



Neutral Citation Number: [2018] EWCA Civ 2847

Case No: C5/2017/1008

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (IMMIGRATION AND ASYLUM
CHAMBER)

DUTJ Hanbury
AA/08069/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:20 December 2018

Before :

LORD JUSTICE LONGMORE
and
LORD JUSTICE PETER JACKSON

Between :

KC (Gambia)	<u>Appellant</u>
- and -	
The Secretary of State for the Home Department	<u>Respondent</u>

Shazia Khan (instructed by **Parker Rhodes Hickmotts**) for the **Appellant**
Eric Metcalfe (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 19 December 2018

Judgment Approved

See Order at bottom of this judgment

Lord Justice Peter Jackson:

Overview

1. The appellant, KC, is a citizen of the Gambia. In August 2013, she claimed asylum in this country. This was refused by the Secretary of State in September 2014. KC appealed and in February 2015 her appeal was dismissed by the First-tier Tribunal. That decision was overturned by the Upper Tribunal in September 2015 and the matter was remitted to the FTT, which in July 2016 allowed KC's appeal. The Secretary of State then appealed and on 20 October 2016 the UT allowed the appeal, remade the decision and dismissed KC's appeal. On 27 February 2017, the UT granted KC permission to bring a second appeal to this court.
2. The grounds of appeal are (1) that the UT was wrong to find that the FTT erred in law, and (2) that the UT itself erred in law in the way it remade the decision.
3. The Secretary of State seeks to uphold the UT decision on the grounds it gave and also by Respondent's Notice seeks to support with additional arguments the UT's reasons for allowing the appeal and for remaking the decision.
4. The Secretary of State also asks us to admit additional evidence about conditions in the Gambia. That evidence predated the appeal to the UT but was not produced at that hearing. Some of it has since found its way into a Country Policy and Information Note on FGM published by the Secretary of State in December 2016.
5. I shall summarise as briefly as I may the facts, the FTT decision, the UT decision, the legal framework, the parties' submissions and my conclusions.

The

facts

6. The facts as described by the KC, and accepted by the FTT, are these.
7. KC is now 31 years old. She is a Mandinka. Her family (father, step-mother and 2 half-sisters) continue to live in her native village. When aged 6 she underwent female genital mutilation (FGM) of a type between Type II and Type III on the World Health Organisation classification. KC is opposed to FGM as a result of her own experience and the death of her best friend as a result of FGM. Her grandmother was an FGM practitioner (a cutter) and this role was passed on to her mother who became well-known and travelled around the Gambia undertaking FGM. KC accompanied her mother as she was expected to take on the role after her mother's retirement. She was reluctant to be involved and was beaten by family member as a result.
8. KC married SB in 2008. He is also a Gambian citizen. He had been living in the UK on a student visa since 2004. In 2009, KC joined him as his dependent spouse, obtaining the necessary visa. However, SB returned to the Gambia in 2012 out of

choice. He and KC nevertheless remain on good terms and are in regular contact. He now works for the Gambian government.

9. KC's mother died in March 2012. In the following week she was contacted by relatives in the Gambia who told her that she must return to the Gambia to take up her mother's role as a cutter. KC did not want to do this and changed her mobile number to avoid further contact.
10. In November 2011, KC had applied to renew her visa. That application was refused and in August 2013 she lodged a claim for asylum. She claimed that if she had to return to the Gambia her family would force her to practise FGM under threat of serious harm or even death if she disobeyed.
11. On 25 September 2014 the Secretary of State refused the application for asylum on the basis of inconsistencies in KC's evidence that were considered to undermine her credibility. It was further said that the functioning police force in the Gambia would provide protection and that internal relocation was a viable option.
12. KC appealed. In February 2015 the FTT (Judge Robson) dismissed her asylum claim and her appeals for humanitarian protection and under Article 8. In July 2015, the UT (Judge Lane) allowed KC's appeal, set the FTT decision aside and remitted the matter to the FTT for rehearing.

First-Tier Tribunal – Judge Kelly and Judge Heap

13. The FTT, in a decision given on 11 July 2016, allowed KC's appeal on the basis that her removal would be contrary to the UK's obligations under the Refugee Convention or alternatively that she was entitled to humanitarian protection under Paragraph 339C of the Immigration Rules.
14. The FTT made the following findings of fact:
 - (1) It accepted the account given by KC as honest and credible and found that any discrepancies relied upon by the Secretary of State were minor and could be reasonably explained.
 - (2) Given KC's physical difficulties as a result of her own FGM, it is understandable and credible that she would be opposed to FGM and particularly opposed to performing it herself, despite the cultural expectations upon her.
 - (3) It accepted that KC's mother was a cutter and that tradition expected KC to return to the Gambia to continue this tradition when she died. This finding was supported by the expert report of Dr Pamela Kea, a co-author of the Country of Origin Information report on FGM (2011).
 - (4) It was satisfied that KC had been subjected to threats regarding returning to take up the role of FGM practitioner from her family and particularly from her step-mother, and that she has a genuine and rational fear for her life if she refused to take on that role.
 - (5) It accepted that KC's mother was widely known throughout the Gambia and that as a result of her resemblance to her mother and her having attended ceremonies elsewhere in the Gambia, KC runs a real risk of her return being brought to her family's attention.

