IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003303

First-tier Tribunal No: HU/63161/2023
LH/02745/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 5th of November 2024

Before

UPPER TRIBUNAL JUDGE O'BRIEN

Between

Olabimpe Janet Omoniyi
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms V Easty of Counsel, instructed by Pride Law Solicitors Ltd
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 27 September 2024

DECISION AND REASONS

1. The appellant was born on 4 December 1981 and is a national of Nigeria. She appeals against the decision of First-tier Tribunal Judge Mills (the judge) promulgated on 6 June 2024 to dismiss her appeal against the respondent's refusal of her human rights claim.

Background

2. The appellant arrived in the United Kingdom on 27 September 2021 with entry clearance as a student, but was refused entry and her entry clearance was cancelled. She promptly claimed asylum on the basis that she and her daughters were at risk of FGM if returned to Nigeria. However, her husband subsequently entered the United Kingdom on 10 May 2023 2 with entry clearance as a Tier 2 worker. The appellant applied on 14 July 2023 for leave to remain as his spouse (and for her daughters to similarly for leave on Article 8 grounds). The appellant

mentioned in that application her outstanding asylum claim but withdrew the latter on 7 August 2023 before either was decided. The respondent's refusal of the human rights application gave no consideration to (and indeed made no mention of) the appellant's asylum claim or the basis for it.

3. At the hearing to decide the appellant's appeal against refusal of that human rights claim, the judge refused to allow her to rely on the claimed risk of FGM, ruling that it was a new matter as defined in s85 of the Nationality, Immigration and Asylum Act 2002, and regarding which the Home Office Presenting Officer confirmed consent was not given for the judge to consider the issue.

4. The appellant applied on 17 June 2024 for permission to appeal. In essence, one ground was advanced, that the judge was wrong to treat the issue of FGM as a 'new matter'. It had been raised in the context of the human rights claim and was manifestly relevant to the question of very significant obstacles to reintegration. It was irrelevant that the respondent had failed to deal with it in her decision. Permission to appeal was granted in the First-tier on 12 July 2024.

5. Before me, Ms Easty relied on her skeleton argument dated 17 September2024, which she supplemented orally. She accepted that a claimed risk of FGM could on its own found a human rights claim, and that the respondent had not expressly considered that particular claim. However, she did not accept that FGM was a new matter as defined in s85(6). She further argued that, even if it were, the appellant was entitled to rely on the issue as part of her human rights case (per JA (human rights claim: serious harm) Nigeria [2021] UKUT 00097 (IAC), and that the judge was obliged to consider it irrespective of the respondent's consent. It was agreed that, if the judge erred as she submitted, it would be a material error.

6. Ms Ahmed argued that the judge had unarguably correctly concluded that FGM was a new matter, directing himself to the principles in Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC). He was clearly aware of the procedural history including the fact that the asylum claim had been withdrawn by the time that the respondent had taken her decision on the appellant's human rights claim. It was reasonable to conclude that the appellant had by then abandoned the issue in its entirety. The judge cannot be criticised for failing to consider JA when it had not been raised before him or for continuing the hearing having ruled that FGM was a new matter when Counsel before him had not sought an adjournment.

The Law

7. The material provisions of s85 Nationality, Immigration and Asylum Act 2002 ('Matters to be considered') are:

> '…
> (4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.
> (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
> (6) A matter is a "new matter" if—
> (a) it constitutes a ground of appeal of a kind listed in section 84, and
> (b) the Secretary of State has not previously considered the matter in the context of—
> (i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.'

8. In Mahmood at [29-31], the Vice-Presidential panel reached the following conclusions on the meaning of a 'new matter' in section 8(56):

> '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.
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> 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.'

