it fit to attend court. It is not correct to say that, "given the lack of the physical oral evidence in support of the Appellant I place little weight on that particular statement" (paragraph 100), because the Appellant had lived here since the age of 13, and had only returned back to Kenya for two weeks, and all her private life was in this country. In the circumstances, for the judge to say that there would be no "very significant obstacles" to the Appellant's return (paragraph 101) was unsustainable, in the light of the fact that there were no ties that the Appellant still retained with anyone in Kenya. Finally, there was the Appellant's relationship with [DN]. She had lived in this country for thirteen years and he had lived in this country for twelve years, and the Appellant explains (at paragraph 36 of her witness statement) that there would be exceptional circumstances in her case. Under Appendix FM, it was important for the judge to carry out an assessment. In fact, there was no reference to Appendix FM or to paragraph 276ADE. There was no reference to the case of Agyarko [2017] UKSC 1. There was a cursory reference to the "Razgar principles" but no assessment was properly carried out (at paragraph 108).
10. For her part, Ms Aboni submitted that there was no material error of law in the judge's determination. This is because from paragraph 97 onwards, the judge fully considered

the position under Article 8, and whereas it was accepted that the Appellant was in a relationship with [DN], the plain fact was that the Appellant could not satisfy Appendix FM, and this is clear from what is said by the judge (at paragraph 99), namely that the Appellant could not satisfy the Immigration Rules “if only because of the lack of information regarding the finances, which the partner himself accepts are insufficient...” (paragraph 99).

11. In reply, Ms Hashmi submitted that there had to be an express reference to paragraph 276ADE(vi) because the Appellant was over 25 years of age, and the issue was whether there would be “very significant obstacles” to her return. The Appellant’s bundle (at page 26) expressly addressed these matters and paragraph 96 drew attention to paragraph 276ADE(vi). She asked me to allow the appeal.

Error of Law

12. 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 TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, this is a case where the Appellant’s bundle expressly addresses the issue of paragraph 276ADE(vi), and this is clear from pages 26 to 27, and at paragraphs 92 to 103. The judge does not address this issue directly, but instead moves on to a consideration of Article 8 rights in general from paragraph 97 onwards. Second, it is plain that the Appellant, who arrived in the UK aged 13, has been in this country for thirteen years, and has been in a relationship with another Kenyan national, who has been in this country for twelve years, and who now has ILR and who made it absolutely clear that he would not be able to return to Kenya himself, or be able to support the Appellant in that country. At stake, therefore, is their relationship. As against this, the Appellant has no-one left in Kenya to whom she can turn to. She has her sister, and her nieces and nephews in this country, and whilst their non-attendance at the hearing did not help the Appellant’s case, nevertheless the question of whether there are “exceptional circumstances” has to be addressed in the context of what the Supreme Court stated in **Agyarko [2017] UKSC 1**. The Supreme Court made it clear that ultimately one has to decide “whether the refusal is proportionate in the particular case” and that “balancing the strength of the public interest in the removal of the person in question against the impact on private and family life” is the task to be undertaken (paragraph 57). Indeed, the Supreme Court made it clear that,

“... the Secretary of State does not impose a test of exceptionality in the sense that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she had defined the word ‘exceptional’, as already explained, as meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate” (paragraph 60).

Accordingly, whereas Section 117B expresses the public interest in immigration control, what the judge had to do was to consider whether the consequences for the Appellant going back to Kenya, without her partner, and after a period of thirteen years, when she had arrived as little more than a child, would be “unjustifiably harsh”

for her. In this case, the judge did not make this proportionality assessment, and did not consider whether her removal would sever her ties with her partner.

Decision

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 re-make the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge G. R. J. Robson, under practice statement 7.2(a) for the reasons given.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

3rd August 2018