Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12365/2017

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 12 October 2018	**On 19 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

A. A.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Soltani, Solicitor, Iris Law Firm
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria who entered the UK lawfully as a student in 2002. His leave to remain was extended until 31 January 2009. An application to vary that leave further was however refused on 13 February 2009, and his appeal rights in relation to that refusal were then exhausted on 10 December 2009. Thus he became an overstayer on 31 January 2009.

2. On 13 May 2010 a grant of discretionary leave to remain was however made, for a short period, in order to allow him to complete, and submit,

his PhD thesis, so that he might be awarded his degree. That leave expired on 30 June 2010, and then the Appellant became an overstayer once again.

3. On 10 June 2011 the Appellant applied for leave to remain as a Tier 1 (Post Study Work) Migrant, which was granted until 12 August 2013. He then sought to vary that leave claiming that he was entitled to ILR on the basis that he had enjoyed a ten year continuous period of lawful residence in the UK. That application was correctly refused on 10 December 2013. Although his appeal was initially allowed on Article 8 grounds by the First-tier Tribunal's decision of 19 March 2014 ["FtT"], the Upper Tribunal set that decision aside for material error of law, and remade the decision upon the Appellant's Article 8 appeal so as to dismiss it on 23 July 2014. The Appellant's appeal rights were exhausted, and he became an overstayer, from 12 August 2013.

4. On 24 November 2015 the Appellant made a further application for a grant of ILR, asserting once again that he met the requisite Immigration Rules, as one with a ten year continuous period of lawful residence in the UK. Inevitably that application was refused on 26 May 2016. The file before me does not disclose if this decision was also subject to appeal – but if it were, then the appeal was unsuccessful.

5. On 21 December 2016 the Appellant's current solicitors submitted an application for a grant of leave to remain, on behalf of himself, his wife and children [A1-], on the basis of the "private life" they had established in the UK. The application was made in the Appellant's name, but the covering letter to that application, dated 21 December 2016, explained that it was in substance an application made in the name of his eldest daughter on the basis that she was now a "qualifying child" as defined in s117D of the 2002 Act, since she had now attained the age of 7 [G3-]. The application was refused on 2 October 2017. The Appellant's Article 8 appeal against this decision came before the FtT at North Shields on 6 February. The Respondent did not attend that hearing, but sought no adjournment to enable him to do so. The Article 8 appeal was allowed, in a decision promulgated on 20 February 2018.

6. The Respondent's application for permission to appeal was granted by the FtT on 15 March 2018 on all the grounds raised. In particular it was considered arguable;

    (i) that the Judge erred in allowing the introduction of a new matter, without the consent of the Respondent (namely the claim that the Appellant's daughter faced a risk of FGM in the event the family relocated to Nigeria), and,

    (ii) that the Judge erred in failing to take into account the immigration history of the Appellant.

7. There has been no application by either party to adduce further evidence pursuant to Rule 15(2A). The Appellant did however submit a Rule 24 response to the grant of permission dated 26 September 2018.

8. Thus the matter comes before me.

Application to recuse and adjourn

9. When the appeal was called on for hearing Ms Soltani applied for me to recuse myself, and in consequence adjourn the hearing of the appeal. The basis for the application was that it was my decision of 23 July 2014 that had set aside the FtT decision upon the 2014 appeal for material error of law, and remade the decision upon the Appellant's Article 8 appeal so as to dismiss it.

10. Ms Soltani accepted that no application had ever been made on behalf of the Appellant to either the FtT, or the Upper Tribunal, to seek a direction that the appeal should not be listed before myself, (or indeed any other judge who had determined any previous appeal advanced by the Appellant). Nonetheless it was argued (without reference to any relevant jurisprudence) that since I had heard, and allowed, the Respondent's 2014 challenge in the Upper Tribunal to the Appellant's Article 8 appeal, it must follow automatically that it was inappropriate for me to hear the Respondent's challenge to the decision of the FtT upon the current appeal. It was not suggested that any "actual bias" existed, but simply that the fact that I had made the 2014 decision would raise a perception of bias against the Appellant.

11. As Ms Soltani accepts, there is no rule of law that prevents a judge from hearing more than one appeal by the same individual, or even from hearing appeals by more than one member of the same family. In any event, the hearing in 2014 concerned an error of law challenge to a decision of the FtT upon the Appellant's then Article 8 appeal. Since the Appellant's attempt to challenge my decision of 23 July 2014 failed, it followed that my decision upon that Article 8 appeal was bound to form the starting point for any Judge required to consider a further Article 8 appeal thereafter, whoever they might be. The Appellant could not expect any decision maker to ignore that assessment of where the proportionality balance lay, upon the facts as they then were.

