



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/15083/2019 (P)

THE IMMIGRATION ACTS

**Decided under Rule 34
On 2 July 2020**

**Decision & Reasons Promulgated
On 14 July 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

EBUNOLUWA [F]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Waterdenes Solicitors (written submissions)

For the Respondent: (no submissions)

DECISION AND REASONS

Introduction

The appellant is a citizen of Nigeria who was born on 1 August 1993. She arrived in the United Kingdom in September 2006 with her mother when she was 13 years old.

On 17 December 2018, the appellant made a human rights claim relying upon her private and family life under Art 8 of the ECHR.

On 4 June 2019, the Secretary of State made a decision refusing the appellant's claim under Art 8.

The appellant appealed to the First-tier Tribunal. In a determination sent on 10 December 2019, Judge Zahed dismissed the appellant's appeal under para 276ADE of the Immigration Rules (HC 395 as amended) and under Art 8 outside the Rules.

The appellant sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal (Judge Foudy) on 21 April 2020. However, on 29 May 2020, the Upper Tribunal (UTJ Keith) granted the appellant permission to appeal.

Deciding without a Hearing

Together with his decision granting permission to appeal, UTJ Keith made directions dated 29 May 2020, that, in the light of the COVID-19 crisis, his provisional view was that the error of law issue could be decided on the papers without a hearing. The parties were invited to make written submissions on that issue and also on the substance of the error of law issue.

Time for filing submissions in response has expired. The appellant's representatives filed submissions. Those submissions focussed upon the substantive error of law issue and raised no objection to the error of law being determined on the papers without a hearing. The Secretary of State did not file any submissions within the required period.

Having taken into account the submissions, and in the absence of any objection, I consider it just and fair to determine the error of law issue without a hearing under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

The Appellant's Case

Before the judge, the appellant relied upon her private and family life in the UK. She claimed that she had come to the UK in September 2006 (that was not disputed) with her mother from Nigeria when she was 13 years old. She claimed that shortly after she arrived, her mother abandoned her. She went to live with one of her mother's friends who was known as "Auntie Kehinde" in London. She attended school in London. Following being abandoned by her mother, she was financially supported by her uncle who lived in Manchester. After she completed her schooling, the appellant went to the University of Salford and graduated with a Bachelor's degree in psychology. She lived with her uncle in Manchester when she left London to go to university.

The appellant claimed that she had lost contact with her mother. As regards her father, she said that she had no direct contact with him but that she communicated with him through her parental uncle.

The appellant said that she had no friends living in Nigeria and that she did not know any extended family members there and with whom she had no communication. The appellant's case was that her life was in the UK since 2006 when she arrived aged 13. She said that she had no accommodation in Nigeria and she was not aware that her parents owned any property in Nigeria.

Although, she had no contact with her mother and only indirect contact with her father, her evidence was that both her parents were in Nigeria.

The Judge's Decision

In his determination, Judge Zahed made, in effect, a number of adverse credibility findings against the appellant. He did not accept that the appellant had been abandoned by her mother, as she claimed, shortly after she came to the UK in 2006. The judge relied upon letters from the appellant's school in Bermondsey dated 13 October 2006, 18 September 2007 and 9 July 2008 all addressed to "Mr and Mrs [F]" which he considered were inconsistent with the appellant's evidence about her mother abandoning her and that she lived with "Auntie Kehinde" in London. Also, the judge noted that there was no evidence concerning the separation of the appellant's parents, such as a divorce document. Further, the judge relied upon an inconsistency between the appellant's evidence and that given by her representatives in her application for leave as to when she discovered that she had no immigration status. Her evidence had been that she only discovered it after graduation when she asked her uncle for her passport. Her representatives, in their covering letter with her application, said that she had discovered it upon admission to university.

Having made these adverse findings, the judge found, on a balance of probabilities, that the claimant's parents had not abandoned her as she claimed and that she was in contact with them and was able to rely upon them if she returned to Nigeria. He also found, therefore, that her parents were able to assist her when she returned to Nigeria, as he put it, "while she finds her feet". Additionally, the judge found, on the basis of the appellant's evidence, that she spoke Yoruba.

The judge found, given all the circumstances including her educational background and the support she would be able to obtain from her parents in Nigeria, that there were not very significant obstacles to her integration in Nigeria and, therefore, she could not meet the requirements of para 276ADE(1) (vi). Further, the judge found that given all the circumstances, the decision did not breach Art 8 outside the Rules.

The Appellant's Challenge

The grounds of appeal, supplemented by the written submissions made on behalf of the appellant, raise two grounds of appeal.

