Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13325/2017

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 30th October 2018	**On 5th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

KS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr. A Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal ("F*t*T) has made an anonymity order and for the avoidance of any doubt, that order continues. KS is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to

comply with this direction could lead to proceedings being brought for contempt of court.

2. The appellant appeals against the decision of First-tier Tribunal ("F*t*T") Judge Parker promulgated on 9th August 2018, dismissing the appellant's appeal on asylum and humanitarian protection grounds.

3. The appellant is a Nigerian national. On 17th February 2016, the appellant was granted a visit visa and she arrived in the UK in March 2016. She remained in the UK unlawfully when her visit visa expired. Her daughter was born in the UK on 10th June 2016. On 5th June 2017, the appellant claimed asylum. The background to that claim is set out at paragraphs [10] to [13] of the decision of the F*t*T Judge.

4. The F*t*T Judge did not find the appellant to be a credible witness. The F*t*T Judge rejected the appellant's account that her sister-in-law had telephoned the appellant and said that the family will force her daughter to undergo FGM on return to Nigeria. The Judge did not find it credible that the appellant did not know whether her niece has undergone FGM, or that the appellant knew very little about her ex-partner's work or the occupations of other members of his family. The Judge noted that the appellant and her sisters have not been subjected to FGM and the appellant's evidence that "*it is against the tradition of her Yoruba tribe.*". The Judge also noted the evidence of the appellant that her family are against FGM.

5. At paragraphs [43] to [58] of the decision, the F*t*T Judge considered the Article 8 rights of the appellant and her daughter. He found that the appellant cannot satisfy the requirements of paragraph 276ADE(vi) of the Immigration Rules and that there are no exceptional circumstances which might warrant the grant of leave to remain outside the requirements of the immigration rules.

6. The appellant's grounds of appeal are set out in grounds of appeal settled by KS and dated 16th August 2018. The appellant makes a number of criticisms of the decision of the F*t*T Judge. The appellant claims that the F*t*T Judge failed to take

account of the fact that the interview record relied upon by the respondent was inaccurate. The appellant also claims that the F*t*T Judge erred in coming to the conclusion that the appellant and her daughter would not be at risk upon return to Nigeria. The appellant maintains that the risk of her daughter being circumcised when she returns is "extremely high", and that the appellant herself "might be subjected to honour killing, which is rampant all over the world.". It is said that the Tribunal failed to recognise the fact that the appellant and her daughter face a severe risk of persecution if returned to Nigeria. The appellant claims that the F*t*T Judge failed to have regard to the best interests of the appellant's daughter, and that the appellant's daughter is at imminent risk of being subjected to emotional torture and FGM.

7. Permission to appeal was granted by F*t*T Judge Andrew on 5th September 2018. She noted:

> "I have considered very carefully the lengthy grounds. I find that there is an arguable error of law solely because the Judge did not consider the child's best interests when coming to his decision. The other grounds are nothing more than a disagreement with the findings of the Judge, findings open to him on the evidence. It is clear that the Judge found that the Appellant was not credible in her claims and that he was entitled to do so."

The hearing of the appeal before me

8. As the appellant is a litigant in person, I explained to her at the outset that I had carefully read the decision of F*t*T Judge Parker and her grounds of appeal. I explained to the appellant that the hearing before me is not a re-hearing of her appeal, and that I would first consider whether there is a material error of law in the decision of the F*t*T Judge affecting the outcome of her appeal. I explained to the appellant that if I find there to be an error of law in the decision of the F*t*T Judge, I would go on to remake the decision.

9. The appellant submitted that the F*t*T Judge did not consider the best interests of the appellant's daughter and the Judge erred in his decision by rejecting the claim that the appellant's daughter is at risk of FGM. The Judge failed to consider what impact FGM would have upon the appellant's daughter and the need to protect her from being subjected to FGM. The appellant submits that the Judge did not have proper regard to the immigration history of the appellant, and did not have sufficient regard to the fact that the appellant had visited the United Kingdom on a number of occasions in the past, and always returned to Nigeria after a short stay. The appellant submits that there was no need for her to remain in the United Kingdom on this occasion, and that if she had not received a call from her sister-in-law, informing her that her daughter would be subjected to FGM, she would not have remained and claimed asylum. The appellant stressed that she had a good life in Nigeria, with a good job, and that she wishes to protect her child. The appellant submitted that although FGM is unlawful in Nigeria, the authorities fail to prosecute, and the appellant could not live elsewhere in Nigeria. The appellant submits that FGM is carried out by the Yoruba tribe, and the Judge was wrong to note at paragraph [22] of the decision, that FGM is against the tradition of the Yoruba tribe.

