



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

Appeal Number: HU/23143/2018

THE IMMIGRATION ACTS

**Decision Under Rule 34 Without a
Hearing
On 1st September 2020**

Decision & Reasons Promulgated

On 6th October 2020

Before

UPPER TRIBUNAL JUDGE HANSON

Between

YAAM
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Buchanan promulgated on the 17 June 2019 following a hearing at Belfast [Laganside Court] in which the Judge dismissed the appellants appeal against the refusal of her application for leave to remain on human rights grounds.
2. Following permission to appeal being granted to the appellant directions were sent to the parties indicating a preliminary view that the issue of whether the First-tier Tribunal had made an error of law material to the decision to dismiss the appeal could be made without a hearing, inviting submission on this point, and providing the opportunity to provide further material. The parties have responded, and their observations taken into account.

3. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
4. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
5. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:
‘34. -
 - (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
 - (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
 - (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
 - (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
 - (a) strike out a party’s case, pursuant to rule 8(1)(b) or 8(2);
 - (b) consent to withdrawal, pursuant to rule 17;
 - (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
 - (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.’
6. It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers. Nothing on the facts or in law is made out that makes consideration of the issues on the papers not in accordance with overriding objectives at this stage.

Background

7. The appellant is a citizen of Nigeria born on 23 June 1991.
8. The Judge, having considered the evidence made available in both written and oral form, sets out his findings of fact from [38] of the decision under challenge by reference to a number of headed paragraphs dealing with those issues considered relevant to the appeal.
9. The Judge concludes the appellant is not able to meet the requirements of the Immigration Rules at either the date of application or date of appeal. Thereafter the Judge considers the merits of the claim outside the Rules, from [79], concluding at [139] that having regard to findings set out in the preceding paragraphs the respondent had satisfied the

Judge that any interference in the family and private life relied upon was a proportionate response for the purposes of maintaining an effective immigration policy in the United Kingdom; leading to the appeal being dismissed on all grounds.

10. The appellant sought permission to appeal asserting the Judge had made a material error of law. Permission to appeal was refused by another judge of the First-tier Tribunal and renewed to the Upper Tribunal where it was granted on 16 January 2020, the operative part of the grant being in the following terms:

- “1. A key feature of the appellants case was that she enjoyed “family life” for the purposes of Article 8 EC HR with her two nieces, the children of her brother and sister in law. The judge found that family life did not exist. At [120], the judge said that no explanation had been provided as to why the mother of the nieces, the appellant’s sister-in-law, had not participated in the proceedings. In her statement at [37], the appellant wrote that her brother had forbidden her sister-in-law from participating the proceedings, or providing any help to the appellant. An extensive background of alleged controlling and abusive behaviour on the part of the brother is set out in the appellants witness statement. It is arguable that the judge fell into error when stating that the absence of the appellants sister-in-law had not been justified or otherwise explained to the tribunal, in light of the appellants statement. It is arguable that the judge held her absence and nonparticipation in the proceedings against the appellant when concluding against the appellant that family life for the purposes of Article 8 did not exist between the appellant and the nieces. The evidence of the children’s mother arguably could have been key to that finding. It is arguable that the judge approached this issue pursuant to an error of fact, which, under R [Iran] [2005] EWCA Civ 982 at [9(vii)] was arguably material.
2. Although the claimed background of abuse features extensively in the appellants witness statement, the judge does not appear to have referred to it in his proportionality assessment. Arguably, that was a failure to take into account a material factor. I grant permission on all grounds.”

Grounds and submissions

11. The appellant asserts the error of fact arises where at [120] the Judge recorded that the appellant had been told that her sister in law and mother of her nieces “could not write a statement or attend the hearing” but the Judge went on to state “no explanation is given to explain why the children’s mother might not have been able to say that directly to the appellant’s representatives”.
12. The grounds assert that the appellants statement sets out in detail her allegation regarding her brother’s behaviour. At [37] of that document the appellant stated:

“I have asked [L] if she would provide me with a letter of support for my appeal. She told me she wants to help and asked my brother if she could

write a letter. He told her no, that she could not write a statement or attend the hearing. This also applies to my nieces. It makes me angry to think of him controlling them, but I do not want to push [L]. She has her children and her own problems with my brother to worry about.”

