



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08523/2015

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2018

Decision & Reasons Promulgated
On 5 March 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

AYOMIDE OLUWAPELUMI AKINWALE
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
For the ENTRY CLEARANCE OFFICER, LAGOS

Respondent

Representation:

For the Appellant: The sponsors: Mr and Mrs Akinwale
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Nigeria national born on 2 May 1998 who seeks to join her paternal uncle and his family for settlement. She is an orphan, it being accepted that her father passed away on 29 June 2010 and her mother on 3 February 2015. The application for entry clearance was made on 22 July 2015 and refused on 18 September 2015 under paragraph 297 (f)(i) of the Immigration Rules. An appeal was lodged under s.82(1) of the 2002 Act on article 8 grounds and was dismissed by First-tier Tribunal Judge Malcolm following a hearing at Hatton Cross on 28 April 2017. Permission to appeal was granted by Upper Tribunal Judge Reeds on 14 September 2017 and the matter came before me at Field House on 23 November 2017. The First-tier Tribunal's decision was set aside for the reasons given in my determination of 8 December 2017 and the matter came to me on 15 February 2018 for the decision to be re-made.

The Hearing

2. The sponsor and his wife attended the hearing. Both gave oral evidence and both made submissions. Mr Akinwale gave evidence first. He submitted the originals of the appellant's birth certificate and the death certificates of her parents. These were seen by myself and Mr Kotas and returned to him.

3. The sponsor confirmed his personal details and stated that the appellant was his late brother's only child. His brother had been a draftsman and had lived with his wife, a former teacher, and the appellant in a rented apartment in Lagos. The sponsor visited Nigeria regularly and sometimes his brother helped him on projects. The sponsor helped them financially; paying towards their accommodation costs and school fees. The sponsor stated that when his brother fell ill, he helped him with medical bills. Eventually his brother's wife found it difficult to cope with his illness and he went to live with their father until his death in June 2010. His parents were now both deceased.

4. The appellant and her mother moved to a smaller property and the latter worked as a petty trader. The sponsor helped her with the money to purchase a pepper grinder. She had stopped teaching. The sponsor visited Nigeria after his brother's death and then again for his father's funeral in early 2016. His wife accompanied him and they were away for 2 - 2 1/2 weeks. He stated that the appellant was very saddened and embittered after she lost both her parents. She had been studying at that time but had since ceased her studies. Following the death of her mother, she initially stayed with a distant relative of her mother who maltreated her. The sponsor then made arrangements with the pastor and the appellant would stay with different church going families for weeks at a time. She also spent time living with different friends.

5. The sponsor said that the appellant was uncommunicative and bitter when he saw her during his visits. He also had an arrangement whereby he would call a friend who would then find the appellant and arrange for her to be present when the sponsor called. The sponsor then purchased a mobile phone for the appellant and they continued contact in that way.

6. The sponsor recalled that he had visited Nigeria in December 2010. He then went for his father-in-law's burial in April 2014 but he was not sure of the date. His last visit was in January 2016 following his father's death.

7. The sponsor said that he texted and "Whatsapped" the appellant but she was not very responsive. His wife kept in touch with her too and was also in touch with the pastor. He said that the arrangement for her accommodation was meant to be temporary until she could join them here. He paid for her accommodation and used to pay her school fees when she studied. The appellant was unhappy and dejected. Sexual advances had been made towards her and she had been beaten up. She was vulnerable following the loss of her parents. She would be looked after here and would be able to receive counselling. He felt unhappy because he could not do what was right for her.

8. In cross examination, the sponsor stated that he had been to Nigeria after his brother's death, after the passing of his father-in-law and after his own father's death. Although his brother and his brother's wife had been working at the time of his brother's death, the sponsor had helped them financially as they could not manage. His step family had sorted out the funeral. The appellant and her mother had not moved in with his father after his brother's death as they were not on good terms. His father had several wives and was living with one of them who did not want them there. The sponsor's mother was the first wife.

9. The sponsor said that his sister-in-law had stopped teaching when she lost her job. She had since been involved in petty trading and he had assisted her financially. There was no formal arrangement but he paid the rent when it was due and he paid for the machine she bought for her work. She had suffered from high blood pressure and she died in 2015. Some of her extended family members sorted out the funeral. The appellant had tried living with them but they were not good to her.

