Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11325/2019 (V)

THE IMMIGRATION ACTS

Heard remotely from Field House	**Decision & Reasons Promulgated**
On 26 March 2021	**On 7 April 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MRS ELYSEE MUMBUSI KIBOBA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Ntochukwu, Legal Representative from Voice for the Voiceless UK
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal with permission against the decision of First-tier Tribunal Judge Davey ("the judge"), promulgated on 13 February 2020, by which he dismissed the Appellant's appeal against the Respondent's refusal of her human rights claim.

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2. The Appellant, a citizen of DRC born in March 1971, arrived in the United Kingdom in 2018 having spent a considerable amount of time in Belgium. Her husband had left DRC in 2002 and come directly to the United Kingdom where he has resided ever since. He was granted indefinite leave to remain in 2004. In 2003 the couple's son, D, born in December 1998, travelled from DRC to join his father in this country. D too was granted indefinite leave to remain in 2004 and he has resided in this country ever since his arrival.

3. D suffers from moderate to severe sensorineural hearing loss with associated delays in speech and language development. In respect of the challenges facing him, he has received assistance from relevant professionals and the local authority over the course of time.

4. The human rights claim made by the Appellant on 21 December 2018 relied on the family life said to be enjoyed in the United Kingdom with her husband and D. It was said that the family unit should not be separated and that it could not relocate to DRC to reside permanently, largely because of D's situation, but also because the husband had resided in the United Kingdom for a significant period of time.

5. The Respondent concluded that the Appellant could not satisfy any of the relevant Immigration Rules relating to Article 8, nor were there any exceptional circumstances such that leave to remain should be granted.

The decision of the First-tier Tribunal

6. The judge set out the relevant background. At [5]-[11] he made references to the absence of detailed and up-to-date evidence, particularly relating to D's circumstances. The Appellant had not provided details in her witness statement as to the particular assistance she provided to her son in this country. The judge noted that the most recent documentary evidence relating to D was dated 1 December 2017 and he noted that D had been discharged from relevant services in that year.

7. At [11] the judge rejected the Appellant's assertion that she might face difficulties on return to DRC due to a claimed relationship with a relative of the (former) President Laurent Kabila. This was said to be an embellishment on the Appellant's part.

8. At [12] and [16] the judge concluded that the Appellant and her partner would not face significant obstacles or insurmountable obstacles in re-establishing life in the DRC. He stated (in my view correctly) that the real focus of the Appellant's case related to D's circumstances and whether it would be proportionate for him to go back with his parents to live in his country of nationality.

9. At [13] the judge directed himself to Hesham Ali [2016] UKSC 60 and Agyarko [2017] UKSC 11 and the need to consider positive and negative

factors when undertaking the balancing exercise pursuant to an Article 8 assessment. At [14] he made reference to a number of factors relating to D which weighed in favour of him both remaining with his parents and in the United Kingdom. These factors were said to include: the fact that D had grown up in this country (having arrived in this country at the age of 4 or 5); he had been educated here with assistance from relevant agencies; that he knew nothing of life in the DRC; that he did not speak "Congolese" (in fact Lingala); and that his "friends, connections and roots are well established in the United Kingdom".

10. In the next paragraph the judge concluded that notwithstanding these factors, it was both reasonable and proportionate to expect D to relocate to the DRC with his parents. In so concluding, the judge took account of his finding that the parents could themselves re-establish themselves in that country. He also took account of the mandatory considerations under section 117B of the Nationality, Immigration and Asylum Act 2002. In [18] the judge expressly disregarded concerns that he held relating to what he described as the Appellant's "abuse of UK immigration controls". Finally at [19] he stated that if the Appellant's circumstances were looked at in isolation, the Article 8 claim would be bound to have failed.

The Appellant's challenge

11. The grounds of appeal are, as noted in the grant of permission, not entirely easy to follow. The essential points to be drawn out from them are as follows. It is said that the judge should have regarded the factors he set out in [14] as being sufficient to show that D could not be expected to go and live in DRC and therefore the Appellant should have succeeded in her appeal. It is said that the conclusion that D could go and live in that country was essentially perverse and/or lacking in adequate reasoning and that in all the circumstances it would not have been reasonable to expect the Appellant to leave this country alone and make an entry clearance application from DRC (having regard to the Chikwamba principle).

12. Upper Tribunal Judge O'Callaghan granted permission by a decision dated 17 August 2020. On 14 October 2020 the Respondent provided a rule 24 response. Paragraph 2 of this document reads as follows:

> "The Respondent does not oppose the Appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing in the Upper Tier Tribunal to consider whether it would be proportionate to expect the Appellant and her family members to return to the DRC."

13. The file then came in front of Upper Tribunal Judge Jackson. By a direction notice dated 1 December 2020, she took the view that the rule 24 response was unclear on the basis that it failed to identify the basis of the purported concession as to error of law and failed to address any issues concerning the materiality in respect of such errors. She did not consider

it appropriate for the Tribunal to deal with the matter without a hearing and was of the view that the case remained suitable for a hearing at which it should be determined whether or not the First-tier Tribunal had indeed erred in law at all and, if it had, whether its decision should be set aside.

The hearing

14. At the outset of the hearing, Mr Kotas confirmed that he had informed Mr Ntochukwu in advance of the Respondent's current position that the rule 24 response was no longer being relied on and that she in fact opposed the Appellant's appeal.

15. Mr Ntochukwu confirmed that he was content to proceed with the hearing on that basis. There was no application for an adjournment.