13. It is asserted this should be classed as a failure of the Judge to take into account a material matter predicated upon an assertion that there was no reference to the background of abuse including the evidence the appellant was a victim of domestic abuse at the hands of a brother, as set out in her statement, when concluding that the interference with the appellants family and private life was a proportionate response. It is also asserted that the Judge erred in law in failing to take into account and assess the best interests of the appellant’s nieces.
14. The grounds also assert the Judge erred in law in relation to section 55 Borders Citizenship and Immigration Act 2009 in concluding there had been no breach as it is claimed there is no evidence to show that the respondent had discharged her duties under section 55 in respect of the children. The grounds assert that pursuant to JG v The Upper Tribunal, Immigration and Asylum Chamber if it was found a breach of section 55 had occurred, that was relevant to the consideration of article 8 as to whether the best interests of the children were properly taken into account.
15. The respondent has filed a response to the submissions dated 17 April 2020 in which it is submitted the Judge made no error of law material to the decision to dismiss the appeal.

Error of law

16. This is a detailed decision in which the judge clearly took into account all the evidence provided with the required degree of anxious scrutiny.
17. In relation to paragraph 37 of the appellant’s witness statement the Judge specifically writes at [120]:

“120. In relation to matters concerning the welfare of children, I note that the appellant does not have children of her own; but the appellant has nieces in the UK who are children of the appellant's brother. There is no evidence before me on appeal from either parent of the two children who the appellant discusses in her evidence. There is, however, positive evidence from the appellant that she is not sure whether the father is aware of the contact which the appellant claims to have exercised with his two children. At WS29, the appellant states that “I am not sure whether or not my brother was ever aware that I meet the girls”. In oral evidence, the appellant said that she did not know whether her brother was aware of her visits to see his daughters. At WS37, the appellant states that she has spoken to the children's mother; but has been told that the mother “could not write a statement or attend the hearing”. No explanation is given to explain why the children’s mother might not have been able to say that directly to the appellant’s representatives.”

18. The Judge was clearly aware of the appellant's explanation for why her sister-in-law had not provided a written statement or attended to give oral evidence and it is not made out the Judge did not take the appellant's explanation into account. The statement there no explanation had been given as to why the mother might not have been able to say that directly to the representatives, which one assumes could have occurred by way of a telephone call, is not challenged as being factually incorrect. What the Judge was recording in this paragraph is that the only source of the claim the sister-in-law was unable to support the appellants account was from the appellant herself in her written and oral evidence.
19. The Judge was also aware of the judgement in JG, which is mentioned at [121], confirming that where possible the wishes and feelings of a particular child are obtained and taken into account but the Judge finds that contrary to that decision, in this appeal, there was a solid evidential foundation to conclude that communication with the children, whether direct or otherwise, would not have been feasible. This is further recognition by the Judge of recognition that any attempt to secure support would not have being possible as a result of the appellant's brother's attitude.
20. The Judge clearly refers to section 55 at [122] referring to the guidance referred to by the appellant at [123]. That guidance is referred to in detail leading to the finding by the Judge at [133] in the following terms:

“133. On the available evidence to me: (1) each child's welfare is appropriately safeguarded and promoted by remaining in the day to day care of their parents: I reached that conclusion primarily because there is no suggestion from any source that the children's welfare is not adequately protected by their parents; (2) It is not necessary for either child's welfare that there be direct personal contact with the appellant; I reached that conclusion because the appellants evidence about her nieces is unsupported by evidence from those having parental responsibility for their care; neither parent has made any representation in the appeal that it is in their children's interests that there be continuing direct contact with the appellant; there is insufficient evidence to conclude that there is any dependency between the appellant and her nieces in their relationships; the evidence of contact is of little detail; there is little evidence of any consequence to either child if visits with the appellant were to stop; the assertion that the children would be devastated is made without reference to enough detail to give the assertion much weight; and the appellants witness at appeal has never seen the appellant in the company of the appellant's nieces.”
21. Contrary to the assertion in the grounds this is not the Judge punishing the appellant for failing to provide evidence but recognition that as a result of the parents of the children not cooperating with the appellant in the appeal the only evidence the Judge had available to him was that set out in the determination. It was for the Judge to assess section 55 and the best interests of the children for himself and he could only do

