Upper Tribunal
(Immigration and Asylum Chamber

Appeal Number: IA/40421/2013
IA/47352/2013
IA/47363/2013
IA/47365/2013
IA/45318/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 20 April 2015	**On: 30 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR OLISA JOHN ONYEKWELI
MRS JANE OTOTIKILO ONYEKWELI
MISS ETIDODINMA PRISCILLA ONYEKWELI
MISS ADAEZE VICTORIA ONYEKWELI
MASTER CHUKWUMA CHARLES ONYEKWELI
(NO ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellants: **Mr M Rana, Rana and Co Solicitors**
For the Respondent: **Ms A Homes, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The appellants are nationals of Nigeria. They are a family unit, consisting of the parents - the first and second appellants - who are married to each other, and their three children, born on 16 December 2005; 25 November 2006 and 21 August 2008. I shall refer to the first appellant as "the appellant."

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2. Their appeals against the decisions of the respondent dated 29 May 2013 refusing to vary their leave to remain in the UK and to issue removal directions against them under s.47 of the Immigration, Asylum and Nationality Act 2006, were dismissed by First-tier Tribunal Judge Symes in a decision promulgated on 10 December 2014.

3. The appellant was initially granted leave to enter the UK on 13 September 2006 until the end of October 2009. He was subsequently granted leave to remain until 30 January 2013. His wife and dependants arrived on 10 October 2004 with leave until the end of October 2009, and were subsequently granted leave in line with the appellant's leave. The grants were pursuant to the student and student dependant categories under the Rules.

4. There were further representations made on 30 January 2013 on the appellants' behalf, by Rana and Co Solicitors, for limited leave to remain in the UK, which included an asserted fear of return to Nigeria on the basis of the risk to the appellant's daughters of being subjected to female genital mutilation ("FGM") on return there.

5. In the reasons for refusal, the respondent noted that the representations based on the fear of return to Nigeria was a request for international protection, 'constituting' an asylum application. They were informed that '…..this claim should therefore be made in person at an Asylum Screening Unit'.

6. The immigration history of the appellants was set out by the Judge [2]. The appellant entered as a student, studying Computer Studies. After his college lost its sponsor licence, he transferred to another college which also lost its licence. He subsequently studied at a college which was no longer a registered sponsor. The application form dated 30 January 2013 recorded that the appellant earned £500 a month net, and received £250 a month from a friend or relative.

7. The application was refused because they did not qualify under Appendix FM of the rules. The appellant's wife was a Nigerian national. They were partners, living in a family unit, ruling out the partner and parent routes. It was not accepted that, having lived in Nigeria for over 36 years of his life, he had severed social cultural or family ties there [4].

8. The evidence before the First-tier Tribunal as set out in witness statement of the appellant and supporting statements was summarised by the Judge. The appellant and his wife came from the Delta region in Nigeria. They feared that their two daughters might suffer FGM if they returned there. If they failed to take part in initiation they would face ostracism from their kinsmen. They could not reasonably be expected to live apart from them, given their family attachments.

9. Return to Nigeria would contravene the best interests of the children. Their maternal grandmother was a British citizen, resident in the UK. Her family life

would be affected following a separation from her. The family would face severe hardship in the event of a return [8].

10. The judge had regard to a statement from the brother of the appellant, Dr Matthew Obi Onyekweli, a British citizen, who stated that he was responsible for his accommodation and his education fees (he was then at the South Chelsea College, Brixton), as well as living expenses [9].

11. There was supporting evidence produced including a statement by HM Government, that FGM was illegal and a terrible form of child abuse which should be eradicated. This is set out in detail by the Judge [10].

12. The appellant asserted when giving oral evidence that his wife had been circumcised, although he acknowledged that no independent evidence of this was produced. Nobody had told him of the need to obtain evidence. It was wrong to say that no threats had been made to the children: his wife's family had pressurised her for years. As his own father, mother and sister were here, there would be no family members to protect them against her family's wishes on a return. He had not originally planned to raise this matter as part of his immigration case. It was only as time went on that he and his wife thought hard about their future [11].

13. His elder daughter was nearly four years old when she came to the UK but had not been cut as they had not received any threats of cutting before coming here. He surmised that this was perhaps because some tribes expected the clitoris to be elevated before they cut which would rule out the procedure for very young children [12].

14. He had first appreciated the dangers to his daughters, having come here in 2006. He had not thought about it when he first married his wife in 2003. He denied the submission that cutting was essentially a matter of parental choice. The pressure came from the family, and in their case had intensified over time and eventually they had threatened to act by force [12].