The first ground of appeal is concerned with the judge's fact-finding and, in particular, his adverse credibility findings. In three respects, it is said that the judge made an adverse finding based upon matters which were not addressed at the hearing or raised in the refusal letter such that it was unfair to take the points without giving the appellant an opportunity to deal with them.

First, it is said that the judge was wrong in para 14 of his determination to rely upon the three letters from the appellant's school on 13 October 2006, 18 September 2007 and 9 July 2008 addressed to "Mr and Mrs [F]". Neither the

appellant, nor her uncle who gave evidence, had an opportunity to deal with this issue and whether there was an inconsistency with the appellant's claim that she had been abandoned by her parents (in particular her mother) on coming to the UK.

Secondly, it is contended that the judge was wrong in para 15 to take into account that the appellant had not submitted any evidence about how she had entered the UK and no evidence in documentary form, such as a divorce document, to show that her parents were separated. It is contended that this was not an issue raised at the hearing by the Presenting Officer nor in the refusal letter. It is further said that it has never been suggested by the appellant that her parents were married such that a divorce document could, even potentially, be produced. It is contended that the respondent accepts that the appellant entered the UK in September 2006.

Thirdly, it is contended that the judge fell into error in para 25 in taking into account an apparent inconsistency between the appellant's own evidence and what was said by her legal representatives as to the point in time when she became aware that she had no immigration status in the UK. That, it is said, was not a point raised at the hearing and the appellant and her uncle were not given an opportunity to address the judge's concerns.

Ground 2 focuses upon the judge's decision under Art 8. First, it is said that the judge was wrong to find that the appellant had given evidence that she spoke Yoruba. Her evidence was that she understood a little bit of Yoruba as she left Nigeria as a child but she did not say that she spoke the language. Secondly, the judge erred in his assessment of whether the appellant, having left Nigeria at the age of 13, would be a sufficient "insider in Nigeria" because she had lived with a Nigerian family throughout her secondary education when assessing whether they were very significant obstacles to her integration. Thirdly, it is submitted that the judge failed, in carrying out the balancing exercise outside the Rules, to take into account the value to the British community which the appellant represented because of her qualifications, as a graduate in psychology and her sports leadership awards. These were relevant factors to be taken into account in her favour following UE (Nigeria) v SSHD [2010] EWCA Civ 975.

Discussion

It is axiomatic that the proceedings before the First-tier Tribunal must be fair. As part of that obligation, a judge has a duty to give an appellant a fair opportunity to deal with matters that may concern the judge and which, if unresolved, may count against the appellant, for example, in assessing an appellant's credibility. The obligation is, in a phrase, 'not to take the appellant by surprise' as to matters arising from their evidence or the evidence otherwise before the judge. Of course, an appellant, particularly if legally represented, can be expected to raise - if they wish - matters which plainly might well concern a judge in reaching his decision. When obvious inconsistencies or points are not addressed by an appellant (particularly when legally represented) there may be many reasons why that is so including, of course,

that the tactical position is taken that it is better not to draw attention to those inconsistencies etc. or the appellant is unable to resolve them satisfactorily. In the usual course of a hearing, when the Secretary of State is represented, it may well be that matters of concern, on the evidence, will be raised in cross-examination by the respondent's representative. The judge, performing his role as impartial decision maker, must be careful not to 'descend into the arena' and raise matters which the respondent's representative leaves untouched. However, if a judge is concerned by a particular inconsistency (perceived by him) in the evidence or some issue arising from the evidence which he may subsequently take into account as part of his reasons when reaching his decision, not to give the appellant (through her representative or otherwise) an opportunity to deal with the matter which the judge considers significant is likely to be unfair.

In this appeal, applying that approach, I accept the submissions made on behalf of the appellant that the judge did fall into error in reaching relevant findings adverse to the appellant.

First, there is the issue of the school letters addressed to "Mr and Mrs [F]" which the judge considered, at para 14 of his determination, were inconsistent with the appellant's claim that she had been abandoned by her parents on arrival in the UK. The judge said this:

"I note that the addresses are the same in the first two letters but change to a different address in South London in the letter dated 9th July 2008. I find that these letters are inconsistent with the evidence given by the appellant and her uncle that the appellant's mother abandoned her and had separated from her father. I find that this inconsistency damages the appellant and her uncle's credibility and the appellant's claim that her parents abandoned her."

Subsequently, at para 17 the judge found that:

"Her parents did not abandon the appellant as claimed".

