Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03622/2019
UI-2021-001423

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 March 2022	**On 7 June 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY JUDGE OF THE UPPER TRIBUNAL JARVIS

Between

MS FK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Eaton, Counsel instructed by Migrant Legal Project
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. The Appellant is a national of the Ivory Coast, born on 22 August 1990. In very brief summary she claimed asylum in the United Kingdom on 3 October 2017 and later appealed against the Secretary of State's decision (dated 28 March 2019) to refuse her international protection and human rights claims but to nonetheless grant her (and her dependent daughter, NSK) Discretionary Leave by reference to section 55 of the BCIA 2009.

2. The Appellant's appeal was allowed by Judge C.H. Bennett (hereafter "the Judge") on the limited basis of Article 8 ECHR by way of a decision dated 7 December 2021.

THE APPELLANT'S GROUNDS OF APPEAL

3. On 4 February 2022, First-tier Tribunal Judge Cox granted permission to appeal on all of the grounds pleaded in the 20 December 2021 application.

4. In very brief summary again, the Appellant raises two Grounds of Appeal against the Judge's decision to allow the appeal on a limited basis:

    a. That the Judge materially erred in deciding the issues relating to risk on return to Ivory Coast (either through the prism of the Refugee Convention or the ECHR/Qualification Directive) without factoring in that the Appellant would be returning with her seriously disabled daughter, Miss NSK (born on 2 May 2018);

    b. The Appellant also challenged the Judge's conclusions in respect of internal relocation again partially on the basis that the Judge should have taken into account that the Appellant would be returning with her child.

THE APPEAL HEARING

5. We heard competing submissions from Mr Eaton, on behalf of the Appellant and Mr Tufan, on behalf of the Secretary of State. We are grateful to them both for the concise and clear way in which they made their respective arguments.

6. During discussion with the panel, Mr Eaton argued that the decision of the Judge did incorporate a discrete finding that there remained a real risk of persecution/serious harm to the Appellant from her father (Mr K) and Mr AD in various areas of Ivory Coast and therefore the Appellant's challenge was not only limited to Article 3 medical pleadings.

7. Mr Eaton also contended that, although the Judge properly factored in that both the Appellant and her dependent daughter had been granted Discretionary Leave by the Secretary of State, he nonetheless erred by failing to consider the hypothetical removal of the Appellant's child as per the requirements of section 84(1) of the NIAA 2002.

8. Mr Tufan submitted that the Judge did not find that an extent risk of harm or adverse interest existed in the Ivory Coast by reference to, inter-alia, [54] of the Judge's decision.

FINDINGS AND REASONS

9. We consider that there has been a certain lack of focus in the Appellant's argument albeit overall we accept that the Appellant has made out her argument that the Judge materially erred.

Grounds 1 & 2 – the Judge's findings on risk and internal relocation

10. It wasn't until discussion with Mr Eaton that the Appellant's challenge focused in a clear away upon the core issue of whether or not the Judge had found that there remained an extant real risk to the Appellant in the Ivory Coast.

11. In coming to our conclusion we have looked at the relevant passages in the detailed decision of the Judge very carefully indeed.

12. We conclude that there is some ambiguity in the Judge's findings on the essential issue as to whether or not a current risk of serious harm still arises from her father or Mr AD. We certainly accept that at [43], the Judge says in terms that he is not satisfied that either Mr AD or the Appellant's father now wish to harm the Appellant or to compel her to resume cohabitation with Mr AD, however this has to be read with, inter alia, what the Judge also says in the same paragraph at sub-paragraph (b).

13. In that particular part of the finding, in reference to Mr AD, the Judge says the following: "*I am not satisfied that, as long as she does not approach him and/or does not call on him to assist or provide for her, he will (1) have any interest in seeking her out and/or doing her harm, or (2) will wish to do so and will have every reason not to do so*."

14. It is also important to note the Judge's further clarification at the end of [43] in which he states: "*my conclusions on this point are not of crucial importance in reaching my ultimate conclusion. The crucially important conclusions of those in paragraphs 42, and 44*", we take the phrasing of the latter part of the sentence to be read as 'the crucially important conclusions are those in paragraphs 42, and 44'.

