Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02054/2019
HU/02036/2019

THE IMMIGRATION ACTS

Heard at Manchester
On 11 August 2020 via Skype

Decision promulgated
On 19 August 2020

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AMINAT SALIU
HIMAMAT SALIU
(Anonymity direction not made)

Appellants

and

ENTRY CLEARANCE OFFICER – UK VISA SECTION

Respondent

Representation:
For the Appellant: Mr J Frost instructed by Migrant Legal Project (Cardiff)
For the Respondent: Mrs R Pettersen Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. On 21 August 2019 First-tier Tribunal Judge Lloyd ('the Judge') dismissed the appellants' appeals on human rights grounds against the refusal of an Entry Clearance Officer (ECO) to grant them leave to enter the United Kingdom to enable them to join their mother in the United Kingdom.

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2. Permission to appeal was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by a judge of the Upper Tribunal on the basis it is said the Judge failed to have regard proper regard to the findings of another judge, Judge Osbourne, in the successful appeal of the appellants sponsor.

Background

3. The appellants are citizens of Nigeria born on 5 September 1997 and 17 September 1999, respectively. They applied for leave to enter the United Kingdom to join their mother who is their sponsor. As both appellants are over 18 years of age they cannot meet the requirements of paragraph 352D of the Immigration Rules and so relied upon an ability to demonstrate exceptional circumstances or compassionate factors which justified a grant of leave outside the Rules.

4. The Sponsor was granted refugee status in the United Kingdom following a successful appeal before First-tier Tribunal Judge Osborne on 30 October 2017. The Judge notes in her appeal the Sponsor claimed she was forced to leave Nigeria in 2012 as a result of long-term domestic abuse perpetrated against her by her husband. The Sponsor took her two youngest children with her but left the two elder children, the appellants', with her husband. Judge Osborne accepted her account of domestic abuse was credible and that she had been trafficked out of Nigeria.

5. The Judge records the issues in this appeal from [8] noting the exceptional circumstances relied upon by the appellants which were:

a) their immediate family, including siblings under 18, qualify for family reunion and have already travelled to the UK
b) they will be left alone in a dangerous situation.
c) They are dependent on immediate family in the country of origin and not leading an independent life.
d) There are no other relatives to turn to and they would therefore have no means of support and would likely become destitute if they remained in Nigeria.

6. Having had the benefit of not only the documentary evidence but also seeing and hearing the Sponsor give oral evidence together with that of a Mr Bakari the Judge sets out his findings of fact from [28] of the decision under challenge.

7. Those findings can be summarised in the following terms:

i. The evidence given by the Sponsor, her uncle Mr Bakare together with the letter from Mrs Olasunbo was not credible and contained a contrived account of the acute mistreatment of the appellants in Nigeria as a means of supporting an 'outside the rules' application [28].
ii. The Judge did not believe the appellants would have been placed in the care of the Sponsor's ex-husband and his family if

what the Sponsor was saying was true as the prospect of mistreatment must have been known to the Sponsor at that time. [29].

iii. If the Sponsor was aware that the consequence of leaving the appellants, who at that time were children, would have resulted in them being exposed to abusive treatment, the Sponsor would never have left them in her ex-husband's care. If the appellant had been in the dire circumstances the Sponsor suggests she would have taken action to make alternative arrangements for them in Nigeria long before her asylum claim was granted and the subsequent application made outside the Rules [29].

iv. The fact the applications were left until the appellants were over 18 is indicative of the fact the circumstances were not treated with any urgency at all [30].

v. To the relevant civil standard the Judge finds the appellant's former husband as being in agreement that their daughters shall join their mother in the United Kingdom. The Judge did not believe the evidence given by the Sponsor that her ex-husband had made repeated telephone calls to them putting them under pressure to return to him, as if they were so afraid of him they would not have answered his call. The scenario that Mrs Olasunbo had invited them to answer their father's calls was found not to be believable [31].

vi. The Judge did not accept the appellants are in circumstances of destitution and vulnerability in Nigeria [32].