10. The sponsor did not know why the pastor had not mentioned the fact that the appellant had lived with these relatives or with friends.

11. The sponsor was asked why there was no reference to sexual advances having been made in his witness statement. He said that he mentioned this once she had told him about it. The fact that she had only disclosed these events recently did not mean that they had not happened. It was put to the sponsor that he should be expected to know who made the advances. He said he was more concerned that they did not continue and that he could not go around accusing the wrong families. He explained that the appellant had been reluctant to disclose this information. She had been reserved and withdrawn. He explained that she had told the pastor that she had been sleeping rough. She did not always take his calls. He was unable to specify where she was because she stayed a week with one family and then a week with another. The relationship had deteriorated between them.

12. The sponsor said that the appellant completed school in 2015. She then took a basic skills computing course which she did not complete. She had stopped studying and stopped going to church. When they spoke last month, she had asked when he was coming for her.

13. The sponsor was asked whether he was exaggerating the appellant's problems. He denied this. He said he needed her here to look after her. Both he and his wife worked and could afford to support her. It was difficult to keep in regular contact the way things were.

14. The sponsor said he had only the one brother who had died. He had step sisters. His wife had siblings in the UK. Her father had passed away and her elderly mother lived in Nigeria. It was not possible for the appellant to live with

her because she was old. He denied that the appellant was living with her. That completed cross examination.

15. In response to my questions, the sponsor said that the appellant's friends were also from church going families. He said that he found out about the sexual advances just before the last hearing. He said his wife had arranged for the appellant's statement.

16. Mrs Akinwale gave evidence next. She confirmed her address and the fact that the appellant's parents were both dead. She said the appellant's father had a stroke. The appellant's mother had lost consciousness on a Sunday and was dead by Thursday. She said they had called the pastor and made arrangements for the appellant's accommodation. He had arranged for her to live with various families as no one family could manage it for a long time. She said at first it seemed to work but then the appellant complained that she was being treated as a servant. Last year she told them that she had suffered sexual advances. She had been reluctant to complain about that before, for fear of losing her accommodation. They then called the pastor and he admitted that she had told him too. They were trying hard to get the appellant here to safety.

17. Mrs Akinwale said she had been to Nigeria in 2013 and in 2016. Her father had died in 2012 but was buried immediately as he was a Muslim. She and the sponsor had visited the following year for the first anniversary of his death. They had seen the appellant and her mother on that occasion. They saw the appellant again in 2016 when they went for the sponsor's father's funeral. Her situation was difficult. She was being passed from family to family. She had been studying then but no longer was. She ceased her studies last year because she felt frustrated and dejected by her situation. Mrs Akinwale said they sent clothes to the appellant and both she and her husband sent money by bank transfer. She explained that she asked the appellant to prepare and send a statement and that she also asked the pastor to write one. The statements were sent by DHL.

18. Mrs Akinwale said that she was in touch with the appellant once a week or a fortnight. Her husband also made contact with her. She said she was concerned for the appellant who was being used as a servant. She was not in a safe environment. She was a young girl with no support and was taken advantage of. She said she and the sponsor were family and willing to support her.

19. Mrs Akinwale stated that her mother lived in a town some distance from Lagos. She was diabetic. The appellant could not live with her because she was not from her side of the family and, in any case, it would be a strain on her mother.

20. In response to Mr Kotas' questions, Mrs Akinwale stated that the appellant's mother had been a teacher but lost her job. She had then worked as a petty trader. The sponsor had helped her buy a machine for grinding pepper.

21. She stated that the appellant may well have gone to live with a relative or friend of her mother after the latter's death. The sponsor knew more about that as he was more involved at the time. She accepted that there was no mention of that in her statement but explained that was because an up to date picture had been sought. She said they had not been to visit more because it was expensive to travel. She said that her own mother lived in Ijebu but also visited Lagos. It was not her mother's responsibility to look after the appellant; she was not a relative. She stated that the appellant had only recently disclosed information about all her problems. The pastor had referred to "*undesirable experiences*" in his statement. The pastor could not take her in as he could not afford to do so. She said that in October 2017 the appellant had run away and it took two days to find her. She had last studied computing in May or June 2017. Mrs Akinwale had sisters in the UK and brothers in Nigeria. The appellant could not live with them because she was not their relative and they had their own responsibilities.

