Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19778/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 August 2019	**On 4 September 2019**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS TANIA NKECHI AGBARA
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:
For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Mr C Mahfuz, Counsel instructed by Global Solicitors & Advocates

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Colin Chapman promulgated on 25 April 2019 allowing the claimant's appeal against the decision of the Secretary of State of 12 September 2018 to refuse her application for leave to remain on the basis that EX.1 did not apply and there were no insurmountable obstacles to family life continuing outside the UK.

2. Permission to appeal was granted by First-tier Tribunal Judge Rai on 24 June 2019 on the basis that it was arguable that the First-tier Tribunal Judge failed to provide adequate reasons why the claimant would face a kidnapping risk and failed to consider the Foreign and Commonwealth Office (FCO) advice and whether, if followed, the advice would be able to overcome the kidnapping risk.

3. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside. For the reasons set out below, I find there was an error of law of sufficient materiality to require the decision to be set aside and remade.

4. Mr Avery points out that the judge's decision appears to be based upon reliance on what is said to be FCO advice and that provides the support for the finding in relation to insurmountable obstacles; I was referred to paragraphs 57 to 65 of the decision where the judge concludes that it would not be safe for the sponsor as a British citizen to go to Nigeria. The judge considered submissions that the FCO advice did not apply to all areas of Nigeria but referred to section F of the appellant's bundle, said to be the published policy security information about abductions in Nigeria. I do not know what the date of that was but Mr Mahfuz has produced today an up-to-date extract of the same advice. It was submitted to the judge that the FCO advice was not reliable objective evidence to show that the sponsor would be targeted. The judge relied on the principle that Home Office guidance should normally be followed; that point has been made to me today by Mr Mahfuz in submissions. However, the case he relies on, SF and Others (guidance post 2014 Act) Albania [2017] UKUT 00120 (IAC), is about a different issue. In that case the Albanian appellants relied on the Home Office's guidance as to whether it will be reasonable to expect a British citizen child to leave the UK, and the court concluded that the Tribunal ought to take the Secretary of State's guidance into account, if it points clearly to a particular outcome in the instant case, so that consistency be maintained between those cases that do and those that do not come before the Tribunal.

5. The point made by Mr Avery in this regard is that is not the same situation as FCO travel advice which he points out is advice of caution aimed necessarily at the lowest common denominator, largely applicable to tourists. It is true to say that the document put before the judge from gov.uk said that there was a high threat of kidnap throughout Nigeria but reading the document further it is clear that the risks that were referred to are geographically located, primarily in the Niger Delta. Apparently some 117,000 people from the UK visit Nigeria each year. The complaint of the Secretary of State is that there was no proper risk assessment and the judge gave undue weight to the FCO travel advice to reach a conclusion that was unbalanced. I agreed with that submission.

6. Of concern also is paragraph 61 of the decision. There, the judge appears to have done something of his own research in citing a paragraph from FCO travel advice referring to a link and a paragraph that is set out headed, "When we advise against foreign travel". Mr Mahfuz and Mr Avery have been unable to find what it was the judge was actually looking at but it certainly was not material put before the Tribunal; it was not part of the evidence. The judge appears to have done his own internet research on the matter.

7. Further, at paragraph 62 the judge says, “The latter sentence of this extract adds weight to the assessment provided in travel advice that the risk of British nationals in Nigeria is at a high level” but the last sentence of the quotation cited refers to terrorism and states, “In the case of terrorism we will only advise against travel in situations of extreme and imminent danger where the threat is sufficiently specific, etc.” It is not clear what the judge was referring to. Mr Mahfuz referred me to a sentence earlier in the extract which states:

> “We sometimes advise against all travel on all but essential travel to a particular place. In cases of non-terrorist threat like coups, civil unrest or natural disasters we advise against travel only when we consider the risk to British nationals is unacceptably high.”

It does not mention kidnapping. It appears that the judge was unduly swayed by this extract, derived from information that he discovered apparently after the hearing so that it was not able to commented upon by either parties’ representatives.

8. Looking at the evidence as a whole, whilst there are certainly risks in particular areas, they are largely in relation to tourists whereas the appellant is not a tourist but a person who has lived in Nigeria for most of her life and in any event she would not be returning to an area where the risks are said to be higher.

9. In the circumstances I find that the conclusions of the judge in relation to both the appellant and her partner as to insurmountable obstacles are not properly assessed, somewhat unbalanced and rather one-sided. There was in fact no evidence to show there was any significant risk to someone such as the appellant. In the circumstances, I conclude that the Tribunal did not properly or adequately engage with the insurmountable obstacles test and therefore the decision is flawed for error of law, cannot stand, and must be set aside to be remade.

10. Where a decision of the First-tier Tribunal has been set aside, Section 12(2) of the Tribunals, Courts and Enforcement Act requires either the case is remitted to the First-tier Tribunal with directions or it must be remade by the Upper Tribunal. The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the functions of primary fact-finding to the Upper Tribunal. Where there is an error such as that in the present case, there has not been a valid determination of the issues.

11. In the circumstances and at the invitation and request of both parties to re-list this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President’s Practice Statement at paragraph 7.2 and therefore it is appropriate to remit this appeal to the First-tier Tribunal sitting at Birmingham for it to be determined afresh.

Signed

Upper Tribunal Judge Pickup

Dated 28 August 2019

Consequential Directions

1. The appeal is remitted to the First-tier Tribunal sitting at Birmingham.
2. The appeal is to be decided afresh with no findings of fact preserved.
3. It may be listed before any First-tier Tribunal Judge with the exception of Judge Chapman and Judge Rai.
4. The estimated length of hearing is three hours.
5. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated indexed and paginated bundle with all objective and subjective material together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal is unlikely to accept materials submitted on the day of the appeal hearing.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 13 in the Tribunal Procedure Rules 2014. There has been no application and in the circumstances I do not make an anonymity direction or order.

To the Respondent
Fee Award

In the light of my decision I make no fee award because the acumen appeal remains to be decided in the First-tier Tribunal.

Signed

Upper Tribunal Judge Pickup

Dated 28 August 2019