15. In respect of [42 & 44] then, it is plain enough that [42] constitutes a detailed finding that the Appellant would not return to the home of Mr AD in Yopougon, the area in which he lives or is reasonably likely to meet her; there is the additional finding that the Appellant would not seek to relocate to the part of Abidjan in which her father lives.

16. At [44] the Judge makes further detailed findings in respect of whether or not it would be unduly harsh/unreasonable for the Appellant to internally relocate to another part of Abidjan away from either Yopougon, Dabou or the part of Abidjan in which her father lives and where she is not likely to meet either Mr AD or her father or any friends of theirs. As an aside this might be said to be a fairly difficult geographical perimeter to assess even at the lower standard.

17. Equally, the Judge appears to find (and we note the similar mixed language in this finding) that the Appellant's family would still have interest in carrying out FGM on NSK albeit by reference to the Appellant's other daughter in the Ivory Coast, HT, as long as the Appellant did not interact with those parties on return, see [50].

18. Furthermore, in coming to the conclusions which the Judge does at [44], it can be seen at sub-paragraph (e) that he adopted the findings of the Tribunal in MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC) at [277] in which the Tribunal noted the particular difficulties faced by single women with children relocating to Abidjan. He also concluded at [45] that the authorities in the Ivory Coast will not be able or willing to provide adequate protection for a single young woman such as the Appellant bearing in mind her particular vulnerabilities including a lack of basic education.

19. In our view then, the overall conclusion of the Judge is, contrary to what might be said to be the unequivocal initial statement at [43], that there does remain an extant reasonable likelihood of serious harm from at least Mr AD in Ivory Coast and in the absence of a sufficiency of state protection, the question of internal relocation was a vital issue in respect of the assessment of the Refugee Convention appeal.

20. Having established that, we also consider that there is material force in the Appellant's claim that the Judge's conclusions about hypothetical return, which only centre upon the Appellant's ability to return and internally relocate without the additional assessment of the impact upon her of returning with her severely disabled daughter.

21. At [44(d)], the Judge prefaces his later findings by pointing out that there was no assumption that the Appellant would take her daughter (NSK) to the Ivory Coast and reverts to his later findings in [50].

22. At [50], the Judge notes a number of different elements including that the Appellant was considered unfit to give oral evidence and had not said in any of her witness statements that she would, if removed, take her daughter with her.

23. In the same paragraph the Judge found that the hypothetical removal question should focus solely upon removal of the Appellant without NSK and then concluded by saying: "*I am not satisfied that Mrs K (the Appellant) would not, if she were to be removed, place NSK in the hands of the local authority, the London Borough of Barking and Dagenham, the local authority for the area in which Mrs K now lives*."

24. Mr Tufan did not contest the Appellant's argument that the Judge should have also considered the simultaneous hypothetical return of NSK (the dependent child). For our own part we consider it to be correctly made.

25. Whilst we have some sympathy for the Judge on the basis that the Appellant did not deal with this issue specifically in her witness statements, we conclude that the Judge went too far in concluding that the Appellant would give up her daughter to social services when there had been no previous local authority intervention and no suggestion that this would be the Appellant's choice despite the stark circumstances summarised by the First-tier Judge.

26. On that basis we allow the Appellant's appeal and set aside the conclusion of the Judge that the Appellant has not made out her claim under the Refugee Convention at [57] and Article 3 ECHR, at [50] and the alternative at [52].

Remaking the decision

27. We also conclude that, in light of the Judge's alternative conclusions that there would be a breach of the modified medical Article 3 ECHR threshold (see AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17) in respect of the return of both the Appellant (due to her mental health difficulties including depression and PTSD) and the child NSK (her severe spina bifida), that the test of undue harshness/unreasonableness within the assessment of internal relocation in the Refugee Convention is made out.

28. We therefore also conclude that the Appellant has established that her removal would constitute a breach of the Refugee Convention, as well as Article 3 ECHR and her appeal is allowed.

NOTICE OF DECISION

The Appellant's appeal is allowed on the basis that the Judge made a material error in law and the decision is therefore set aside to the limited extent described above.

On remaking, the substantive Refugee Convention and Article 3 ECHR appeals are allowed.

Signed  Date 6 April 2022

Deputy Judge of the Upper Tribunal Jarvis