Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02467/2013

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 21st August, 2013	**On 30th September 2013**

Before

Upper Tribunal Judge Chalkley

Between

PETERSON EKHATOR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Ms Miriam Rasoul, Counsel, instructed by Iris Solicitors*
For the Respondent: *Ms Hilary Rackstraw*

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 13th April, 1976. The appellant applied for a visa to the UK on 22nd December, 2006, in order to study. The visa was issued to him on 7th November, 2007, valid until 31st July, 2009. The appellant

married his wife on 17th November, 2007, before travelling to the United Kingdom in December, 2007.

2. The appellant's wife applied for a visa to join him in the United Kingdom on 26th November, 2008, and that was issued on 5th December, 2008. The appellant's wife travelled to the United Kingdom on 19th December, 2008 and the appellant and his wife remained in the United Kingdom and applied for a continuation of their visas on 28th July, 2009. The visas were renewed until 30th January, 2011.

3. The appellant's wife gave birth to a daughter, Promise, on 14th September, 2009. The appellant applied for a renewal of his leave on 27th January, 2011, which was issued until 25th February, 2013. The appellant's wife gave birth to a son, Paul, on 20th June, 2011. The appellant claimed asylum on 5th February, 2013, and his visa expired on 25th February.

Basis of the claim to asylum

4. The basis of the appellant's claim is his fear that his daughter, Promise, would be subject to female genital mutilation on return to Nigeria.

Appeal to the First Tier Tribunal

5. The respondent considered the appellant's claim and concluded that he did not qualify for recognition as a refugee. On 6th March, 2013, the respondent made a decision to refuse to vary leave and the appellant appealed this to a judge of the First-tier Tribunal. On 14th May, 2013, First-tier Tribunal Judge Crawford's determination was promulgated in which the judge dismissed the appellant's appeals on asylum, on humanitarian protection grounds and on human rights grounds under Articles 2, 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6. The Immigration Judge records at paragraph 19 of the determination that an expert report from Professor Mario Aguilar was submitted in support of the appeal. Unfortunately, the judge failed to consider this expert report when making his findings. At paragraph 35 and paragraph 40 of the determination, the judge relies on a Country of Origin Information Report, but makes no mention at all of the expert's report placed before him and nor does he give any reason for preferring the Country of Origin Information Report rather than the expert report.

The hearing before me

7. Ms Rasoul, appearing on behalf of the appellant, also pointed out that the judge had failed to consider the appellant's wife's statement which had been included within the appellant's bundle.

8. I pointed out to Counsel that neither the expert report nor the appellant's wife's statement had been signed. I asked in the circumstances what, if any reliance could be placed on either document? She then sought to introduce fresh evidence relating to the appellant's wife.

9. For the respondent, Ms Rackstraw submitted that the expert's report was "woefully inadequate" and referred me to *AX (China) CG* [2012] UKUT 00097, where the Upper Tribunal had been critical of this expert's methodology. She suggested that the judge had good reason to prefer the Country of Origin Information Report, because the expert, at paragraph 12 of the report, refers to other documents which were not actually before the judge. She referred me to other criticisms she had of the report, including the suggestion that no comment has been made by the expert on the majority of women in Nigeria who have not been circumcised.

9. I indicated to the representatives that I would reserve my determination. They both confirmed to me that, were I to find an error of law, they would have no objection to the matter being remitted to the First-tier Tribunal, given the lengthy delay that was likely before the appeal would come back for hearing before me again.

10. I have concluded that the First-tier Tribunal judge **has erred in law** by failing to have any regard to the expert evidence. The judge proceeded with the hearing and he erred by making no findings on the expert's report. The report was not signed by the expert and, given the nature of the appeal, it would have been appropriate for the judge to have adjourned so that a signed copy could be placed before him. In the absence of the signature, the judge had no way of knowing whether the report had been read and approved by Professor Aguilar or not; it may, for example, have been an early draft. In the event, the judge appears to have ignore the report completely.

11. Paragraph 7 of the Senior President's Practice Statement provides as follows:-

> "7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
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> 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:
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> (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
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> (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.

> 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary."

12. I believe that this is a case which falls squarely within paragraph 7 of the Senior President's Practice Statement, given the length of time that the parties would have to wait for the matter to be relisted before me in North Shields and that it could, conversely, be heard relatively speedily by the First-tier Tribunal. In view of the overriding objective in forming the onward conduct of this appeal, I have decided that the appeal will be remitted to the First-tier Tribunal for hearing afresh before a First-tier Tribunal judge, other than First-tier Tribunal Judge Crawford.

Directions

13. I indicated to the appellant's representative that before the matter was relisted, the First Tier Tribunal would expect the appellant's bundle to be re served and to include a signed and dated witness statements and a signed and dated original expert report from Professor Aguilar. I also indicated that since it had been made clear by the Home Office Presenting Officer that the respondent was likely to be highly critical of the expert, the appellant may wish to consider calling the expert to give oral evidence, so that he can be cross-examined.

14. Any witness statement included in the bundle made by anyone whose first language is not English, should include an endorsement by a suitably qualified interpreter confirming that they have read aloud the contents of the statement to the maker of it in the maker's own language and that the maker of the statement has confirmed that he or she is satisfied that it is a true and complete statement and does not require altering, amending or correcting.

Upper Tribunal Judge Chalkley