Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11313/2016

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 27 March 2018	**On 06 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

E. A.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Brakaj, Solicitor, Iris Law Firm
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria who entered the UK lawfully in 2008 with a grant of entry clearance as the dependent spouse of a student. She was accompanied by her three children. Their leave to remain expired on 14 November 2013, and they have remained in the UK unlawfully since.

2. The Appellant's husband is said to have left the UK for Nigeria in January 2014, having withdrawn an appeal against the refusal of an application to vary his own leave in the capacity of a Tier 1 Entrepreneur. In withdrawing his appeal he requested the Respondent and the Tribunal should remove

his wife and children to Nigeria. Nonetheless the Appellant and the children remained in the UK, and insisted on pursuing their own appeals against the decision to refuse to vary the leave to remain previously granted to the family. (They had sought such leave as his dependents.) They pursued their appeals only on Article 8 grounds, advancing no protection claim. Their appeals were dismissed on all grounds by decision of First tier Tribunal Judge Fisher promulgated on 24 April 2014. His decision records the Appellant's stance as being that she did not wish the children to return to Nigeria because she preferred them to be educated in the UK – albeit that would mean education at public expense for individuals who could not meet the requirements of the Immigration Rules. Although she was not divorced, she claimed that her marriage was over, but she did not allege that either she or the children faced any risk of harm in the event of return to Nigeria at the hands of either her husband, or any other individuals. It is clear from his decision that Judge Fisher concluded the Appellant had not told him the truth, that her marriage was not at an end, that her aim was simply to secure medical treatment for herself and her children, and, education for her children, at public expense.

3. On 30 March 2016 the Appellant advanced an asylum claim asserting for the first time that if removed to Nigeria her daughter would be subjected to FGM, by her husband and his family. That claim was refused on 2 October 2016, and her appeal against that refusal came before the First-tier Tribunal at North Shields on 29 September 2017, when it was heard by First-tier Tribunal Judge Heatherington. The appeal was dismissed on asylum grounds in a decision promulgated on 3 October 2017. Judge Heatherington noted the Appellant's admission that she had not been subjected to FGM, and her admission that although the Family Court had been persuaded to grant an FGM Protection Order on 16 May 2016, no attempt had been made to produce that Order to the Supreme Court in Abuja for enforcement, or to obtain a mirror order. He rejected as untrue the Appellant's evidence that such a risk of harm existed. The appeal was however allowed on Article 8 grounds.

4. The Appellant has not sought to appeal the decision to dismiss the appeal on protection grounds. The Respondent's application for permission to appeal the decision to allow the appeal on Article 8 grounds was granted by First tier Tribunal Judge Grimmett on 21 November 2017 on all of the grounds advanced. Thus the matter comes before me.

5. Both parties are agreed before me that the passage within the Judge's decision that deals with the Article 8 appeal is extremely brief. There is no reference to any of the relevant jurisprudence, and thus both parties agree that the decision must be read to see if it demonstrates that the Judge had in mind, and applied, the correct principles. The Respondent's argument in brief is that although the Judge correctly looks at the "best interests" of the children he treats them as determinative of the appeal, and indeed the only factor he is required to consider. Although section 117B(6) of the 2002 Act is quoted in full within the decision [8.12], the text that

accompanies that quotation within the same paragraph is a self direction that is manifestly wrong. Thus it is argued that the Judge appears to be unaware of the guidance to be found (for example) in Kaur (children's best interests/public interest interface) [2017] UKUT 14, or, MA (Pakistan) [2016] EWCA Civ 705, and his decision fails to demonstrate that he had in mind, or applied, the principles set out therein.

6. Whilst Ms Brakaj felt unable to concede the Respondent's criticisms, in my judgement she had no answer to them. Her difficulties in defending the decision simply served to highlight its deficiencies. For my own part I am satisfied that the decision in relation to the Article 8 appeal is fatally flawed, and that it must be set aside and remade.

7. I have considered whether the decision should be remade in the Upper Tribunal, but the re-hearing could not proceed immediately and thus would require adjournment in any event. Moreover, in circumstances such as this, where by reason of the brevity of the decision it would appear that the relevant evidence concerning the family's true position has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the parties of the opportunity for their case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 13 November 2014. Moreover the extent of the judicial fact finding exercise required is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 13 November 2014.

8. To that end I remit the appeal for a fresh hearing by a judge other than Judge Heatherington at the North Shields Hearing Centre. No interpreter is required.

Notice of decision

9. The decision upon the Article 8 appeal promulgated on 3 October 2017 did involve the making of an error of law sufficient to require the decision to be set aside and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing de novo of the Article 8 ground of appeal, with the directions set out above.

10. The decision upon the asylum, humanitarian protection, and Article 3 grounds discloses no error of law. The decision to dismiss the appeal on those grounds is confirmed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant

and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 28 March 2018

Deputy Upper Tribunal Judge J M Holmes