



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/05502/2016

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 1 September 2017**

**Decision & Reasons promulgated  
On 4 September 2017**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**M F A**

**(anonymity direction made)**

Respondent

**Representation:**

For the Appellant: Mr Singh Senior Home Office Presenting Officer

For the Respondent: No appearance

**ERROR OF LAW FINDING AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge James ('the Judge') promulgated on 2 March 2017 who allowed the appeal on all grounds.

**Background**

2. The above respondent is a citizen of Nigeria born on 17 July 1975 who on 23 November 2015 claimed asylum. The application was refused against which the above respondent appealed.
3. The Judge noted the Secretary of State refers to the above respondent using several aliases. The Judge records that the core of the claim is that a daughter born to the above respondent on 27 January 2010, referred to as 'Blessing', will be subject to FGM if returned with the appellant to Nigeria.
4. It is noted the Secretary State accepted the appellant is a member of a particular social group by reason of being the accompanying parent of a child subject to FGM and also by reason of being a woman and that the appellant's identity and nationality were accepted in the Reasons for Refusal Letter.
5. It was also accepted by the Secretary of State that the appellant is a member of the Yoruba tribe.
6. The Judge sets out the nature of evidence received and submissions made before setting out findings of fact at [31-42] of the decision under challenge. Those findings may be summarised in the following terms:
  - (i) the Judge was in no doubt that the appellant has, in the past, been less than forthright with the Tribunal and with the Secretary of State and has a conviction for a criminal offence in relation to immigration matters, but was mindful that the person alleged to be at risk in the appeal is a child and that it would be wrong to punish the child for the misdeeds of her parent [31].
  - (ii) The Judge found the recent change in law relating to FGM in Nigeria would not remove the risk of FGM to Blessing as FGM is considered to be a cultural matter by those who practice it and the new law would not deter most practitioners. The Judge found there is no evidence the Nigerian authorities have been able to enforce the new law and the objective evidence provided by the appellant is said to make it clear that the change in law will make little difference until there has been a significant cultural shift. The Judge accordingly was satisfied that within certain tribes and communities in Nigeria women, and particularly young women and girls, remain at risk of FGM [32].
  - (iii) The Judge noted the Yoruba tribe practice FGM [33].
  - (iv) The Judge found the information in the Home Office Country Information and Guidance relating to Nigeria to suggest that a female child has a one in four chance of suffering FGM and that in certain tribal areas it will be higher. The Judge noted the above respondent has suffered FGM and considered whether there are any factors relating to Blessing that would make it more likely she will suffer FGM, in considering this position the Judge accepted that the above respondent's husband has died [34].

- (v) The Judge accepted the appellant had told a credible narrative in relation to Blessing including claiming she had received requests to take Blessing to Nigeria since husband died in 2015. The Judge found the delay between the above respondent and her husband separating in 2010 and the requests in 2015 were explained by the fact that whilst the respondent's husband was alive he would have been the person who would have determined where Blessing would live and it was only since his death that the remaining members of the family would have been able to claim authority in relation to Blessing. The Judge noted and accepted the above respondent's siblings are involved in family discussions regarding where Blessing should live and accepted that in accordance with Nigerian culture she should be with her father's family which placed the above respondent in the position of not being able to rely upon her family for support in the event of her return to Nigeria [35].
- (vi) The Judge was satisfied to the lower standard that "if Blessing were taken to Nigeria and was taken to her late father's family she would have a risk of FGM significantly higher than the already serious one in four risk across the country" [36].
- (vii) The Judge therefore concluded the above respondent is a member of a particular social group as a single parent of a female child, that that child faces a real risk of FGM against the wishes of her mother and for the child to face that risk will be subjected to FGM would amount to persecution of the above respondent. [37].
- (viii) The Judge considered the issue of internal relocation having noted quoted passages from the Country Information and Guidance and was not satisfied the above respondent and her daughter would be able to avail themselves of the protection of the State authorities on return to Nigeria, was not satisfied that they will be able to relocate and avoid the risk of FGM bearing in mind the prevalence of the practice in some form or another throughout Nigeria, and that if the above respondent had to relocate within the Yoruba areas of Nigeria the Judge believed she would be at risk from her late husband's family and have no support from her own family, and that if she relocated outside those areas the above respondent would face difficulties by reason of not being part of the tribal culture of those areas and would have nobody protect to protect her or Blessing [40].
- (ix) The Judge considered the best interest of Blessing in accordance with section 55 whilst accepting that at this age her life will be more concerned with being with her mother, it was found on return to Nigeria there is a risk the

child will be taken by her late father's family who would exercise control over her leading to the concern about the child being subjected to FGM which is said to be relevant in assessing the best interests and accordingly the Judge found the child's best interests would be to remain in the UK with her mother [41].

