



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/01250/2013
AA/01642/2013
AA/01639/2013
AA/01645/2013
AA/01647/2013
AA/01640/2013

THE IMMIGRATION ACTS

Heard at Manchester
on 28th January 2014

Determination Promulgated
On 25th March 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

H A M I
M G M K A
S G M K A
W G M K A
R G M K A
B G M K A

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Warren instructed by Seraphus Solicitors.
For the Respondent: Mr Harrison – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. On 7 November 2013 it was conceded by the Secretary of State that First-tier Tribunal Judge Levin had erred in law in his determination dismissing the

appeals of this family unit, composed of a mother and her four children, promulgated following a hearing in Manchester on 30th May 2013. The concession was based upon a lack of clarity in the Judge's findings and a failure to assess the risk on return as a result of the conclusions set out in paragraph 40 of the determination, with reference to paragraph 52, in which it was not clear whether the Judge was saying he did not believe that the First Appellant's husband was involved in a coup or supported it whereas paragraph 40 contained a specific finding of involvement.

2. The determination was set aside with adverse credibility and other findings of fact set out in the determination being preserved findings.

Background

3. The appellants are a mother and her five children, three of whom are girls. The years of their births are 1973, 2001, 2003, 2003, 2007 and 2011 respectively.
4. Miss Warren submitted that the preserved findings are those set out at paragraph 29, 30, and 40 of the determination of Judge Levin which are as follows:

29. I find that there was an attempted coup in Sudan on 22nd November 2012 to overthrow the Sudanese Government. In making that finding I have had regard to paragraph 13 of the Reasons for Refusal Letter in which the Respondent cites two articles in the Sudan Tribune dated 22nd November 2012 and 4th December 2012 stating that Sudan's National Intelligence Security Service (NISS) had announced that they had foiled a plot to destabilise security led by unidentified opposition figures on 22nd November 2012. I am also satisfied that arrests of both civilian and military individuals suspected of being involved in the plot were made by NISS having regard to the report thereof in the Sudan Tribune dated 22nd November 2012.

Furthermore, and having regard to the report dated 4th December 2012 which states that there had been '*a wave of new arrests in relation to the putative putsch*' and also having regard to the background information which shows that the authorities in Sudan frequently arrest and detain political opponents, then I am also satisfied that there had been widespread arrests by the Sudanese authorities and in particular by the NISS of those suspected of being involved in the failed coup.

30. I find that the background information upon Sudan clearly indicates that the Sudanese authorities employ torture and other forms of severe punishment against detainees. In such circumstances I find that a person who is suspected by the Sudanese authorities of being

involved in the attempted coup on 22nd November 2012 would be at real risk of being arrested, detained and tortured.

40. Firstly, there is strong circumstantial evidence that the first Appellant's husband was involved in the plot, evidenced by the fact that the first Appellant herself accepted that her husband was involved therein, and for this reason I do not accept Miss Smith's alternative explanation that he was not involved in it. Secondly given the first Appellants evidence that a friend of her husband with whom he had been associating regularly during the period leading up to the plot had been arrested, and also given the background information previously referred to which showed that there had been widespread arrests of both civilian and military personnel who were suspected of being involved in the plot, and also having regard to the fact that the first Appellant's husband would clearly have been aware of these arrests given his position as [removed following making of anonymity direction], then I do not accept that he would have believed that he had nothing to fear, in circumstances where he had been associating with one of the plotters and where he sympathised with their aims. Even if I were to accept that the first Appellant's husband's mother had recently suffered an amputation of her leg and that he would therefore wish to see her, I still do not find it credible that the first Appellant would have exposed himself, his wife and five children to what he must have been aware was a real risk of both himself and his family being detained at the airport upon arrival, and the inevitable detention and torture that he would suffer.
5. The reference to the first Appellant as male and to him being aware of the risk is obviously an error as the husband is not a party to these proceedings. Also, the error of law finding does not limit the preserved findings to these three paragraphs. The findings relating to citizenship of this family [27], the first Appellant's husband's employment [28], the fact the first Appellant has suffered type 3 FGM and the analysis of the medical evidence provided in support of the same [31 -32], the acceptance of the first Appellant's claim that both her own family and her husband's family want her daughters to be circumcised [33], the finding the first Appellant's evidence that the reason why their daughters had not been circumcised to date was because her husband was fundamentally opposed to the practice and had prevented it from happening is credible, and that the risk to the first Appellant's daughters facing FGM is entirely dependent upon the credibility of the claim that her husband was arrested and detained at Khartoum Airport when returning to Sudan from Turkey on 17th December 2012 and that she had not seen him since [34], are also preserved.
6. There are also a number of adverse credibility findings relating to the claim the first Appellant and the five children returned to Sudan with the first Appellant's