10. In reply, Mr Tan relied upon the rule 24 response filed by the respondent and dated 10th October 2018. He accepts that the F*t*T Judge does not appear to have had regard to the duty under s55 Borders, Citizenship and Immigration Act 2009, but submits that is immaterial to the outcome of the appeal. He submits that the appellant's daughter is only two years old. The appellant has only been in UK since 2016 and both the applicant and her daughter are Nigerian nationals. It is trite law that the best interests of a child is to be with his or her parents; in this case with her mother. He submits that a proper consideration of the best interests of the child as a primary consideration can only point in one direction. On the findings made by the Judge, the best interests of the child are served by her remaining in the care of her mother and returning to Nigeria with her mother.

Discussion

11. I remind myself of the observations made by Mr. Justice Hadon-Cave in **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC);**

> *"It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."*

12. I have also had regard to the decision of the Upper Tribunal in **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 IAC** where it was stated in the head note that:

> "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision makes sense, having regard to the material accepted by the judge.*"

13. It is in that context that I have considered the grounds of appeal and the submissions that have been advanced by the appellant. The core of the appellant's account was not particularly complex. It is set out at paragraphs [10] to [11] of the decision of the F*t*T Judge. The assessment of risk upon return and credibility, is always a highly fact sensitive task. The F*t*T Judge did not find the appellant to be a credible witness and rejected her account of events. It was for the Judge to consider the ingredients of the story, and the story as a whole, by reference to all the evidence available to the Tribunal. It was for the Tribunal to make its own findings on whether, and to what extent, the appellant's account is credible. Here, the F*t*T Judge considered the evidence relied upon by the appellant, including the affidavits from the appellant's sister-in-law and from her ex-partner's family. It was for the Tribunal to make its own findings on whether, and to what extent, the appellant's account is credible. In my judgement the F*t*T Judge carefully weighed up the evidence, made an adverse credibility finding and rejected the appellant's account of events.

14. As Brooke LJ observed in the course of his decision in **R (Iran) v The Secretary of State for the Home Department [2005] EWCA Civ 982**, "unjustified complaints" as to an alleged failure to give adequate reasons are all too frequent. The obligation on a Tribunal is to give reasons in sufficient detail to show the principles on which the Tribunal has acted and the reasons that have led to the decision. Such reasons need not be elaborate, and do not need to address every argument or every factor which weighed in the decision. If a Tribunal has not expressly addressed an argument, but if there are grounds on which the argument could properly have been rejected, it should be assumed that the Tribunal acted on such grounds. It is sufficient that the critical reasons to the decision are recorded. The Court of Appeal held that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. A finding that is "perverse" embraces findings that are irrational or unreasonable in the Wednesbury sense, and findings of fact that are wholly unsupported by the evidence.

15. Permission to appeal was granted by F*t*T Judge Andrew upon the sole ground that there is an arguable error of law because the Judge did not consider the child's best interests when coming to his decision. Mr Tan accepts, rightly in my judgement, that there is no reference to s55 and the best interests of the applicant's daughter in the decision. The issue for me is whether that is material to the outcome of the appeal.

16. Th F*t*T Judge gave reasons why he did not accept that the appellant's daughter would be at risk of FGM if returned to Nigeria. In the alternative, the Judge went on to consider whether there is a sufficiency of protection available to the appellant. Furthermore, the Judge also considered whether it is in any event, reasonable to expect the appellant to relocate and whether it would be unduly harsh to expect her to do so. For the reasons set out at paragraphs [36] to [38] of the decision, the F*t*T Judge found that there is sufficiency of protection available to the appellant and

that it would not be unduly harsh to expect the appellant and her daughter to relocate.

