Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00147/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th March 2019	**On 16th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS O. A.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Mallick, Counsel
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 6th July 1984. The Appellant has an extensive immigration history and on 26th April 2016 applied for asylum. That application was based on a contention that she had a well-founded fear of persecution in Nigeria on the basis of her membership of a particular social group (a potential victim of F.G.M.). Her application was refused by Notice of Refusal dated 13th December 2017. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Asjad sitting at Birmingham on 26th February 2018. In a decision and reasons promulgated on 6th April 2018 the Appellant's appeal was dismissed.

2. On 6th April 2018 Grounds of Appeal were lodged to the Upper Tribunal. Those Grounds of Appeal asserted that the judge had erred in the approach to Article 8 and failed to consider paragraph EX.1 of Appendix FM and Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in circumstances where the Appellant was the mother of a child who had lived in the UK continuously for more than seven years.

3. On 20th June 2018 First-tier Tribunal Judge O'Keeffe granted permission to appeal. Judge O'Keeffe noted that at paragraph 37 of the decision the judge had made a finding that the best interests of the children were to be with their mother and father. The judge however did not go on then to consider whether it was reasonable to expect the children to leave the UK and return with the parents to Nigeria. In such circumstances it was arguable that the judge had fallen into error.

4. 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. I note firstly that the basis of the appeal is somewhat different from the original application for asylum and Grounds of Refusal on the asylum application in that they are now maintained on human rights grounds. The First-tier Tribunal Judge anonymised this matter. No application is made to vary that order and the anonymity direction will remain in place. The Appellant appears by her instructed Counsel, Ms Mallick. The Secretary of State appears by her Home Office Presenting Officer, Mr Whitwell.

Submission/Discussion

5. Ms Mallick points out that there are two children of the Appellant born respectively on 17th December 2010 and 21st November 2013 and that they both have different fathers. She submits that the error of law submissions are based on the grounds that if the Appellant were returned to Nigeria the two children would return with her and that on such return they would be at risk of being subjected to FGM. She submits that the judge has, at paragraph 20 of his decision, set out the risk and goes on to comment that in addition a second child suffers from pulmonary stenosis and has been referred to social services, i.e. that the social services are consequently aware of the position of the children. She comments that there are no specific findings of the judge to be found in the body of the decision although she acknowledges that at paragraph 36 the judge has found that the Appellant's daughters are not at risk in Nigeria and that if he is wrong in that assessment then internal relocation and state protection would be available. What she emphasises however is that at paragraph 37 it is her contention that the judge has thereinafter gone on to make specific findings regarding her daughter.

6. The main submission is that the reasonableness question of return has not been considered by the First-tier Tribunal Judge and that the judge has failed to give full and proper consideration to the guidance given by the Supreme Court in *KO (Nigeria) and Others v Secretary of State for the*

Home Department [2018] UKSC. She asked me to remit the matter back to the First-tier Tribunal for rehearing.

7. In response Mr Whitwell points out there are two Grounds of Appeal which have been slightly elaborated within the grant of permission. He accepts that there has been no express finding with regard to the issue of reasonableness in the meaning of *KO* but questions whether it is material. He points out that so far as the first ground is concerned at paragraph 121 of the Notice of Refusal the judge noted that the eldest child was not a qualifying child at the date of application although the Secretary of State admits the child is now and that would explain the basis upon which paragraph 38 of the First-tier Tribunal Judge's decision was reached and why the Rules were not met.

8. He acknowledges that the main paragraph in the decision upon which we are concentrating is paragraph 37 and that that makes specific reference to the best interests of the Appellant's daughter, pointing out there was access to education in Nigeria and that the judge found there are no concerns regarding the medical treatment that could be available in Nigeria. He considers that the judge has addressed many of the submissions made by Ms Mallick.

9. He takes me to the findings of paragraph 33 pointing out that both the Appellant and her husband are opposed to FGM and that the judge has consequently given reasons as to why her decision is reasonable even if he has not couched them in express terms. He points out that *KO* as an authority did not disturb the reasoning of returning to a country such as Nigeria with both parents and therefore the decision may not be unreasonable. He asked me to maintain the decision of the First-tier Tribunal Judge.

The Law

10. 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.

11. 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

12. I remind myself that the issue before me is whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. I am satisfied that there is on the basis that it is not appropriate for a judge to reach conclusions without making findings. This is what the judge has done at paragraph 37. The judge has not set out what is reasonable in respect of the two children.

13. It is appropriate as a matter of law for a Tribunal to carry out a full proportionality analysis. The judge has unfortunately failed to do this. I remind myself of the general approach to the application of Article 8 in immigration cases as set out at paragraphs 12, 17 and 23 of *KO.* It is further considered, albeit of course at a lower level, in the Upper Tribunal decision of *JG (Section 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC)* which is authority for the proposition that Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 require a court or Tribunal to hypothesise that the child in question would leave the United Kingdom even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.

14. It is the failure of the judge to pose those questions that constitute the material error of law. In such circumstances I am satisfied that the correct approach is to send the matter back to the First-tier Tribunal for rehearing. I do however express one caveat to the Appellant. What the First-tier Tribunal Judge appears to have done is to have made his conclusions without setting out his reasons and that creates the error of law. There is a requirement of fairness which clearly means the judge must go through this exercise. That is not to say that another judge hearing this matter will not come to exactly the same conclusion as the First-tier Tribunal Judge having heard all the evidence and setting out his or her reasons in reaching that conclusion.

Notice of Decision

The decision of the First-tier Tribunal Judge contains a material error of law and is set aside. Directions are given hereafter for the rehearing of this matter:

1. That on finding that there is a material error of law in the decision of the First-tier Tribunal Judge the decision is set aside and the matter is remitted to the First-tier Tribunal sitting at Birmingham on the first available date 28 days hence with an ELH of three hours.

2. That none of the findings of fact are to stand.

3. That the rehearing is to be before any Judge of the First-tier Tribunal other than IJ Asjad.
4. There be leave to either party to file and serve an up-to-date bundle of objective and/or subjective evidence upon which they seek to rely at least seven days prior to the restored hearing.

5. That the Appellant do attend the hearing for the purpose of cross-examination.

6. That in the event that the Appellant requires an interpreter her instructed solicitors must notify the Tribunal within seven days of receipt of these directions giving details of the language requirement.

7. That the First-tier Tribunal Judge granted the Appellant anonymity. That anonymity direction will remain in place.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge D N Harris 15th April 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 15th April 2019