



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: AA/01214/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 23<sup>rd</sup> December 2015**

**Decision & Reasons  
Promulgated**

**On 18<sup>th</sup> May 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**SD  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms H Short instructed by Rahman & Company  
Solicitors

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. The First-tier Tribunal has made an anonymity order and for the avoidance of any doubt, that order continues. The appellant is

granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

2. This is an appeal against a decision and reasons by First-tier Tribunal Judge Morris promulgated on 22<sup>nd</sup> July 2015 in which she dismissed an appeal against a decision made by the Secretary of State on 7<sup>th</sup> February 2014, to refuse to grant the appellant asylum and to remove the appellant from the UK. At the time of the respondent's decision of 7<sup>th</sup> February 2014, the appellant had one dependent child, a daughter born on 19<sup>th</sup> November 2009. By the time of the hearing before First-tier Tribunal Judge Morris, the appellant had given birth to her second daughter on 26<sup>th</sup> February 2015.
3. The proceedings have a considerable history which is referred to at paragraphs [3] to [5] of the Judge's decision and which I do not repeat here.
4. The appellant's claim for refugee status has two facets to it. First, the appellant fears return to Mali because her parents were killed and she was made to do household chores and forced into marriage by an uncle, and raped. Her aunt tried to help in 2007 by sending her to Senegal but she was taken back, by her uncle who arranged her marriage. She went to France, again with the assistance of her aunt but she again returned to Mali. She was then forced into marriage before her aunt could make arrangements for her to leave, but her aunt arranged for her departure to the United Kingdom after the appellant had sent her a message via someone she met at a bus stop.

5. Second, the appellant would be at risk of suffering persecutory treatment either directly or indirectly as a result of her two female children being subject to FGM. This second aspect of the appellant's claim was first raised by the appellant after the respondent's decision of 7<sup>th</sup> February 2014 in preparation for her appeal before the First-tier Tribunal. The appellant's grounds of appeal for permission to appeal to the Upper Tribunal set out the background and state:

*"3. The Appellant's appeal was first listed for hearing before the FIT on 13 June 2013. That hearing was adjourned, because the Appellant had in the preparation of her appeal put forward the risk of FGM to her daughter as a new risk category. The SSHD had not considered this as part of her asylum decision, and the matter was adjourned on agreement of both parties in order for her to consider this issue.*

*4. The matter was then re-listed for 8 October 2014, and the appeal was heard by FTTJ Majid on that date. The SSHD had not reconsidered the case and had not issued any new reasons letter dealing with the FGM issue. This issue was raised on behalf of the Appellant at the hearing, but no application to adjourn was pursued.*

*....*

*6 At the outset of the hearing, Counsel for the Appellant raised as a preliminary issue the fact that the SSHD had still not provided the Appellant with any notification as to her position regarding the risk of FGM to what is now both of the Appellant's daughters. It was at that point that FITJ Morris queried whether the matter was properly before the Tribunal, as this issue was not expressly mentioned in the Grounds of Appeal, as drafted in 2014. Counsel for the Appellant pointed out that this point had not previously been raised in either the adjourned or full hearings before the FIT, but nonetheless formally applied to amend the Grounds of Appeal. Permission to do so was granted, as recorded in the determination.*

*7 The gravamen of this situation is that the Appellant did not know before the start of the hearing what was the Respondent's position with regards to this aspect of her claim.*

### The decision of First-tier Tribunal Judge Morris

6. The Judge set out the background to the appeal before her at paragraphs [3] and [4] of her decision. At paragraph [7] she sets out, in broad terms, the appellant's claim:

*"7. As can be seen from the matters I have set out above, the Appellant's core claim was the treatment she alleged she had received from her uncle and her husband. In the Skeleton Argument the Appellant had raised the issues of the Respondent's tracing obligations on the basis that her date of birth was 15 June 1992 and also the risk of FGM to the Appellant's daughters who were born on 19 November 2009 and 26 February 2015."*

