IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08837/2015

THE IMMIGRATION ACTS

Heard at Field House

On 18th April 2016

Decision & Reasons Promulgated
On 28th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

[M K]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Robinson (Counsel)
For the Respondent: Mr L Tarlow (Senior Home Office Presenting Officer)

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is a citizen of Nigeria. In a decision promulgated on 14th December 2015, her appeal against refusal of a protection claim and a human rights claim was allowed by First-tier Tribunal Kelly ("the judge"). The judge allowed the appeal on human rights grounds, concluding that the decision under appeal was not in accordance with paragraph 276ADE

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of the Immigration Rules and that it was incompatible with the appellant's Article 8 rights under the Human Rights Convention. There is no challenge to the judge's conclusion that the appeal fell to be allowed in these terms.

2. The judge also concluded, however, that the appellant's Refugee Convention grounds of appeal were not made out and dismissed the appeal in this context. In doing so, he took into account the grant of discretionary leave to the appellant for a period of two years from October 2015 and assessed risk on return to Nigeria as at the date of expiry of that leave. In other words, rather than taking the date of assessment as the date of the hearing on 30th November 2015, he considered whether the evidence showed that the appellant would be at risk on return in October 2017.

3. The judge's reasoning on this aspect is contained in paragraphs 46 and 47 of the decision. He noted that the appellant's appeal rights arose under the 2002 Act, as amended by the Immigration Act 2014 and that there was no removal decision as such (and no prospect of removal for at least two years).

4. In grounds in support of an application for permission to appeal, it was contended that the judge was obliged to assess risk as at the date of the hearing and that he erred in failing to do so and in assessing risk as it might arise in the future.

5. Permission to appeal was refused by a First-tier Tribunal Judge, who found that the decision was adequately reasoned. An Upper Tribunal Judge granted permission on 10th February 2016, on the basis that a protection claim should be assessed as at the date of the hearing.

6. In a rule 24 response from the Secretary of State later that month, it was accepted that the judge erred in law in assessing risk as at the date of expiry of the appellant's discretionary leave. The critical issue was whether the error was material, so as to render the decision unsustainable. The author of the rule 24 response declined to form a concluded view but stated that the judge's findings of fact suggested that the risk of re-trafficking was likely to be so small that there was no real risk on return, assessed as at the date of the hearing and so the error was not material.

7. In directions made on an uncertain date, the parties were advised that the hearing would be confined to deciding whether the First-tier Tribunal decision should be set aside for legal error.

Submissions on Error of Law

8. Ms Robinson relied on her skeleton argument. Before the First-tier Tribunal there were four important strands to the evidence regarding the risk that the appellant faced of being re-trafficked.

9. The first was the report of Ms Stepnitz. The decision showed that the judge gave this little weight for two reasons. The first was that the risk had fallen away to an extent because the appellant was now older than when trafficked and the circumstances of her being trafficked in the past were fact specific. The second was that there was no gang involved, the appellant having suffered ill-treatment at the hands of family members. However, as was clear from paragraph 119 of the report (tab D of the appellant's bundle at page 65), many of the risk factors were not resolved, notwithstanding the appellant's current age. There was a lack of work experience and family support and the appellant was at risk of being exploited in the light of her likely desire to leave Nigeria if she were returned there. Ms Stepnitz was clear that the appellant was more vulnerable to trafficking, having already suffered that fate. Although the judge did consider her report, he did not give it the weight it deserved and disregarded it wrongly.

10. The second strand was the IOM report (tab E at pages 69 and 70). This showed that the younger a person was when trafficked, the more vulnerable he or she was to re-trafficking. This evidence was not taken into account by the judge.

11. The third strand was the report from Dr Thomas, the clinical psychologist. He prepared two reports in all, examining the appellant's vulnerability to further exploitation. The judge disregarded the substance of the reports precisely because the appellant had two years leave to remain. He found that her health would improve so that the current assessment was not relevant. Dr Thomas' view was that the appellant had some insight into what had happened but insufficient to act as a protective mechanism. At her age, she was still at risk and still vulnerable at the time of the more recent report (tab A at page 45).

12. Fourthly, the country expert assessed the appellant as still being at risk (tab A at pages 21 and 22).

13. In all four strands, the assessments were made in the light of circumstances as they were at the time of the appeal and, more particularly, the hearing. The judge focussed his own assessment two years hence, with the result that there was no proper engagement with the evidence bearing on risk at the correct date.

14. Mr Tarlow relied on the rule 24 response and on the refusal of permission by the First-tier Tribunal Judge. The overall conclusion was one the judge was entitled to reach and there was no material error.

15. The representatives agreed that if the decision fell to be set aside, as containing legal error, the appropriate venue for the remaking of it should be the First-tier Tribunal. Substantial fact-finding would be required and

an assessment of the evidence bearing on the appellant's circumstances as at the date of the remaking of the decision.

Conclusion on Error of Law

16. I am grateful to the representatives for their careful submissions. Both sides agreed that the judge erred in relation to the date of assessment. The grounds of appeal available under section 84, as amended by the 2014 Act, are similar in some respects to some of the grounds available under section 84 as it was before amendment. For example, the current section 84(1)(a) is similar to the old section 84(1)(g) and enables an appellant to argue that hypothetical removal from the United Kingdom at the present time would result in a breach of the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998. In this context, the author of the application for permission to appeal mentioned the decision of the AIT in LQ [2008] UKAIT 00005 and there is also the well-known authority of JM (Liberia) [2006] EWCA Civ 142. Although the Upper Tribunal adopted a different approach in Amirteymour [2015] UKUT 446, that case concerned the Immigration (European Economic Area) Regulations 2006 and has no direct bearing on the present appeal.

17. The judge's decision to consider risk on return as it might be in the autumn of 2017 inevitably involved a degree of speculation. An example is the concluding sentence of paragraph 49 of the decision where he made an assumption that the appellant will receive the specialist support recommend by Dr Thomas over the course of the next two years. It is clear from Dr Thomas' reports, as noted at paragraph 47 of the decision, that the appellant's prospects for recovery are good, provided she receives such support. The judge concluded at the end of that paragraph that there was no real risk that the appellant would commit suicide "as a result of her putative removal". What was required, however, was an assessment of the evidence showing the appellant's circumstances as they were in November 2015. The good prospects of recovery in the future were a factor of negligible or very modest weight.

18. The approach taken is further illustrated by paragraph 48 of the decision, where the judge found that the appellant "will be considerably less psychologically vulnerable ... by the time of her putative removal than she is at the present time." This shows that the assessment of risk was, again, based on the likelihood of reduced vulnerability in two years time, rather than the appellant's circumstances as they were as at the date of the hearing.

19. In summary, the judge's approach was inconsistent with guidance given in LQ and JM (Liberia). Material evidence bearing on risk, as at the date of hearing, was not given due weight. The decision of the First-tier Tribunal must be set aside and remade.

20. After careful consideration, I agree with the representatives that the First-tier Tribunal is the appropriate venue, in view of the substantial fact-finding that will be required. The issue to be decided is the protection claim. The judge's decision to allow the appeal on human rights grounds remains intact.

Notice of Decision

The decision of the First-tier Tribunal is set aside and shall be remade at Bradford before a judge other than First-tier Tribunal Judge Kelly. The issue to be decided is the appellant's protection claim (and any directly related human rights claim based on risk on return rather than the appellant's circumstances in the United Kingdom).

Anonymity

The judge made no anonymity direction and there has been no application before me. I make no direction on this occasion.

Signed Date

Deputy Upper Tribunal Judge R C Campbell