12. Since it is not suggested that there is any real or actual bias, it follows that in order for the application to succeed the Appellant has to demonstrate a sound basis for an assertion of perceived bias. A tenuous, or frivolous, assertion that such a perception might arise, is not sufficient for that purpose. Since Ms Soltani was unable to articulate any way in which the mere fact that I made the decision of 23 July 2014 would give rise to any perception of bias, I am satisfied that to succeed the application would have to rely upon the way in which I had expressed myself within that

decision. Ms Soltani appeared to accept that point, but the highest she felt able to put such an argument was the following passage;

> *"4. On 13 May 2010 a short grant of DLR was made to the Appellant to the end of June 2010 to allow him to complete and submit his PHD thesis, and be awarded that degree [ApB p19]. I am wholly unpersuaded that this grant of DLR was open ended, or indefinite, or that it allowed him to pursue his studies indefinitely. It is quite plain from the terms of the grant, for the reasons set out below, that it was not, and that it did not.*
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> *5. Thus on 30 June 2010 the Appellant became once more an overstayer, and on any view he retained that status until 12 August 2011. Indeed it was about twelve months before the Appellant even applied for a further grant of leave, so that on 10 June 2011 the Appellant applied for leave to remain as a Tier 1 (Post Study Work) Migrant. On 12 August 2011 he was granted a period of LTR in that capacity until 12 August 2013.*
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> *6. On 28 May 2013 the Appellant applied for a grant of ILR asserting that he had enjoyed a ten year continuous period of lawful residence in the UK.* ***That assertion was untrue, as he must have known****, and that application was refused on 10 December 2013. At the same time, pursuant to s47 of the 2002 Act, a decision was made to remove the Appellant to Nigeria.* [emphasis added]"

13. Thus the application rested upon the wording "*that assertion was untrue, as he must have known*". No reference was made to any relevant jurisprudence in support of the application. The principles are however relatively well know, and the assumption that a judge must automatically recuse themselves from any subsequent hearing involving an individual whose evidence he has heard on another occasion finds no support in the approach set out in Locabail (UK) Ltd v Bayfield Properties Ltd [1999] EWCA Civ 3004. The qualification is that in a case concerning the credibility of an individual, a Judge might have to recuse himself if he had in a previous case rejected the witness' evidence in such outspoken terms as to throw doubt upon his ability to approach such a person's evidence with an open mind on a subsequent occasion [25]. If, however, that is the true nature of the Appellant's application it must fail for at least two reasons; (i) I did not express myself in such terms in 2014, and, (ii) the current hearing is an error of law jurisdictional challenge, that does not require me to consider the weight to be given to the Appellant's evidence.

14. In any event, (i) there has been significant passage of time since the 2014 hearing, (ii) moreover the need for an application for such a direction had plainly never occurred to the Appellant or his advisers prior to the hearing, (iii) the delay in the disposal of the appeal, and waste of public resources, that my recusal would necessitate was neither in the wider public interest, nor consistent with the overriding objective, and, (iv) recusal would also achieve no practical purpose since any decision maker would have to take the 2014 decision as their starting point in an evaluation of the current Article 8 rights of the family. In the circumstances I rejected the application.

The jurisdictional challenge

13. The first ground of appeal is that the Appellant introduced at the hearing a "new matter", namely a risk of FGM to his daughters, having failed to seek the Respondent's consent to his reliance upon it. Thus pursuant to s85(6) of the 2002 Act, it is argued that the FtT was unable to consider such evidence, and materially erred in law in doing so. The only course open to the FtT in the circumstances, Mr Diwnycz argues, given the Respondent had not attended the hearing of the appeal was for the hearing to be adjourned for directions.

14. Although Ms Soltani initially sought to argue that the covering letter to the Appellant's application for leave to remain dated 21 October 2016 raised the prospect of a risk of harm to his daughters in the event the family were removed to Nigeria, it is plain that there is no substance to that argument. There is quite simply no express reference to FGM contained in the text of that letter. When this was pointed out, Ms Soltani argued that one sentence from the quotation from what was then the current Amnesty International report upon Nigeria implicitly raised a risk of FGM. The sentence in question reads; "*violence against children, including child trafficking, child labour, sexual exploitation and harmful traditional practices continue to take place in Nigeria.*" I reject the suggestion that such an oblique reference, that can properly be said to have been buried within a detailed seven page letter, raises a risk of FGM as something the Appellant relied upon.

15. Ultimately it was accepted by Ms Soltani that the first occasion upon which the existence of a risk of FGM to the Appellant's daughter was raised, was in the Appellant's witness statement dated Friday 2 February 2016. This document was served upon the Respondent by fax of 1317hours, although it was not filed with the Tribunal until Monday 5 February 2016; ie the day before the FtT hearing.

