Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/32378/2015
IA/32385/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 August 2017	**On 20 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARINE [C]
[P D]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondents: Mr N Aborisade, Quintessence Solicitors

DECISION AND REASONS

1. This is the remaking of the decision First-tier Tribunal Judge Taylor which was promulgated on 23 November 2016 and set aside by me on 12 July 2017. For convenience, the Error of Law Decision and Reasons are annexed below.

2. The first appellant came to the United Kingdom in September 2010, following the birth of the second appellant, her daughter in April of that year. They had entry clearance until 15 March 2011. Application for an extension was refused on 13 April 2011. On 24 June 2014 they applied to remain in the United Kingdom on the basis of family and private life with the sponsor, John [C], a United Kingdom citizen. The Secretary of State's findings are fully set out in the First-tier Tribunal's decision which I need not rehearse.

3. A principal issue before the First-tier Tribunal was whether there was a genuine and subsisting relationship between the first appellant and the sponsor, which concluded that they were. Those findings of fact have been preserved, but fresh material has been placed before me by both parties, concerning subsequent developments concerning the relationship between the first appellant and the sponsor.

The appellants' evidence

4. I heard evidence first from the first appellant, Arine [C]. She adopted her witness statement dated 14 August 2017. She further stated that the reason why the sponsor had not attended the hearing was because he believes that his family will disown him if he does so. A signed statement from the sponsor dated 14 August 2017 had been filed and served. I indicated at the outset of the hearing that bearing in mind there were contentious issues to be decided, the sponsor's statement would carry little weight as he was not present to offer himself for cross-examination. I invited the appellants' representative to consider making an application to adjourn the hearing so the sponsor could attend and was told in terms that the appellants did not wish to have the matter adjourned.

5. In cross-examination, the first appellant stated that she lived with the sponsor on a permanent basis. This evidence did not sit happily with Appendix E of the appellants' evidence, which is a letter from Agnes Hemingway, a BME advocate, stating:

> "[the first appellant] further highlighted that on many occasions she and her sibling would have to leave the home temporary [*sic*] and take up lodging at friends so as to avoid the abuse."

6. It may be that there was a misunderstanding between Ms Hemingway and the first appellant. The letter, dated 12 July 2017, seems to be riddled with anomaly: a reference to a sibling rather than a daughter; and later a statement about seeking legal counsel "from a local GP". I can derive very little assistance from what Ms Hemingway says in that letter.

7. The first appellant accepted that she had received a letter dated 8 February 2017 from Andrew Jackson & Co, a firm of solicitors. The letter read as follows:

> "We act for your husband John [C] in connection with the matrimonial situation between you both. He informs as follows: there has never been a proper marriage between you both. There is only the legal shell of a marriage. You have never agreed to sexual relations with him and you have acted in a very cold manner to him and shown him no affection throughout the marriage.
>
> In view of this our client now intends to take nullity proceedings against you to have the marriage annulled. Our client can no longer stand your continuing to live in his home, which is in his sole name and which he has lived in for many years. Our client requests that you leave the house now permanently. We understand that you have friends you can stay with as you frequently stay with them. We strongly advise you to go to a solicitor of your own choice to obtain your own legal advice, taking this letter with you, and that you do so urgently.
>
> Yours faithfully"

8. The Appellant says that that letter was placed under her bedroom door, not through the exterior post box as she would have expected. She spoke of a conversation between herself and the sponsor asking him about the meaning of the letter, which apparently led to a conversation about the signing of a prenuptial agreement. This she thought was somewhat odd since the marriage had already endured for some five years.

9. The first appellant said that it was the sponsor's daughter, Joy, who tried to put pressure on him to break off the relationship and he did not want to come to court to argue against his daughter.

The respondent's evidence

10. Joy [P] is the daughter of the sponsor. She adopted her statement as her evidence in chief. She dealt with a number of matters and suggested that when the sponsor signed his witness statement he did not appreciate its content or understand its consequences. She said that the sponsor did not wish to be at the hearing. As the hearing was taking place he was with his partner, Odette, with whom he has been in a relationship for something in the order of eighteen months. She referred to them recently taking a holiday all together in Benidorm.

11. She stated that the sponsor booked an appointment to go and see the firm of Andrew Jackson & Co in February of this year and that she attended that appointment with him at his request. He was crying and emotional while in the office. He talked very much about his late wife, Rose, who was the sister of the first appellant, and seemed to feel that it was her dying wish that she looked after the first appellant, if necessary by marrying her.

12. Joy [P] says the sponsor signed a public statement that the relationship was no longer subsisting on 7 February 2017, and he did so in her

presence. She was not challenged on this by the appellants' Counsel. Her evidence was that the first appellant is not living full-time at the sponsor's home at Wallasey Road, and that there had been occasions when the police had been summoned because of breaches of the peace. On one occasion, the first appellant said that both the sponsor and Odette, his girlfriend, were to leave the property.