9. Whilst not cited by either party before me, I reminded myself after the hearing of the recent case of Ayoola (previously considered matters) [2024] UKUT 00143 (IAC), in which this Tribunal had the following to say about matters raised in applications but not dealt with the respondent's consequential decision:

> '30. The purpose of the new matter regime, whether in section 85 or regulation 9, is to ensure the Secretary of State has the opportunity to be the primary decision maker, and to confine the jurisdiction of the First-tier Tribunal to those matters which the Secretary of State has already had the opportunity to consider in the course of taking the primary decision under challenge, or when addressing a response to a section 120 statement. The logical conclusion of Mr Deller's submissions would be that the Secretary of State could evade the jurisdiction and scrutiny of the tribunal simply by declining to address matters expressly raised in an application. If that were so, it would enable the Secretary of State to shield aspects of his decisions from appellate scrutiny simply by omitting expressly to address certain features of the application before him. There would be an inverse correlation: the greater the Secretary of State's failure to take into account relevant

factors, the narrower the tribunal's jurisdiction would be to consider those alleged failures. That cannot have been the intention of Parliament.

31. It follows that if a matter is raised in the course of an application to the Secretary of State, the Secretary of State's refusal of the application will amount to having "considered" the matter for the purposes of regulation 9(6)(b), even if the decision under appeal is silent on a matter expressly raised in the application. But the references to the matter will have to be sufficiently clear to make it reasonable for the Secretary of State properly to respond to it. A buried or tangential reference in an application which ostensibly otherwise relies on some other matter is unlikely to be sufficient to merit the conclusion that it has been "considered" by the Secretary of State.'

10. Of course, the appellant goes further than simply arguing that FGM was not a new matter at all, but also argues in the alternative that the judge was obliged to consider FGM notwithstanding, as a matter raised in and relevant to her human rights claim. In support of this alternative proposition, the appellant relies on JA (human rights claim: serious harm) Nigeria [2021] UKUT 97 (IAC). The ratio of JA can be found at [26-29]:

26. Where, as here, a human rights claim is made, in circumstances where the respondent considers the nature of what is being alleged is such that the claim could also constitute a protection claim, it is appropriate for the respondent to draw this to the attention of the person concerned, pointing out they may wish to make a protection claim. Indeed, so much would appear to be required of the respondent, in the light of her international obligations regarding refugees and those in need of humanitarian protection.

27. As Mr Ndubuisi pointed out, however, there is no obligation on such a person to make a protection claim. The person concerned may, as in the present case, decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private life aspects of Article 8, whether by reference to paragraph 276ADE(1)(vi) or outside the Rules. If so, then, as in the present case, the "serious harm" element of the claim falls to be considered in that context.

28. We also agree with Mr Ndubuisi that what we have just said is not affected by the procedures the respondent has for assessing protection claims, including the need for a person making such a claim to be interviewed about it. Where, in the context of a human rights claim involving a "serious harm" element, the respondent considers it necessary to do so, she can make arrangements for the applicant to be interviewed about it.

29. This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is (as here) drawn to their attention by the respondent will never be relevant to the respondent's and, on appeal, the First-tier Tribunal's assessment of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by the refusal to subject oneself to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. The appellant may have to accept that the respondent and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the 2002 Act. On appeal, despite the potential overlap we have noted at paragraph 18 above, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1), but only on the ground specified in section 84(2).

Discussion on the Law

11. The applicant submits that JA is authority for the proposition that serious harm matters raised in the context of a human rights appeal can always be considered by the First-tier Tribunal, whether or not 'new matters' as defined in s85(6) and, if so, whether or not the respondent gives her consent. Ms Easty relies in particular on the sentence in [29], 'That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the 2002 Act.'

12. I am unable to interpret JA that way for the following reasons.

13. JA concerned a family of nationals of Nigeria who expressly raised in their applications for further leave to remain in the United Kingdom the risk of kidnapping in Nigeria and possibility of the child of the family being inculcated into a harmful family tradition. These matters were summarised in the refusal letter under the heading 'Exceptional Circumstance' However, the appellants had not made asylum claims despite the refusal letter recording the offer of an opportunity to do so. The refusal letter consequentially recorded that the application had been considered 'under the private life route only.' The First-tier Tribunal Judge similarly dealt with the appellants' case solely under Article 8. Contrary to the appellants' submissions, the Upper Tribunal accepted that the First-tier Tribunal Judge had dealt with the appellants' claimed risks within her Article 8 assessment [31] notwithstanding that respondent had not considered them within the context of very significant obstacles to reintegration [30].

