IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001984

First-tier Tribunal No: HU/57352/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27th September 2023
Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

ZAINAB SMITH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Tawiah, Counsel
For the Respondent: Mr E Terrell, Senior Home office Presenting Officer

Heard at Field House on 6 September 2023

DECISION AND REASONS

Introduction

1. The appellant, a national of Nigeria born on 12 May 1975 appeals to the Upper Tribunal against a decision of the First-tier Tribunal Judge Chinweze ("the judge") promulgated on 4 May 2023 to dismiss the appellant's appeal against the decision of the respondent dated 4 November 2021 refusing the appellant's application of 20 August 2020 for leave to remain on the basis of her private and family life.

Background

2. The appellant had arrived in the UK, it would appear clandestinely, on 1 December 2005. Her previous applications made in 2013 and in 2015 on the basis that she was stateless were refused by the respondent. In respect of the application which is the subject of this appeal the respondent did not accept that the appellant faced very significant obstacles to integration in Nigeria as she

retained social and cultural knowledge of the country having lived there until 2005 from 1980. The respondent further did not accept that the appellant's relationship with her adult siblings in the UK amounts to family life for the purposes of Article 8 ECHR and concluded that the refusal decision would not result in unjustifiably harsh consequences.

3. The judge in his findings set out from paragraph [26] onwards of the decision, considered the appellant's private life and was not satisfied that the appellant met the requirements of paragraph 276ADE(1)(vi), the judge being satisfied that the appellant would be able to integrate successfully on return to Nigeria.

4. The judge proceeded to consider Article 8 outside of the Immigration Rules, from [33] onwards. The judge considered the issue of family life but whilst he was satisfied that the appellant was close to her siblings, he was not satisfied that the relationship went beyond normal emotional ties and the judge considered **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**. The judge took into consideration the public interest.

5. The judge went on to consider the best interests of the appellant's nieces and nephews and took into consideration the case of **R (on the application of RK) v Secretary of State for the Home Department (Section 117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC)** (**RK)** and set out the headnote.

6. Whilst the judge accepted that the appellant's siblings' children had a close bond with the appellant and that the appellant looked after each of her respective sibling's children whilst their parents were at work, the judge took into consideration that the children lived with and were also looked after by their respective parents. He took into consideration that both parents retained parental responsibility for their own children. The judge was satisfied that the appellant did not have a parental relationship/role in the children's lives. The judge went on to find that it was in the best interests of the children to remain with their parents and that whilst there was an attachment to the appellant, any bond was not outweighed by the public interest in immigration control. Having considered all the factors the judge dismissed the appeal.

Grounds of Appeal to the Upper Tribunal

7. The appellant appeals to the Upper Tribunal with permission from the First-tier Tribunal on the following grounds:

(1) that the judge erred at [37] in concluding that there was no family life between the appellant and her brother or sister, particularly in light of the respondent's apparent acceptance in the refusal letter that there was 'a degree of family life';

(2) that the judge erred in concluding there was no family life between the appellant and her nieces and nephews;

(3) it was argued that the appellant's Article 8 assessment was flawed as it did not adequately take into account the nature of the relationship between the children and the appellant and the circumstances of the children living with a single parent and the grounds also referenced the wider public interest and criticised the judge's approach to proportionality;

(4) it was argued that the judge erred in his decision under paragraph 276ADE(1)(vi) specifically in his consideration of the appellant's brother's status, in failing to recognise that XXA, an endorsement in his travel document, is confirmation that he is stateless and also in erring in failing to engage with the fact that the appellant has no ties in Nigeria and would not be able to establish relationships in a meaningful way, having been absent from there for eighteen years.

Rule 24

8. The respondent lodged a Rule 24 response dated 16 June 2023 which argued that ground 1 was a misinterpretation of the Secretary of State's position in that there had been no concession that there was a protected family life and indeed it was agreed at the outset of the hearing, see [10] of the decision and reasons, that family life was a live issue which showed that the First-tier Tribunal properly considered the evidence in relation to family life and it was open to the judge to conclude that it was no more than the normal relationship between adult siblings.