22. That completed the oral evidence. I then heard submissions. Mr Kotas submitted that the case turned on credibility and there had been serious divergences from the previous evidence. There had been no suggestion before the First-tier Tribunal Judge of any ill treatment or concern over the appellant's welfare. This was an embellishment. Had the appellant felt at risk, she would have said so earlier. The sponsor could not recall when the appellant had been sleeping rough. There were discrepancies over whom the appellant lived with, whether with friends or with church goers. It was strange that all these events were not mentioned in the sponsor's statement. The pastor did not mention that the appellant lived with friends or a relative; that was an astonishing omission. The letter was not addressed to anyone. The appellant's statement was undated. The sponsor's wife's mother was a relative and the appellant could go and live with her. The case at its highest was that the appellant missed her parents. There was no reason to find that she had suffered abuse or ill treatment. The sponsors never went to visit the appellant. That was indicative of the fact that she was being cared for by others. They had been on other holidays which undermined the claim that they could not afford to travel to Nigeria. The requirements of paragraph 297 had not been met. The threshold was high. Reliance was placed on Mundeba [2013] UKUT 99. The claim of abuse had not been made out and there were no other compelling circumstances. Her best interests would therefore be to stay in Nigeria. The appeal should be dismissed.

23. Mrs Akinwale then made her submissions. She relied on the appellant's statement and its contents and she submitted that these were not embellishments. They had provided evidence as accurately as possible, bearing in mind that some events occurred several years ago. They had only been made aware of the abuse last year. They had a mortgage and their own children to support and a ticket to Nigeria cost £650-£700. They were also supporting the appellant. She would not be in a strange environment here as they shared the same cultural background. The pastor was not familiar with legal statements and had simply written out his own account. The appellant's best interests had not been considered. She required love and support. It was not tenable for the

present arrangements to continue. The appellant was the sponsor's responsibility and not the responsibility of his in-laws.

24. I then heard from Mr Akinwale. He sought to differentiate this case from the facts in Mundeba. He stated that he was responsible for the appellant and had been caring for her even before her parents' demise. He was British born and had not come here to claim asylum. He was able to provide support and was not dependent upon the state. The appellant's living conditions were untenable. He could not shift responsibility for her to his in-laws. This was his duty towards her and to his brother.

25. That completed the submissions. At the conclusion of the hearing, I reserved my determination which I now give.

Discussion and Findings

26. In reaching my findings, I have taken careful note of all the submissions and the evidence, whether or not specifically referred to in my determination. I bear in mind that it is for the appellant to make out her case on the balance of probabilities and that I may take account of the human rights claim as at the date of hearing. The appeal is to be considered under article 8. As part of my consideration, I have had regard to paragraph 297 of the Immigration Rules as the potential to satisfy the rules impacts upon the proportionality of the decision to refuse entry clearance. It is, therefore, a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. I have also had regard to s.117C when undertaking the proportionality assessment.

27. Paragraph 297 provides:

The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

.....

(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

- (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and*
- (vi) holds a valid United Kingdom entry clearance for entry in this capacity; and*
- (vii) does not fall for refusal under the general grounds for refusal.*

28. It is no longer disputed that the appellant is the niece of the sponsor, that she was born on the date claimed and that her parents are both deceased. There was also no issue taken by the respondent on the following matters: that the sponsor is a British national and settled in the UK with his wife and their three children, that the appellant was under the age of 18 when she made the application, that she is unmarried and does not lead an independent life, that she can and will be adequately maintained and accommodated by the sponsor, that suitable arrangements have been made for her care here and that she does not meet the general grounds for refusal. The only provision that was disputed was (i)(f): whether there are serious and compelling family or other considerations which make exclusion undesirable. As far as article 8 is concerned, there was no submission by the respondent that the appellant and the sponsors do not enjoy family life. The focus of the respondent's case was that the refusal was a proportionate interference with her family/private life.

29. I have also had regard to the respondent's guidance to entry clearance officers on the issue of what constitutes serious and compelling circumstances and on the approach to be taken in such applications. The relevant part of that guidance (at Chapter 8 Section 5A) states:

"Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions. Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55.