vii. The Judge does not dispute that First-tier Tribunal Judge Osborne found the Sponsor credible in her asylum claim and to have suffered prolonged abuse by her husband, but it was not found axiomatic that the appellant's claims to have suffered abuse from their father and paternal grandmother are true. The Judge finds this appears to be the starting point of the proposition which is made on appeal in the context of the appellants application to join their mother in the UK outside the immigration rules [34].

viii. The Judge does not find objective evidence provided by the appellant's representative compatible with the findings the Judge had made on the evidence presented by the sponsor and other witnesses [35].

ix. The appellants own evidence in a statement of 25 June 2019 was they had left their father's house because of their grandmother as their father was always travelling away and their grandmother was head of the household. The Judge finds the level of abuse suggested to have been inflicted on them by the grandmother not corroborated by anything before the First-tier Tribunal. The Judge does not accept there is any corroborated evidence that their father gave their grandmother money which was intended for their support but which was not used for that purpose. There was also no corroboration to support the claim their father would flog them when they he

returned home because of accusations by their grandmother that they had insulted her and said bad things to her [36].

x. The Judge accepts it is a matter of judicial record that the sponsor and her former husband had a toxic relationship and the reasons for its breakdown and notes the appellant's appeal is predicated on the assumption that because the relationship between the Sponsor and appellants father was toxic so must be their relationship with their father and in turn their grandmother. The Judge does not accept this proposition and did not accept that the country information recording that domestic violence in Nigeria cannot be defined exclusively to be violence between husband and wife automatically applied to the present appeal as that was not one that was supported by the evidence placed before the Judge [37].

xi. The Judge notes reference to an expert report of Mrs Thullesen which was relied on by the Sponsor in her asylum appeal. The author is said to be an expert in psychotherapeutic intervention with victims of trafficking. The Judge does not find the appellants reliance placed upon the report in the context referred to in the citation set out at [38] of his decision is sustainable for the purposes of this appeal [39].

xii. The Judge does not accept the appellants are financially and emotionally dependent upon the Sponsor, rejected the submission the appellants were living on borrowed time in their current accommodation, it was not accepted the appellants cannot safely or reasonably returned to the care of their father, it was noted both appellants are adults, and the Judge finds the Sponsor was deliberately vague about their level of educational qualifications for if they had been educated to at least high school level it was probable that they would have obtained some basic qualifications that would fit them for employment and therefore regular earning in Nigeria [40].

xiii. The Judge finds the Sponsor's brother lives in Nigeria but there is no effective corroboration of the claim the brother was forced to leave Ibadan due to threats from the Sponsor's former husband [41].

xiv. The Judge does not accept the refusal of the application will constitute a disproportionate interference with the appellant's article 8 rights [42].

xv. The facts do not engage paragraph 352D of the Immigration Rules [44].

xvi. On the totality of the evidence it is not a case of exceptional circumstances and the evidence did not support a finding that Article 8 is engaged; for the reasons set out by the Judge in the decision as a whole [45].

Grounds and submissions

8. The appellant asserted the Judge erred in law relying on four grounds.

9. Ground one asserts a failure to take adequate account of relevant evidence, asserting the credibility findings of Judge Osborne constitute substantive corroboration of the appellant's claims yet there was no evidence the Judge treated them as such. The grounds assert this treatment perpetrated by the appellants father is what is corroborated in the determination of Judge Osborne in the context of the Sponsor's asylum claim. This grounds asserts the Judge downplayed the history of sexual and physical abuse suffered by the Sponsor. The finding of the Judge the Sponsor would have not left the children with her ex-husband is said to be infected by arguable error as Judge Osborne already found the sponsor's claim to be credible with regard to domestic abuse perpetrated against her which is relevant to the Sponsors evidence that she was forced to leave the appellants behind when she fled with her two younger children due to lack of space at her initial refuge. It is said there was never a suggestion this was her choice to place them in the care of their father. The grounds assert that against the domestic background was not only the Sponsor's own history of abuse but other factors, namely the absence of the appellant's father for long periods of work which meant it was plausible and credible that the appellants should gradually become a target of serious domestic abuse. The grounds assert there was no suggestion that Mr Bakare's evidence in relation to the central issue of alleged domestic abuse suffered by the appellants was ambiguous and inconsistent and that the Judge's assessment fails to give due regard to Judge Osborne's earlier findings that this was an honest witness. The grounds assert the Judge only paid "lip service" to the previous relevant findings and failed to take previous findings into account that corroborated the plausibility and credibility of the appellants claims, and as such failed to take the required holistic approach when evaluating the appellant's human rights claim.