16. It is common ground that the Respondent has never commented in writing upon the content of the witness statement of 2 February 2016, and has never given consent to the Appellant's reliance upon anything that may, or may not constitute a "new matter". Ms Soltani argued that this was irrelevant for two reasons;

    (i) the assertion that such a risk existed did not constitute a "new matter", but was merely new evidence relied upon in the Article 8 appeal, so that no protection ground of appeal was advanced in reliance upon it, and,

    (ii) the Appellant had not asserted that there was a real risk of FGM to his daughter, merely that at best it was a possibility. His case had been that the significance of the fact that his daughter had not been mutilated, lay in the cultural embarrassment or awkwardness that this would cause to his father as a result of his father holding the local office of chief.

17. As to the second reason, Ms Soltani accepted that there was no evidence before me from the colleague who had represented the Appellant below to explain how his case had been presented to the FtT, and to provide an evidential basis for this second argument. She accepted that she did not know how the appeal had been argued before the FtT. On the other hand, the Judge clearly understood the Appellant's case to be that his daughters faced a real risk of serious harm in Nigeria because she would be likely to be subject to FGM [41]. It is easy to see why, given the terms in which his witness statement was drafted; "*My presence along with my wife might be alright to prevent this from happening, but I can't be sure of what could happen to ... in either of our absence".* The statement then went on to comment upon the Appellant's perceptions of both the physical and psychological injuries that can result from FGM. Ms Soltani argued that the Appellant had never advanced in any tenable way that any member of his family required protection from the risk of FGM, because he had never claimed that any member of his family was actually at risk of harm, and that his case had been no higher than that he did not know what would happen to his daughters in Nigeria. That argument is in my judgement not based upon a fair reading of the Appellant's witness statement, and it is unsupported by any evidence of what the Appellant, or his representative said during the hearing. In the circumstances I regret that I can find no substance in Ms Soltani's argument that the Judge misunderstood the nature of the Appellant's case as presented to her.

18. As to the first reason, I note with regret that neither representative brought to the hearing any relevant jurisprudence that would provide guidance upon the application of s85(6) of the 2002 Act. The appeal was stood down whilst I obtained copies for the representatives of Mahmud (s85 NIAA 2002 – "new matters" – Iran) [2017] UKUT 488 and Quaidoo (new matter: procedure/process) Ghana [2018] UKUT 87, and provided them with time for their digestion.

19. In Mahmud a Vice Presidential panel offered the following guidance upon what constituted a "new matter" for the purpose of s85;

> *"Conclusions on the meaning of a 'new matter' in section 8(6)*
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> *29. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal. For example, medical evidence of a serious health condition could be a matter which constitutes a ground of appeal on human rights grounds based on Article 3 of the European Convention on Human Rights which if breached, would mean that removal would be contrary to section 6 of the Human Rights Act, a ground of appeal in section 84(2) of the 2002 Act. Similarly, evidence of a relationship with a partner in the United Kingdom could be a matter which constitutes a ground of appeal based on Article 8 and for the same reasons could fall within section 84(2) of the 2002 Act as if made out, removal would be contrary to section 6 of the Human Rights Act.*

> *30. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. In the absence of this restriction, section 85(5) of the 2002 Act could potentially allow the Respondent to give the Tribunal jurisdiction to consider something which is not a ground of appeal by consent, thereby undermining sections 82 and 84 of the 2002 Act;*
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> *31. Practically, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. By way of example, evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential requirements to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to section 6 of the Human Rights Act.*
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> *32. In accordance with the construction of section 85(6)(a) of a 'new matter' contended for by Counsel for the Appellant, he submitted that on the facts of this case, the Respondent had considered the matter, (namely whether the Appellant's removal from the United Kingdom would be contrary to section 6 of the Human Rights Act 1998 on the grounds that there would be a disproportionate interference with his right to respect for private and family life protected by Article 8 of the European Convention on Human Rights) so that no further matter raising the same ground could be a 'new matter' within section 85(6)(b). For the reasons set out above, the primary submission fails and therefore so does the submission that in fact, the Respondent had considered the matter. The fact that the Respondent had, in her decision dated 19 May 2016, considered the Appellant's private and family life on the basis of information known to her at that date, was not sufficient to show consideration of the matter now relied upon: the Appellant's relationship with a new partner and her child. Actual consideration in a decision letter of the new factual matrix relied upon is required for a matter to fall outside section 85(6)(b) and therefore not be a 'new matter'."*

20. That guidance was approved and confirmed by the Presidential panel in Quaidoo.

21. With that guidance in mind it is in my judgement clear that the first reason advanced by Ms Soltani must fail. It is self evident, for the reasons set out

above, that the evidence concerning a risk of FGM constituted evidence that the Respondent had been given no proper opportunity to consider in advance of the hearing. It had not been raised in a section 120 statement, or in the application for leave to remain. The evidence (however strong or weak) that the Appellant's daughters faced a risk of FGM in Nigeria, was capable of constituting a claim that their removal to Nigeria would pose a risk of a breach of their Article 3 rights. Potentially, it could go even further, and constitute a claim (however weak) that their parents risked a breach of their Article 3 rights in the event they sought to protect their daughters. As such it is abundantly clear that it was evidence that could constitute a ground of appeal of the type mentioned in section 84 of the 2002 Act, and thus a "new matter" for the purpose of section 85(6).