- (6) Taking into account the advice of Dr Kea and the country guidance decision in *K and ors. (FGM) The Gambia* [2013] UKUT 62, which noted that the Gambia is small and highly interconnected and that there was no reliable evidence of state protection against FGM, it accepted that KC cannot reasonably be expected to internally relocate, even with her husband, as she would quickly be recognised and word would be sent back to her family.
 - (7) It accepted KC's evidence that limited protection could be expected from the security services. While contending that the corroborating report of Dr Kea was out of date, the Secretary of State had provided no contrary information or other substantive challenge to its content.
15. Based on these findings of fact, the FTT reached the following conclusions:
- (1) As a member of a particular social group – women of Mandinka ethnic origin – KC would be at risk of having her life taken as a result of her refusal to undertake FGM.
 - (2) Alternatively, KC should be afforded humanitarian protection on the basis that there are substantial grounds for believing that if she was returned to the Gambia she would face a risk of serious harm. There is a substantiated risk that she would be put to death as a result of her refusal to practise FGM.
 - (3) KC cannot be expected to internally relocate as that would not negate the inherent danger.

Upper Tribunal – Deputy Judge Hanbury

16. The Secretary of State appealed to the UT on 3 August 2016 on the basis of a material error of law in that the FTT had failed to properly consider both the matter of internal relocation and sufficiency of protection as follows:
- (1) The FTT failed to consider the assertion in the refusal letter that KC could relocate to Banjul, the capital city. It also failed to consider the submission that the Gambia has a population of over 1.7 million and that Banjul is densely populated. The FTT did not provide adequate reasons as to why KC's family would be able to find her or describe the evidential basis for accepting that 'news travels quickly'. The FTT simply failed to grapple with the real question – is relocation unduly harsh or not?
 - (2) Further the FTT failed to properly assess whether the authorities are 'unable or unwilling' to assist KC should she go to them. The expert opinion was out of date and was not sufficiently analysed by the FTT who, by simply stating that the Secretary of State had not filed evidence in rebuttal, did not apply the appropriate test.
17. Permission to appeal to the UT was granted by FTT Judge Manuell on 29 July 2016.
18. In a judgment promulgated on 16 November 2016, Deputy UTJ Hanbury allowed the appeal, set aside the decision of the FTT and substituted a decision dismissing KC's appeal against refusal of asylum. He also stated that the Secretary of State was entitled to consider that KC had no right to international humanitarian protection under para.339C of the Immigration Rules, and nor were her Article 8 rights engaged.

19. The judge commented that he found the matter to be ‘finely balanced’ and that it was with hesitation that he allowed the appeal. He gave the following reasons:
- (1) Before dismissing the suggestion that KC could avail herself of her husband’s protection or the protection of security services, the FTT ought to have properly analysed the facts and given clear reasons; no reasons were given.
 - (2) The issue did not turn on KC’s credibility but on an objective analysis of the facts and the question of whether there was an adequacy of state protection in the Gambia.
 - (3) It was necessary to ask whether there was a safe internal flight alternative available to KC and whether it would be unduly harsh for her to avail herself of that option.
 - (4) He was not satisfied that the FTT had applied the correct test. It appeared to place a burden on the Secretary of State, who needed only establish primary facts giving rise to a possible internal flight alternative. The question of undue harshness was not answered by the suggestion that KC would be recognised on her return.
 - (5) The reasoning of the FTT regarding internal relocation was excessively vague.
20. In remaking the decision, Deputy Judge Hanbury made the following points:
- (1) According to the principle in *Horvarth v SSHD* [2001] 1 AC 489, the burden was on KC to show an insufficiency of state protection. She was unable to do this; on the contrary, the Gambia has a functioning police force that has attempted to control acts of violence directed towards women. KC would be ‘able to access the police service if needed’. She had failed to demonstrate that her family would have an influence on her above that of the state.
 - (2) Given the fact that KC was from a large tribe, it was simply not credible that she could not settle at some safe place in the Gambia.
 - (3) The issue was not primarily a matter of expert evidence but of weighing up the evidence and applying the unduly harsh test. There was a safe internal flight alternative to international protection.
 - (4) KC has a husband in the Gambia. It was not unreasonable to expect her to return to the Gambia and reintegrate with him.

