



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

Appeal Number: AA/00291/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7 April 2017**

**Decision & Reasons Promulgated  
On 10 May 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ESHUN**

**Between**

**[J O]  
(~~ANONYMITY DIRECTION NOT MADE~~)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Miss M Muzira  
For the Respondent: Mr P Armstrong, HOPO

**DECISION AND REASONS**

1. The appellant is a citizen of Nigeria born on 25 December 1980. She has been granted permission to appeal the decision of First-tier Tribunal Judge O'Hagan dismissing her appeal against the decision of the respondent made on 26 January 2016, to refuse her claim for asylum and humanitarian protection.

2. The appellant claimed that if she were to return to Nigeria, her three daughters would be subjected to female genital mutilation (FGM). Since her community in Nigeria heard about the birth of her first daughter on 28 April 2011, they have asked for her to return so that her daughters could receive circumcision. She underwent FGM herself as a child.
3. The three daughters were born on 28 April 2011, 28 April 2011 and 23 April 2015.
4. On 31 March 2010, the appellant was granted leave to enter the United Kingdom as the spouse of a British citizen, James Samuel Walters, for a period of two years. On 20 January 2012, however, before the leave granted had expired, the appellant was served with form ISI51A. This was because it had been discovered that her husband was not in fact a British national called James Walters, but a Nigerian national called [FA]. He had fraudulently adopted the identity of Mr Walters, a British citizen who died in New York in 1989. He obtained a British passport in that name, and used his assumed identity to sponsor the appellant's application. He was convicted of fraud and conspiracy, and sentenced to a term of imprisonment for those offences. The appellant herself was acquitted of conspiracy in respect of her husband's fraud.
5. On 29 June 2012, the appellant applied for leave to remain on the basis of her human rights. That application was refused on 15 August 2013 with no right of appeal. On 3 December 2013 the appellant issued proceedings for judicial review against the respondent's first decision, and on 23 January 2014 it was agreed that her application would be considered. The matter was duly reconsidered on 17 April 2014, but the decision was upheld. The appellant appealed against that decision. The appeal came before Judge Flower on 12 September 2014. By way of a decision promulgated on 30 September 2014, Judge Flower dismissed the appeal on all grounds.
6. The respondent made a separate decision on 25 June 2014 to deport the appellant's husband. He appealed against that decision. The appeal came before Judge Phull on 15 May 2015. Judge Phull allowed the appeal to the limited extent that she found that the decision had not been in accordance with the law. This was because the appellant and her husband had raised fears that, if returned to Nigeria, their daughters would be subjected to female genital mutilation (FGM). Although the appellant had herself claimed asylum on that basis, at the time Judge Phull came to consider the matter, the appellant's asylum claim had yet to be determined, and no interview had been conducted. Judge Phull found that she was not in a position to properly assess the risk of the children being subjected to FGM. She was also concerned that the respondent had not considered the welfare and best interests of the children. She remitted the matter back to the respondent so that these matters could adequately be considered.

7. Subsequently the respondent considered the application and made a decision on 26 January 2016 to refuse the appellant's claim for asylum and humanitarian protection. It was the appellant's appeal against this decision that First-tier Tribunal Judge O'Hagan dismissed. It is the dismissal of this appeal that forms the subject of the appeal before me.
8. The judge said she had considered the findings made by Judge Flower and Judge Phull. In so doing, she had reminded herself of the guidance set out in the case of **Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702**. The judge said that Judge Flower's findings in relation to the issue of FGM were extremely limited. She said that was not surprising because she noted from paragraph 13 of Judge Flower's decision that the issue of FGM was raised for the first time in the appellant's bundle prepared in readiness for the hearing before her. At paragraph 14, Judge Flower recorded that both the appellant's Counsel and the Home Office Presenting Officer before her agreed that it would have been inappropriate for her to explore and determine the issue. Judge Flower concurred with that. Accordingly, she made no findings in respect of the matter, save one, that is that medical evidence had been presented which established that the appellant had herself been subjected to FGM. Judge O'Hagan said that this formed part of the factual matrix of the appeal before her.
9. The judge, at paragraph 35, said that Judge Phull set out in her decision her concern that the respondent had not engaged with the issue of FGM. The judge also said that Judge Phull did not make any findings of her own in respect of the issue of FGM. She noted that Judge Phull had recorded at paragraph 46:-

*"I find that the evidence from both the appellant and his wife is consistent that FGM is prevalent and compulsory in the states from which they originate. They cannot relocate to another part of the country because FGM is practised widely throughout Nigeria and the authorities are unable or unwilling to protect the victims of FGM. "*

