Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/31712/2015
IA/31714/2015
IA/31717/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 May 2017	**On 02 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS AUGUSTA ULOMA UGWOKA
[M U]
[F U]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Whitwell, Home Office Presenting Officer.
For the Respondent: Mrs M A Hodgson, Counsel.

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State for the Home Department. However, for the sake for clarity, I shall use the titles by which parties were known before the First-tier Tribunal with the Secretary of State referred to as "the Respondent" and Miss Ugwoka, [MU] and [FU] as "the Appellants".

2. The Appellants are citizens of Nigeria. The first Appellant is the mother of the second and third Appellant. The first Appellant, having entered the United Kingdom pursuant to valid leave as a student, applied for her circumstances to be considered outside of the Immigration Rules. On 10 September 2015 the Respondent made a decision to refuse the application for leave to remain on the grounds that removal would not place the United Kingdom in breach of its obligations under the Human Rights Act 1998. It is against that decision that the Appellants appealed. It was heard at Taylor House and in a decision promulgated on 2 November 2016 Judge of the First-tier Tribunal Ghaffar dismissed the immigration appeals of the first and third Appellants, allowed the immigration appeal of the second Appellant and allowed the human rights appeals of all three Appellants.

3. The Respondent sought permission to appeal. On 1 April 2017 Judge of the First-tier Tribunal Frankish granted that application. His reasons for so doing were:-

> "1. In a decision promulgated on 2 November 2016 F-tTJ Ghaffar allowed appeals, the first appellant having entered as a student, against refusal of leave to remain under the Rules for appellant 2 and all three under article 8 outside of the Rules.
>
> 2. The application for permission to appeal asserts: overemphasis on the children's private life rather than the "real world setting" per EV (Philippines) (2014) EWCA Civ 874 and not to have taken account of the parental immigration history per MA (Pakistan) (2016) EWCA Civ 705 i.e. a totally UK child-centred assessment with no regard to reconstitution of private life and education in Nigeria; lack of regard to cultural connections as well as a brother still in Nigeria including the main focus still being within the family and the first appellant's employment prospects in the home country as a midwife/staff nurse; no reason given for risk of FGM especially as the mother/first appellant is against and it is a federal offence in the home state; lack of regard to the burden on the public purse given that the first appellant depends on others rather than being financially independence for the past 3 years.
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> 3. Arguably, the finding under the Rules (§22) underplays cultural heritage and family reunion back home, the key factor being merely the absence of attendance at a Nigerian Roman Catholic chaplaincy in the UK. That is also the basis of the finding (§28) under article 8 outside of the Rules. Arguably, there is no basis for the unsupported finding that the third appellant "faces the risk of Female Genitalia Mutilation in the area to which she would have to live were she required to be returned to Nigeria.""

4. Thus the appeals came before me today.

5. Mr Whitwell began his submissions by handing up three decisions which I have taken into account and which both representatives referred me to. They are **MA (Pakistan) and Ors, R (on the application of) v Upper Tribunal (Immigration and**

Asylum Chamber) and Anor [2016] EWCA Civ 705, E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC) and **PD and others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)**.

6. He relied on the Respondent's grounds seeking permission to appeal and sought to identify material errors within the Judge's decision. In particular that at paragraph 16 and 17 the Judge has inadequately reasoned his findings that the third Appellant would be at risk of Female Genitalia Mutilation in Orlu, Nigeria and that the second Appellant has a diagnosis of autism. The FGM issue has to be seen in the context of paragraph 10 of the Judge's decision and the failure of the first Appellant to explain why an asylum claim had not been made on behalf of the third Appellant based upon this fear. The decision records the second Appellant being investigated for autism and like the issue of Female Genitalia Mutilation there is no reasoning given for the conclusions the Judge has come to. At paragraph 18 of the Judge's decision a conclusion is made that there are "no insurmountable obstacles to returning to Nigeria as a family unit". This does not sit well with paragraph 28 of the Judge's decision and the finding there that it would "not be reasonable to expect them to leave the country". The Judge's error is equating the issue of "reasonableness" with that of the "best interest" of the children. The best interest of the children should have been factored into the reasonable test. Further the Judge's decision is entirely absent of a "real world" assessment and erroneously adopts a "solely child centric analysis". There is no consideration of whether the private lives of the Appellants can be reconstituted within their returning country.

7. Mrs Hodgson urged me to accept that no "irrationality" can be found within the Judge's decision. That the Home Office Presenting Officer at the First-tier Tribunal hearing did not argue the "real world" issue and that the Respondent today has failed to highlight any public interest factors that should have been considered and were not. The Judge was aware of all such factors but because of the strong links of the third Appellant to the United Kingdom was entitled to come to the conclusion that he did. Albeit that the first Appellant had a precarious status she argued that it was settled law that that did not render the second and third Appellants status precarious too. The grounds are an attempt to put forward arguments that should properly have been put at the First-tier Tribunal hearing and did not amount to material errors. The Judge took into account the first Appellant's "cultural nexus" with Nigeria but despite that was entitled to come to the decision that he did. The Respondent's "best argument" relates to that of FGM. However despite this the Judge was entitled to come to the findings and con conclusions that he did.

8. In coming to my decision I have taken into account the authorities referred to and particularly the parts therein highlighted by both representatives. These include paragraph 41 of **PD** which states:-

> "Furthermore, we must weigh the third Appellant's best interests, as we have assessed them, which have the status of a primary consideration. The main countervailing factor is that the first and second Appellants have no legal right

> to remain in the United Kingdom. Their immigration status is that of unlawful over-stayers. This is a factor of undeniable weight. However, it has been frequently stated that a child's best interests should not be compromised on account of the misdemeanours of its parents. See, for example, per Baroness Hale in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, at [20]-[21] and [35] and EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64, at [49]. Having regard to our predictive finding of the most likely future scenario for this family, we consider that there is a preponderance of factors impelling to the conclusion that it would not be reasonable to expect the third Appellant to leave the United Kingdom. Accordingly, his appeal succeeds under the Rules."

9. Paragraph 29 of **E-A** which states:-

> "We are satisfied that there was a material misdirection, and that analysis of the best interests of the children entirely through the prism of the right to education was too narrow an approach. The error might well be a material one and we will accordingly set aside the decision and remake it in the light of the evidence before the judge and the submissions made to us."

10. And from **MA** paragraph 46:-

> "Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment."

11. I am satisfied that Judge Ghaffar has materially erred. He has failed to adequately reason why he came to the conclusions that he did in relation to both the issues of autism and FGM. He has misdirected himself in law when considering this appeal and has failed to take account of the above mentioned authorities. Irrespective of whether the Home Office Presenting Officer in the First-tier Tribunal hearing referred to them it was incumbent upon the Judge to take them into account when deciding this appeal. His decision is absent a "real world" assessment and his reasoning is inadequate on all the issues identified by Mr Whitwell.

12. Both representatives were of the view that if I found material errors as asserted by the Respondent this appeal should be remitted to the First-tier Tribunal for further fact finding on all issues.

Conclusion

13. The making of the decision of the First-tier Tribunal involved the making an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any Judge aside from Judge Ghaffar.

No anonymity direction is made.

Signed Date 1 June 2017

Deputy Upper Tribunal Judge Appleyard