husband and the children's father, notwithstanding his involvement in the failed coup. Judge Levin accepted the submission that the first Appellant's husband was aware of the coup in light of his employment referred to in the determination [36] together with the first Appellant's evidence that she discussed the attempted coup with her husband and asked his views upon it.

7. It was further found that the first Appellant clearly believed that her husband was involved in the coup [38].
8. It was found not credible that even if the first Appellant's husband had wanted to see his mother that he would have taken his wife and children with him to Sudan and thereby exposed them to the risk of arrest and detention in circumstances where she and the children already had visas to visit the United Kingdom. It was not found credible that the first Appellant returned to Sudan with her husband and her five children on 17th December 2012 in circumstances which evidentially indicate that he had been involved in the failed coup on 22nd November 2012 [41].
9. It is further found that the claim the first Appellant's passport and those of the children were returned after she had been detained for questioning for five hours at the airport in Sudan was not credible, especially those passports contained visit visas valid for the United Kingdom and therefore the Sudanese security forces would have been aware that there was such a visa in the passport had they been in possession of them for the four or five hours it is alleged. It was found inconsistent for the authorities to have imposed upon the first Appellant a condition of residence at her parent's home in order to restrict her movements yet to have returned their passports affording them an ability to leave the country and travel to the United Kingdom. It was not found credible that the Sudanese security services would return the family passports in the circumstances alleged [42].
10. Judge Levin also found the first Appellant's account of her ability to depart through Khartoum International Airport on 24th December 2012 with her five children using their own passports without attracting adverse attention to lack credibility; even taking into account the claim an agent was used to facilitate their departure and that they were travelling on diplomatic passports. The first Appellant's own evidence was that they had been photographed and fingerprinted on arrival at Khartoum Airport and therefore her claim she was able to leave without any problems was found to be more incredible [43].
11. The claim that on the evening of 18th December 2012, the day following her husband's arrest, her husband's brother together with her husband's parents and her parents decided the first Appellants three daughters had to be circumcised and made arrangements for this to happen on 28th December 2012 was found not to be credible as it was not found credible that they would prioritise the

circumcision over and above the welfare of the first Appellant's husband. It was found this element of the claim was fabricated [44].

Discussion

12. There are two elements to this claim the first of which is that the first Appellant and the children are at risk of persecution as a result of an imputed adverse political opinion due to the first Appellants husband having been arrested in Sudan due to his involvement in a failed coup which took place on 22nd November 2012 and, secondly, as a result of the risk to her daughters from both families of being subjected to FGM.
13. In relation to failed asylum seekers, in HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062 the Tribunal found that neither involuntary returnees nor failed asylum seekers nor persons of military age (including draft evaders and deserters) are as such at real risk on return to Khartoum which is a finding not affected by the decision in AA (Non-Arab Darfuris- relocation) Sudan CG [2009] UKAIT 00056.
14. Following the error of law hearing a further bundle of evidence has been provided, albeit that it was not seen by Mr Harrison until the day of the hearing. He was, however, given time to read the material and did not make application for the hearing to be adjourned to allow for further consideration of the evidence. The evidence contained within the bundle, which was filed out of time, was admitted in the interests of justice. That evidence includes a further witness statement from the first Appellant stating that her sister arranged for a lawyer, by the name of Mr Grashi Mhmouad Salih, to represent her husband. She confirms an issue raised at the error of law hearing regarding BBC press reports indicating that some of those involved in the coup have been released, although she asserts that her husband is still in prison. There is a statement and other documents from the lawyer in which he confirms his instructions on behalf of the first Appellants husband, that some defendants who were arrested have benefited from an amnesty issued by the President and been released, but that some remain in detention including the first Appellant's husband awaiting a court hearing date. The documents indicate the first Appellant's husband is detained at Kober Prison in Khartoum North.
15. There is also a country expert report dated 20th January 2014 prepared by Peter Verney. This is a report prepared at short notice and following an interview with the first Appellant at her home. Mr Verney confirms that he has seen the documents from the lawyer but is unable to verify beyond doubt that it was issued by that particular lawyer due to the shortage of time. Due to the time available he was also unable to confirm independently that the first Appellant's husband was detained although his profile is similar to those known to have been involved in the coup [16].