As the submissions made on behalf of the appellant make plain, this was not a matter relied upon by the respondent's representative at the hearing. Nor, on reading the refusal letter, was it a matter relied upon in the refusal letter itself. Indeed, although the refusal letter acknowledges that the appellant had not provided "any evidence or dates of when you were abandoned by your mother", it does not directly assert that the respondent disbelieves the appellant.

In my judgment, if the judge wished to rely upon this inconsistency, it was only fair that the appellant and her representative should appreciate that this was a point which might be taken against her and given an opportunity to give evidence or deal by way of submissions with the judge's concerns. The appellant was, undoubtedly 'taken by surprise' on this matter when it was first raised in the judge's decision as part of his reasons for disbelieving material parts of the appellant's account.

Secondly, at para 15 the judge took into account that the appellant had not submitted any evidence as to how she had entered the UK or any supporting evidence of her parents' separation. The judge said this:

"The appellant has submitted no evidence of how she entered the United Kingdom. The appellant has submitted no evidence that her parents are separated such as divorce document or any other documentary evidence. The appellant was unable to give any explanation of why she would have been abandoned by her mother at the age of 13. The appellant in evidence stated that she had 'no idea why I was left in the UK'."

It is unclear why the judge noted that the appellant had not submitted any evidence of how she entered the United Kingdom. The respondent, both in the refusal letter and at the hearing, accepted that the appellant had entered the United Kingdom in September 2006 even though, as the refusal letter notes, the appellant had provided "[n]o evidence ... to document your arrival in the UK". Again, even if the issue about when and how the appellant had entered the UK was relevant to the judge's findings, if he was to call into question the issue of when she entered the UK or the absence of any documents when that was not relied upon by the respondent either in the refusal letter or at the hearing, fairness required that he raise this issue at the hearing so that the appellant and her representatives had a fair opportunity to deal with it.

In addition, the judge's reliance upon the absence of documentation, such as a divorce certificate or other document to support her claim that her parents had separated had, in the instance of an absent divorce document, no basis in the evidence. The appellant had never said that her parents were married such that they could be divorced. In any event, given the appellant's evidence that she had no contact with her mother and only indirect contact with her father and given that their separation occurred when the appellant was 13, it was not reasonable of the judge to expect that she would be able to produce documentary evidence to support her claim that they had separated many years previously.

Thirdly, as regards the alleged inconsistency between the appellant's own evidence and the statement of her legal representatives as to when she became aware of her immigration status, the judge said this at para 25:

"The appellant stated that she was unaware of her immigration status until she was making holiday plans with friends after her graduation, and asked her uncle for her passport, when her uncle told her that she did not have legal status in the UK. However, I note in the appellant's application covering letter (appellant's bundle p 31) it states 'our client has grown up not knowing the immigration requirements of living in the UK, only to discover this upon admission to university.' I find that this is inconsistent to the evidence of the appellant. I find that the appellant was aware of her immigration status by the time she turned 18 in August 2014."

Again, it would appear that this was a point not raised by the respondent and was taken for the first time by the judge in his determination when reaching adverse findings in relation to the appellant's claim. Again, fairness required

that this issue, if it was to be relied upon by the judge, should have been raised with the appellant and her legal representatives so that they would have an opportunity to give evidence or deal with the matter in submissions.

Taking these points cumulatively, I am satisfied that the judge materially erred in law in reaching adverse findings both in relation to the appellant's claim based on Art 8 under the Rules (para 276ADE(1)(vi)) and outside the Rules.

In the light of that finding, it is not strictly necessary to reach a conclusion on ground 2. However, at least to this extent, I am satisfied that ground 2 is made out. In determining that the appellant would, on return to Nigeria, be able to integrate as she spoke Yoruba, the judge relied upon evidence, which he said, established that she spoke Yoruba. However, that was not her evidence. Her evidence was that she understood a little of Yoruba but that she did not say that she spoke it. The finding did not, in my judgment, necessarily and rationally follow from the appellant's evidence. As I have said, strictly it is not necessary to consider whether the appellant has established ground 2 since the judge's findings cannot survive my conclusion that ground 1 is made out. However, this point only adds to my overall view that the judge's findings, adverse to the appellant, under both para 276ADE(1)(vi) and outside the Rules under Art 8 were legally flawed and cannot stand.

Decision

For the above reasons, the First-tier Tribunal materially erred in law in dismissing the appellant's appeal. The decision is, as a result, set aside.

Given the nature of the error of law, none of the judge's findings can be preserved. As a consequence, given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Zahed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
2 July 2020