16. In all the circumstances, I considered that it was fair to proceed on the basis set out by Mr Kotas. Judge Jackson had raised her concern on the rule 24 response issue number of months before the hearing. I shared Judge Jackson's view. The Respondent is entitled to put forward concessions, but the Tribunal is not necessarily bound to accept them when matters of law are involved. The absence of any particulars in the rule 24 response was problematic. Further, errors of law do not necessarily lead to a decision being set aside: that is a matter for the Tribunal's discretion. In this case, the rule 24 response was vague in both respects.

17. I therefore proceeded to hear submissions.

18. Mr Ntochukwu relied on the grounds and expanded thereon. He submitted that the judge had essentially failed to take proper account of the interests of both D and the Appellant's husband. When the matters referred to in [14] of the judge's decision were taken into account, the conclusion in [15] was simply inconsistent: the judge should have concluded that it would not be proportionate for D to go and live in the DRC. Mr Ntochukwu confirmed that the judge had not failed to take account of evidence, but had failed to attach appropriate weight to what evidence there was. On the Chikwamba issue, he submitted that it would be "reasonably likely" for an entry clearance application to succeed if the Appellant made one from DRC. Finally I was referred to the well-known judgment of the House of Lords in Beoku-Betts [2008] UKHL 39. The judge had failed to apply this principle in respect of D and the husband.

19. Mr Kotas submitted that the judge had clearly found that the Immigration Rules had not been met. He pointed out the lack of relevant evidence relating to D's current circumstances. There had been no evidence from D himself, little from the Appellant in respect of relevant matters, and the documentary evidence was by the time of the hearing before the judge outdated. Mr Kotas submitted that the judge's findings and conclusions were not perverse, that adequate reasons had been provided, and that the judge's decision was sustainable. In respect of the Chikwamba issue, it

was clearly not certain or near-certain that an entry clearance application would have succeeded.

20. In reply Mr Ntochukwu referred me to paragraphs 20 to 23 of the Appellant's witness statement in which it was said that she had provided evidence of the care provided to D in the United Kingdom.

21. At the end of the hearing I reserved my decision.

Conclusions

22. I conclude that the judge has not erred in law such that I should exercise my discretion to set his decision aside, with reference to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

23. The judge was entitled to conclude that, leaving aside D's circumstances for the time being, the Appellant and her husband could have reintegrated into DRC society without facing very significant obstacles (or indeed insurmountable obstacles, if the test is materially different). The judge was clearly aware of the length of time that the husband had been in the United Kingdom and of his status.

24. Mr Ntochukwu confirmed that it was not argued that the judge failed to take into account evidence, only that insufficient weight had been placed on relevant matters. The weight attributable to relevant factors is a matter for the fact-finding tribunal, subject to which represents a difficult threshold to overcome. In this case, there is no perversity and the judge's findings on the couple's position is sound.

25. As regards D's situation, the judge was entitled to conclude that there was a lack of both detailed and/or up-to-date evidence. Paragraphs 20 to 23 of the Appellant's witness statement do not in fact provide any real detail as to the particular care or assistance that she provided to D in this country, nor did it say anything about why such care would not be possible in the DRC. As regards the documentary evidence, the letter from the National Deaf CAMHS from Springfield University Hospital in the Appellant's bundle, dated 15 February 2017, was not only relatively out of date, but confirmed that D did not require referral to adult mental health services. As the judge noted at [9] of his decision, there was a missing page in the bundle but that had never been rectified by the appellant. The judge clearly recognised the nature of D's conditions and challenges, but was also entitled to place these in the context of what evidence he had been presented with at the hearing.

26. I turn to what is said about D at [14]. The judge took what were plainly relevant matters into account. I agree with Mr Kotas that the judge must have had the actual length of time spent in the United Kingdom in mind when referring himself to the fact that he had grown up in this country. There was no obligation on the judge's part to conduct what Mr Kotas

described as a mathematical exercise. At [15] the judge was weighing up the factors set out in the previous paragraph with all other relevant circumstances. These of course included his previous finding that the Appellant and her husband could reintegrate into DRC society without facing very significant obstacles. In my view it is also clear enough that the judge was taking into account the benefit to D from the reunification of his family unit following the Appellant's arrival in this country from Belgium. This included the care she and her husband would be able to continue to provide. The judge was also of course bound to take into account mandatory considerations under section 117B of the 2002 Act, which he duly did.

27. Contrary to Mr Ntochukwu's submissions, the elevated threshold of perversity is not met in this case in respect of the assessment of D's circumstances. The judge was the arbiter of weight and he conducted what in my judgment was an adequate balancing exercise, having regard to relevant factors, including those specific to D and the Appellant's husband.

28. On the issue of reasons, I agree with Mr Kotas that a judge is not required to give reasons for reasons. In this case, whilst perhaps relatively briefly stated, the judge stated at [15] what his conclusion was, in light of the balancing exercise which he was obliged to carry out.

29. Finally, the Chikwamba argument, whilst not specifically addressed by the judge, could not have availed the Appellant (assuming that it was properly put at the hearing). For such a submission to have been capable of affecting the outcome, the Appellant needed show that a putative entry clearance application would have been certain or near-certain to succeed. On no rational view could that have been made good, at least on the evidence before the judge.

30. It may be said that the decision is one which I or another judge might not have arrived at on the same facts, but that is not the test when it comes to deciding whether the First-tier Tribunal has erred in law. Whilst one would certainly have sympathy with the family's circumstances, and a relocation to DRC as a unit would not be without its difficulties, there are no errors of law in the judge's decision such that I should exercise my discretion to set it aside.

Notice of decision

31. The decision by the First-tier Tribunal did not involve the making of errors on a point of law.

32. The decision of the First-tier Tribunal shall stand.

33. No anonymity direction is made.

Signed H Norton-Taylor Date: 31 March 2021

Upper Tribunal Judge Norton-Taylor