



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

Appeal Number: PA/12279/2016

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated
On 12 July 2017**

Reasons

On 29 June 2017

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

**TRACY LADI ALFRED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Tampuri, Tamsons Legal Services

For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS
(Delivered orally on 29 June 2017)

Introduction

1. This is an appeal brought against a decision of First-tier Tribunal Judge Hussain, promulgated on 6 January 2017, dismissing the appellant's appeal against a decision of the Secretary of State dated 21 October 2016 refusing a human rights claim.

Grounds of Challenge

2. The pleaded grounds of appeal, which are drafted with admirably succinctness by Mr Tampuri, take four points of challenge to the First-tier Tribunal's decision:
 - (a) the First-tier Tribunal failed to make any findings in relation to the application of Section 55 of the Borders, Citizenship and Immigration Act 2009;
 - (b) the First-tier Tribunal failed to give any consideration to Section 117 of the Nationality, Immigration and Asylum Act 2002;
 - (c) the First-tier Tribunal failed to carry out a proportionality assessment as required by the guidelines set out in Razgar [2004] UKHL 27; and
 - (d) in considering the Article 8 ECHR claim outside of the Rules, the First-tier Tribunal erred in directing itself that the appellant was required to demonstrate that her circumstances were compelling.

3. The grant of permission loosely identified an arguable additional ground, in following terms:

"The First-tier Tribunal Judge (arguably) failed to adequately consider Article 8 particularly in the light of her sister being granted leave to remain in what appears to have been very similar circumstances. It is arguable the differential treatment has a bearing on the proportionality of the decision to refuse the appellant leave to remain."

4. I invited Mr Tampuri to particularise the terms of ground he was seeking to pursue arising out of aforementioned 'observations' of Judge Coker, primarily so as ensure that Mr Clarke had a proper opportunity to engage with it. In response Mr Tampuri characterised the ground in the following terms:

The First-tier Tribunal erred in failing to take account of the appellant's sister's witness statement of December 2016 when coming to its conclusions on the Article 8 ECHR ground.

5. During his submissions, Mr Tampuri sought to pursue yet a further ground of challenge, i.e. that the First-tier Tribunal erred in concluding within paragraphs 44 and 45 of its decision that the appellant's evidence, given to the effect that she had no family in Nigeria, was not truthful. Having carefully considered all of the circumstances of the case I refused to admit such ground, for the following reasons.
6. The aforementioned ground first crept into appellant's case during the course of Mr Tampuri's oral submissions. No formal application was made to amend the grounds of challenge, even after the Tribunal had identified that the ground was not pleaded and that permission had not been sought, or granted, to rely upon it.

7. In any event, insofar as the submissions made by Mr Tampuri could be treated as an application to amend the grounds, there was no explanation provided as to why this ground was being introduced at such a late stage in the proceedings i.e. half way through oral submissions. This is particularly significant given that permission to appeal was granted over a month ago, and the decision of the First-tier Tribunal was promulgated nearly six months ago.
8. Had I admitted the ground I would, nevertheless, have concluded that it lacks any merit. The conclusions of the First-tier Tribunal, found in paragraphs 44 and 45 of its decision, are well-reasoned and are not irrational.

Decision and Discussion

9. Returning to the grounds that have been admitted, I first consider the additional ground identified in Judge Coker's grant of permission, and characterised by Mr Tampuri in the terms identified above.
10. I begin by observing that the witness statement drawn on behalf of the appellant's sister (A6-A8 of the appellant's bundle) for the most part sets out the chronology of the claims she made to the Secretary of State and how those claims led to her being granted of indefinite leave to remain. Such matters take up the first nine paragraphs of the statement. There are then two remaining substantive paragraphs which state as follows:

"[10] My sister and I went though a lot of trauma since were kids (sic). We lost our father and believe our mother is no longer alive. When we were brought to the UK we were both very young and innocent. We are now fully grown adults with children of our own. We only have ourselves, our aunt and our children left in the world.

[11] There is nothing to return to in Nigeria, she doesn't know anywhere in that country apart from Kaduna where we were born. As Christians, none of (sic) can live in peace in Kaduna and I know for certain that my sister will suffer immeasurably if she was forced out of this country. She will be a stranger in her country of birth starting her life all over again."

