
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/11683/2018

**THE IMMIGRATION ACTS**

| **Heard at Glasgow** | **Decision & Reasons Promulgated** |
|---|---|
| **on 12th July 2019** | **on 2nd August 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DEANS**

**Between**

**NSONA [N]**
**(No anonymity direction made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr W Olabamiji, DMO Olabamiji, Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision by Judge of the First-tier Tribunal David Clapham dismissing an appeal on protection and human rights grounds.

2. The appellant is a national of the Democratic Republic of Congo. In 1998 she and her husband left DRC and went to South Africa, where in 2003 the appellant was granted refugee status. The appellant's

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marriage broke down and the appellant states she last had contact with her husband in March 2015. According to the appellant, in 2015 in South Africa she became active with the DRC opposition group UDPS, as a result of which she was harassed and persecuted by an agent of the DRC. In November 2017 the appellant applied for a visa to travel to the UK as a visitor. The appellant arrived in the UK on 10th January 2018 and made a protection claim on 24th January 2018. The appellant's two daughters (referred to herein as Q1 and Q2) reside with her in the UK as currently does her adult son (referred to as C).

3. The Judge of the First-tier Tribunal did not believe the appellant's claim that she was at risk in South Africa from an agent of the DRC. Even supposing she was, the judge was not satisfied that she would not receive sufficient protection from the South African authorities. The judge did not accept that there was a risk to the appellant in DRC. The judge concluded that the appellant's account given in evidence was not credible and that her claim for protection must fail. The judge then stated that the appellant's human rights claim would stand or fall with the asylum claim. The judge dismissed the appeal on human rights grounds as well as on protection grounds.

4. Permission to appeal was granted by the Upper Tribunal on the sole ground that the judge arguably did not properly consider the rights of the appellant and her children under Article 8.

**Error of law**

5. At the hearing before me it was pointed out that Article 8 was raised before the First-tier Tribunal both in the grounds of appeal and in a written submission for the appellant. Mr Diwnycz very properly acknowledged that he was not able to argue that the Judge of the First-tier Tribunal did not err in law by not addressing Article 8 in his decision.

6. Accordingly it was accepted by the parties that the Judge of the First-tier Tribunal erred in law by omitting to address Article 8. This part of his decision, but only this part, was therefore set aside to be re-made on the basis of the evidence before the First-tier Tribunal and submissions made at the hearing before me. In addition there was an Article 15(2A) application on behalf of the appellant to admit a bundle containing evidence about the appellant's adult son, C, who is now aged twenty-one. As this evidence addresses the family's current circumstances and was not available at the time of the hearing before the First-tier Tribunal, I allowed it to be admitted.

**Submissions**

7. Mr Olabamiji referred to the appellant's 13-year-old daughter, Q2, who has epilepsy. The child was born in South Africa and speaks only English and not Lingala. The other daughter, Q1, is aged 16

and was also born in South Africa. The appellant is a single mother. Her son, C, now has a mental illness, as evidenced by a psychiatric report in the latest appellant's bundle. Mr Olabamiji submitted that C has not established independent family life but is part of the appellant's family unit. He is visited by a community nurse and this is likely to continue for 2 years. It would be unduly harsh to remove the appellant from the UK and not in the best interests of her children.

8. For the respondent, Mr Diwnycz submitted that the appellant's son, C, is an adult. In terms of Kugathas [2003] EWCA Civ 31, it had not been shown that he has family life with his mother. He was convicted of two offences and medically assessed as suffering from psychosis. The daughter Q1 was of an age when she would still be in full-time education. There was no evidence that she was in need of medical treatment or had any special needs.

9. Mr Diwnycz referred to a medical report on the daughter Q2 (Appellant's bundle, p 153). Her epilepsy was controlled by medication and she had had no seizures since 2017. Although the children did not speak Lingala, French was an official language in DRC and even English might be used.

10. In response, Mr Olabamiji asked me to consider the mental capacity of the appellant's son, C, and his relationship with the appellant, who is his primary carer. It might not be possible for C to live a normal life without the appellant. There was still a medical report awaited on whether C is capable of giving instructions in relation to an appeal arising from a protection claim made in his own right. Although C was discharged from hospital he might relapse. Article 8 was engaged and in all the circumstances it would be unduly harsh to remove the appellant and her daughters to DRC.

**Discussion**

11. It has not been suggested that the appellant might qualify for leave under the Immigration Rules. Her appeal depends upon succeeding outside the Rules under Article 8 on the basis of a very strong or compelling claim which outweighs the public interest in maintaining effective immigration controls, in terms of Agyarko [2017] UKSC 11. In other words, the appellant will succeed if removal would result in unjustifiably harsh consequences for her and her children amounting to a disproportionate interference with her private or family life. In considering this I must have regard to section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). Mr Olabamiji also referred me to ZH (Tanzania) [2011] UKSC 4 in relation to the best interests of the children, and to an unreported decision of the Upper Tribunal in SS-A (IA/29332/2013, 20th October 2015), to which Mr Diwnycz did not object.

12. Neither of the appellant's daughters are "qualifying children" in terms of s 117B(6) of the 2002 Act. They are neither British citizens nor have they lived here for a continuous period of 7 years or more. They were born in South Africa and have lived most of their lives there, having come to the UK as recently as January 2018. Their best interests are a primary consideration of this appeal but in considering their best interests I will take as the starting point that it is in their best interests to remain in a family unit with their mother.