9. The Rule 24 response referenced the judge's findings at [40] to [42] where he made findings on the relationship between the appellant and her nieces and nephews. The judge's conclusions it was argued were properly open to him. Although there was a close bond, he had regard to whether there was any degree of parental responsibility.

10. In relation to the issue of the appellant's statelessness it was argued that the judge's findings were made in the context of the Secretary of State's two refusals of the appellant's statelessness claims and the lack of supporting evidence regarding her pursuit of any appeal against the refusal of the French authorities to recognise her as a French national or any supporting evidence that she attempted to assert her claimed Nigerian nationality. It was open to the First-tier Tribunal to conclude that both these avenues remained open to the appellant.

Discussion

9. I have reminded myself of the authorities which set out the distinction between errors of fact and errors of law and which emphasise the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges. This was summarised by Lewison LJ in **Volpi & Anor v Volpi [2022] EWCA Civ 464** at [2] as follows:

"i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence

(although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

10. In the earlier case of **Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5** at [114]: the Court of Appeal similarly advised appropriate restraint in the approach to first instance decisions:

"i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
ii. The trial is not a dress rehearsal. It is the first and last night of the show.
iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

Ground 1

11. Whilst it is correct to say that the respondent in the refusal letter indicated, under the exceptional circumstances consideration in two paragraphs, that "whilst it is recognised you may enjoy a degree of family life" and "whilst you may enjoy a family life with your brother and sister" in respect of both the appellant's siblings and the appellant's nieces and nephews, the respondent's refusal went on to clearly state that "this does not constitute a family life for the purposes of Appendix FM".

12. There was no suggestion, either in the appeal skeleton argument (ASA) before the First-tier Tribunal or in the findings of the judge, that it was suggested/disputed in the First-tier Tribunal, that the respondent had made a concession in the refusal letter in relation to family life.

13. Indeed, the judge at paragraph [10] of the decision and reasons specifically set out at (ii) that he had discussed the issues in dispute with the parties and one of those issues still in dispute was "whether the appellant had a family life with her siblings for the purposes of Article 8 of the ECHR". I am satisfied that such a discussion would necessarily have included consideration of whether family life existed between the appellant and her nieces and nephews.

14. It is not open to the appellant now to raise an issue which was not in dispute before the First-tier Tribunal. In any event, I am satisfied the grounds are misconceived as the respondent was acknowledging in the refusal letter that there are family relationships but that these did not constitute a family life for the

purposes of either the Immigration Rules or by extension Article 8 outside of the Immigration Rules.

15. Ground 1 went on to dispute the judge's findings including where the judge stated at [37] that "the appellant's brother and sister did not in their evidence refer to providing the appellant with financial support" whereas the appellant relied on the fact that the appellant's brother in a statement that was before the First-tier Tribunal, confirmed that he supported the appellant with "day-to-day living expenses" and that evidence was not challenged at the hearing.

16. However, I note that the letter referred to from the appellant's brother, at page 32 of the respondent's bundle before the First-tier Tribunal was dated 5 March 2019, four years before the hearing before the First-tier Tribunal. The judge was correct in his findings that the appellant's brother and sister in their evidence before him at the date of decision, made no reference to the appellant's siblings currently providing financial support to the appellant. The judge was entitled to reach those findings. There was no material error in any failure to specifically cite the 2019 letter from the appellant's brother where he referenced providing day to day living expenses at that date (and I note the judge also recorded in oral evidence at paragraph [17] that the appellant was supported by her brother) which the judge will have considered in the round.

17. The third limb of ground 1 argued that the judge erred in ignoring the evidence, that due to both the brother and sister being single parents the appellant split her time during the week between the two households. The judge was fully aware of that evidence, including as he recorded the oral evidence, at [17] that the appellant spent weekends with her brother and weekdays with her sister. The judge was entitled to take into consideration, indeed was required to, the holistic circumstances in determining whether or not there was something beyond emotional ties between the appellant and each of her siblings. The fact that she did not live full-time with either of the siblings, for whatever reason, was a relevant factor.