14. Therefore, JA was a case where the First-tier Tribunal Judge had in fact considered the serious harm matters raised by the appellants. The respondent had expressly addressed those matters in her refusal letter (albeit that she did not consider them within her assessment of very significant obstacles to reintegration). Even if the serious harm matters were still considered by the respondent to be a new matter as defined in s85(6), there is no suggestion in JA that the respondent refused consent for them to be considered by the First-tier Tribunal Judge.

15. In any event, it is key to consider the context in which the sentence relied on is to be found. Crucially, if it were intended to be understood as the appellant submits, then the Presidential Panel would surely have placed it at the end of [27], to make the concluding phrases of that paragraph read:

> 'The person concerned may, as in the present case, decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private life aspects of Article 8, whether by reference to paragraph 276ADE(1)(vi) or outside the Rules. If so, then, as in the present case, the "serious harm" element of the claim falls to be considered in that context. That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the 2002 Act.'

16. Instead, the sentence in question is to be found in the heart of [29], a paragraph dealing with the consequences of relying on serious harm matters in an Article 8 claim without having made a concomitant protection claim. Reading it in context and together with the preceding sentence, the meaning is clear:

> 'The appellant may have to accept that the respondent and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is

> advanced only late in the day. That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the 2002 Act.'

17. The Tribunal intended to make clear that the First-tier Tribunal was entitled to treat such matters with scepticism, even if they were not new matters as defined is s85(6).

18. I should add that the appellant's interpretation of the sentence, taken to the logical extreme of necessitating a judge to adjudicate on a claimed risk that had never been raised or perhaps even alluded to before disclosure of the appellant's bundle, would entirely undermine the intention of the s85 scheme as explained in Ayoola at [30].

Conclusions

19. The question of whether the First-tier Tribunal can consider a matter is by definition an issue of jurisdiction, which is a paradigm question of law. Therefore, the question I must consider is not whether the judge was entitled to conclude that he did not have jurisdiction to adjudicate on the appellant's claimed risk to her and her daughters from FGM but whether in all of the circumstances he did have the jurisdiction.

20. Given my conclusions on JA, the fact that the claimed risk was relevant to the appellant's human rights claim was not in itself sufficient for the judge to have jurisdiction to consider the matter. Instead, and given the respondent's clear refusal to consent to the matter being dealt with, the question becomes whether the claimed risk was a new matter as defined in s85(6).

21. The appellant's application for leave to remain was made on 14 July 2023 and was followed on 25 July 2023 by a letter from her representatives noting their involvement, and including the following material extracts:

    a. The Applicant claimed asylum on the same day and had her screening interview the following day (i.e., 28 September 2021). Her Asylum claim is currently under consideration.

    b. Our client now wishes to submit an application for limited leave to remain in the UK as a partner of a person who has been granted limited leave to remain in the UK as a worker, under the 10-year partner route to settlement.

    c. The Applicant has been in genuine and subsisting marriage for over 11 years and have three children together. The Applicant, Sponsor and their three children all reside in the UK as a family unit. The Sponsor is a Nigerian national with limited leave as a worker, and there are insurmountable obstacles to family life with that partner continuing outside the UK. These obstacles can range from personal, and professional disruptions, financial to potential logistical complications. Uprooting the Applicant to Nigeria while her partner and the children are in the UK can be emotionally and mentally challenging, but most importantly will put her at risk. The Applicant is an asylum seeker and sought protection to the UK. Please see enclosed asylum screening interview confirming the same.

d. It is therefore submitted that the Applicant's circumstances are considered when assessing her application. The Applicant's case should be based on the presence of an insurmountable obstacle that cannot be overcome within the current circumstances.

e. In this matter, the Applicant has an ongoing asylum claim which is currently pending and under consideration. She cannot relocate to Nigeria for fear of prosecution [sic]. It is therefore submitted that it would be unreasonable to return the Applicant back to her country of origin to which she has a well-founded fear. Such a decision would be unlawful and unproportionate.