Permission to appeal

21. Permission to appeal was granted by UT Judge Plimmer on 27 February 2017 on the basis that it was arguable that the FTT gave adequate reasons and that the UT erred in law in finding in the face of the evidence of the country expert:
- (1) That KC (whose credibility had been accepted in its entirety) could safely relocate in the Gambia; and
 - (2) That she had not shown that she would not obtain sufficient protection from the police because they would view her situation as ‘domestic’ and decline to become involved.
22. Judge Plimmer further stated her view that it was arguable that the UT erred in law in remaking the decision in:

- (1) Considering the sufficiency of state protection generally in the Gambia and not the likely protection that this particular appellant would receive in light of the country information and expert evidence;
 - (2) Failing to take into account the accepted evidence that KC's family have the will and the means to track her down anywhere in the Gambia; and
 - (3) Disregarding the expert and country evidence when assessing sufficiency of protection and internal relocation.
23. She stated that the grounds were arguable and that there was a compelling reason for a second appeal as it involves an asylum claim of an applicant who had been found to be entirely credible and had succeeded before the FTT, and where the UT had made arguable errors of law.
24. On 26 April 2017, the Secretary of State filed a Respondent's Notice seeking to uphold the UT's decision on additional grounds. At the same time, the Secretary of State sought leave to adduce further evidence of a general nature concerning the Gambia, including new country of origin guidance published in December 2016.

Legal Framework

25. The Refugee Convention 1951 of course exists to protect a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. Article 33 of the Convention, concerning the return or 'refoulement' of such persons provides as follows:
- '1. No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'*
26. Part 11 of the Immigration Rules sets out the procedures in relation to consideration of asylum applications.

Grant of humanitarian protection

339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

- (i) *they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;*
- (ii) *they do not qualify as a refugee as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006;*
- (iii) *substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and*
- (iv) *they are not excluded from a grant of humanitarian protection.*

339CA. For the purposes of paragraph 339C, serious harm consists of:

- (i) *the death penalty or execution;*
 - (ii) *unlawful killing;*
 - (iii) *torture or inhuman or degrading treatment or punishment of a person in the country of return; or*
 - (iv) *serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations or international or internal armed conflict.*
- ...

Internal relocation

339O (i) *the Secretary of State will not make:*

- (a) *a grant of refugee status if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or*
 - (b) *a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.*
- (ii) *In examining whether a part of the country of origin or country of return meets the requirements in (i), the Secretary of State, when making a decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.*
- (iii) (i) *applies notwithstanding technical obstacles to return to the country or origin or country of return.*

Submissions of the parties

27. On behalf of KC, Ms Shazia Khan argues that

- (1) The UT erred in law in finding that the FTT made errors of law in insufficiently reasoning its finding that KC could not avail herself of the protection of her husband or the police force and in disturbing the FTT's finding that KC could not safely relocate internally. The FTT's decision was fully reasoned, clear and intelligible and the UT was wrong to hold that it had reversed the burden of proof.
- (2) In remaking the decision, the UT failed to take account of material considerations, namely the evidence of Dr Kea that 'news travel quickly' and the country guidance about the difficulty of relocation in the Gambia. His finding that 'it is simply not credible that the appellant could not settle at some place in Gambia' conflicts with the evidence that the FTT was entitled to accept on this issue. Further, the UT failed to look beyond the general sufficiency of protection to the individual circumstances of the appellant.

There was no evidence for its finding that the Gambian police force that has attempted to control acts of violence directed towards women. It was also wrong, in the light of Dr Kea's unchallenged evidence and the decision in *K*, to hold that the FTT had given no reasons for why KC should not avail herself of the protection of her husband or police force.

28. On behalf of the Secretary of State, Mr Eric Metcalfe accepts that the UT went too far in saying that the FTT gave no reasons for its decision, and that in reality it had held that the reasons given were inadequate. The Secretary of State's case is that the UT rightly found an error of law in the FTT decision in these respects:

- (1) The FTT in effect imposed a burden of proof on the SSHD to adduce evidence demonstrating that internal relocation was suitable and there was a sufficiency of protection. It is long-established in case law that this is incorrect – that the burden is on the applicant and that it is simply for the Secretary of State to assess the information with a degree of rigour: *Horvarth* (above); *Bagdanavicius v SSHD* [2004] 1 WLR 1207; and *Januzi v SSHD* [2006] 2 AC 426.
- (2) The FTT was wrong to reject the Secretary of State's case that safe relocation was possible and that insufficiency of protection had not been shown.
- (3) Further, by way of Respondent's Notice, the FTT elided the risk to Mandinka women of suffering FGM with the risk to KC from being forced to perform FGM. KC's claim is not based on her origins as a Mandinka woman but as her mother's daughter who had already suffered FGM. Societal pressure to undergo FGM is very different to pressure to perform this. The decision in *K* should not have been relied on.
- (4) Still further, by way of Respondent's Notice, the FTT elided a risk of identification with a risk of persecution that could not be avoided by internal relocation or sufficiency of state resources. Had the FTT addressed the evidence relied on in the decision letter it would have noted that men had been prosecuted for violence against women and that some communities had announced their commitment to abandon FGM.

