IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003335
UI-2022-003336
First-tier Tribunal No: PA/00499/2021
PA/00500/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 March 2023

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

A O F
O E F
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms C Wigley instructed by Asylum Justice
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 2 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are granted anonymity.

No-one shall publish or reveal any information, including the names or addresses of the appellants, likely to lead members of the public to identify the appellants. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellants are brother and sister aged 20 and 22 years old respectively. They are citizens of Nigeria.

2. The appellants were brought to the United Kingdom by their father in 2013 when they were aged 11 and 13 years old respectively. They were abandoned by their father in 2017 and were in care for two years, living with a foster family. Since 2020, they have been living independently in South Wales in their own accommodation with social services support.

3. In March 2018, the appellants claimed asylum. The first appellant's claimed asylum on the basis that he would be subjected to tribal scarification practices in Nigeria. The second appellant claimed that she would be subject to FGM in Nigeria.

4. On 13 October 2020, the Secretary of State refused each of the appellants' claims for asylum, humanitarian protection and under the ECHR. Although the respondent accepted that the first appellant had been physically abuse by his stepfather in Nigeria, and the second appellant had been sexually abused by her stepfather, the respondent did not accept that the appellants were at risk as they respectively claimed. The respondent also rejected the appellants' claims under Art 8 of the ECHR.

The First-tier Tribunal's Decision

5. The appellants appealed to the First-tier Tribunal. In a decision sent on 25 May 2022, Judge Clems dismissed the appellants' appeals on all grounds. First, the judge was not satisfied that the appellants' would be at risk and that, in any event, he was satisfied they could obtain a sufficiency of protection and they could internally relocate. Second, the judge rejected the second appellant's claim under Art 3 based upon health grounds. Third, the judge found that the appellants' return to Nigeria would not breach Art 8 under the Rules (para 276ADE) or outside the Rules.

The Appeal to the Upper Tribunal

6. The appellants sought permission to appeal to the Upper Tribunal. On 28 June 2022, the First-tier Tribunal (Judge N Karbani) granted the appellants permission to appeal.

7. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 2 March 2023. The appellant was represented by Ms Wigley and the respondent was represented by Ms Rushforth.

8. I heard oral submissions from both representatives. Ms Wigley also relied upon a skeleton argument.

The Grounds

9. Ms Wigley acknowledged that the judge's adverse decisions in relation to the appellants' asylum claims was not challenged. The focus of the challenge was in relation to the decisions to dismiss the appeals under Art 8. She relied upon the six grounds of appeal ((i)-(vi)) upon which permission was granted. In addition, she sought to rely upon a seventh ground ((vii) challenging the judge's self-

direction in respect of the Art 8 claim outside the Rules by applying a "very compelling circumstances" test. Ms Rushforth did not object to this additional ground. The Grounds may be summarised as follows.

10. Ground (i): in applying para 276ADE(1)(vi) and determining proportionality outside the Rules, the judge failed to take into account that the appellants had been subject to physical and sexual abuse respectively by their stepfather in Nigeria. This was accepted by the respondent but the judge proceeded on the basis that was not the case.

11. Ground (ii): the judge wrongly failed to take into account the report of the Independent Social Worker (ISW), Amanda De Leon Capdesuner because she was, inappropriately, offering medical opinion which only a psychiatrist was qualified to do.

12. Ground (iii): the judge failed to give due weight to the length of time the appellants have been in the UK. In particular, if the first appellant had arrived in the UK 3 months earlier, he would have been in the UK 7 years at the age of 18 and para 276ADE(1)(iv) would have applied in his favour.

13. Ground (iv): the judge was wrong to assess the appellants' circumstances on return on the basis that both appellants were fluent in Yoruba. The only evidence was that they had "basis" fluency/understanding in Yoruba.

14. Ground (v): the judge was wrong to consider the appellants could have the support of their mother on return as there was no evidence that she was not with their stepfather who had abused them before they came to the UK.

15. Ground (vi): the judge failed to take into account the evidence that the second appellant, aged 22 years, presented as "younger than her chronological years".

16. Ground (vi): in determining proportionality, the judge had been wrong to require "very compelling circumstances" to outweigh the public interest which was too high a hurdle only relevant in a deportation case applying s.117C(6) of the Nationality, Immigration and Asylum Act 2002 (as amended).