16. Mr Verney confirms that not all detainees involved in the coup have been freed and that those that were freed were mainly released for publicity purposes [17] He also states that due to the limited time available he is unable to establish independently whether the first Appellants husband is still in prison, he does not know if such corroboration would be possible, and that the most reliable source of evidence appears to be the Sudanese lawyer acting for the first Appellant's husband [21].
17. Mr Verney notes the reference in the lawyer's letter, and first Appellant's statement, of the possible transfer of her husband to the El Fasher prison, North Darfur, which he states is ominous and consistent with the regimes known treatment of political detainees [21] and which indicates likely long-term incarceration in challenging conditions as the prison has been used for holding political dissidents since the regime came to power [23].
18. The report also refers to the NISS and their ill-treatment of those who come to their adverse attention and to the fact their victims have neither protection nor the likelihood of legal redress.
19. Mr Verney's conclusions are as follows:
 20. [HAMI] appears to have become a target of serious adverse attention by the Sudanese authorities by reason of her husband's alleged involvement in a coup plot.
 21. In this case the appellant gave responses in interview which I regard as indicative of the likely authenticity of her account. Her statement gives an account of events which is essentially in line with the available evidence.
 22. She would be taken for interrogation on arrival by the security forces, which interview all such returned asylum seekers.
 23. The fact of her having applied for asylum will be held up as evidence of disloyalty to Sudan, which would leave her liable to charges of defamation and serve as a pretext for persecutory acts.
 24. Relocation inside Sudan is not a safe or realistic option.
20. The Respondent has provided copies of the application for the visit visas to the United Kingdom made to the Consulate General in Istanbul. They relate to the applications for each family member and have been submitted as they state that the first Appellant's husband will be travelling with them.

21. Having considered the evidence in the round, the adverse credibility findings recorded by Judge Levin regarding the plausibility of the claim that the first Appellant's husband would have put her and his children at risk of ill-treatment by returning them to Sudan just because he wished to visit his mother, when information of the failed coup would have been known to him as a result of the particular nature of his employment within the Sudanese hierarchy, are sustainable findings. It is possible that when the application of the visit visas was made it was the intention of all the family to travel to the United Kingdom. I find that it has not been established on the evidence that the first Appellant and the children returned to Sudan where they suffered ill-treatment. This element of the claim has not been substantiated.
22. The fact the first Appellant and the children did not return to Sudan but travelled to the United Kingdom does not, per se, create a risk on return but as Judge Levin identified, the credibility of the claim that her husband has been arrested and detained is relevant to the assessment of risk.
23. The report of Mr Verney quite properly contains its own statements regarding the limited weight that can be given to the report in light of the lack of time that he had to complete his instructions. He specifically states that the best source of evidence is the statement from the advocate and there was no application by Mr Harrison for an adjournment to allow further enquiries to be made in light of the late service of this evidence. Having considered the evidence in the round, and the preserved findings, and applying the lower standard applicable to appeals of this nature I find the first Appellant has substantiated her claim that her husband returned to Sudan where he was detained and where he is currently being held by the authorities. This is in accordance with the finding in paragraph 40 of Judge Levin's determination.
24. There are two consequences of this finding the first of which is that if the family are now returned they will return without the protection of the first Appellant's husband who is said to strongly oppose the wish of the extended family to subject the three girls to FGM. The second consequence is that the first Appellant will be returned as the wife of a person who is being held as he is thought to hold views adverse to the interests of the government and to pose a threat to them. They may be returned using their diplomatic passports which will clearly identify a status not held by ordinary failed asylum seekers being returned on emergency travel documents or ordinary Sudanese passports.
25. It is not disputed that the first Appellant will be questioned on arrival and may be detained for additional questioning to ascertain whether she was involved in the coup plot or to obtain additional intelligence or information to be used against her husband. It is not established that the children will be detained as they are clearly too young but if their mother is detained it is likely they will be released into the custody of extended family members.