7. At paragraphs [8] to [18] of her decision, the Judge sets out, in broad terms, the matters referred to by the respondent in the reasons for refusal letter of 7<sup>th</sup> February 2014. At paragraphs [19] to [25] she refers to the hearing and the evidence that she received. At paragraph [20] the Judge refers to the issue of the appellant's age and goes on, importantly, at paragraphs [20] and [21] to record the following:

*"20. ....I then sought confirmation as to whether or not the issue of FGM is before the Tribunal. Miss Pountney stated that it was not without any application to amend the grounds of appeal. Miss King then stated that she sought to amend the grounds of appeal to include FGM and the precise wording she sought was:*

*"That the Appellant would be at risk of suffering persecutory treatment either directly or indirectly as a result of her two female children being subject to FGM."*

*21. Miss Pountney did not object to the application to amend the grounds of appeal and on the basis that there had been no objection to the application to amend I allowed the amendment to the grounds of appeal as set out.*

8. The Judge records at paragraph [22] that following the exchange that is recorded above, the appellant resumed her evidence and at paragraphs [23] to [25] of the decision, that evidence is set out. The Judge records the submissions made by Miss Poutney on behalf of the respondent at paragraph [26] of the decision. Insofar as the issue of FGM is concerned, the Judge records:

*“26. ....When dealing with the amended grounds of appeal concerning FGM Miss Pountney submitted that there is no case law in the United Kingdom of FGM in Mali and the Skeleton Argument submitted relies upon details for Sierra Leone. Miss Pountney submitted that such matters are not relevant to Mali. There is no objective evidence as to the extent of FGM in Mali. She referred to the expert report of Dr Rodet at pages 7-19 of the Appellant’s bundle. She referred, in particular, to page 12 and said that the expert is not giving evidence of her own knowledge and relies on a French report which was accessed in May 2014. There is no information to show when such report was made or the methodology used etc. Such is not sufficient to make findings about FGM in Mali. The Respondent acknowledges a US report in 2013 that FGM in Mali is not criminalised. She submitted that the documents provided at the hearing by Miss King echo the fact that FGM is not criminalised. The document provided at the hearing on behalf of the Respondent shows that there are efforts being made to see that the practice is discontinued and that one thousand villages show that efforts are being made to stamp out the practice.....”*

9. At paragraph [27], the Judge sets out the submissions made by Miss King on behalf of the appellant:

*"27. Miss King relied upon her Skeleton Argument as amended. She said that the starting point is credibility and such does affect the protection claim on asylum and Article 8. The issue on FGM does largely stand alone from a full assessment on credibility. She submitted that I should look at the circumstances to which the Appellant would be returning. She said that the Respondent's suggestion that the Appellant's account has continuously changed is not a fair or reasonable assessment if the evidence is looked at as a whole. The Appellant's difficulties cover an eight year time span from 2007 to 2015. The Appellant's difficulties with her uncle in 2007 was the first occasion when her aunt had facilitated her exit. On that occasion it was to Senegal but on the second occasion it was to France and on the third occasion it was to the United Kingdom. Miss King submitted that aside from the Appellant's failure to declare that she had been to France her account has been remarkably consistent. The core of her account is that her parents were killed; she lived with her uncle Solo; she was made to do household chores; her aunt tried to help in 2007 by sending her to Senegal; she was taken back by Uncle Solo; he arranged her marriage; she went to France with the assistance of her aunt; she returned to Mali; she was forced into marriage before her aunt could make arrangements for her to leave and her aunt arranged for her departure to the United Kingdom after the Appellant had sent her a message via someone she met at the bus stop. She then referred to the age assessment which was carried out on 17 August 2009 and she accepted that in that assessment cutting was not mentioned at all. At this point Miss Pountney interjected to confirm that the Respondent did not accept that the Appellant has undergone FGM and that her credibility is in doubt, the extent of cutting in Mali is in dispute and there is no medical evidence in relation to the Appellant. I asked Miss King if there were any medical records relating to the Appellant and she replied that there were not. I asked if there were any obstetric records available since those may be of assistance when considering FGM given that the Appellant has now given birth to*