22. I have noted Ms Soltani's argument that this new evidence was never relied upon before the FtT so as to constitute a new ground of appeal, but simply as evidence that should be considered as part of the proportionality balancing exercise. The argument is not supported by any evidence concerning how the appeal was advanced to the FtT, and it is inconsistent with the terms in which the FtT's decision is written. I am not satisfied it has any proper foundation in what actually occurred at the hearing below. More importantly it is an argument that cannot in any event succeed. It is not open to an applicant to say that their new evidence can only be considered by the FtT in a particular way, and within say the confines of an Article 8 appeal, if in truth that evidence raises a real risk of a breach of either the Refugee Convention, or, Article 3 rights. An applicant cannot simply avoid the consequences of section 85(5) by undertaking some form of self-labelling or ring-fencing exercise in order to restrict the use to which his evidence can be put by the FtT. Thus Ms Soltani's argument falls into the same trap as that advanced and dismissed in Mahmud [32];

> *"The fact that the Respondent had, in her decision dated 19 May 2016, considered the Appellant's private and family life on the basis of information known to her at that date, was not sufficient to show consideration of the matter now relied upon: the Appellant's relationship with a new partner and her child. Actual consideration in a decision letter of the new factual matrix relied upon is required for a matter to fall outside section 85(6)(b) and therefore not be a 'new matter'."*

23. Accordingly the Respondent makes out his first ground. It was incumbent upon the FtT to determine whether the new factual matrix relied upon, of a risk of FGM, constituted a "new matter", before going on to dispose of the appeal. It is common ground that the FtT did not do so. Had it done so, then directing itself appropriately the FtT would have been bound to consider that the new evidence constituted a new factual matrix, that raised a matter that could constitute a new ground of appeal. In turn the FtT was bound to apply the jurisdictional limits imposed by section 85(5) of the 2002 Act. In failing to do so the FtT, as a creature of statute, exceeded its statutory jurisdiction. In my judgement that is not an immaterial error of law as Ms Soltani argued. Nor can the error be cured by the simple expedient of deleting all references to FGM from the decision, and looking

to see if what is left could be a sustainable decision, as Ms Soltani invited me to do. The circumstances in which the FtT was placed by the separate actions of the parties left no practical course open to the FtT other than to adjourn the appeal of its own motion, in order to determine whether the Respondent would wish to consent to the introduction of the "new matter", perhaps after further enquiry into the new evidence relied upon.

24. In the circumstances it is perhaps unnecessary for me to rehearse the other challenges made by the Respondent to the decision of the FtT. However at least the second and final grounds are clearly made out, and they too amount to material errors of law requiring the decision to be set aside and remade. It is plain from the decision that the FtT did not undertake any analysis of the 2014 decision upon where the balance of proportionality then lay, or, overtly take that decision and the reasoning therein as the starting point, as the FtT was obliged to do; Devaseelan [2002] UKIAT 702. Moreover, the FtT did not consider the nature of the risk that was said to be faced by the Appellant, in terms of the locality from which it originated, or the size of the tribe from which it originated. Nor did the FtT consider the ability of the Appellant and his wife to protect their daughters within Nigeria from any risk of FGM either through their own opposition to such practices, within the context of their educational achievements, employment opportunities and earning potential, or, through internal relocation; Omeredo v Austria [2011] ECHR 1538

25. In the circumstances I am satisfied that the only course open to me is to remit the appeal for a fresh hearing by a judge other than Judge Arullendran at the North Shields Hearing Centre. No interpreter is required. Although the Appellant has not indicated any desire to do so, he may upon reflection wish to lodge further evidence to clarify the nature of his case, and to bring matters up to date. He may do so within 14 days of the promulgation of this decision.

26. The Respondent shall consider whether to give consent to the "new matter", and must give his response to the Appellant and to the FtT within 14 days of the promulgation of this decision. If the Respondent wishes to invite the Appellant to interview, to investigate further the matter, then the Respondent should do so at the same time.

27. The remitted appeal may be listed at short notice only after 5 November 2018.

Notice of decision

28. The decision did involve the making of an error of law sufficient to require the decision to be set aside on all grounds, and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing de novo, with the directions set out above.

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 her or any member of her 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 15 October 2018
Deputy Upper Tribunal Judge J M Holmes