18. Fourthly, it was argued that the judge did not take into account the evidence of Mr Smith, the appellant's brother, in relation to his wife passing away and the help provided by the appellant. Again, it is clear from a proper consideration of the judge's decision that he took into account all of the evidence before him. At [20] and [21] the judge set out the oral and written evidence from Mr Smith, which included that his wife had died of cancer, having set out the same from the appellant's sister.

19. It is evident from the judge's findings including at [22] where he stated that he also took into account the positive character evidence from additional letters that he carefully took into account all of the evidence before him. He then proceeded to reach his findings including that although he was satisfied that the appellant was close to her siblings [37], the judge was satisfied that the appellant stayed with her brother and sister not because of the relationship she had with them beyond normal emotional ties but rather because she was unable to work or rent a property.

20. There was no specific challenge to that finding in relation to the appellant choosing to live with her siblings because she was unable to work or rent a property. Again, it was open to the judge to take that into consideration in the round and the judge also considered that in his findings that the evidence did not establish that her siblings were dependent on the appellant emotionally, or on

health grounds or that the appellant was dependent on them. Therefore, whilst he accepted that there was a close relationship it was open to the judge, taking into account the relevant jurisprudence including **Kugathas**, to find that the relationship did not go beyond normal family ties.

21. Similarly, whilst it was argued that the appellant's sister, who was not cross-examined, had set out her relationship with the appellant and it was again argued that the judge failed to take into consideration the specific circumstances, including that the appellant's brother had lost his wife and the appellant's siblings were single parents, there is no merit in that submission which amounts to a disagreement with the findings of the judge, which are both reasonable and adequate, that there was nothing beyond normal ties and the judge had correctly directed himself that what had to be established was real, or effective or committed support. No error of law material or otherwise is established in ground 1.

Ground 2

22. The appellant also disputed the judge's reasoned conclusion that there was no family life between the appellant and her nieces and nephews, despite it being argued that the appellant had taken on a role of a parent and despite the children not having both parents.

23. The judge's comprehensive decision reveals that he was fully aware of the circumstances of the family generally, having set this out in considerable detail from [11] to [23] of the decision, in relation to both the appellant's circumstances and that of her siblings and her nieces and nephews.

24. Whilst it was apparent the appellant wanted the judge to make a finding that the appellant had a parental relationship in respect of both her brother's and her sister's children, ultimately it was open to the judge to conclude that this was not the case.

25. The appellant argued in the grounds of appeal that the judge had not adequately engaged with the evidence. It was argued that the judge's findings in relation to **RK** were irrational and erroneous for failing to apply the proper test and that the judge's reasoning at [41] was flawed in that the fact that the children were sometimes looked after by their biological parents would not negate the appellant playing a parental role.

26. That is to misstate the judge's findings. The judge at paragraph [41], having considered and set out the headnote of **RK** at [40] which indicated including that whether a person who is not a biological parent is in a "parental relationship" with a child for the purposes of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, depends on individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent. The judge found as follows at [41]:

> *"I accept the children of the appellant's siblings have a close bond with the appellant and that she looks after them whilst their parents (who are both single) are at work. However, the appellant's sister's children are looked after by their mother at weekends when the appellant is at her brother's house and her brother looks after his children during the week when the appellant is at her sister's. Both parents retain parental responsibility*

for their children. I am satisfied that the appellant does not play this role nor has she stepped into their parental, 'shoes'."

27. Whilst the judge's findings might have been better expressed, in criticising the wording of [41] the appellant is very clearly asking the Upper Tribunal to 'island hop'. The judge was not saying that the appellant had not stepped into parental shoes because both parents retained parental responsibility. The judge was fully aware, including in his consideration of **RK** summarised in the previous paragraph, that a parental relationship was a possibility for a person who is not a biological parent.

28. However, what the judge was saying, having considered all of the evidence in this case, including (but not limited to the fact) that both parents retained parental responsibility for their own children (and the judge took into account that their parents looked after their own children, who lived full time with their parents, for part of the week), was that he was not satisfied that in this particular case that the appellant had stepped into parental 'shoes', albeit that she did childmind for the children when their respective parents were at work.