Discussion

17. I state at the outset that some of the grounds are stronger than others, namely grounds (i) and (ii) particularly the latter.

Grounds (i) and (ii)

18. I propose to take these two grounds together because there is some overlap in relation to the ISW's report.

19. In her decision letters, the respondent accepted that the first appellant had been physically abused and that the second appellant had been sexually abuse by their stepfather in Nigeria prior to coming to the UK (see the respective DLs at paras 31-33 and 31-32 and 42-45). Ms Wigley submitted that it was not clear whether the judge accepted this and, therefore, took it into account. She accepted that at para 15 the judge had said that each of the appellants had had "issues with their stepfather abusing them…was not challenged". But, she submitted that in para 22 the judge's account of the second appellant's evidence somewhat understated what had happened when he said her stepfather "had

also started to show a sexual interest in her". Finally, in para 18, the judge had noted that Ms Wigley's (then) skeleton argument did not rely upon any future risk from the stepfather and so "it adds nothing to the substance of the appeal". Ms Wigley submitted that it was unclear, therefore, what the judge made of the accepted past abuse and whether he had factored it in under para 276ADE and outside the Rules under Art 8.

20. I have no doubt that the past abuse is a relevant factor, if supported by appropriate evidence, to the extend that it might impact upon the appellants mental health or well-being on return even if they were not claiming that there was an actual risk from their stepfather on return. It does not seem that the judge took this factor into account. Indeed, and this trespasses onto Ground (ii), when raised by the ISW in her report (at paras 8.333 and 9.23), the judge discounted that report on the basis, in essence, that the ISW did not have the expertise to express an opinion on the impact upon the appellants on return. As will become clear below, whilst that may be correct in relation to an diagnosis or medical assessment of impact, it is not in relation to their well-being including the kind of trauma that experienced social workers see and work with in their day-to-day work dealing with vulnerable children and young adults in situations of abuse etc. For present, the judge's approach raises a concern that he may not have accepted the past (conceded) abuse.

21. In substance, therefore, I accept Ground (i) identifies a failure by the judge to take into account a relevant factor given the particular circumstances of the appellants. Standing alone, it might not be sufficient to set aside the decision but, taken with my conclusions on Ground (ii), it adds to the weight of argument to set aside the decision.

22. Turning then to Ground (ii), the appellants relied on a very detailed and lengthy report by an ISW. This report undoubtedly, on its face, contained highly relevant evidence of the impact upon the appellants if returned to Nigeria. The judge dealt with the report at paras 26-27 as follows:

> "26. I note that there was reference to the mental health issues that OEF has faced in the report from Amanda De Leon Capdesuner, an Independent Social Worker ("ISW"). That report also describes the chronology of how the appellants came to be looked after by the local authority. She spoke to the appellants themselves as well as their father. The appellants' father told the ISW that his sister was in the UK, a fact that neither appellant mentioned or seemed to be aware of despite claiming that they were close to their father. The terms of reference of the ISW report are at pages 23-24 of her report.
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> 27. The ISW carries out an assessment of OEF's emotional well-being. Whilst this was done, I am satisfied, in good faith it is not a substitute for medical records, access to which I have not been given and indeed neither were they provided to the ISW. She is not a medical expert, I remind myself. The Adult Wellbeing Scale is a subjective test based on the answers provided by a patient which could then go on to be used by a mental health professional to form a diagnosis and prescribe accordingly. I am not satisfied that the scale is in anyway a substitute for a qualified medical opinion. Furthermore it is widely accepted that asylum seekers might suffer mental health issues by virtue of the process which they are undergoing. I am not satisfied that I can Appeal Numbers: PA/00499/2021 PA/00500/2021 8 accept the conclusion at