10. The judge continued at paragraph 35 as follows:-

*I think it somewhat unfortunate that Judge Phull records this under the heading 'My Findings' since the findings in this passage are limited to the fact that the appellant and Mr [A] (sic) were consistent with one another in their evidence as to the position in Nigeria. Judge Phull was not saying that she found that matters were, as a matter of fact, as they describe, but merely that they were consistent in their claims. I am, therefore, left with the one judicial finding, on which I rely, that the appellant had been subjected to FGM."*

11. The judge at paragraph 36 went on to consider the evidence given to her by the appellant and Mr [A]. In contrast to Judge Phull's experience of

them, she found that their evidence was not mutually consistent. More significantly still she found neither of them to be a reliable witness. On the contrary, she found them both to be evasive and dishonest. The judge set out the inconsistencies in their accounts from paragraphs 37 to 40.

12. The judge said at paragraph 41 that given the regrettably lack of reliability shown by both witnesses, she was not satisfied that she could accept their account of the position taken by the appellant's family to FGM, and nor could she accept their evidence as to the general level of risk. She found that both were quite willing to say anything that they felt would bolster their chances of remaining in this country.
13. In the absence of evidence from the parties on which it could rely, the judge considered the objective evidence available to her about the level of risk generally of girls being subjected to FGM in Nigeria. The judge said as follows at paragraphs 42 to 45:-

*"42. ... The country information and guidance issued in August 2015, at paragraph 2.3.6, states,*

*'Although against the law and in decline, female genital mutilation(FGM) continues to be practiced with differing prevalence rates and type across Nigeria and by ethnic group, religion, residence (urban/rural), state, education and socio-economic class. A 2013 UNICEF report found that 27% of women had undergone FGM, although in the last 20 years the prevalence among adolescent girls has dropped by a half. FGM is usually inflicted on a child before she can give her informed consent but it may also be difficult for adolescent girls and women to refuse social and extended family pressure to have the procedure.'*

*Whilst a rate of 27% is unacceptably and depressingly high for such an appalling practice, it is still less than a third of the population. Moreover, that 27% contains a considerable historic element when the prevalence was much higher. I note that, in 2013, UNICEF found that the prevalence amongst adolescent girls had dropped by a half, indicating a declining practice. It is also reasonable to assume that the figures include a preponderance of girls subjected to the procedure with the agreement of their parents, and that the position is very much better where, as here, the parents do not agree.*

43. *The UNICEF report which the guidance refers was, of course, issued before the practice was made illegal in 2015. Whilst I have no direct evidence as to the degree to which the new law is being enforced effectively, it is reasonable to suppose that the prevalence of the practice is unlikely to have increased since it was criminalised, and it is more likely the criminalisation will*

*have compounded the existing trend to a decrease in the practice. That view is reinforced by section 2.4 of the August 2015 country information and guidance. In essence, the position is that there is steadily improving situation in Nigeria, particularly since the Violence against Persons (Prohibition) Act 2015 was passed. The guidance states that this,*

*'... shows a determination to tackle violence against women, provides stiffer penalties for a number of gender-based offences such as FGM, and may make it easier for women to seek recourse and protection.'*

*The guidance acknowledges that there are still difficulties, both with the implementation of the legislation, and with the adequacy and effectiveness of the state institutions, such as the police, from which protection may be sought. Nonetheless, it describes an improving situation.*

- 44. The guidance indicates that regard must be had to the individual circumstances of the case in considering whether adequate protection is likely to be available to the specific individual. In this case, the Appellant has not sought protection, still less been refused it. On the face of it, as an articulate woman, with the support of her husband, she would be well placed to seek protection.*
- 45. Having considered all of these matters, I am not satisfied therefore that the Appellant has discharged the burden of proving that she or her daughters face a substantial risk of serious harm in her home country. I find the Appellant has not discharged the burden of proof of showing entitlement to the protection of the Refugee Convention or Articles 2 and 3 of the Human Rights Convention. Any claim to humanitarian protection would stand or fall for identical reasons. Since I have not accepted the factual basis for the claim, the issues of internal flight and sufficiency of protection do not arise. Even if the factual claims were accepted, the evidence leads me to believe that there would be a sufficiency of protection in this case. The protection might not be certain or carry the level of confidence that one might ideally like, but it would be sufficient."*

14. The judge said at paragraph 46 that although Miss Muzira who had also appeared before her raised paragraph 276ADE(1)(vi) and Article 8, she had no independent arguments to advance, and conceded that the matter would stand or fall with the issue of FGM. Given that concession, the judge found that the appellant's claim fell for the same reasons given in respect of her claim for asylum.