15. He still fears that the FGM procedure being done by unqualified people: However it was done, it would be dangerous. He acknowledged that there were some parts of Nigeria where FGM was not practised, such as Kogi and Ogun States. There were however many parts of the country which were not safe and where the police would not arrest perpetrators. He did not accept that the reports collated in the Home Office country evidence were accurate in recording that FGM had become less common [13].

16. In his assessment and findings, Judge Symes accepted that the appellant was a credible witness. He gave a detailed and graphic evidence of the reality of his fears as to his wife's family's plans for their children [19]. He accepted the historical facts asserted. However, this did not mean that he accepted the inferences that the

parents drew from those circumstances as to the possibilities of a life for their children safe from the scourge of FGM in Nigeria [19].

17. The Judge set out the requirements under paragraph 276ADE of the rules. The appellant and his wife have lived in Nigeria for most of their lives. His wife retains family there. It is their concerns as to cultural practices of their family that motivate their application to remain here. They have relatives there, including siblings with whom they remain in touch. The Judge found that it was not tenable to contend that they have no real or effective links with Nigeria [21].

18. He accepted that they have established private life here. The appellant stated that his own family were largely based here although his relationship with them "remains unparticularised as to the frequency and extent of such life." There is nothing to explain why it is that their lives are focussed on the United Kingdom. The "factual matrix" in that respect is "remarkably slight." He has worked and studied here. The Judge accepted that Article 8 is engaged. The relevant issue in the appeal was thus one of proportionality [23].

19. He had regard to the need to consider the best interests of the children under s.55 of the Borders, Citizenship and Immigration Act 2009 [24]. The children have lived here for much of their lives. The third appellant from the age of nearly four until she was nearly nine; the fourth from the age of nearly three until the age of nearly eight, and the fifth appellant from around one year until the age of six.

20. Judge Symes found that were there to be substantial grounds for thinking that there was a real risk of any child facing the FGM procedure, he would ".....have no hesitation in finding their removal to infringe their rights to be free from inhuman and degrading treatment." [25]

21. However, the issue was whether they did face such a real risk. He had regard to the recent COIS report: FGM takes place throughout the country and has cultural importance.

22. He referred to and set out the statistics of women who have been subjected to the process. This was most prevalent in the southern region, among the Yoruba and Igbo. The age at which women and girls were subjected to the practice varied from the first week of life until after a woman delivered her first child. However, most women were subjected to FGM before their first birthday. The percentage of women at risk decreased with every generation. An article dated February 2012 asserted that the prevalence of FGM in Nigeria is estimated at 30-60% - [26].

23. He noted that the Nigerian state had taken some steps to reduce the prevalence of the practice. He set out the evidence in that regard at paragraph 27. However, the 'Say No Unite To End Violence To Women' campaign stated in a report in July 2012 that the practice is still very rampant in the country. Though some states including

Lagos, Osun, Ondo, Ogun, Ekiti, Babyelsa, Edo, Cross-River and Rivers have enacted FGM laws, implementation of the laws has been "a huge challenge" [27].

24. Judge Symes noted that from the evidence referred to there was widespread prevalence of FGM and real problems in the national authority's response to that scourge. He concluded that '…..there is a real risk of a Nigerian female child facing FGM if her family practises it and is able and willing to force any recalcitrant parents to cooperate; and that there will be no effective protection such as to reduce that risk to a level where there are no substantial grounds' – [28].

25. However, in this case, the children's parents have set their face against the process. This has the consequence that FGM will take place only if their will is overcome by family pressure. He stated that no evidence had been put forward as to the nature and extent of the threats that they have experienced in the past, and nothing has been said of the potential reach of the wife's family across the territory of what is a very large country [28].

26. Whilst they may not speak the language of some of the territories where FGM is not practised, he did not accept that they would be unable to relocate to a major urban area such as Lagos where even if FGM might be practised by families who believe in it, the second appellant's family would have no way of finding her or coercing her into behaviour against her will. He noted that they had moved across the world and established themselves successfully in the UK even though the appellant's course of studies had not been smooth. Whilst they would have to start afresh, they are resourceful and would enjoy the benefits of the studies undergone by the appellant even if he had not attained the qualifications to which he aspired [29].

27. Judge Symes accordingly found that the children faced no real risk of FGM on return to Nigeria [30]. He accepted that the children had established private lives in the UK. They had been in education for several years enjoying the company of their grandmother. They are relatively young.