17. There is now a body of case law addressing the significance of the best interests of children affected by a decision of this nature. I take into account the decision of the Supreme Court in ZH (Tanzania) -v- SSHD [2011] UKSC 4. Lady Hale noted Article 3(1) of the UNCRC: which states that "in all actions concerning children, whether undertaken by ... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Article 3 is now embodied in s55 of 2009 Act which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

18. In Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC), the Upper Tribunal in considering the case law in relation to decisions affecting children stated;

> *"13. It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:*
>
> *i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.*
>
> *ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.*
>
> *iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.*

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well being of society amply justifies removal in such cases."

19. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 874, the appellants were a family from the Philippines whose application for indefinite leave to remain in the United Kingdom had been rejected. The F*t*T found that, although it was in the children's best interests to continue their education in the UK, removal would be proportionate to the legitimate aim of immigration control. The Upper Tribunal upheld that decision. The Court of Appeal, in dismissing the family's appeal, issued guidance on how tribunals were to approach the proportionality exercise where it had concluded that continuing education in the UK would be in the best interests of the children:

"32. There is a danger in this field of moving from looseness of terms to semantics. At the same time there could be said to be a tension between (a) treating the best interests of the child as a primary consideration which could be outweighed by others provided that no other consideration was treated as inherently more significant; and (b) treating the child's best interests as a consideration which must rank higher than any other which could nevertheless be outweighed by others. It is material, however, to note that Lord Kerr, as he made clear, was dealing with a case of children who were British citizens and where there were very powerful other factors - see [41] below - in favour of not removing them ('the best interests of the child clearly favour a certain course'/ 'the outcome of cases such as the present'). He also agreed with the judgment of Lady Hale. In those circumstance we should, in my judgment, be guided by the formulation which she adopted.

33. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even

though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

20. Although the applicant's daughter was born in the UK, she is a Nigerian national and there can be no doubt that as a two-year old, her best interests are met by remaining with her mother. Indeed, I cannot see that any evidence was put before the F*t*T Judge to suggest otherwise. Where the appellant is expected to be, is plainly relevant. Absent evidence to the contrary, it will normally be reasonable for a child, to be with his or her parents. Here, the appellant is the primary carer of her

daughter, and there is nothing in the evidence to suggest that the best interests of the appellant's daughter are served by anything other than remaining with her mother.

21. The appellant's daughter has no separate claim to remain in the United Kingdom. Any assessment of the best interests of a child must be made on the basis that the facts are as they are in the real world. If a parent has no right to remain, that is the background against which the assessment is conducted. Thus the ultimate question will be whether it is reasonable to expect the child to follow the parent with no right to remain. The appellant refers to the decision of the Supreme Court in ZH (Tanzania). On the facts of ZH, it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens. That is a long way from the facts of this case. Here, the F*t*T Judge rejected the appellant's account that the appellant's daughter will be subjected to FGM upon return to Nigeria, or that the appellant and her daughter are at risk upon return. Neither the appellant nor her daughter are British citizen. None has the right to remain in this country. If the mother is removed, her daughter has no independent right to remain. If the appellant is removed, then it is entirely reasonable to expect her daughter to return to Nigeria with her.

22. In my judgment, although the F*t*T Judge did not consider the best interests of the appellant's daughter, that is immaterial to the outcome of the appeal. On the findings made by the F*t*T Judge, as Mr Tan submits, a consideration of the best interests of the child could only point in one direction. On any proper view, it is in the best interests of the appellant's daughter to remain in the care of the appellant. The Judge found that the appellant and her daughter are not at risk upon return to Nigeria. The appellant and her daughter could in any event internally relocate for the reasons set out in the decision of F*t*T Judge Parker. In my judgement there is no material error of law in the decision of the F*t*T Judge capable of affecting the outcome of the appeal.

23. It follows that I dismiss the appeal, and the decision of F*t*T Judge Parker shall stand.

Notice of Decision

24. The decision of F*t*T Judge Parker is not infected by the making of a material error of law and the appellant's appeal is dismissed.

25. An anonymity direction is made.

Signed Date 28th December 2018

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

I have dismissed appeal. In any event, no fee was paid and there can be no fee award.

Signed Date 28th December 2018

Deputy Upper Tribunal Judge Mandalia