two children. Miss King repeated that there were no medical records available for the Appellant. She continued her submissions by stating that from the age assessment the Appellant's account for leaving Mali and her history is consistent. She referred me to various passages in the age assessment and she said that it would take a lot to "hoodwink" an experienced social worker. She said that the answers given by the Appellant to questions 68 and 69 in the Asylum Interview dated 29 June 2011 were subject to a letter from the Appellant's solicitors dated 6 July 2011 in which they had tried to correct the answers given at question 68. She accepted that the evidence in the Appellant's application made in 2007 for a visa to enter the United Kingdom is inconsistent with the Appellant's subsequent evidence concerning the death of her parents, but she submitted that such is consistent with the Appellant's account that she wanted to get out of Mali. When refusing the application in 2007 the Respondent had said that the applicant's application was not truthful and the appellant now agrees that it was not truthful. She submitted that there is sufficient evidence to find on a low standard that the events did occur as the Appellant alleges. She continued her submissions by stating that the Appellant would face reprisals from her uncle or her husband on return and she referred me to paragraphs in the report by Dr Rodet. She submitted that the expert report is consistent with other background information. The expert has demonstrated that her report is prepared after conducting research and her evidence to the Tribunal that this is the situation in Mali can be accepted without going into the minutiae of exactly what her report says. She summed up the submissions she had made thus far by saying that the Appellant is credible; she would be at risk if returned to her home area from her husband and uncle; her aunt would not be able to provide protection and there is no state assistance. It would be unduly harsh to relocate due to general discrimination against women and the lack of support. There is a real risk that the Appellant and her children will end up destitute or in a situation of exploitation. The two children also need to

*access healthcare for sickle cell and that is a further factor on reasonableness. When dealing with FGM she submitted that there is sufficient evidence that it is endemic throughout Mali and although there have been some efforts by NGOs to combat it it is still a real likelihood. There are societal pressures which the Appellant would not be able to resist. She continued by submitting that the Appellant would be a lone female without family support. Such matters could be considered separately to the forced marriage point. Given the passage of time there is real risk that the Appellant would return to a country where she would not have family support. She submitted that when I make a decision as to the Appellant's age I should take account of the fact that 1992 is on her Home Office card and that the date of birth did not seem to be an important aspect to the Respondent. She said that it is a matter for the Tribunal to decide the Appellant's age but where there is room for doubt the earlier age should be accepted. That has two main factors on Article 8: if she was a minor she should never have been considered under the Dublin Convention and if she was a minor tracing was relevant. Miss King accepted that the children's sickle cell cannot reach the threshold for Article 3. She went on to submit that part of private life under Article 8 is healthcare and particularly the suffering the children would face if they were to be returned. Both children have the same condition. She said that the cumulative factors show that it is in the children's best interest to remain in the United Kingdom. She concluded by making submissions in relation to Section 117A of the Nationality, Immigration and Asylum Act 2002 and said that the delay in deciding the Appellant's claim has not been her fault."*

10. The Judge's conclusions are set out at paragraphs [28] to [59] of her decision. At paragraphs [31] and [32], the Judge deals with the age of the appellant and finds that her date of birth is 15<sup>th</sup> June 1991.
11. At paragraph [33], the Judge states:



*“33. By reason of the matters set out above and below I find the Appellant’s evidence to be inconsistent, contradictory, not credible and unpersuasive such that I do not accept her story.”*

12. At paragraphs [34] to [40] of her decision, the Judge sets out the inconsistencies in the appellant’s account relating to her previous travel to Senegal and France. The Judge carefully considered the evidence of the appellant and concluded that the inconsistent and contradictory evidence of the appellant undermines her credibility and the credibility of her case. At paragraph [42] the Judge finds:

*“42. By reason of all the matters set out in this decision and taking the evidence as a whole, as I do, I find that the Appellant has not established to the low standard that her parents are dead; that she was a victim of domestic abuse by her uncle; that she was the victim of domestic violence by her husband; that she was forced into marriage by her uncle and raped by her husband or that she is at risk from any person in Mali. I further find that she has not shown to the low standard that she has no contact with her family in Mali. Not only do I refer to the matters set out above but, in the Appellant’s own evidence, she was helped to leave Mali on three occasions by her aunt but on each occasion when she returned in 2007 and 2008 she remained in contact with that aunt. In contrast, she now states that since her arrival in the United Kingdom in August 2009 she has lost all contact with that aunt and she would not be able to assist the Appellant because she is now an adult. For all the reasons set out in this decision I reject that.”*

13. The Judge went on at paragraph [43] of her decision to find that it is in the best interests of both of the appellant’s daughters that they should continue to be cared for by their mother. She found that if the appellant is removed to Mali the children will go with her. The Judge noted that the youngest child was only 4 months of age and is entirely dependent upon her mother for her care. The

eldest child was now 5 years of age and any move to another country would require her to adapt to that new country, but there was no evidence before the Judge to show that she would not be able to do so with the help and support of her mother.

14. The Judge turned to the issue of FGM and stated at paragraphs [44] to [46] of her decision:

*“44. The Appellant has raised the issue of FGM in respect of her two daughters. It is for his reason that an anonymity direction has been made in this case. The Respondent does not accept that the Appellant has undergone cutting herself and there is no medical evidence before me to show that she has. As I have already set out at the beginning of this decision, there were no medical records or obstetric records available which would have assisted with such matter. Further, during the course of the various interviews the Appellant has undertaken since her arrival in 2009 she has never stated that she was the subject of FGM. On 29 June 2011 the Appellant was asked, at question 163, “Apart from what you have told me today did anything else happen to you in Mali?” In response to that question the Appellant said that she was pregnant but she did not mention FGM. Likewise, at question 166 she was asked “Did anything else happen to you?” to which she replied “No”.*

*45. By reason of all the matters set out above I find that the Appellant has not shown to the low standard that she has been subject to FGM.*

*46. It is accepted by both representatives that there is no specific case law as to FGM in Mali. The Respondent and Dr Rodet agree that FGM is not criminalised in Mali. Dr Rodet’s report is based on the Appellant’s assertion that she was cut as a young girl. Dr Rodet then goes on to consider the situation of the Appellant’s in-laws or her own relatives carrying out the procedure. By reason of all the matters I have set out above I find that the Appellant has not shown to the low standard that her*

*children are at risk of cutting; that she could not prevent them being cut or that they would return to an area where the children would be at risk."*

### The Appeal before me

15. The grounds of appeal advanced by the appellant are twofold. First, the First-tier Tribunal Judge failed to give any, or any adequate reasons for rejecting the core of the appellant's claim, namely the death of her parents, the abuse by her uncle, the forced marriage and her aunt's attempts to help her. Second, the Judge failed to properly assess, with anxious scrutiny, the risk to the appellant and her daughters upon return to Mali, with regard to the FGM claim. The appellant submits that she was disadvantaged at the hearing of the appeal because of the respondent's failure, despite a previous adjournment so that the respondent could consider that aspect of the claim, to properly set out the respondent's position so that the appellant knew the case that she had to meet on appeal.
16. The appellant states in the Grounds of appeal that she has now obtained confirmation from her GP that she has been subject to an FGM procedure. She seeks permission to rely upon this evidence to demonstrate that the First-tier Tribunal Judge made a material error of fact in assessing the appellant's claim on the basis that she had not been cut.
17. Permission to appeal was granted by Upper Tribunal Judge Blum on 21<sup>st</sup> September 2015. He noted that a copy of the GP report had not been provided with the grounds, but that if the Judge did make a mistake of fact, this may have been material to the FGM aspect of the appeal.
18. At the hearing before me, Ms Short relied upon the appellant's grounds of appeal and reminded me of the procedural history. She submits that it was not until the closing submissions made by the appellant, that the respondent for the first time, claimed that the