10. Ground 2 asserts a failure to give reason/speculative reasoning as asserted at [37] in which the Judge finds the evidence before that Tribunal tended to show that the UNICEF 2015 report on domestic violence was not applicable to the present case. It is said the implied reasoning based on an argument in the determination is that Judge Osborne's findings are to be relativised to the point of irrelevance. It is asserted the Judge's reasoning is materially defective. The grounds also assert the Judge gives no reason for finding at [39] that reliance upon a key aspect was "an evidential step too far". It is also asserted the findings in relation to the telephone calls said to have been made by the appellant's father are speculative with no reasons being given for why that was not a believable scenario. It is also asserted the telephone was only answered on one occasion contrary to the Judge's findings at [31].

11. Ground 3 asserts the Judge failed to give anxious scrutiny to factors telling in the appellant's favour.

12. Ground 4 asserts a misdirection on the evidence leading to an unlawful finding that Article 8 ECHR is not engaged as it is said that the approach to the evidence failed to give proper regard to the findings of Judge Osborne in the previous determination of the

mothers protection claim and that as a recognised refugee who was forced by circumstances to leave behind her two older children article 8 is plainly engaged and that continued enforced separation of the appellants from their mother is a disproportionate interference with article 8.

Error of law

13. Mr Frost's oral submissions relied upon the grounds of appeal summarised above, with additional reference to the evidence of Mr Bakare, an assertion there was no conspiracy to bring the children over, and the Judge failed to consider the history of domestic violence and the account of what Mr Bakare had seen on a visit to Nigeria.

14. Mrs Pettersen was invited to respond in which she asserted [22] in relation to the submissions and comments concerning Mr Bakare's evidence answered this criticism, in which the Judge writes:

> 22. Mr Bakare's evidence has been ambiguous and inconsistent. In a post-hearing written submission of 15 August 2019, from Mr Frost, of Counsel, and for which I had given no formal leave, Mr Frost observed that during the hearing Mr Bakare appears to have "one or two memory lapses". He was indeed very unsure in his recall of quite significant events relevant to the Appellants' cases. Mr Bakare remarked during his evidence that "at his age" he found it difficult to remember details. Age is of course relative. Mr Frost somewhat belatedly submits that any lapses ought not to undermine Mr Bakare's or the Sponsor Ms Saliu's, overall credibility. In particular, Mr Bakari stated in evidence that he first met Ms Saliu in the UK in 2016, whereas Ms Saliu stated that that it was 2014. Mr Frost says that he should have pointed the Tribunal to the letter/character reference from Mr Bakare dated 3 September 2014 (at AB/A210), showing that they did indeed establish contact however, the flaws in Mr Bakare's evidence are more troublesome to credibility than that.

