Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/26249/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th December 2018	**On 15th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

KEDIEN [F]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Mgbeike, Legal Representative
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Jamaica born on 19th November 1991. The Appellant has an extensive immigration history. She arrived in the United Kingdom on 15th December 2004 and thereafter applied for and was granted leave to remain as a dependent child. That leave was extended until 30th June 2009 and an application for further leave was refused in August 2009. In October 2011 the Appellant was served with notice as an overstayer. On [~] 2011 the Appellant's son, [KM], was born. The Appellant applied on 15th November 2012 for leave to remain under Article 8 of the European Convention on Human Rights. That application was

refused on 28th March 2013 and a subsequent application was made on 12th September 2016. That application was refused by Notice of Refusal dated 8th November 2016. It is proceedings arising out of that Notice of Refusal that come before me. However, based on that immigration history it would appear that the Appellant has been in this country without leave to remain since 30th June 2009.

2. Following the refusal of the Secretary of State to grant the Appellant leave to remain on 8th December 2016 the Appellant lodged Grounds of Appeal to the First-tier Tribunal. That appeal came before Judge of the First-tier Tribunal Cohen sitting at Taylor House on 24th September 2018. The Appellant failed to appear. Despite that the Appellant's appeal was successful and the appeal was allowed on human rights grounds in a decision promulgated on 5th October 2018.

3. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal contending that there were material errors of law in the decision of the First-tier Tribunal Judge on 16th October 2018.

4. On 24th October 2018 First-tier Tribunal Judge Ford granted permission to appeal. Judge Ford noted that it was arguable that the Tribunal had erred in:-

   (a) failing to give adequate reasons for finding that the decision was disproportionate; and

   (b) failing to consider Sections 117A and B of the NIAA 2002 (as amended) in the proportionality exercise.

   The judge found that the remaining grounds were unarguable.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears now by her Legal Representative, Mr Mgbeike. The Secretary of State appears by his Home Office Presenting Officer, Mr Tufan. I note that this is an appeal by the Secretary of State, but for the purpose of continuity throughout the appeal process Miss [F] is referred to herein as "the Appellant" and the Secretary of State as "the Respondent".

Submissions/Discussions

6. Mr Tufan takes me to the decision of Judge Cohen and submits that the findings therein are brief in the extreme and points out to me that the judge makes in his decision three findings which are negative to the Appellant at paragraphs 12, 13 and 14, in that firstly, he concludes that the Appellant cannot succeed under the parent route; secondly, that the Appellant, having not put forward any details of having a partner in the UK, the Appellant cannot succeed under the partner route; and thirdly, that the Appellant's appeal with reference to paragraph 276ADE is bound to fail.

7. The judge makes some findings he acknowledges at paragraph 16 in what effectively leads to a conclusion that the Appellant succeeds under Article 8 outside the Rules. However, he stipulates that the judge has failed to give reasons and in failing to give reasons that the judge has materially erred. He asked me to find that there are material errors of law and to remit the matter back to the First-tier Tribunal for rehearing.

8. In response Mr Mgbeike states that the judge has at paragraph 18 looked at the case properly and has come to conclusions and has made findings that lead to the judge's decision being the correct one. He submits that when the Appellant came to this country she was aged 14 and was dependent upon her mother and that she is now aged 27 and lives here with her child, as does her sister, grandfather and all other family members. He further points out that the Appellant's child is 7 years old and has lived here all her life. He asked me to maintain the decision of the First-tier Tribunal Judge.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

11. This is a judge who had to make a decision on appeal by an Appellant who failed to attend before the First-tier Judge. What the judge has done is to set out from paragraphs 9 to 17 his analysis of the evidence. However, the only finding that he has made is to be found at paragraph 16 where he has acknowledged that the Appellant lives in a family unit with her son

and that removal would cause interference with her right to family and private life. The judge goes on at paragraph 18 to draw conclusions and it is important to consider that paragraph. All the judge states is:-

> "Having regard to my findings above, I find the Appellant's circumstances are sufficiently serious that the Appellant's case is amongst the small proportion of cases that the Supreme Court anticipated would be allowed under Article 8 in *Agyarko*."

12. I am satisfied that this is an insufficient conclusion. The judge has effectively made no findings. He has taken no evidence from the Appellant nor considered witness statements. He has failed to give any consideration to the submissions made by the Secretary of State and he has failed to give any consideration whatsoever to or to even mention the requirements of paragraph Section 117B of the 2002 Act. To that extent there are material errors of law and the decision is set aside.

13. Mr Mgbeike has made submissions orally on behalf of the Appellant with regard to her family and private life in the UK. As Mr Tufan points out, this is not a case where having made an error of law it is appropriate that I should go on and remake it because there is no evidence before the Tribunal, and whilst it might be open for the Appellant's Legal Representative to make an application under paragraph 15(2)(a) of the Upper Tribunal Procedural Rules, he indicates that he would oppose this because there is no opportunity for the Secretary of State to consider such evidence. That is a fair comment. This is an Appellant who has knowingly, persistently overstayed. That may well be a relevant factor in any proportionality analysis. Equally, the extensive family and private life that she would appear to have as set out by Mr Mgbeike in his submissions are also factors that need to be taken into account by any judge when balancing the issues in order to come to a reasoned decision. In such circumstances, all these factors should be considered and the matter is best addressed by way of remittal for complete rehearing with none of the findings of fact to stand before the First-tier Tribunal.

Decision and Directions

14. The decision of the First-tier Tribunal contains material errors of law and is set aside. The following directions will apply:-

    (1) On finding that there are material errors of law in the decision of the First-tier Tribunal Judge, the decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal sitting at Taylor House to be heard on the first available date 28 days hence with an ELH of two hours.

    (2) That the appeal is to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Cohen.

    (3) That none of the findings of fact are to stand.

(4) That there be leave to both parties to file and serve a bundle of such subjective and/or objective evidence upon which they seek to rely by 23rd January 2019.

(5) That it is not envisaged that the Appellant will require an interpreter or that an interpreter will be required for any other person giving evidence. If however an interpreter is required, it is the responsibility of the Appellant's instructing solicitors to notify the Tribunal within seven days of receipt of these directions giving details of the language requirements.

(6) The Appellant is to personally attend the restored appeal.

(7) No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris 4th January 2019

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris 4th January 2019