> 8.28 of the report regarding OEF and I equally am not satisfied that the ISW is qualified to conclude as she does at paragraph 8.33 (echoed at paragraph 9.23 for AOF) that: "it is evident that both Miss [OEF] and her brother have experienced significant physical and emotional abuse whilst in the care of her mother and step father". This is an opinion that only a qualified medical professional could/should offer, I find. The ISW does mention, with qualification regarding OEF's case, that both appellants have shown resilience in adapting to life in the UK despite some quite severe challenges presented by their father's abandonment of them five years ago. Neither appellant mentioned to the ISW a telephone call with their mother from December 2021 in which she mentioned facial scarring or FGM to them as ongoing threats despite the ISW closely examining the relationship that they had with their mother and their fears of facial scarring/FGM if returned to Nigeria. The report does conclude that the appellants are vulnerable and in need of support and guidance from professionals as care leavers and because of their past trauma. They rely upon each other to a great extent. The ISW reaches a conclusion that both appellants would suffer a detriment to their well-being if they are returned to Nigeria as they would lose support networks in the UK. At paragraphs 10.3.2 and 10.3.8, the ISW gives medical opinions upon which I place very little weight. The weight that I can attach to this report is also affected by the non-production of social services and medical records by the appellants' advisers and also by the repeated inclusion of opinions by the ISW upon matters where she is not qualified to give an opinion."

23. Ms Wigley submitted that the judge was wrong to interpret the ISW as going behind here expertise. As regards the past abuse, she was merely reporting something which the respondent, in any event, accepted. Further, it was perfectly proper for her to express opinions on the emotional impact and well being of the children given her extensive experience and expertise as a social worker. Ms Wigley drew my attention to a number of passages in the report in her skeleton argument. It suffices to set out paras 10.3.2 and 10.3.8 of the report:

> "10.3.2 With [the second appellant] my concerns focus on the level of trauma she experienced as a child and her current emotional and mental health. She doesn't present with the resilience at present to be able to deal with any forcible return and if this were to be the case, I would have concerns that she would potentially self-harm and that her mental health and wellbeing would spiral further, to the extent that she would not be able to function day to day.
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> ….
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> 10.3.8 It is my professional view that the emotional impact on [the first appellant] should he be forcibly returned would be significant and without the safety net he has around him currently and sense of familiarity he would struggle to adapt to life in Nigeria. Especially as he does not want to be there."

24. Ms Wigley submitted that the judge was simply wrong to discount her report on this basis as if she were not qualified to give opinions on these issues.

25. I agree with Ms Rushforth's submission that diagnosis of psychiatric conditions principally requires the expertise of a qualified psychiatrist (see, e.g. HA (expert evidence; mental health) Sri Lanka [2022] UKUT 111 (IAC)). However, social workers are also experts – in the care, well being and support of children and families, vulnerable adults etc. This fell within the ISW's expertise. That is why the statutory authorities with these responsibilities employ, and rely upon, social workers. In my view, the judge rather too readily discounted the ISW's report on the basis she was not an expert on the matters she raised upon the impact upon the appellants, given their history etc, on return to Nigeria. There was much relevant material in her report which the judge should have taken into account but did not. That evidence was so relevant to the assessment under para 276ADE and outside the Rules under Art 8 that the judge's findings on those issues are unsustainable in law; they cannot stand and must be set aside.

The other grounds

26. Given my view on Grounds (i) and (ii), it is not necessary to consider in any detail the merit of the remaining grounds. The remaining grounds are undoubtedly weaker. Grounds (iii) to (vi) reflect little more than a disagreement with the judge's assessment and do not obviously demonstrate a failure properly to consider a relevant factor. Ground (vii) probably fails to acknowledge the actual approach of the judge in his final paragraph (misnumbered a second [40]) applying an "unjustifiably harsh consequences" test (and looking for 'compelling circumstances') consistently with R(Agyarko) v SSHD [2017] UKSC 11.

Conclusion

27. However, for the above reasons and on the basis of Ground (ii) (and bolstered by Ground (i)), the judge erred in law in dismissing the appeal.

Decision

28. The decisions of the First-tier Tribunal to dismiss the appellants' appeals involved the making of an error of law. The decisions cannot stand and are set aside.

29. The decisions must be remade in relation to the appellants' Art 8 claims. None of the findings in respect of Art 8 are preserved.

30. However, the decisions and findings in respect of the appellants' asylum, humanitarian protection and Art 3 claim on health grounds were not challenged. They stand.

31. Having regard to the nature and extent of fact-finding required, and to para 7.2 of the Senior President's Practice Statement, the proper disposal of the appeals is to remit then to the First-tier Tribunal for a rehearing on the basis set out above before a judge other than Judge Clems.

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 March 2023