29. In relation to remaking the decision, the Secretary of State submits that the UT was entitled to make the findings it made on the evidence before it.

30. Alternatively, following *R (Iran) v SSHD* [2005] EWCA Civ 982, this court should consider the further evidence provided by the Secretary of State, consisting of:

- a 2013 report from the US State Department;
- a BBC news report from November 2015;
- a UN Development Programme article dated February 2016;
- a UN Women website article dated August 2016;
- the Secretary of state's country guidance of December 2016.

Particular emphasis is placed on the fact that FGM has been illegal in the Gambia since December 2015. It is submitted that this information should be admitted by this court both in relation to the appeal (as supporting the UT decision) or, if the appeal is allowed, as to the remaking of the decision.

Conclusions

31. I would allow this appeal. There was no error of law in the decision of the FTT and the UT had no proper basis for overturning its decision. The decision of the UT itself was in my view wrong in these respects:
 - (1) Contrary to its view, there was no vagueness or lack of clarity in the FTT's conclusions on the issues of sufficiency of protection or internal relocation.
 - (2) On the contrary, the conclusions of the FTT were soundly based on five elements: the evidence of KC, of her husband, and of Dr Kea, and on the country information and country guidance prevailing at the time.
 - (3) I see no sign that the FTT, having given itself a correct self-direction on the issue, went on to place an impermissible burden of proof on the Secretary of State. On the contrary, KC adduced clear evidence in relation to sufficiency of protection which the Secretary of State singularly failed to meet.
32. There is no substance in the arguments raised in the Respondent's Notice. The FTT did not elide risks of one kind with risks of another but took a broad, practical assessment of the evidence with which it was presented. There was clearly a relevant overlap between the risks that arise for a potential victim of FGM and the risks that face a person who is expected to become a cutter. Similarly, the risk of identification and the risk of persecution are related and there is no sign that the FTT mistook one for the other.
33. Overall this is a case where the Secretary of State's decision was centrally based upon a rejection of the truth of the KC's assertions about the risks she faced in the Gambia. When that account was vindicated by the FTT, the Secretary of State fell back on her alternative arguments relating to internal relocation and state protection. When these too were rejected, the appeal to the UT was based upon narrow forensic arguments concerning the reasoning of the FTT. After the UT, wrongly in my view, allowed itself to intervene in a case that it considered to be finely balanced, the Secretary of State has been driven to seek to bolster that decision with yet more elaborate arguments by way of a Respondent's Notice. None of these attempts persuade me that the FTT did not direct itself correctly in law or that the decision was not one that it was entitled to reach on the evidence it heard. Ms Khan's submission that there was nothing wrong with the FTT's decision is unanswerable.
34. The above is sufficient to dispose of the appeal. It follows that the UT was wrong to remake the decision, and I have further concluded that in doing so it failed to give proper effect to the accepted evidence of KC, her husband and Dr Kea, or to the country information and guidance.
35. I also would not have admitted the Secretary of State's further evidence had the appeal not succeeded on the first ground. Except for the new country guidance, the

material predates the hearing in the UT. Applying *Ladd v Marshall* [1954] 1 WLR 1489, the first requirement (that it could not have been obtained with reasonable diligence for use at the trial) is not remotely satisfied. Nor for that matter has it been shown that the material would probably have had an important influence on the result of the case, so the second requirement is not met either. This material could only properly have been admitted on this second appeal if we had allowed the appeal only to the extent of deciding that the UT was entitled to set aside the FTT's decision but wrong to remake the decision in the way it did. At that point, the issue would have been whether this court could remake the decision or (more likely) whether it should have been remitted so that KC could respond to the further evidence. Be that as it may, the issue does not arise in the light of our conclusion on the first ground of appeal.

36. For these reasons, I would allow this appeal and restore the decision of the FTT.

Lord Justice Longmore

37. I agree.

ORDER

Upon hearing Counsel Ms Shazia Khan for the Appellant and Mr Eric Metcalfe for the Respondent.

IT IS ORDERED THAT:

1. The appeal is allowed.
2. The determination of the FTT promulgated on 11 July 2016 is restored.
3. The Respondent shall pay the Appellant's costs of the appeal, to be assessed if not agreed.
4. The Appellant's costs of the appeal shall be the subject of a detailed assessment in accordance with the Civil Legal Aid (Costs) Regulations 2013 and CPR 47.18.

Dated this 20 December 2018