Submissions on behalf of the appellants

13. Mr Aborisade, who acts for both appellants, made clear in opening that the appellants' case was that the public statement was a forgery. He repeated this in closing submissions. As recorded above, he did not challenge Joy [P]'s evidence that the document had been signed in her presence, nor (when I raised the matter) did he seek to have her recalled so he could do so.

14. Mr Aborisade submits that there have been many trials and tribulations that the first appellant has had to contend with. He says that the sponsor's daughter, Joy [P], has displayed a hostile animus towards the first appellant and wants her out of the country to protect her inheritance. He relies on the findings at the First-tier Tribunal that the relationship between the first appellant and the sponsor was genuine and subsisting. He suggests that the evidence of Joy [P] is a cunningly orchestrated smokescreen to frustrate this appeal succeeding. He refers to an earlier signed statement from the sponsor dated 2 November 2016, in which the sponsor denied all the allegations levelled by his family members against the first appellant, and asserted that the sponsor loves the first appellant, and that the second appellant is like a child to him. In his written submissions, he describes the sponsor's daughter as "a meddlesome interloper".

15. Mr Aborisade submitted that it would be unduly harsh for the appellants to return to Nigeria. He states, in his written representations, that the sponsor has some medical issues which will not permit him to love outside the United Kingdom. He did not elaborate on this in his oral submissions, nor refer me to any supporting evidence. At appendix C of the supplementary material was a letter dated 6 June 2017 from Professor F Joseph, consultant physician in diabetes and endocrinology, to Mr Colin Chan, consultant vascular surgeon. It discusses the sponsor's diabetic condition and advices on future care. There is no suggestion that he is unfit to travel or live overseas, or any material from which a conclusion could be reached that Nigeria lacks the medical facilities to care for his condition.

16. There are, submits Mr Aborisade, insurmountable obstacles to the first appellant and the sponsor relocating to Nigeria, and the best interests of the second appellant, under section 55 of the Borders, Citizenship and Immigration Act 2009, lie in her remaining in the United Kingdom where she has lived for all but the early months of her life.

Submissions on behalf of the respondent

17. Mr Avery, for the Secretary of State, submitted that in the light of the more recent evidence, there is no family life to consider for the purposes of Article 8. He states that whatever may have been the case previously, the relationship between the sponsor and the first appellant is now firmly at an end. Solicitors have been instructed. The second appellant has been compelled (by the threat of legal process) to leave the matrimonial home. The sponsor has signed a public declaration that the relationship is at an end.

18. Mr Avery points to the complete absence of evidence from the appellant to point to a meaningful emotional relationship between the sponsor and the second appellant. There is nothing, for example, to suggest engagement with her schooling. To the contrary, Joy [P]'s evidence is to the effect that he has no interest in, and precious little contact with, the second appellant. Mr Avery points to **EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874**, and the oft-cited remarks of Lewison LJ at paragraph [60], that "Just as we cannot provide medical treatment for the world, so we cannot educate the world".

Assessment

19. Those acting for the appellant have not put a shred of evidence before the tribunal to support the contention of forgery in relation to the sponsor's public statement that the relationship was no longer subsisting. I consider it ill-judged on the part of the Mr Aborisade to have made (and persisted in) such an allegation without any foundation for so doing. I proceed on the basis that the document is genuine.

20. The Supreme Court has recently provided assistance as to the correct approach in determining cases of this type. See **R (on the applications of Agyarko & Anor) v Secretary of State for the Home Department [2017] UKSC 11** and in particular the judgment of Lord Reed, with which the other Supreme Court Justices all agreed. It is common ground between the parties' representatives that this approach should be adopted in this case.

21. On the evidence as I find it to be, whatever may have been the case hitherto, there is currently no family life enjoyed by the first or the second appellant with the sponsor such as to engage Article 8. The uncontroverted evidence that the sponsor signed a public statement asserting that the relationship is no longer subsisting carries considerable weight. Equally I find that the sponsor's relationship with the second appellant, to the extent that it exists at all, is negligible and certainly not that of parent-child.

22. As to insurmountable obstacle, there is no material before me to suggest that the sponsor cannot relocate to Nigeria with the first appellant, were that to be his wish. There may be a degree of inconvenience but nothing more. That being the case, this appeal must fail.

23. However if (contrary to my primary finding), there were to be a family life in existence, capable of protection under Article 8, then the issue of proportionality would arise in the context of **Agyarko**. The approach commended by Lord Reed is at paragraphs [56] and [57]:

> [56] … The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.
>
> [57] That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control. (emphasis added)

24. It would not, in my opinion, be disproportionate for the first appellant to return to Nigeria, where she has lived for the majority of her life. Her family life with the sponsor (if, contrary to my primary finding, it subsists) was forged largely when her presence in the United Kingdom was unlawful or precarious. It therefore carries little weight.

25. What then of the second appellant, a child of 7, who according to Mr Aborisade, has lived in this country (as at the date pf the hearing) for fifteen days short of seven years. He submits that the best interests of the child are to remain in the United Kingdom. He draws particular attention to an order of Birkenhead County Court dated 2 April 2010 giving parental responsibility of the second appellant to the sponsor (page 52 of the bundle before the First-tier Tribunal). He submits that the sponsor is the

de facto father of the second appellant, she having known no other father figure in her life thus far.