The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities. Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;*
- The child's interests being made a primary, although not the only consideration;*
- No discrimination of any kind; ...*
- Identification of those that might be at risk from harm.*

This paragraph relates to the considerations referred to in Paragraphs 297(i)(f)... of the Immigration Rules. The objective of this provision is to allow a child to join a parent or relative in this country only where that child could not be adequately cared for by his parents or relatives in his own country. It has never been the intention of the Rules that a child should be admitted here due to the wish of or for the benefit of other relatives in this country. This approach is entirely consistent with the internationally accepted principle that a child should first and foremost be cared for by his natural parent(s) or, if this is not

possible, by his natural relatives in the country in which he lives. Only if the parent(s) or relative(s) in his own country cannot care for him should consideration be given to him joining relatives in another country...

If the sponsor is not a parent but another relative, eg an aunt or grandparent, the factors which are to be considered relate only to the child and the circumstances in which he lives or lived prior to travelling here. These circumstances should be exceptional in comparison with the ordinary circumstances of other children in his home country. It would not, for instance, be sufficient to show he would be better off here by being able to attend a state school. The circumstances relating to the sponsors here (eg. the fact that they are elderly or infirm and need caring for) are not to be taken into account".

30. Mr Kotas submitted that the case turned on credibility issues; the credibility of the appellant and her sponsors. I agree. Although he sought to argue that the sponsors had embellished and exaggerated the claim, I found them to be straightforward and honest witnesses, trying to assist the court to the best of their abilities. I accept their evidence in its entirety and I also accept the evidence of the appellant as contained in her witness statement as a true account of the difficulties she has faced since the tragic loss of both her parents. The pastor has been consistent in his description of the appellant's difficulties and I accept that his reference to "undesirable experiences" refers to the sexual attention the appellant has received.

31. The appellant was 17 when she made her entry clearance application just a few months after the death of her mother which left her orphaned at the age of 16. I must have regard to her age as it was when the application was made. I accept the evidence that her life had already been difficult since the earlier passing of her father when she was 12 but, as she said in her statement, she still had her mother at that stage. After her mother's death her life became unsettled and harsh. She was temporarily housed by various individuals and families arranged by the church and forced to change homes after a few weeks or months. This is confirmed by the oral evidence of the sponsors and the written evidence from the appellant and the pastor. I see nothing sinister in the pastor's failure to address his statement to a particular person nor do I read anything into the fact that he did not refer to the appellant living with a distant relative immediately after her mother's death or with friends at various points in time. I accept that he was presenting an overall picture and, given that the appellant's friends were also members of church going families, there is nothing discrepant between his evidence and hers. I note from the pastor's October 2015 letter that by that time, she had already lived in ten different households.

32. The guidance states that an appellant's circumstances must be compared to the ordinary circumstances of other children in the country of origin. Mr Kotas submitted that many children could be orphaned but he did not refer me to any documentary evidence to support that submission. In any event, losing both parents at a tender age and moving around from pillar to post is not what I would consider to be an ordinary circumstance faced by other Nigerian children.

33. I fully accept that the appellant felt vulnerable and reluctant to disclose the personal and very unpleasant and unwelcome advances that she experienced from adult males as well as the physical ill treatment from others from the very beginning of her itinerant lifestyle. She is a young girl with no family support in Nigeria and I accept that she has felt despondent, embittered and vulnerable. I also accept that a genuine fear of losing whatever shelter she had prevented her from revealing to the sponsors the abuse she had suffered. I find that is why they made no reference to the ill treatment earlier on in these proceedings. I reject the submission that this was a late attempt to embellish the claim. I heard the sponsors give evidence twice; at the error of law hearing and again at the most recent hearing and, on both occasions, I was impressed by their sincerity and integrity. I find that the evidence of abuse and ill treatment pertains to circumstances appertaining at the date of the decision and that it is ongoing. I accept that the appellant cannot be sent to live with the sponsor's mother-in-law or brother-in-law. There is no evidence that they have even met the appellant and they certainly cannot be expected to take on the responsibility for a young girl who is not part of their family. As confirmed by Mundeba (s.55 and paragraph 297(i)(f)) [2013] UKUT 88 (IAC) relied on by the respondent and by Upper Tribunal Judge Reeds who granted permission to appeal, the Tribunal found that the context of the rule suggested that *the relative in the country of origin must be able to provide suitable care for the child of the sort that a parent would* (at paragraph 30). There is no such person in Nigeria. The sponsor is her closest living relative and I accept that he and his wife are best placed to care for her needs. I find there is no relative in Nigeria who is able to care for her. There is no suggestion by the respondent that the appellant is being brought here to meet the needs or to assist the sponsors in any way. The application was made solely in her best interests which are quite plainly to live in a safe environment with her family.