7. The Secretary of State sought permission to appeal on a number of grounds which was granted by another judge of the First-tier Tribunal in the following terms:
  1. the Respondent seeks permission to appeal against a decision of the First-tier Tribunal (Judge James) who, by decision and reasons promulgated on 2 March 2017, allowed the Appellant's appeal against the decision of the respondent made on 23 May 2016 refusing to grant asylum and humanitarian protection under paragraph 336 and 339F of HC 395 (as amended).
  2. The grounds asserts that the FTT Judge had failed to consider whether there was a sufficiency of protection available to the appellant; failed to apply the principles in **Devaseelan**; failed to correctly apply section 8 of the Asylum and Immigration (Treatment of claimants, etc) Act 2004; failed to adequately carry out the proportionality test in dealing with the best interests of the child; failed to provide adequate reasons for her findings; and failed to consider the resolve issues surrounding the appellant's corroborative documents which amounted to an error of law.
  3. The appellant stated that she had been subject to FGM in fear that on return to Nigeria her infant daughter will be subjected too.
  4. It is clear from the decision and reasons that the judge had not considered the first determination relating to the appellant which was applicable especially as both claims had involved family members. The appellant had produced documents which the respondent had not accepted but there had been no consideration of these within the terms of the judgment, nor had the issues under section 8 of the 2004 Act. There was arguably a failure to give adequate reasons for her findings overall with particular to the issue of sufficiency of protection in the best interests of the child.
  5. Permission is granted.

### **Error of law**

8. There was no appearance by or on behalf of the above respondent at the Upper Tribunal. Notice of the date, venue, and time of hearing has been posted to both the above respondent and her representatives by first class post on 17 July 2017. No documents have been returned as not having been posted. No correspondence has been received requesting an adjournment or any explanation for the failure to attend.
9. Checks were made by the clerk assisting the Tribunal prior to the commencement of the day's business at 10 AM and again at 10:15 and 10:50 AM. Checks on the latter occasion being when the appellant's case was called on for hearing.
10. In light of the fact valid service of the notice of hearing has occurred and the lack of an explanation for the failure to attend or any application to adjourn, this tribunal considers it fair and reasonable in

all the circumstances to proceed to hear the appeal in the absence of the appellant.

11. The Secretary of State has filed detailed grounds of appeal challenging the determination identifying a number of key legal errors, the most important of which can be summed up as being:
  - a. The First-tier Tribunal Judge erred in making a misdirection in law when finding there was not a sufficiency of protection available to the appellant in Nigeria as the appellant failed to prove that the Nigerian authorities were unwilling or unable to assist if a real risk of FGM arose in relation to Blessing.
  - b. The First-tier Tribunal Judge erred when finding at [24] that although FGM has been a punishable offence since May 2015 the respondent was unable to provide any information as to whether there had been any prosecutions, which arguably reverses the burden of proof which is upon the appellant to prove there is a lack of a sufficiency of protection.
  - c. The First-tier Judge erred in failing to correctly apply the Devaseelan principles when considering the credibility of the appellant's account. The previous determination in relation to an early asylum appeal should have formed the starting point of the Judges determination which is not arguably the case when reading the decision under challenge.
  - d. The First-tier Tribunal Judge failed to correctly apply section 8 of the Asylum and Immigration (Treatment of claimants, etc) Act 2004 when determining the credibility of the appellant's account. This is raised as a specific matter in the Reasons for Refusal letter yet there appears to be no consideration of the factors in the decision under challenge.
  - e. The First-tier Tribunal Judge erred in appearing to allow the appeal on the basis the child's best interests are served in the UK inferring the appeal is allowed on article 8 grounds on this basis without considering mandatory factors outlined in section 117B of the 2002 Act. Treating the child's best interests as the paramount consideration instead of a primary consideration amounts to arguable legal error.
  - f. The Secretary of State disputed the appellant's claim that her partner had died and several issues were raised with regard to the reliability of documentation provided in support of this claim yet the Judge fails to provide adequate reasons in support of the finding that it was considered the appellant's husband had died and again where the Judge notes and accepts that the appellant siblings were involved in family discussions regarding where Blessing should live.
  - g. The First-tier Tribunal Judge provides no reasons why the appellant has provided a credible account at [35] said to be particularly material in light of the failure to consider issues referred to above.
  - h. The First-tier Tribunal Judge erred in failing to identify and resolve the conflicts in the evidence and to explain in a clear and brief terms the reasons for preferring one case to the other so that the parties can understand why they have won or lost.
  - i. The First-tier Tribunal failed to consider the appellant's documentation anywhere in the determination. Issues were raised regarding the

reliability of the documentation at paragraphs 27 and 28 of the Reasons for Refusal Letter. It is arguable that the failure to consider the documents and ascertain the weight to be applied to them by application of Tanveer Ahmed has led to an unsafe finding in relation to husband's death and ultimately the risk on return from his death.

12. There is no counter argument presented on the above respondent's behalf as a result of the failure to attend the hearing. Having considered the decision in light of the submissions made, I find the Secretary of State has made out that the determination is infected by arguable legal error material to the decision to allow the appeal.
13. In light of the failure of the Judge to consider material elements or to make adequate findings, the determination is set aside in its entirety with no preserved findings and remitted to the First-tier Tribunal sitting at Sheldon Court in Birmingham to be reheard by a judge nominated by the Resident Judge of that hearing centre in accordance with operational requirements.
14. Remittal is appropriate in this case in light of the fact the appeal has not been properly determined by reference to all relevant aspects of the evidence and the positions adopted by the appellant and respondent and in light of the need for extensive fact-finding to be undertaken once all aspects of the appeal have been properly considered.

### **Decision**

15. **The Immigration Judge materially erred in law. I set aside the decision of the original Immigration Judge. I remit the appeal to a First-tier Tribunal sitting at Sheldon Court in Birmingham to be heard by a judge other than Judge James.**

### **Anonymity**

16. I make an order the identity of the appellant (above named respondent) shall be anonymized. An order in similar terms having been made by the First-tier Tribunal.

Signed.....  
Judge of the Upper Tribunal

Dated the 1 September 2017