29. The fact that each of her siblings were single parents and that her brother was a recent widower (which the judge had noted in the decision and took into account) was insufficient in this case in the judge's adequately reasoned finding, to establish that the appellant had a parental relationship with any of her nieces and nephews.

30. No material error of law has been made out in respect of ground 2.

Ground 3

31. It was argued in the written grounds (although limited submissions were made before me on ground 3) that the Article 8 proportionality assessment was flawed. This amounts to no more than a disagreement with the judge's reasoned proportionality assessment. Those findings were open to the judge and properly argued and cannot be said to be either inadequate or unreasonable.

32. Whilst the judge may not have carried out the balance sheet exercise as recommended by the Supreme Court in **Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60** to fail to do so is not an error of law in itself and is only one way of structuring the proportionality assessment.

33. The judge whilst he found that the appellant did not have a parental relationship with her nieces and nephews, took into account that they had a close bond with the appellant. The judge found that it was in the best interests of the children to remain in the UK with their parents and was not persuaded that the desire to maintain the bond with the children outweighed the public interest in immigration control.

34. The judge properly took into account all the relevant factors in a holistic assessment having found that family had not been established (and although the submission criticised the judge's approach to considering the whole family, at [33] the judge properly directed himself that he must consider not only the applicant but the whole family (**Beoku-Betts v SSHD [2008] UKHL 39)**). Relying on those findings and his findings in respect of the children, the judge went on to consider the section 117B, Nationality, Immigration and Asylum Act

2002 factors, and was not satisfied that there were any factors in the appellant's case (and the judge had already dismissed the appellant's appeal under the Immigration Rules and section 117B reminds that the maintenance of effective immigration controls is always in the public interest) which were sufficiently strong to outweigh the public interest. No error is disclosed.

Ground 4

35. It was argued that the judge's approach to 276ADE(1)(vi) was flawed, in that it failed to consider the practicality of removal in the absence of a passport and in failing to recognise the appellant's brother's statelessness when his nationality was endorsed in his travel document as "XXA" and failed to engage with the appellant's lack of ties in Nigeria.

36. The judge reached his findings in the context of the Secretary of State's two refusals of the appellant's statelessness claims which the judge referenced in his findings together with the lack of supporting evidence regarding the appellant's pursuit of any appeal against the refusal of the French authorities to recognise her as a French national or any supporting evidence that the appellant had attempted to assert her claim to Nigerian nationality. There was no error in the judge's conclusion that both these avenues remained open to the appellant.

37. The grounds also suggested, at paragraph 16, that the respondent must show that the appellant is removable to a particular country. However, the judge was not considering a removal decision. Rather, it was for the appellant to demonstrate that there were very significant obstacles to the appellant's integration in the country of return, and the grounds of appeal conceded that the judge considered the correct test at [26].

38. It was open to the judge to reach the findings he did that the appellant had not established that there were such very significant obstacles to the applicant's integration to Nigeria for the reasons that the judge gave from [27] to [32]. The assertion that the judge failed to engage with the appellant's absence from Nigeria for a lengthy period, is plainly wrong, with the judge considering this at [28] and [32]. The judge at [30] rejected the submission that her brother's document with XXA designation, supported the appellant's claim that she was stateless, as she and her brother were born in similar circumstances.

39. The judge was not saying that it was not accepted that the appellant's brother did not have a passport that might have indicated statelessness. Rather the judge noted that he did not have information about the reasons for the brother's travel document in the form it appeared and noted that there were differences in his circumstances in that he was married with two children when he had the travel document, whereas the appellant was always single. In addition, the judge took into consideration that the appellant's brother's immigration history was unknown, whereas the appellant had had two applications for leave to remain in the UK on the basis of statelessness rejected.

40. What the judge found therefore at [30], was that the totality of the evidence including the evidence of the appellant's brother passport, was insufficient to establish that the appellant was stateless, given all the other factors.

41. No error of law material or otherwise is established.

Conclusion

42. The decision of the First-tier Tribunal does not contain an error of law and shall stand. The appellant's appeal is dismissed.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 September 2023