15. The Judge specifically deals with Mr Bakare at [24] in the following terms:

> 24. I do not believe that Mr Bakare's evidence is reliable. I do not dispute that he has visited Nigeria on a fairly regular basis, and that on his last visit, in June/July 2019, he went to the home of Mrs Olasunbo where the Appellants were staying. On a previous occasion in 2018, he met the girls at a hotel in Lagos. His recall of his visits to Nigeria and meetings with the Appellants are very vague. He cannot remember with any accuracy what gifts he delivered to them from the Sponsor, although she purports to give evidence of what she had handed to her uncle to take to Nigeria. In response to a question about whether Mr Bakare had ever taken gifts to Nigeria for the sisters from their mother, Mr Bakare stated that on one visit he took a mobile phone. When Mrs Saliu was questioned earlier in the hearing, she had not mentioned this phone. I am not prepared to admit in evidence "retrospectively" what Mr Bakare is now said (by Mr Frost) to have recalled, in conference after the hearing even if it assisted - which I do not believe it does. Namely, that it was in fact Mr Bakare himself who had taken the initiative to purchase this phone. The Sponsor had nothing directly to do with it. I acknowledge that both mentioned the gift of some clothes on a recent visit.

16. Even if Mr Bakare was found by Judge Osborne to have given credible and reliable evidence when that appeal was heard and the decision promulgated on 30 October 2017 that did not prevent the Judge

from making his own assessment of the credibility of that witness at the hearing on 15 August 2019. No legal error material to the Judge's findings in relation to the reliability of this witness has been made out.

17. There is no merit in the submission made by Mr Frost that the Judge's approach this appeal from the start was on the basis of there being a conspiracy between the sponsor and the witnesses to try and secure the appellants entry to the United Kingdom, which is suggestive of the Judge not having an open mind to the merits of the appeal. The Judge was arguably entitled to come to such a conclusion if that was one reasonably open to him having considered the evidence in the round and balancing up the competing interests.

18. There is also no merit in the argument that the Judge somehow attempted to devalue the sponsors experiences at the hands of her ex-husband in Nigeria when he describes the sponsor having been involved in a toxic relationship. Mr Frost's suggestion that this grossly undervalued the sponsors experiences is not made out. The Judge was not required to set out findings in relation to each and every aspect of the evidence and would have been criticised as he set out verbatim paragraphs of Judge Osborne's decision in which the positive findings were made in relation to the sponsors experiences at the hands of her ex-husband in Nigeria and of her being trafficked the United Kingdom. A toxic relationship a relationship characterised by behaviour on the part of the toxic partner that can be emotionally and, not infrequently, physically damaging to their partner. The Judge's use of the term "toxic relationship" appears to accurately reflect the behaviour experienced by the sponsor which was both controlling and violent. No material legal error is made out on this basis.

19. At [29] Judge finds:

> I do not believe that the Appellants would have been placed in the care of the Sponsors ex-husband and his family, including his mother. If what the Sponsor says were true, the prospect of the mistreatment must have been known to the sponsor at the time. I conclude that the circumstances of her leaving her former husband and fleeing to the UK were such that if she had thought that his abusive treatment would extend to his two daughters she would never have left them in his care; and more especially for so long a time. It is in my view no explanation for the Sponsor to say that she did not think that the process of her securing asylum in the UK would take so long. If the Appellants had been in the dire circumstances which she suggests, or if she had even feared that might happen, she would and could have taken action to make alternative arrangements for them in Nigeria long before her asylum was granted, and the subsequent application was made outside the rules.

20. The Judge is criticised for this finding on the basis that the material considered by Judge Osborne indicated the Sponsor had been subjected to ill-treatment and domestic abuse and had to flee for her own safety and was unable to take the appellants with her. Even if that is so that does not explain error in the Judge finding that if the sponsor was aware of ill-treatment being suffered by the children she did nothing to remove the children from that environment and to arrange alternative carers for them, as she did subsequently. As

noted by Mrs Pettersen when the application was made for leave to enter the United Kingdom for the purposes of settlement on 17 May 2018, the appellants were still living with their father with regular contact with their mother. They only moved to their current address following the refusal by the ECO. The visa applications show both have access to a mobile phone and Gmail accounts too. The application form at Part 8 also asks for an applicant to set out any additional information they wish to be considered as part of the application being relied upon the application yet there is no reference any incidents of violence or abusive treatment having been suffered by either applicant.