that on the basis of the evidence that had been made available in both written and oral form. It is not established that the Judge's finding that the best interests of the children did not require the appellant to remain in the United Kingdom and that the best interests of the children are to remain with their parents who will provide adequately for their needs irrespective of the appellants removal, is a finding outside the range of those available to the Judge on the evidence. Nothing in the grounds or further submissions supports a finding to the contrary.

22. No error of fact material to the decision to dismiss the appeal is made out.
23. In relation to Ground 2, the alleged failure to take into account a material matter, it is asserted the Judge failed to mention within the proportionality assessment the background of abuse that the appellant had suffered at the hands of her brother.
24. The issue being considered by the Judge was the proportionality the appellant's removal from the United Kingdom to Nigeria. It is not made out the Judge failed to consider the appellants evidence concerning her experiences at the hands of her brother. As noted by the respondent's representative this issue was specifically covered by the Judge between [84-88] of the decision. At [88] the Judge writes:

"88. At 171, the expert opines that "[YM] is an unmarried, who has experienced domestic violence in the hands of her family member. This further validates the position of the above report". The report "above" is entitled Domestic Violence in Nigeria, the British Council/DFID gender in Nigeria report" which discusses that "Women in urban areas [of Nigeria] are also more likely to have experienced violence than those in rural areas. The highest proportion of women who experienced physical violence is found in the South-west and South-south." It is plain from the excerpt lifted expressly by the expert and repeated at 170 that the report is about violence in Nigeria. However, the appellant does not complain about domestic violence having been perpetrated against her in Nigeria. The appellant complains about her brother's conduct in the UK. I am at a loss as to why the expert considers that the appellants circumstances "further validates the position of the above report" when in fact, the appellants abuse was in the UK rather than in Nigeria. In these circumstances, I attach little weight to the expert's commentary on this issue."

25. The grounds claimed the judge did not factor this element into the proportionality assessment but fail to identifying what way the Judge should have including an aspect of the appeal relating to ill treatment by the appellants brother in the United Kingdom in the assessment to the proportionality of return to Nigeria; especially when there was insufficient evidence before the Judge of any adverse impact upon the appellant of the treatment experienced at the hands of her brother sufficient to be relevant to the proportionality exercise or, which had it been taken into account, may have made a material difference. The Judge was clearly aware of this element of the appellants claim but did not find it relevant to the ability of the appellant to return to Nigeria. It

- is not made out the Judge forgot or failed to factor this element into an aspect of the appeal where it should have been properly included.
26. Under the Immigration Rules the Judge concluded there will be no very significant obstacles to integration into Nigeria on return at [90] which is a finding not challenged by the appellant in the application for permission to appeal. Indeed, the rejection of the appeal under the Rules does not appear to have been challenged at all. It is quite clear that any issues relating to gender-based violence either in the UK or in Nigeria, or issues of FGM, were not made out sufficient to warrant a finding in the alternative. There is merit in the assertion by the respondents representative that given the Judge found gender based violence would not be a risk element for the appellant on return and that the appellant would not face very significant obstacles to her reintegration it was impossible to understand the relevance of a history of domestic violence in the UK in the article 8 assessment. No arguable legal error material to the decision is made out in respect of this ground.
 27. Ground 3 asserts the Judge erred in the conclusion there was no breach of section 55. This matter has been commented upon above and is a claim without merit.
 28. The issue before the Judge was whether there was any entitlement made out enabling the Judge to allow the appeal either within or outside the Immigration Rules. Whilst the appellant disagrees with the Judge's conclusion there was not it has not been shown the finding the appellant could not satisfy the Rules is a finding outside the range of those available to the Judge on the evidence. The assessment of article 8 ECHR has been conducted in a properly structured manner as evidenced by the Judge setting out the Razgar test at [97]. The Judge concludes that there will be no interference with respect for family life with the nieces as the relationship the appellant has with her nieces did not fall within the ambit of family life protected by article 8. That is a fact specific assessment. The Judge clearly considers the evidence regarding the nature of the relationship between the appellant and the nieces before concluding at [101-102] the following:

“101 In my judgement, in this appeal there is insufficient evidence of dependency between the appellant and her nieces to constitute “family life”. The high point in the evidence before me about the aunt/niece relationship came when the appellant said in oral evidence that “we do have an emotional need for one another”; but there was little evidence in appeal of what that actually means for the appellant or the children. The appellant said that her nieces were able to question her about their mixed-race background; but I am far from persuaded that that sort of discussion could only be undertaken with the appellant. In any event, I do not consider that that sort of discussion amounts to “an emotional need” between the appellant and her nieces. Although the appellant may visit her nieces: (i) there was no detail about regularity or duration of visits; and (ii) there was insufficient evidence of any dependency between them.

102 I am not persuaded that the appellant has “family life” with her nieces.”

29. The Judge's primary finding is therefore that article 8 is not engaged in relation to family life which is a finding within the range of those available to the Judge on the evidence. In the alternative (my emphasis), from [103], the Judge considers the Razgar questions. Best interests of the children are referred to from [104] in which the Judge considers in detail the evidence received in relation to the appellant's relationship with her nieces and the evidence from the witness in relation to this issue. The Judge considers the judgement in JG. The Judge records at [115] discussing with the appellant's counsel what the First-tier Tribunal ought to do in the event that the reasons for refusal letter was properly to be construed as failing to make it clear that the substance of any section 55 duty had been discharged. The Judge records it was submitted that the First-tier Tribunal ought to make a declaration to the effect that the section 55 duty had not been discharged by the respondent and that the Tribunal ought to make a finding that the decision made in the reasons for refusal letter is unlawful. The Judge finds, however that such an approach would amount to him determining the matter as though he was judicially reviewing the reasons for refusal letter in relation to which he did not have jurisdiction by reference to the decision of the Supreme Court in Hesham Ali.
30. The Judge considers relevant case law before concluding at [119]:

“119. In my judgement, though the respondent might be argued to have failed to comply with the duties set out in section 55 of the 2009 act, I am not persuaded that the decision set out in the RFR is not “in accordance with the law” as that phrase is to be applied in assessing the article 8 questions; because there is a legislative framework in place for the decision which has purportedly interfered with the appellant's family and private life; and the framework is published in a form which is accessible to those who are likely to be affected, such as the appellant. In applying the approach set out in the case of Charles: I conclude that the “proposed interference” (here refusal of the human rights claim) has a proper basis in domestic law and is accessible and foreseeable as to its effects.”
31. The Judge properly notes in relation to welfare of the children that the appellant does not have any children of her own but relies upon the relationship with her nieces who are the children of her brother.
32. Having considered the competing arguments which are set out in detail in the decision, including section 117 Nationality, Immigration and Asylum Act 2002 the Judge concludes any interference with any protected right is proportionate.
33. Whilst the appellant disagrees with this and raises a number of issues in contest it is not made out the decision of the Judge is outside the range of those reasonably available to him on the evidence. The Judge clearly considered the evidence with the required degree of anxious scrutiny and has given adequate reasons in support of the findings made.

Even taking the appellants case at its highest, as the Judge did on one occasion, it is not made out the conclusions reached are not ones properly available to the Judge. It is not made out there is anything arguably unfair or irrational in the findings and decisions arrived at by the Judge having carefully considered the evidence made available.

34. I therefore find the appellant fails to establish the Judge has erred in law in a manner material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

- 35. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

36. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 1 September 2020