22. There are two other matters of note regarding this letter. First, whilst the letter claims that the appellant's screening interview was enclosed, the same was not mentioned in the list of evidence relied upon set out on the letter's penultimate page. Neither was the screening interview to be found in the bundle before the First-tier Tribunal (or the bundle before me). Second, whilst the letter made extensive submissions on the best interests of the children, no express mention is made of any risk (of FGM or otherwise) to them.

23. Of course, the appeal skeleton argument did mention the claimed risk to the appellant and her daughters from FGM, albeit in a single line in a 5-page document concentrating otherwise on what could perhaps be described as the conventional Article 8 aspects to the appeal, and the appellant and sponsor's witness statements went into the issue in some detail. Moreover, the judge appears to have accepted at [2] that the appellant's asylum claim had been a fear of FGM for her and her daughters. However, it is unclear whether that point was understood by the judge to be material to his subsequent decision under s85.

24. That said, the judge cannot be criticised for failing to follow Ayoola; it was not reported until after his decision was promulgated. However, had he addressed his mind to it he might have enquired further into what detail had previously been given to the respondent about the claimed fear in Nigeria. Nevertheless, the Presenting Officer before the judge could reasonably have been expected to say at the time if FGM had not formed at least part of the appellant's basis for claiming asylum. Indeed, Ms Ahmed did not suggest the contrary to me today, instead relying on the withdrawal of the asylum claim as reasonable grounds for it not having been considered within the human rights application.

25. Therefore, I proceed on the basis that the appellant did indeed raise in her screening interview a risk to her and her daughters from FGM in Nigeria but, as is usual at screening stage, gave little more than that in the way of detail.

26. It is not in issue that the appellant mentioned her asylum claim in her human rights application but without giving any detail of its basis. However, whilst I do not doubt that different case-workers would have been involved in the two separate processes and that different decision-makers would have made the final decisions, they were (or would have been) all acting on the respondent's behalf. It would in any event have been reasonable to expect the human rights case-worker to obtain a copy of the screening interview if it was not in fact enclosed with the letter of 25 July 2023. The reference in the letter to the applicant's asylum claim and the record of her screening interview was neither 'buried' nor 'tangential'.

27. In sum, I find that the human rights case-working team had the opportunity to consider the appellant's claimed FGM risk, but effectively chose not to. Whilst I accept that the appellant withdrew her asylum claim shortly after making her human rights application, she did not withdraw her assertion that the same matters constituted or contributed to insurmountable obstacles to her return to Nigeria (as was alleged in the letter – see paragraph 21c above).

28. Consequently, applying Ayoola, I accept that the appellant's claimed risk of FGM to her and her daughters was considered by the respondent for the purposes of s85(6) and so was not a new matter. It follows that the judge had jurisdiction to consider that issue and erred in law in refusing to do so.

29. Of course, it would have been open to the judge to reject that element of the claim, but only after hearing evidence on the point. As it is, the judge 'assumed' at [41] that the asylum claim had not been genuine but rather was an attempt to circumvent immigration controls. In the circumstances, it will be necessary to remit the case to the First-tier Tribunal to be heard by another judge with no findings preserved.

Notice of Decision

1. The appeal is allowed.

2. The judge's decision on the appeal involved the making of an error of law.

3. The appeal is remitted to the First-tier Tribunal to be dealt with by a different judge with no findings of fact preserved.

Sean O'Brien

Upper Tribunal Judge O'Brien

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 October 2024