IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004592

First-tier Tribunal No: HU/00118/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 10th of January 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Secretary of State for the Home Department
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Oluwafunke Abike Ajayi
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms S. McKenzie, Senior Home Office Presenting Officer
For the Respondent: In person

Heard at Field House on 27 November 2023

DECISION AND REASONS

1. By a decision promulgated on 19 September 2023, First-tier Tribunal Judge Hussain ("the judge") allowed an appeal brought by the appellant before the First-tier Tribunal, a citizen of Nigeria born in June 1982, against a decision of the Secretary of State dated 20 December 2021 to refuse her human rights claim. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge S. Aziz.

3. Although this is an appeal brought by the Secretary of State, for ease of reference I will refer to the appellant before the First-tier Tribunal as "the appellant" in these proceedings.

Factual background

4. This matter has a relatively lengthy procedural background, but the underlying issues are straightforward. The appellant was granted leave to enter as a Tier 4 dependent partner from 23 January 2020 to 20 May 2021. On 8 May 2021, she made a human rights claim to the Secretary of State in the form of an application for leave to remain made on the basis of her relationship with her unmarried British partner and his children, Adekanmi Awotidebe, having divorced her previous partner for reasons I need not outline here.

5. The human rights claim was refused and the appellant appealed to the First-tier Tribunal. Her appeal was allowed by First-tier Tribunal Judge Suffield-Thompson by a decision dated 12 May 2022. The Secretary of State appealed to the Upper Tribunal (UI-2022-003840). The appeal was heard and allowed by Upper Tribunal Judge Kebede who remitted the case to the First-tier Tribunal to be reheard by a different judge, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

6. The appellant's circumstances have changed since she initially made the human rights claim to the Secretary of State. She is no longer in a relationship with Mr Awotidebe, but on 13 June 2022 she gave birth to their daughter, AA, who is a British citizen. This development plainly amounted to a "new matter" for the purposes of section 85 of the 2002 Act (new matters), however the Secretary of State provided her consent for the new matter to be considered by this tribunal in the course of the proceedings before Judge Kebede. That grant of consent remains in force and effective. Judge Kebede observed that the significance of AA's birth was a matter to be considered by the First-tier Tribunal upon the proceedings being remitted.

7. It was in those circumstances that the proceedings resumed before Judge Hussain, at a hearing on 28 July 2023.

8. The judge's operative findings commenced at para. 20. He found that the only family life enjoyed by the appellant was with AA. He could not allow the appeal on the basis of para. EX.1 of Appendix FM of the Immigration Rules, he said, because he "did not hear any submissions as to whether the appellant meets the eligibility requirements under the Immigration Rules" (para. 22). At para. 23, he said that, in any event, the appellant had not demonstrated that it would not be reasonable for AA to leave the United Kingdom, and that there was "very little" evidence going to whether doing so would adversely affect AA's welfare.

9. The judge concluded at para. 24 stating "by way of a passing remark" that the appellant should consider making a new application, which would provide her with the opportunity to furnish the respondent with evidence demonstrating that the removal of AA from the UK would be unreasonable and contrary to her best interests.

10. The judge allowed the appeal.

The hearing in the Upper Tribunal

11. The appellant appeared before me as a litigant in person. I established that she was able to speak English and communicate with me. She had prepared a bundle in anticipation of the hearing. She explained that she did not have a copy

of the Secretary of State's grounds of appeal, but relied on a series of reasons why the appeal should be decided in her favour, to which I will return. I provided her with assistance appropriate to her status as a litigant in person.

12. For the reasons set out below, I allowed the decision of the Secretary of State, set the decision of the judge aside, and remade the decision by allowing the appeal.

Issues before the Upper Tribunal

13. The Secretary of State's appeal against the judge's decision is, at its core, based on the following proposition: the judge allowed the appeal even though his reasoning was to dismiss the appeal. There was thus a disconnect, or alternatively an insufficiency of reasons for allowing the appeal, since the only reasons given by the judge strongly militated in favour of dismissing the appeal, and it was not clear to the Secretary of State, as the losing party, why the judge reached that conclusion.

Decision of the First-tier Tribunal involved the making of an error of law and is set aside

14. This appeal may well have been a strong candidate for the First-tier Tribunal to review the decision upon receiving the application for permission to appeal, acting under rule 35 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. However, since permission to appeal has been granted, and the Upper Tribunal is now seized of the proceedings, and the Upper Tribunal must exercise its jurisdiction to determine whether the decision of the judge involved the making of an error of law. I find that it did. I accept that the judge erred by allowing the appeal when he plainly intended to dismiss the appeal. His reasoning was inconsistent with the appeal being allowed.

15. The error was material, in that the reasons given by the judge only supported the appeal being dismissed and there was no basis for it to be allowed in the reasoning he adopted. I therefore set aside the decision, acting under section 12(2)(a) of the 2007 Act.