13. The appellant's son, C, is aged 21. Mr Olabamiji informed me that he now lives with his mother, following his discharge from hospital, but this was not always the case. A social work report in the latest bundle for the appellant states that, according to C, he lived for several months in accommodation provided by the Home Office which he shared with a person from eastern Europe, before that in a hostel in Glasgow, and prior to that in Croydon. It is not clear whether the appellant's mother and sisters were also in Croydon at that time. A psychiatric report in the same bundle states that on moving to the UK, C initially lived in London but then lived with his mother and two siblings in Glasgow. It seems that while sometimes C has lived with his mother, he has also lived away from his family for periods.

14. In July 2018 C committed a sexual assault on a female shop worker and assaulted as community safety worker to his injury. C pled guilty to both offences. He was for a period in HMP Polmont and in April 2019, 5 days after he was liberated, he was admitted to a psychiatric ward, from which he was discharged on 12 June 2019. C has a psychotic illness and has responded well to medication but there is a high risk of relapse. His consultant psychiatrist records that according to C's mother he has always required some assistance with daily living and the psychiatrist suggests this is in keeping with some learning disability. The appellant is keen that C lives with her and she supervises his medication.

15. While there is some evidence of dependency between C and the appellant, I am not satisfied this exhibits the strong ties to constitute family life as envisaged in Kugathas. There has been some attempt by C to live independently. This was brought to an end by his offending and the diagnosis of a psychotic illness. Were the appellant not there to supervise C's medication and assist with his daily living then the community nurse and other health and social services might be called upon. It is significant that C has his own application to stay in the UK and, according to his psychiatric report, this is at the appeal stage. It ought not to be assumed that C will continue to reside in the UK or that he will acquire any right to do so.

16. Reference has already been made to the medical evidence for the appellant's younger daughter, Q2. A letter of 26th September 2018 from her GP (Appellant's bundle, p 153) states that her epilepsy is controlled by medication. Her last seizure was at the start of 2017. There was some evidence in the respondent's bundle on the availability of treatment for epilepsy in South Africa and in DRC. It appears from this that while treatment would be available in South Africa, health care in DRC is less well-organised and more difficult to access, particularly outside the main cities. There is no evidence of any health problems or special needs in respect of the older daughter, Q1.

17. I note that the appellant reported some health difficulties of her own to the respondent. These included headaches, gastritis and cramps. I was not referred to any medical evidence in relation to the appellant herself and her own health was not mentioned in the submissions made to me.

18. In terms of s 117B(1) of the 2002 Act, the maintenance of effective immigration controls is in the public interest. As far as knowledge of English is concerned, I note that when the appellant gave evidence before the First-tier Tribunal she did so through a Lingala interpreter. This is despite having lived in South Africa for many years. In relation to s 117B(2), it seems therefore that the appellant is not fluent in English, although I understand this to be the language used by her daughters. In relation to s 117B(3), there was no evidence before me that the appellant is financially independent and would not be a burden on taxpayers. Although the appellant entered the UK with a visa and then claimed protection, her stay here is precarious. Little weight should therefore be given to any private life she has established in the UK, in terms of s 117B(5).

19. In terms of s 117B there is little to put on the appellant's side in the balancing exercise under Article 8. So far as family life is concerned, the appellant's daughters would be with her were she to be removed from the UK. It would be in their best interests to remain with their mother. While both daughters appear to be benefiting from attending school in the UK they have been here only since January 2018. They are teenagers who have spent most of their lives in South Africa. The younger daughter, Q2, is receiving medication for epilepsy and with the benefit of this medication her condition is under control. According to the respondent, treatment would be available in South Africa and there is no firm evidence that it would not be available in DRC.

20. There is some limited evidence of dependency upon the appellant by her adult son, C, largely in consequence of his having

developed a psychotic illness. C has, however, no right to remain in the UK and is in the process of pursuing an appeal seeking to be allowed to stay. His status at present is precarious. The assistance he is given by his mother with daily living and supervising his medication could be provided by other means. C lived independently from his mother for a period following his arrival in the UK. It seems reasonable to assume he could do so again. C was discharged from hospital on 12th June 2019 so it is only for a few weeks so far that the appellant has been assuming greater responsibility for him.

21. Taking into account C's precarious immigration status and the short time that has elapsed since his diagnosis of medical illness, there is little evidence to show dependency amounting to family life between the appellant and C and unjustifiably harsh consequences arising from interference with such family life. I accept that the appellant is able to help with the care of C and the supervision of his medication. Were she no longer able to do so I am not persuaded that the consequences would be unjustifiably harsh either for the appellant or for C. Furthermore, if in due course C is not permitted to remain in the UK he may rejoin his mother outside the UK.

22. In carrying out the balancing exercise under Article 8, I am not persuaded that there would be unjustifiably harsh consequences arising from the appellant's removal from the UK which would outweigh the public interest in maintaining effective immigration control. The appeal will not succeed under Article 8.

**Conclusions**

23. The making of the decision of the First-tier Tribunal involved the making of an error of law in the Tribunal's consideration of Article 8.

24. The decision is set aside so far as it concerns Article 8.

25. I re-make the decision by dismissing the appeal.

**Anonymity**

The First-tier Tribunal did not make a direction for anonymity. I have not been asked to make such a direction. While my decision contains some personal information involving children, the children are not identified by name. In the circumstances it is not necessary to make a direction.

M E Deans
24th July 2019
Deputy Upper Tribunal Judge

Approval for Promulgation