15. Upper Tribunal Judge Perkins granted the appellant permission to appeal. He said that the grounds before him were much better than those supporting the application to the First-tier Tribunal and made out a reasonably arguable case that the First-tier Tribunal Judge overlooked evidence that might have made a difference to the decision. He therefore gave permission on all grounds.
16. Miss Muzira challenged the judge's decision on **Devaseelan**. She argued that the judge failed to properly take into account Judge Phull's decision at paragraph 46 which the judge recorded at paragraph 35 of her decision as her starting point. Miss Muzira submitted that Judge Phull made more than one judicial finding. The first finding was at paragraph 33 when she adopted Judge Flower's finding that the appellant had herself been subjected to FGM. The second finding was that the appellant and her family could not relocate in Nigeria because FGM is practised widely throughout Nigeria, and thirdly, that despite the change in the law in 2015, the authorities in Nigeria are unable or unwilling to protect the victims of FGM. In the light of these claimed findings, Miss Muzira argued that there was no need to have re-litigated the appellant's case.
17. I accept that the finding that the appellant herself had been subjected to FGM was a finding that was first made by Judge Flower, accepted by Judge Phull and also accepted by Judge O'Hagan. I do not, however, find that Judge Phull made the second and third findings as claimed by Miss Muzira. I agreed with the judge that Judge Phull was not saying at paragraph 46 that she found that matters were as a matter of fact, but merely that they were consistent in their claims. I find that Judge Phull did not make any substantive findings. Judge Phull found that the respondent's decision was not in accordance with the law because the respondent had failed to give any consideration to the risks of FGM that the appellant's daughters may face on return to Nigeria to enable her to make a proper assessment under Article 3 and Article 8 ECHR. Consequently, she referred the case back to the respondent to consider the appellant's claim.
18. Miss Muzira sought to challenge the credibility findings made by the judge. I informed her that having considered the findings of fact made by the judge, I found that they disclosed no error of law. The judge had identified the inconsistencies in the accounts, the evasiveness and the lack of credibility of the appellant and her husband on core matters. I found that the judge's findings on credibility were properly made and therefore sustainable.
19. The only issue that we were left with was in respect of the risks the appellant's children may face if they return to Nigeria and whether there was a sufficiency of protection for them if they returned to Nigeria.
20. The grounds upon which permission was granted argued that the judge paid no regard to the background evidence in her assessment of risk to the children on return to Nigeria should the parents resist having their

children subjected to FGM. It was further argued that no regard was paid in the judge's decision to the educational level and economic status of the family in being better able to resist the procedure having regard to the background evidence. It was also argued that the judge was wrong to state that she did not have the relevant evidence before her and further erred in making suppositions which were not backed by relevant evidence.

21. I accept Miss Muzira's argument that the adverse credibility findings made by the judge against the appellant and her husband did not go to the core of her claim having regard to what is in issue in this case, namely, risk to the young children of being subjected to FGM, in particular, their mother's family members and an FGM practising community. She submitted that according to the appellant's witness statement of August 2014, she and her husband are uneducated and they would not be able to resist societal pressure to have their daughters subjected to FGM. She submitted that at paragraph 43 the judge erred in seeking to ignore background evidence about the effectiveness of police protection. Miss Muzira submitted that the authorities in Nigeria may be willing to prevent FGM but are unable to provide effective protection.
22. I find from the background evidence that FGM is viewed as a tribal identity and is rooted in culture and tradition. Indeed, the appellant herself underwent FGM. The objective evidence indicates that the performing of FGM depends on the educational level and economic status of the family, with better educated and more affluent families more resistant to the practice. In view of the appellant's own experience, I accept her evidence that she and her husband would not be able to resist societal pressure to have their daughters subjected to FGM because of their lack of education.
23. I find that having made the finding which she did at the end of paragraph 43, the judge should have allowed the appeal. The judge held as follows:

*"The guidance acknowledges that there are still difficulties, both with the implementation of the legislation, and with the adequacy and effectiveness of the state institutions, such as the police, from which protection may be sought. Nonetheless, it describes an improving situation."*
24. I find that despite the improving situation, the objective evidence indicates that the authorities in Nigeria would not be able to offer the children with adequate and effective protection.

### **Notice of Decision**

The appeal is allowed.

No anonymity direction is made.

Signed

Date: 9 May 2017

Deputy Upper Tribunal Judge Eshun