respondent did not accept that the appellant has been cut. The respondent had not disputed the cutting of the appellant, before the hearing. She submits that the Judge has failed to make any finding as to the risk upon return to the appellant's children and the conclusions at paragraph [46] are inadequately reasoned. She submits that the judge fails to give any reasons as to why the report of Dr Rodet should be rejected. Ms Short submits that the adverse credibility findings made against the appellant, do not relate to the risks to which the appellant's daughters would be exposed, upon return to Mali. She submits that the credibility findings made against the appellant are based entirely upon the appellant's immigration history and that the Judge fails to provide any adequate explanation at paragraph [42] of the decision, as to why the core of the claim for asylum is not credible.

19. I was provided with a copy of a letter from the appellant's GP, Dr R Baqai dated 12<sup>th</sup> August 2015. The letter states:

*"...On reviewing her medical records, I can confirm that she disclosed a history of Female Genital Mutilation to the obstetric team at Kings College Hospital during her most recent pregnancy. This has been confirmed as FGM Type 1 according to the Post Natal Discharge Summary and Baby Transfer of Care enclose with this letter.*

*There is no documentation to confirm she had disclosed this to a member of the medical team at the surgery."*

20. The respondent has filed a Rule 24 response dated 7<sup>th</sup> October 2015 that was adopted by Mr Whitwell. The respondent opposes the appeal and submits that in a detailed decision, the Judge considered all the evidence before her, and reached conclusions as to the credibility of the appellant and her claims, that were open to her. The respondent submits that the appellant had failed to adduce any medical evidence to corroborate her claim that she

had been subjected to FGM. The deficiency in the evidence was brought to the attention of the appellant's Counsel by the Judge, but there was no application to adjourn the hearing, even part heard if necessary, despite a successful application to amend the grounds of appeal so that the issue of FGM was before the Tribunal.

21. Mr Whitwell submits that the decision of the Judge must be read as a whole and that the Judge clearly rejected the core of the appellant's account at paragraph [42] of her decision. Mr Whitwell submits that the findings as to the core of the appellant's account are inextricably linked to the appellant's account of her having left Mali on at least two previous occasions before she left to travel to the United Kingdom. The reasons why she had previously left Mali, and returned there, must be relevant to the core of the appellant's account and the events that she claimed, occurred in Mali. He submits that the Judge has clearly considered the best interests of the appellant's two daughters and the finding at paragraph [46] of the decision was open to the Judge on the evidence. Mr Whitwell submits that the Judge had proper regard to the expert report, and this appeal amounts to a disagreement with the findings of the Judge that were properly open to her.
22. Mr Whitwell submits that irrespective of whether the respondent had made a decision upon the FGM claim, the burden remained upon the appellant to establish that claim, and to satisfy the Judge that she had been subjected to FGM. No evidence was provided by the appellant in that respect and the interjection by the presenting officer during the appellant's closing submissions, was simply to clarify that the respondent did not accept that the appellant had been cut, as she appeared to be claiming.
23. Ms Short responded by drawing my attention to paragraph [26] of the decision. She accepts that it is for the appellant to establish

her case, but submits that the appellant suffered a significant disadvantage because the respondent did not make her position clear in advance of the hearing, and until the appellant's closing submissions. Ms Short submits that it is irrational for two young uncut girls, to be expected to return to a country such as Mali, without very careful consideration of the expert evidence.

