Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/43203/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 14 March 2016	**On 5 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

G I K
(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr S Staunton, Senior Home Office Presenting Officer
For the Respondent: Mr M Goldborough, solicitor, of UK law

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant so that the anonymity direction deemed necessary by the First-tier Tribunal is preserved.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Thankie, promulgated on 5 August 2015, which allowed the Appellant's appeal on article 8 ECHR Grounds.

Background

3. The Appellant was born on 19 June 1973 and is a national of Nigeria.

4. The appellant has three dependent children. The appellant applied for leave to remain in the UK or 14 March 2012. The respondent refused that application of 2 July 2013. The appellant appealed that decision successfully. In a determination dated 13 December 2013 an Immigration Judge found that the respondent's decision was not in accordance with the law. The case was remitted to the respondent to properly consider the best interests of the appellant's dependent children.

5. The respondent reconsidered the original decision and refused the application on 7 October 2014.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Thanki ("the Judge") allowed the appeal against the Respondent's decision on article 8 ECHR grounds.

7. Grounds of appeal were lodged and on 4 January 2016 Judge Grimmett gave permission to appeal stating *inter alia*

> *"It is arguable that the Judge erred in failing to consider s.117A and s.117B of the Nationality, Immigration and Asylum Act 2002"*

The Hearing

8. (a) Mr Staunton, for the respondent, moved the grounds of appeal. He explained to me that there are four grounds of appeal; the fourth ground relates to the appellant's estranged husband. He told me that his investigations reveal that the appellant's estranged husband has been granted leave to remain in the UK, so that he would not move the fourth ground of appeal. He did however rely on the first three grounds of appeal.

(b) Mr Staunton told me that throughout the decision the Judge had failed to have regard to the immigration rules, the relevant legislation and established case law. He relied in particular of paragraph 33 of SS (Congo) and Others [2015] EWCA Civ 387. He told me that the judge had failed to take account of the public interest as required by section 117B of the

2002 Act, and that particularly at [37] the Judge had failed to follow EV (Philippines) and others v SSHD 2014 EWCA Civ 874.
(c) Mr Staunton urged me to allow the appeal and set the decision aside. He told me that if I was to find that the decision is tainted by a material error of law, then the case should be remitted to the First-tier to be heard of new.

9. (a) Mr Goldborough, for the appellant, told me that the decision does not contain an error of law, material or otherwise. He reminded me that the grant of permission to appeal focused on sections 117A and 117B of the 2002 Act. He told me that the Judge had given due weight to the determinative factors in this case and that the decision reflected a careful balancing exercise which correctly balanced the rights of the appellants three dependent children against the public interest.

(b) Mr Goldborough reminded me that the appellant's oldest child is 12 years of age and has lived in the UK for 11 years; that the appellant's middle child has lived in the UK for seven years, and next month the appellant's youngest child will have been in the UK for seven years. He told me that the Judge gave appropriate weight to the rights of three qualifying children, and properly recognised that the appellant is a victim of domestic violence. He relied on a court order allowing the appellant's former partner restricted contact to the appellant's three children. He argued that the grounds of appeal amount to no more than a disagreement with findings of fact which were well within the range of findings available to the Judge. He urged me to dismiss the appeal and allow the decision to stand

Analysis

10. The Judge's findings and conclusions start at [27]. Between [27] & [30] the Judge effectively sets out the procedural history of this appeal and then, at [31] in one sentence, the Judge finds *"…. That the respondent's decision with regard to the best interests of the children under section 55 of the 2009 Act is inadequate."*

11. The problem created by that one sentence at [31] is that there are no detailed findings of fact which lead the Judge to that conclusion. At [32], [33] & [35] the Judge states that he ha s given "*significant weight*" to evidence tendered of domestic violence, but the decision does not contain any analysis of that evidence nor any reason for giving that evidence significant weight.

12. At [38] the Judge repeats his opinion that the respondent has not properly considered the best interests of the children. At [40] the Judge rehearses his findings that the appellant and her children have established private life whilst they had lawful leave to remain in the UK, and appears to embark on an investigation of the five questions posed in

Razgar. At [42] it appears that the Judge's decision is reached primarily on the basis of consideration of the rights of the appellant's children.

13. What the Judge does not do is consider appendix FM of the immigration rules and then paragraph 276 ADE of the immigration rules. It is not clear from the Judge's decision whether or not the appellant fulfils the requirements of the immigration rules, because the Judge does not make any findings in order to reach any conclusions in relation to the immigration rules.

14. At [38] the Judge says

> *"While I note the respondent's finding that there were no insurmountable obstacles in the mother and the children going to Nigeria..."*

But the Judge neither analyses the evidence nor does he come to his own conclusion about "*insurmountable obstacles*". It appears that the Judge makes no inquiry into the appellant's ability (or otherwise) to meet the terms of the Immigration Rules.

15. It is most likely that the Judge has simply considered the appellant's application on article 8 ECHR grounds out-with the immigration rules. The Judge does not explain why he chooses not to consider the immigration rules. The Judge does not follow the guidance given in SS Congo. Insofar as the judge conducts a proportionality assessment, he does so without any consideration of section 117B of the 2002 Act.

16. The Judge's superficial approach to the fact-finding exercise and his failure to consider the immigration rules, his failure to consider the Nationality Immigration and Asylum Act 2002, and his failure to take guidance from the established case law are all material errors of law. They are material errors because had the Judge considered the facts of this case against the guidance provided in statute in case law his decision may have been different.

17. I therefore find that the decision is tainted by material errors of law and must be set aside.

18. I consider whether I am in a position to substitute my own decision but find that I am unable to do so. There is force in Mr Staunton's submission that this case requires to be heard of new. The errors in the decision include an inadequacy in the fact-finding process. It is clear from the submissions of Mr Goldsborough, and from the documentary evidence, that a child arrangement order has been made allowing the father of the appellants three children restricted contact to them. Two of the appellant's children are qualifying children in terms of section 117 of the 2002 Act. In just a few weeks, the appellant's youngest child will have lived in the UK for more than seven years and will be a qualifying child.

19. These are all matters which may well be determinative of this appeal at a renewed hearing; They are matters on which the appellant should have the opportunity of leading up-to-date evidence.

Remittal to First-Tier Tribunal

20. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 a case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

> *(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*
>
> *(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal*.

21. In this case I have determined that the case should be remitted because of the nature and extent of the fact finding exercise necessary to reach a just decision in this appeal. None of the findings of fact are to stand. A complete re-hearing is necessary.

22. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge Thanki.

CONCLUSION

Decision

23. The decision of the First-tier Tribunal is tainted by material errors of law.

24. I set the decision aside. The appeal is remitted to the First Tier Tribunal to be determined of new.

Signed Date 21 March 2016

Deputy Upper Tribunal Judge Doyle