11. All the material matters set out in the appellant's sister's witness statement are the subject of consideration by the First-tier Tribunal, albeit such evidence is not attributed to the appellant's sister - for example, paragraphs 1, 21 and 22 incorporate comparisons between the appellant and her sister's contact with the immigration authorities. There is also reference in paragraphs 18, 19 and 20 of the First-tier Tribunal's decision to the claimed circumstances in the appellant's home area in Nigeria.
7. I am not satisfied that it has been demonstrated that the First-tier Tribunal disregarded the appellant's sister's statement as now claimed. In any event, I find that there is nothing in the appellant's sister statement which could have led the First-tier Tribunal to come to a different conclusion. In reality the statement made by the appellant's sister, when set in the

context of the evidence as a whole, adds little or nothing to the appellant's case.

8. Moving on to the assertions that the First-tier Tribunal (i) failed to take account of Article 8 outside the Rules (ii) failed to engage in a proportionality assessment and/or (iii) misdirected itself to the correct legal test when considering Article 8 outside the Rules, none of these grounds have any merit.
9. In my conclusion, it is clear that the First-tier Tribunal undertook an assessment of Article 8 outside of the Rules. This is exactly what the First-tier Tribunal says it is doing in paragraph 49 of its decision and the assertion to the contrary is not made out.
10. I also reject the appellant's contention that the First-tier Tribunal erred in law in directing itself that the appellant was required to demonstrate that "*her circumstance is compelling*" when assessment was being made in relation to Article 8 outside of the Rules. It is important that this direction is seen in the context of the Tribunal's earlier conclusion that the appellant did not meet the requirements of the Immigration Rules. When viewed in that context the First-tier Tribunal's direction is entirely consistent with approach set out by the Court of Appeal in SS (Congo) [2015] EWCA Civ 387 at [33]. Such consideration incorporates the proportionality assessment identified as the fifth stage of the suggested framework identified by the House of Lords in Razgar.
8. I do accept, however, that the First-tier Tribunal erred in failing to engage with the considerations set out in section 117B of the 2002 Act. Whilst this may be an error of law it is not one that is capable of affecting the outcome of the appeal. The primary difficulty for the appellant in establishing this ground is that there are no features of section 117B of the 2002 Act in play in the instant case that have the capability of operating in her favour. Case law relating the relevance of an appellant's ability to speak English and an applicant's financial stability clearly identifies that, at best, such features are neutral in the proportionality assessment. All of the other subsections of section 117B, save for section 117B(6) which is not applicable on the instant facts, are only capable of operating adversely to an appellant's claim.
9. Moving on, looking at paragraph 49, it is also clear that the First-tier Tribunal had in mind Section 55 and the best interests of the child when undertaking its considerations. Although that phrase does not appear in anywhere in the decision, the Tribunal referred in paragraph 49 thereof to the welfare of the children.
10. There was no evidence before the First-tier Tribunal suggesting that the two children (aged 2 and 3 at the relevant date) had any independence from their mother. There is only one parent known to the children, and no evidence was provided about the father. It is inevitable in such circumstances that it will be in the best interests of the children to stay

with the appellant, even if she is removed. On the very limited evidence that was available before the First-tier Tribunal it is difficult to see what else it could have said and what other conclusion it could have reached regarding the best interests of the children.

10. I finally deal with the submission that the First-tier Tribunal's conclusion on the Article 8 ground was irrational. Reliance was placed on certain features of the appellant's case said to compel a conclusion favourable to her, in particular, on the fact that the appellant left Nigeria at the age of 17, that she has two young children and a sister in the United Kingdom, and that she has no other relatives or connections in Nigeria.
11. I first observe that the First-tier Tribunal rejected the contention that the appellant has no relatives remaining in Nigeria [44] and [45]. I have refused permission to challenge that finding. Furthermore, the First-tier Tribunal was clearly aware of all of the relevant features of the appellant's claim and in my view, on the basis of the evidence that was before the First-tier Tribunal, its conclusion was not only open to it, but was inevitable once it had been established that the appellant did not meet the requirements of the Immigration Rules.
12. I therefore refuse this appeal, concluding that the decision of the First-tier Tribunal does not contain an error of law capable of affecting the outcome of the appeal and that it is to remain standing.

Signed:



Upper Tribunal Judge O'Connor