28. He had regard to the s.55 duties in this case and directed himself in accordance with authority. He found that given their ages, even though their residence here had been for most if not all of that portion of their lives that they can remember, it did not involve seven years' residence after the age of four, the period at which, as identified in Azimi-Moayed and others (decisions affecting children; onward appeals) Iran [2013] UKU 197 (IAC) it can be presumed that there are close and meaningful independent links with peers and teachers [31].

29. He found that the children here could only realistically be expected to see themselves as part of a family unit with their parents. There was nothing to suppose that they could not, in the future, thrive amongst the education facilities and social contacts available in Nigeria. No evidence had been put before the Tribunal suggesting that they have any specific connections here outside the family

unit on account of schooling or social activities. No school reports were produced. It was hard to imagine that they would be materially affected by departure from the UK either now or in the future. No details had been given as to any family life between the children and any grandparents, aunts or uncles save for an unparticularised reference to a relationship with their grandmother which did not describe the nature or frequency of their contact with her [32].

30. After considering the appeals following the 'principles' identified in EV (Phillipines) and others v SSHD [2014] EWCA Civ 878 at [58-60], he concluded that the best interests of the children, given the limited evidence of private and family life in the UK, pointed in favour of their relocation with their parents abroad [33].

31. On 12 February 2015, First-tier Tribunal Judge Osborne granted the appellants permission to appeal. He stated that in an otherwise careful and well reasoned decision and reasons, it was nevertheless arguable that the Judge failed to take into account s.117 of the Immigration Act 2014 as there is no reference to any part of that section in the decision and reasons. He referred to s.117A(2) where it is provided that in considering the public interest question, the Court or Tribunal must, in particular, have regard in all cases to the considerations listed in s.117B. As an error of law had been identified, all the issues raised were arguable.

32. The actual grounds accompanying the permission to appeal are unusual. All that is done is to pose certain questions. Thus, with regard to relocation, the ground asks whether having regard to the oral evidence of the appellant of ostracism in the event of his resistance to subject his daughter to undergoing FGM, is this is a reasonable alternative? – ground (ii) (a) and (b).

33. The question is also posed in a separate ground as to whether the respondent and the tribunal acted in accordance with the duties under s.55 of the 2009 Act? Did the Tribunal consider or properly apply any of the policies of the respondent regarding FGM, in particular having regard to the Female Genital Mutilation Act 2003 and its extra territorial application? Would the combined effect of s.11 of the Children Act 2004 and s. 55 BCIA 2009 and article 3 ECHR not operate as to establish that the appellants are being exposed to "inhuman and degrading treatment"?

34. With regard to Article 8, the question posed was: "In the view of the mandatory provisions of s.117 of the 2014 Act, can the tribunal lawfully and properly determine an Article 8 claim by reference to Appendix FM and the Immigration Rules".

35. Mr Rana, who had not represented the appellants at the hearing before the First-tier Tribunal, raised the issue of paragraph 117B of the 2014 Act.

36. It was pointed out by Ms Holmes that s.117B provides that in the case of a person who is not liable to deportation, the public interest does not require that person's

removal where the person has a genuine and subsisting parental relationship with their 'qualifying child' and that it would not be reasonable to expect the child to leave the UK.

37. That did not apply here because of the definition of "qualifying child" in s.117D(1). A qualifying child means a person under the age of 18 who is a British citizen or has lived in the UK for a continuous period of seven years or more. The requirements could accordingly not be satisfied.

38. In the circumstances, the public interest considerations were properly applied in this appeal.

39. Mr Rana then submitted that the risk of FGM had not been properly appreciated by the Judge. He referred to paragraphs 26 and 27 where the Judge noted that FGM does take place. The Judge had also concluded that there was a real risk of a Nigerian female child facing FGM if the family practices it. Mr Rana submitted that internal relocation could not take place because there are tribes in Nigeria as well as a cultural tradition favouring FGM. The appellants belong to tribes from the South and could not relocate.

40. It was also submitted that the Judge did not properly consider that 'the girls' would be at risk of being isolated and ostracised in the future. The appellant's wife had been a victim of FGM. However, Mr Rana accepted that no evidence to that effect had been produced to the Tribunal, as acknowledged by the appellant. He told the Tribunal that he had not obtained evidence of this from a doctor as he had not been told [11].

41. Mr Rana also referred to the Female Genital Mutilation Act 2003 and its extra-territorial application. That Act makes it an offence to assist the practice of FGM. If they are living in a tribal area, they could not resist the undergoing of FGM for a lengthy period. He submitted that family life had been referred to, and in particular the relationship between the children and the grandmother. There was, he submitted, 'an emotional dependence that had arisen'.