21. In the refusal notice the ECO writes :

> You have provided a letter from Migrant Legal Project, who have made representations on your behalf, stating the exceptions do apply to your circumstances. However, I am not satisfied that you have provided adequate evidence to demonstrate this is the case.
>
> I understand you to remain living with your father who I believe you have lived with since birth. Whilst I accept that the circumstances of your mother's departure from Nigeria and her subsequent claim for leave to remain in the UK on the basis of her relationship with your father, there is nothing to suggest you are in any danger from him. Your mother left you in his care when she departed Nigeria and has maintained contact with you since then. I am therefore not satisfied you are in a dangerous situation in Nigeria.
>
> You state you remain dependent on immediate family members. You live with your father and are financially supported by your mother. You have not provided any evidence to suggest that this arrangement cannot continue or that should this change you would be unable to find paid work and live independently from your father. Therefore I am not satisfied you would likely become destitute on your own or that you have no means of supporting yourself.

22. The appellants were granted a right of appeal which they exercised. The grounds of appeal were considered by a reviewing Entry Clearance Manager (ECM), in accordance with normal procedure, who wrote:

> Based on the refusal notice and the additional documentation submitted, I am satisfied the original decision to refuse was correct. The decision is therefore in accordance with the law and the Immigration Rules and I am not prepared to exercise discretion in the appellant's case.
>
> The evidence submitted with the appeal does not address the issues raised in the reasons for refusal letter. The appellant was 20 years old at the time of application and therefore does not meet the requirements of the rule.
>
> It is noted the appellant has been living with her father in Nigeria since birth. No suggestion has been made as to why with the financial assistance from her mother, the appellant cannot continue to reside in Nigeria. Therefore the appellant does not qualify outside of the Rules.
>
> I have considered, under paragraphs GEN 3.1. and GEN 3.2 of Appendix FM as applicable, whether there are exceptional circumstances in the appellant's case which could or would render refusal of breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for the appellant or the appellant's family. In completing this assessment I have also taken in to account,

under paragraph GEN 3.3 of Appendix FM, the best interests of any relevant child as a primary consideration. Following a thorough assessment of the appeal I am satisfied that there is no basis for such a claim.

23. Those reasons apply to both appellants who were over the age of 18 at the date of the applications.

24. Notwithstanding the lack of evidence having been recorded by both the ECO and ECM in relation to the appellants claims the Judge's finding is that same situation existed when he considered the evidence made available.

25. The Judge was clearly not satisfied the appellants had made out their claim. The specific claim by the appellants that they are in circumstances of destitution and vulnerability in Nigeria was specifically rejected by the Judge at [32].

26. The Judge was not oblivious to the findings of Judge Osborne as noted at [34].

27. Mrs Pettersen submitted that if the alleged risk to the children was as claimed it was reasonable to have expected the sponsor to have referred to the same in her asylum claim in 2017, yet she did not.

28. Mr Frost, in his reply, submitted that even if there was a lack of evidence of certain issues before the Judge the finding and evidence from the sponsors case should have been accepted as having 'plugged the gap' and that, accordingly, the only decision open to the Judge was to have allowed the appeals.

29. The decision of Judge Osborne was a decision of a relative not of the appellants. The Devaseelan principles, as modified, are relevant. It is not made out the Judge did not take this as a starting point but the same is not determinative as no findings were made in relation to these appellants in the decision of Judge Osborne which required the Judge to assess the evidence he received and make findings he considered were open to him on the evidence. This is not a case in which the findings of Judge Osbourne are conclusive so far as the appellants are concerned. The ECO note lack of evidence of ill treatment by their father and grandmother, yet this was not remedied before the Judge.

30. The findings are adequately reasoned, and it has not been shown are outside the range of findings open the Judge on the evidence.

31. The finding in relation to Article 8 has not been shown to be one not available to the Judge on the evidence either. Whether family life recognised by Article 8 exists is a question of fact. No material legal error arises in the finding there will be no breach of Article 8 ECHR.

Decision

32. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

33. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…
Upper Tribunal Judge Hanson
Dated the 13 August 2020