Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01038/2020

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 20 January 2022	**On 2 February 2022**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

AOF
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Frost, instructed by Migrant Legal Project (Cardiff)
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Nigeria who was born on 15 April 1983. She entered the United Kingdom on 3 February 2010 with entry clearance as a Tier 4 Student and leave valid until 30 May 2011. Thereafter, her leave was extended until 20 May 2013.

3. On 23 April 2013, the appellant made an application for a residence card as a spouse of an EEA national exercising treaty rights in the UK. On 20 January 2014, that application was refused on the basis that it was a "sham marriage".

4. On 14 November 2013, the appellant was convicted at the Birmingham Crown Court of conspiring to do an act to facilitate the commission of a breach of UK immigration law. The underlying basis of that conviction was her "sham marriage" and application for a residence card as a spouse of an EEA national. On 6 March 2014, the appellant was sentenced at the Warwickshire Crown Court to sixteen months' imprisonment and ordered to pay a surcharge of £100.

5. On 25 March 2014, the appellant was served with a notice of liability to deportation. On 17 April 2014, the appellant's legal representatives made a human rights claim on her behalf. On 12 September 2014, a Deportation Order was signed against the appellant and on 19 September 2014 her human rights claim was refused.

6. On 26 September 2014, the appellant appealed to the First-tier Tribunal. On 14 May 2015, her appeal was dismissed and, on 19 June 2015 and 17 August 2015, the First-tier Tribunal and Upper Tribunal respectively refused her permission to appeal.

7. On 16 January 2017, the appellant made an international protection claim including her partner and two eldest children as dependants. On 17 January 2017, she submitted a claim that she was a potential victim of trafficking. On 19 January 2017, a positive Reasonable Grounds decision was made by the NRM. The appellant was not granted any leave as the result of her trafficking claim.

8. On 9 May 2019, the appellant made further international protection submissions. On 17 January 2020, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR. A supplementary decision letter was issued on 4 January 2021.

The Appeal to the First-tier Tribunal

9. The appellant again appealed to the First-tier Tribunal. In a decision sent on 19 February 2021, Judge Suffield-Thompson dismissed the appellant's appeal on asylum and humanitarian protection grounds but allowed the appeal under the Immigration Rules and on human rights grounds. The judge accepted that he appellant had been trafficked but did not accept that the appellant was at risk of being re-trafficked or that her two daughters, on return to Nigeria, would be subject to Female Genital Mutilation ("FGM"). The judge found, however, that, taking into account

the best interests of her children, that it would be disproportionate under Art 8.2 to return her to Nigeria.

The Appeal to the Upper Tribunal

10. Both the appellant and Secretary of State appealed to the Upper Tribunal.

11. The appellant's grounds contended, inter alia, that the judge had failed to deal with, and make any findings, in relation to the appellant's claim that there was a real risk of her committing suicide or self-harm on return to Nigeria (ground 1); that the judge had made inconsistent findings concluding (in relation to the asylum claim) both that she had family in Nigeria who could assist her in avoiding any risk of being re-trafficked (para 43) but, at the same time, finding that the appellant and her husband do not have any family in Nigeria who would pressure them to subject their daughters to FGM (para 53) (ground 2). In addition, the grounds contended that the judge failed properly to take into account the expert evidence concerning the incidence of FGM in Nigeria (ground 3).

12. The Secretary of State's grounds contended that the judge had failed properly to consider Article 8 of the ECHR, in particular, as the appellant was subject to deportation, she had failed to consider the proportionality of the appellant's removal in accordance with s.117C of the Nationality, Immigration and Asylum Act 2002 (as amended) (the "2002 Act (as amended)") by failing to consider whether the appellant's deportation would be "unduly harsh" upon her children.

13. On 7 April 2021, the First-tier Tribunal (UTJ Martin) granted both the appellant and respondent permission to appeal.

14. Prior to the hearing, which was listed at the Cardiff Civil Justice Centre on 20 January 2022, both the appellant and respondent submitted skeleton arguments. At the hearing, the appellant was represented by Mr Frost and the respondent by Ms Rushforth.

Discussion

15. Both Mr Frost and Ms Rushforth addressed us briefly. Ms Rushforth conceded the appellant's grounds and accepted that the judge had erred in law in reaching her adverse finding in relation to the appellant's international protection claim. Further, she accepted that the judge had erred in law by failing to consider at all the appellant's claim that she was at real risk of suicide on return due to her mental health. That claim fell, principally, to be determined under Art 3 of the ECHR.

16. Mr Frost accepted that he was in some difficulty in defending the judge's favourable decision in relation to Art 8. He accepted that the inconsistent factual finding made by the judge - both that the appellant had family support in Nigeria and that she did not - undermined both the positive Art 8 decision and the rejection of the appellant's international protection claim. In addition, Mr Frost recognised that given that the appellant was

subject to deportation, the judge had been wrong not to apply the "unduly harsh" test in s.117C(5) of the 2002 Act. Initially, he contended that given the judge's finding in relation to the best interests of the children, that error was not material. He did not, however, seek to maintain this point – and rightly so in our judgment. Mr Frost also contended that the judge had failed to consider at all Art 3 in the context of any risk of suicide to, or self-harm by, the appellant.

17. In our judgment, the judge did materially err in law both in dismissing the appellant's international protection claim and also in allowing the appeal under Art 8. We accept that the judge's inconsistent findings concerning whether the appellant has family to support her (and therefore is able to provide support or is not able to apply pressure to make the appellant's daughters undergo FGM) in Nigeria was an error of law and undermined both the finding that the appellant had not established her international protection claim and also that she had established her Art 8 claim.

18. In addition, in relation to the appellant's Art 8 claim, it is clear that the judge failed to apply the provisions in s.117C(5) that were plainly applicable in determining whether the appellant could succeed under Art 8, given that she was subject to deportation. The judge had to first decide whether the impact of her deportation would be "unduly harsh" upon her children (s.117C(5)) and, if not, whether there were "very compelling circumstances" sufficient to outweigh the public interest applying s.117C(6). The judge did not adopt that approach but rather, it would seem, treated the appellant's Art 8 claim as if she were seeking to resist a removal decision.

19. For those reasons, the judge's decisions in relation to the appellant's international protection claim and Art 8 cannot be sustained and we set those aside. Further, the judge's decision to allow the appeal "under the Immigration Rules" was not one open to her given the more limited grounds of appeal set out in ss.84(1) and (2) of the 2002 Act (as amended). In addition, the judge erred in law by failing to consider the appellant's claim to be at real risk of suicide (or self-harm) on return, principally in the context of Art 3 of the ECHR. In our judgment, the appeal must be re-heard afresh and the relevant decisions in the appeal remade.

Disposal

20. For the above reasons, the decisions of the First-tier Tribunal to dismiss the appellant's appeal on international protection grounds involved the making of an error of law and to allow the appellant's appeal under Art 8 of the ECHR involved the making of an error of law. The judge's decision, as a whole, cannot stand and is set aside.

21. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, we remit the appeal to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Suffield-Thompson. No factual findings are preserved.

Signed

Andrew Grubb

Judge of the Upper Tribunal
24 January 2022