26. In my judgment, the evidence of Joy [P] is to be preferred. She states that there is little if anything by way of an ongoing parental relationship between the sponsor and the second appellant. He may have secured a court order but he does not appear to have exercised it in any way at all. There is no evidence from the school showing an involvement of the sponsor in the second appellant's education and there is no evidence from the second appellant (whether directly or indirectly) to indicate that there is a genuine paternal relationship. The second appellant's best interests are served by remaining with her mother, the first appellant, and by returning with her to Nigeria. In any event, it was conceded by Mr Aborisade that the second appellant's appeal was parasitic upon that of the first appellant. It follows that the dismissal of the first appellant's appeal must result in the second appellant's appeal similarly being dismissed.

27. For each and all of those reasons these conjoined appeals are dismissed under the Immigration Rules and under consideration of Article 8 outside of the Rules.

Notice of Decision

(1) The decision of the First-tier Tribunal having been set aside, it is remade as follows.

(2) The appeal is dismissed under the Immigration Rules and on human rights grounds.

(3) No anonymity direction is made.

Signed *Mark Hill* Date 18 September 2017

Deputy Upper Tribunal Judge Hill QC

ANNEXE

ERROR OF LAW DECISION AND REASONS

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/32378/2015
IA/32385/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 July 2017	.....

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FORT THE HOME OFFICE

Appellant

and

ARINE [C]
[P D]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondents: Mr A Shittu, Quintessence Solicitors

ERROR OF LAW DECISION AND REASONS

1. This is an appeal from First-tier Tribunal Judge Taylor which was promulgated on 23 November 2016. It relates to a mother and child, the mother being a citizen of Nigeria born on 22 April 1982. She is in a relationship with the sponsor in this case, John [C], who is a United Kingdom citizen.

2. The judge considered this matter under the Immigration Rules and in particular paragraph 276ADE. Having heard evidence and made certain findings, he came to the conclusion that there was a genuine and subsisting relationship between the first appellant and the sponsor and that there would be insurmountable obstacles to the appellant's return to Nigeria. The judge's findings at paragraph 15 read as follows:

> "The appellant is a citizen of Nigeria and has lived there for most of her life and she has family living in Nigeria. If I was only considering the appellant I do not consider that living in Nigeria would entail very serious hardship. However, the sponsor is the spouse of the appellant, they were married in the UK and have been married since August 2011, being five years. The sponsor was born in the UK, he is a UK citizen, he is aged 66 and has spent his entire life living in the UK. He has given credible evidence of the difficulties which he would face if he had to leave the United Kingdom."

3. The judge then continues:

> "I am satisfied that the combination of these several factors is such that expecting the sponsor to relocate to Nigeria would cause him very serious hardship. For the appellant to leave the UK on her own would deprive a UK citizen of his spouse, which would be contrary to the guidance in the 2015 case of **Mirza CSIH 28**."

4. The judge then went on to consider the position of the child on the basis that he had allowed the mother's appeal and stated that to require a 5 year old to return without parents would be exceptional circumstances to be considered outside the Rules, and he went on in due course to allow the child's appeal in those circumstances.

5. The primary ground upon which permission to appeal was granted related to an alleged misdirection on law concerning the interpretation of insurmountable obstacles, namely very serious hardship. Reference was made in the grounds of appeal to the case of **Agyarko [2015] EWCA Civ 440**. I need not recite the facts of that case save to say that they are strikingly similar to those in the present one.

6. Although the judge made reference to certain authorities, he did not cite **Agyarko** and it seems from the passage which I have quoted that he had not fully understood the high hurdle which is posed by the expression insurmountable obstacles. On any reading of the determination, the judge

did not have the **Agyarko** test in mind and that accordingly did not make findings on correct understanding of the law.

7. This is a material error of law which leads inevitably to the decision being set aside. Since the judge's determination of the second appellant's appeal was predicated on his flawed assessment of the first's, it must also follow that the decision concerning the child should similarly be set aside.

8. Since the basic facts are not in dispute, both matters can properly remain within the Upper Tribunal for the decision to be remade.

9. I so order and will adjourn the matter for the remake decision to take place at a later date on the first available date after 21 days, any additional evidence to be put before the court and served on the Home Office seven days prior to the hearing. Skeleton arguments should be served three clear days before the resumed hearing.

Notice of Decision

(1) An error of law having been found, the decision of the First-tier Tribunal is set aside.
(2) The matter is to be retained in the Upper Tribunal for the decision to be remade.
(3) The resumed hearing is to be given a time estimate of half a day and relisted before Deputy Upper Tribunal Judge Hill, if available, but not reserved.
(4) Any additional evidence to be filed and served at least 7 days prior to the resumed hearing.
(5) Skeleton arguments to be lodged at least three clear days prior to the resumed hearing.

No anonymity direction is made.

Signed *Mark Hill* Date 10 July 2017

Deputy Upper Tribunal Judge Hill QC