16. Upon the decision being set aside, the role of the Upper Tribunal must either remit the decision to the First-tier Tribunal, or remake the decision itself. Given the time these proceedings have already taken, with two appeals before the First-tier Tribunal, and this being the second Upper Tribunal hearing, I decided that it would not be consistent with the overriding objective for the matter to be remitted to the First-tier Tribunal for a third hearing. I reached this decision bearing in mind the importance of avoiding delay, so far as is compatible with proper consideration of the issues. I decided that para. 7.2(b) of the Practice Statement did not militate in favour of the matter being remitted to the First-tier Tribunal since, although some findings of fact would be necessary, they were not such that a remittal was appropriate.

Remaking the decision: section 12(2)(b)(ii) of the 2007 Act

17. Having reviewed the decision of the judge, I do not consider that it would be appropriate simply to remake the decision by dismissing the appeal. To do so would entail adopting and endorsing the findings reached by the judge. The basis upon which the judge concluded, at para. 22, that the appellant did not meet the eligibility requirements of the Immigration Rules was not clear; according to the Secretary of State's decision dated 20 December 2021, the appellant *met* the suitability, immigration status, and financial requirements. She did not meet the relationship eligibility requirements under para. EX.1(b) of Appendix for reasons

that are no longer relevant, but that left only EX.1(a) (whether reasonable to expect British citizen child to leave the UK) for the judge to resolve. It was plainly possible for him to do so.

18. The appellant had prepared a short bundle of evidence ahead of the hearing before me which outlined the role that her former partner, AA's British father, has in AA's life. Remaking the decision by dismissing the appeal would be to endorse the proposition that it would be reasonable for AA to leave the United Kingdom. Pursuant to section 117B(6) of the 2002 Act, the public interest would not require the appellant's removal from the UK if it would not be reasonable to expect AA to leave the United Kingdom. On the basis of the materials in the appellant's bundle, that was not a conclusion this tribunal could reach without exploring those issues further. I decided to remake the decision afresh.

Remaking the decision: principle controversial issue

19. The central issue in these proceedings has now evolved to the following question: whether it would be reasonable to expect AA to leave the United Kingdom.

20. The Secretary of State has consented to this issue being considered, even though it was not (and could not have been) raised by the appellant in her original human rights claim.

Legal framework

21. Section 117B(6) of the 2002 Act provides:

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child,
>
> and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

22. AA is a "qualifying child" on account of her British citizenship: see section 117D(1).

23. While it is for the appellant to establish that Article 8(1) is engaged, it is common ground that it is. It is therefore for the Secretary of State to establish that any interference in the appellant's Article 8(1) rights is justified under Article 8(2); in these proceedings, the means by which the Secretary of State does so is by pointing to the requirements of the Immigration Rules, and to the public interest in the maintenance of effective immigration controls, which is (amongst others) a statutory consideration in section 117B(1) of the 2002 Act. The standard of proof is the balance of probabilities.

It is not reasonable to expect AA to leave the UK

24. Having considered all the evidence, including the appellant's oral evidence, I reach the following findings of fact to the balance of probabilities standard:

    a. Article 8(1) of the ECHR would be engaged by the appellant's removal to Nigeria.

b. The appellant is in a genuine and subsisting parental relationship with AA. There was no challenge by Ms McKenzie to this aspect of the appellant's case.

c. AA's father, the appellant's ex-partner is Mr Awotidebe. He is a British citizen. He resides in the UK with his children. There is no suggestion by the Secretary of State that Mr Awotidebe would or could be expected to accompany the appellant to Nigeria.

d. Mr Awotidebe has a genuine and subsisting relationship with AA. I accept the appellant's evidence that he sees her regularly, through visits to the appellant's home and that he supports the appellant financially. Her bank statements show inward transactions in his name. He takes AA for unsupervised contact.

25. Against that background, I conclude that it is in AA's best interests to remain in the UK. It is not in her best interests to relocate to Nigeria because that would entail separating her from her father, with whom she has a genuine and subsisting relationship. Her father is a British citizen, with British children, residing in the UK. If AA were to leave the UK for Nigeria, her relationship with her father would suffer harm. She would see him far, far less than she is able to see him at the moment since there is no suggestion or possibility on the evidence before me that he would sever his UK-based family life in order to relocate to Nigeria to be with her. She is entering a crucial stage of her childhood and needs the love and care of both parents. Although Ms McKenzie cross-examined the appellant on the basis that that *would* be reasonable, I find that it would not be reasonable, for the reasons set out above.

26. In light of the above findings of fact, and the best interests of AA, I conclude that it would not be reasonable for AA to leave the UK. That being so, pursuant to section 117B(6), the public interest does not require the appellant's removal.

27. The appeal is allowed under section 117B(6) of the 2002.

Notice of Decision

The decision of First-tier Tribunal Judge Hussain involved the making of an error of law and is set aside.

I remake the decision, allowing the appeal on human rights grounds.

I do not make a fee award because the basis upon which the appeal has been allowed has not involved finding that the Secretary of State erred by refusing the appellant's human rights claim.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 December 2023