42. During the course of his submissions, Mr Rana contended that the children have a bond with their grandmother. She is 85 years old and family life had been established. He accepted that there had been no reference to the grandmother and the asserted relationship in the grounds of appeal to the First-tier Tribunal.

43. On behalf of the respondent, Ms Holmes submitted that there had been no material error of law. The Judge had assessed the evidence relating to FGM carefully. This began at paragraph 25 of the determination which identified the issue as whether their departure from the UK would result in their facing a risk of female genital mutilation. The Judge stated that if he thought that there was such a risk he would have no hesitation in finding their removal to constitute inhuman and degrading

treatment. He set out the evidence from the COIS reports as well as other reports fairly [27-28].

44. In the result, she submitted that the findings made were open to the Judge.

Assessment

45. I have referred to the basis upon which permission to appeal was granted. It had been contended that s.117 of the Immigration Act 2014 had not been properly complied with, and in particular the considerations listed in s.117B.

46. However, as already indicated, the provisions in the 2014 Act were not germane or relevant as none of the female child appellants is a 'qualifying child' for the purpose of s.117.

47. I have set out and had regard to the determination of the First-tier Judge. I agree with the comments of Judge Osborne in granting permission that this was a careful and well reasoned decision.

48. The Judge was alive to the crucial issue of whether there were substantial grounds for thinking that there was a real risk to any child facing such a procedure

49. In his assessment, he had regard to their concerns regarding the cultural practices of their family, which motivated their applications to remain in the UK. The maternal grandparents live in Nigeria.

50. The Judge has however properly assessed whether they faced a real risk of such conduct. He has had regard to the recent COIS report, the results and conclusions of which are summarised at paragraphs 26 and 27 of the determination.

51. He went on to find that there is a real risk for a Nigerian female child facing FGM if her family practises it and is able and willing to force any recalcitrant parents to cooperate and that there will be no effective protection to reduce the risk to a level where there are no substantial grounds.

52. In this case, the Judge found that the children's parents have set their face against the process. This had the consequence that FGM would only take place if their will would be overcome by family pressure.

53. He noted that no evidence had been put forward as to the nature and extent of the threats experienced in the past. Nothing has been said of the potential reach of the wife's family across the territory of Nigeria. He noted that the children had not been subjected to FGM prior to coming to the UK, albeit that the appellant's elder daughter was nearly four years old when she came to the UK.

54. The Judge gave proper reasons as to why he did not accept that they would, if necessary, be unable to relocate to a major urban area such as Lagos where, even if FGM might be practised by families who believe in it, the second appellant's family would have no way of finding her, or of coercing her into such behaviour against her will.

55. In coming to that conclusion he had regard to the evidence that the appellants had moved across the world and established themselves successfully in the UK. Even though they might have to start afresh, they are resourceful and would enjoy the benefits of the studies undergone by the appellant.

56. For all those reasons, the Judge found that they would face no real risk of FGM on return to Nigeria.

57. The Judge has given proper reasons for such findings, which are sustainable and based on the evidence before him as to the risk of FGM on return to Nigeria.

58. With regard to private and family life in the UK, the Judge noted that they enjoyed the company of their grandmother. However, he also noted that there had been no evidence presented as to its nature and extent. No details had been provided as to any family life between the children and any grandparents, aunts or uncles, save for an 'unparticularised' reference to a relationship with their grandmother, which did not describe the nature or frequency of any contact with her.

59. Having accepted that the children have established private lives in the UK, he took into account that they had been in education for several years. They are relatively young. He had regard to s.55 of the 2009 Act. He found that at their ages, even though their residence here had been for most if not all of that portion of their lives that they can remember, this did not involve seven years' residence after the age of four, the period at which, as identified in Azimi-Moayed, supra, it can be presumed that there are close and meaningful independent links with peers and teachers.

60. Moreover, he considered the "principles" identified by Lewison LJ in EV (Philippines), supra, to the effect that the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. Neither parent had the right to remain. That is the background against which the assessment is conducted. Lewison LJ could not see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents.

61. In the circumstances, the Judge's conclusion at paragraph 33, that given the limited evidence of private and family life established in the UK, the best interests of the children point in favour of their relocation with their parents abroad, is based on the underlying evidence and is sustainable.

Notice of Decision

The decision of the First-tier Tribunal Judge did not involve the making of any material errors on a point of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed Date 28/4/2015

Deputy Upper Tribunal Judge Mailer