## **Discussion**

24. I shall take each of the two grounds of appeal advanced by the appellant separately.
  
25. I deal first with the Judge's assessment of the substantive asylum claim, as it was when first made, and considered by the respondent. The issue for me to decide is whether or not the Judge was entitled to conclude that the appellant was not a credible witness and to reject the core of the appellant's account for the reasons that are given at paragraph [42] of her decision. In that respect I follow the guidance of the Court of Appeal in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**. The Court of Appeal held that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. A finding that is "perverse" embraces findings that are irrational or unreasonable in the *Wednesbury* sense, and findings of fact that are wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really could not understand the original judge's thought process when she was making material findings. I apply that guidance to my consideration of the decision in this appeal.
  
26. I have carefully considered the reasons that are set out at paragraphs [34] to [40] of the Judge's decision. The Judge focuses upon the inconsistencies and contradictions in the appellant's

evidence by reference to what the appellant said about her time previously in Senegal and France. However, when properly read, that evidence is not only concerned with the appellant's immigration history and her journey to the UK as one often finds. In this case, her account of her travel to Senegal, return to Mali, travel to France and return again to Mali, is relevant to the appellant's subjective fear of return to Mali and the events that she claims occurred. One has to read the findings of the Judge and the conclusions that she reached against the evidence that she sets out at paragraphs [22] to [25] of the decision in particular. The Judge finds at paragraph [42] of her decision that the appellant has not established to the low standard that her parents are dead; that she was a victim of domestic abuse by her uncle; was the victim of domestic violence by her husband; that she was forced into marriage by her uncle and raped by her husband or that she is at risk from any person in Mali. The Judge found that the appellant has not shown to the low standard that she has no contact with her family in Mali. The Judge states:

*"...Not only do I refer to the matters set out above but, in the appellant's own evidence, she was helped to leave Mali on three occasions by her aunt but on each occasion when she returned in 2007 and 2008 she remained in contact with that aunt. In contrast, she now states that since her arrival in the United Kingdom in August 2009 she has lost all contact with that aunt and she would not be able to assist the Appellant because she is now an adult. For all the reasons set out in this decision I reject that."*

27. I reject the submission made on behalf of the appellant that the Judge failed to give any, or any adequate reasons for rejecting the core of the appellant's claim. The appellant's immigration history is intrinsically linked to her account of events in Mali. On the appellant's own account she had left Mali previously in 2007 and 2008. She returned on each occasion, before she finally left on the



third occasion to come to the UK. In my judgement it was open to the Judge to find the appellant's evidence to be inconsistent, contradictory, not credible and unpersuasive such that she rejected the story advanced by the appellant. The Judge made findings that were adverse to the appellant having had the opportunity to see and hear the appellant give evidence. She properly noted at paragraph [30] that she had borne in mind that although a person may be found to be not truthful on one matter, it does not mean that they are not truthful on other matters. The appellant disagrees with the findings, but the findings are not irrational or unreasonable in the *Wednesbury* sense, or findings that are wholly unsupported by the evidence.

28. Turning to the second aspect of the protection claim, the issue of FGM, the Judge allowed an amendment to the grounds of appeal such that that matter was before the Tribunal. The precise wording of the ground relied upon by the appellant is set out at paragraph [20] of the decision. The appellant resumed her evidence after the amendment to the grounds of appeal was permitted, but no further evidence about the risks that her daughters may be exposed to, was given by the appellant in her oral evidence in chief. At paragraph [24] of her decision, the Judge records the evidence of the appellant in re-examination:

*"24. ....She was asked if her aunt would help her to avoid FGM and she said that in their village all the girls are cut whether they like it or not. Someone could come and take your daughter whether you like it or not."*

29. I have already set out the submissions that were made on behalf of the appellant and which are recorded at paragraph [27] of the Judge's decision. Following the interjection by the presenting officer, the decision records:

*27. .... I asked Miss King if there were any medical records relating to the Appellant and she replied that there were not. I asked if there were any obstetric records available since those may be of assistance when considering FGM given that the Appellant has now given birth to two children. Miss King repeated that there were no medical records available for the Appellant...."*