34. It is confirmed in Mundeba that, although the s.55 duty under the 2007 Act only applies to children in the UK, "*the broader duty explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55*" (head note (ii)). The Tribunal found that:

"Family considerations require an evaluation of the child's welfare including emotional needs. Other considerations come into play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social background and developmental history and will involve an inquiry as to whether :

- (a) there is evidence of neglect or abuse;*
- (b) there are unmet needs that should be catered for;*
- (c) there are stable arrangements for the child's physical care.*

The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission" (head note (iv)).

35. The assessment must of course be fact sensitive. No assessment was undertaken by the ECO in his decision. Only the briefest reference to s.55 is made in the ECM's review of 23 May 2016. The conclusion there is simply that "*there are no exceptional circumstances*" but no explanation is provided for why this view was taken or of what circumstances were considered. I accept that the full picture was not, however, available to the respondent at the time of the application. An examination of the appellant's circumstances as now known does, in my view, disclose evidence of neglect and abuse, unmet emotional and physical needs, a lack of stability in the arrangements for her care which were only ever designed as a temporary measure following the sudden loss of her mother. As a young female, she is vulnerable to preying males who have attempted to take advantage of her situation. She is living in an unacceptable environment. I accept the threshold is a high one and excludes cases where, without more, it is simply the wish of the parties to be together (Mundeba at paragraph 34). This is not, however, a case where the application was made solely because the parties wished to be united. It is far more than that. It seems to me that all the circumstances identified constitute sufficiently serious and compelling circumstances to justify admission given the appellant's specific background. Unlike in Mundeba, this appellant's needs are not being met. It follows that I find that the requirements of paragraph 297 have all been met in so far as they relate to the appellant.

36. Any suggestion by the respondent that the appellant had fared all right as indicated by her graduation from school, is undermined by the evidence which demonstrates that the appellant completed her SSC (not GCSEs) in 2014 *before* the death of her mother. There is no evidence to suggest that she successfully completed any course of education since then and I have no reason to doubt the sponsors' evidence that she did not.

37. I consider the guidance set out in Razgar [2004] UKHL 27. There was no submission by Mr Kotas that family life does not exist between the appellant and the sponsor and his family and, based on all the evidence I have seen and heard, I find that it does. The sponsor is the closest relative the appellant has and I accept that he had taken on a father's role in her life and that she has a close relationship, if strained at times due to the unfortunate circumstances, with him, his wife and their children (the appellant's cousins) whom she has grown close to on their visits to Nigeria. I accept that there is also a dependency of an emotional and financial nature upon the sponsor and that there was financial dependency going back a number of years. I find that the refusal of entry clearance does interfere with that family life although it is in accordance with the law and in pursuance of a legitimate aim.

38. Turning then to the question of proportionality, that being the crux of this appeal, I find that the decision to refuse entry clearance is a disproportionate one. I have already set out all my findings of fact and those facts which are not contentious. There is family life. It cannot be enjoyed in Nigeria as the sponsor is a British national by birth and cannot be expected to uproot himself, his wife and

their three children who have known no other home to move to Nigeria. The sponsors have employment here and a mortgage on their home. Their children are settled and in education. Their lives are here. Relocating to Nigeria would be unreasonable. The applicant can speak English as her statement and educational papers show. She would not be a burden on the state as she would be fully accommodated and supported by the sponsors. The fact that the appellant meets the requirements of the Immigration Rules impacts further on the balancing exercise. It means that the refusal of entry clearance serves no public interest and indeed undermines the appellant's best interests which I find are to be united with the only remaining family she has; the sponsor, his wife and children.

39. For all these reasons, I conclude that article 8 is engaged and the appeal succeeds.

Decision

40. The appeal is allowed on article 8 grounds.

Anonymity Order

41. I make no order for anonymity.

Signed

A handwritten signature in black ink, appearing to read 'R. Kekić' with a period at the end. The signature is written in a cursive, slightly stylized font.

Upper Tribunal Judge Kekić

Date: 28 February 2018