26. If the first Appellant is suspected of being involved in a plot she is likely to be subjected to detention and treatment sufficient to breach her Article 3 rights at the hands of the NISS, based upon Mr Verney's report and the country material, even if it is later established that she has no such adverse opinion or profile.
27. If the children are released into the custody of the extended family this will mean they will effectively be denied the protection of both their mother and father. It is a preserved finding that their mother has type 3 FGM which is the most serious form thereof and which involved the removal of part or all of the labia minora with the labia majora having been sewn together covering the urethra and vagina. Expert evidence from medical professionals confirms that the first Appellant had been de-infibulated when she got married although evidence of the FGM she suffered is still present.
28. In relation to the issue of FGM: in FM (FGM) Sudan CG (2007) UKAIT 00060 the Tribunal found that significant action is being taken in Sudan, both within government and by NGOs, to combat the practice of female genital mutilation in all its forms. Legal sanctions are, however, unlikely to be applied where a woman has been subjected by her family to FGM. There is in general no real risk of a woman being subjected to FGM at the instigation of persons who are not family members. As a general matter, the risk of FGM being inflicted on an unmarried woman will depend on the attitude of her family, most particularly her parents but including her extended family. A woman who comes from an educated family and/or a family of high social status is as such less likely to experience family pressure to submit to FGM. It is, however, not possible to say that such a background will automatically lead to a finding that she is not at real risk. The risk of FGM from extended family members will depend on a variety of factors, including the age and vulnerability of the woman concerned, the attitude and whereabouts of her parents and the location and "reach" of the extended family. If a woman's parents are opposed to FGM, they will normally be in a position to ensure that she does not marry a man who (or whose family) is in favour of it, regardless of the attitude of other relatives of the woman concerned.
29. The risk of FGM from extended family members appears on the evidence to be a 'real risk'. The three female children are of an age where such acts are undertaken and if their mother and father are in detention the children will be extremely vulnerable, more so if those family members are responsible for the care of the children.
30. I find on the evidence that the first Appellant has substantiated the claim that there is a real risk to the three female children being subjected to FGM if returned to Sudan without the protection of their parents. I find this claim to be substantiated even if the first Appellant is released after a relatively short period

of detention and resumes care of the children, as the evidence is clearly that their father's presence and opposition has perhaps been the determinative factor, when combined with their mother's opposition, in preventing this happening to date.

31. If the three female children are entitled to refugee status on this basis their siblings are entitled to remain on the basis of the close family connection and the fact those children cannot be left in the United Kingdom on their own. Their mother is their primary carer and so she too must succeed in line, on section 55/ Article 8 grounds if nothing else, although I have noted authority indicating that it is arguable that the fear of ones female children being subjected to FGM on return may amount to persecution – see FM(FGM) Sudan CG 2007 UKAIT 00060 in which it was said, in similar circumstances that "Given the first appellant's abhorrence of FGM, any infliction of it upon either of her daughters is, we find, reasonably likely to have so profound an effect upon the first appellant as to amount to the infliction on her of persecutory harm". The Respondent will have to consider this issue when determining the nature of the leave the first Appellant is entitled to as this was not an issue specifically addressed before me.
32. I substitute a decision allowing the appeal is in respect of each appellant. The three female children and possibly their mother are entitled to be recognised as refugees. The two male children are entitled to remain in line with the leave granted to their mother as they too are dependent upon her as their primary carer and it is not in the best interests of any of the children for the siblings to be separated.

Decision

33. **The First-tier Tribunal Judge materially erred in law. I remake the decision as follows. This appeal is allowed.**

Anonymity.

34. I continue the anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 20th March 2014