30. In reaching her conclusions, at paragraph [44] the Judge notes that the respondent does not accept that the appellant has undergone cutting herself, and that there were no medical records or obstetric records available which would have assisted with such matters. The Judge also noted the appellant's failure to mention that she had been subjected to FGM previously, before finding at paragraph [45] that the appellant has not shown to the low standard that she has been subject to FGM. The Judge notes at paragraph [46] of her decision that Dr Rodet's report is based on the appellant's assertion that she was cut as a young girl. That was at odds with the finding made by the Judge.
31. The letter that is now before me from the appellant's GP appears to establish that the appellant disclosed a history of FGM to the obstetric team at Kings College Hospital during her most recent pregnancy.
32. In **E & R -v- SSHD [2004] EWCA Civ 49**, the Court of Appeal held that the Tribunal and the Court of Appeal have the power to review a decision of the Tribunal where it is shown that an important part of the Tribunal's reasoning is based on ignorance or mistake of fact, and to admit new evidence to demonstrate the mistake. When giving the judgment of the Court of Appeal Carnwath LJ stated, at paragraph 66:

*"In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."*

33. In my judgment, the Judge's conclusion at paragraph [45] that the appellant has not been subjected to FGM contains a mistake of fact, since there is now medical evidence available that establishes that the appellant "...is FGM Type 1..". Whether or not the appellant has been subjected to FGM is objectively verifiable. It was a matter that was in issue during hearing of the appeal, but it appears that the appellant's representatives were not aware that the question of whether the appellant had been subjected to FGM was in issue, until counsel for the appellant was making her closing submissions. I have some sympathy with the submission made by Mr. Whitwell that irrespective of whether the respondent had made a decision upon the FGM claim, the burden remained upon the appellant to establish that claim, and to satisfy the Judge that she had been subjected to FGM. However, notwithstanding the opportunity previously provided by the Tribunal, the respondent had failed to set out her position on that issue. I cannot find therefore that the appellant was responsible for the mistake, since further evidence might have been adduced on behalf of the

appellant if she had been aware of the respondent's position before the hearing of the appeal. In my judgment, the mistake played a material part in the Judge's reasoning in relation to the risk arising from FGM, and the weight to be attached to the report of Dr Rodet. The Judge found at paragraph [45] that the appellant has not shown that she has been subject to FGM, but noted at paragraph [46] that Dr Rodet's report is based on the appellant's assertion that she was cut as a young girl.

34. In my judgment, the Judge's conduct of the hearing and her decision is not to be evaluated by reference to a test of reasonableness or fault. The judge cannot in any way be criticised for the appellant's failure to put evidence before her. It is the mistake as to fact that can now be seen from the medical evidence now available and that was not available during the proceedings at first instance, that gives rise to a material error of law requiring the decision of the Judge in relation to the issue of FGM to be set aside.
35. The findings made by the Judge in respect of the protection claim on what has been described as the core of the appellant's account, stand.
36. I must then consider whether to remit the case to the First-tier Tribunal, or to re-make the decision with regard to the FGM issue, myself. I consider that where a first instance decision is set aside on the basis of an error of law involving the deprivation of the appellant's right to a fair hearing, the appropriate course will be to remit the matter back to the First-tier Tribunal for the risk to the appellant's daughter's arising from the issue of FGM, to be determined.

### **Notice of Decision**

37. The appeal is allowed, limited to the decision of the First-tier Tribunal in respect of the issue of FGM. The appeal is remitted to the First-tier Tribunal for the appeal on the ground that the appellant would be at risk of suffering persecutory treatment either directly or indirectly as a result of her two female children being subject to FGM, to be determined.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

38. An anonymity direction was made by the First-tier Tribunal and is continued by me. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

**Deputy Upper Tribunal Judge Mandalia**

**TO THE RESPONDENT**

**FEE AWARD**

As I have allowed the appeal in part and remitted the matter to the First-tier Tribunal, the question of any fee award can properly be determined by the First-tier Tribunal.

Signed

**Deputy Upper Tribunal Judge Mandalia**