



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

Appeal Number: PA/01885/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 9 January 2018**

**Decision & Reasons Promulgated
On 6 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**A A R
(ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr Duffy, Home Office Presenting Officer

For the Respondent: Mr Yekinni, Supreme Solicitors, Rainham, Essex

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.
2. The appellant is a citizen of Nigeria born on [] 1981. She appealed against the decision of the respondent dated 9 February 2017 refusing her asylum and humanitarian protection claims and her claim on human rights grounds. Her appeal was heard by Judge of the First-Tier Tribunal

Courtney on 23 August 2017. Her appeal was dismissed on asylum and humanitarian protection grounds but allowed under Article 8 of ECHR in a decision promulgated on 14 September 2017.

3. An application for permission to appeal was lodged by the Secretary of State for the Home Department and permission was granted by Judge of the First-Tier Tribunal Alis on 10 November 2017. The grounds argue that the Judge failed to consider Section 117B of the Nationality, Immigration and Asylum Act 2002, failed to consider proportionality and allowed the appeal on the basis that the children's best interests must outweigh the public interest in removal. The permission states that although the findings are not separated under distinct headings that identify a protection/Article 3/Article 8 claim, the Judge noted that the children's best interests would need to be considered. She then looked at the protection claim and the risk posed by forced FGM to the appellant's daughters. She rejected the protection claim. Article 8 issues were only considered at paragraph 65 and the permission states that the Judge seems to have been confusing protection and Article 8 issues, as having rejected the claim that the appellant would be at risk because on return her daughters might suffer forced FGM, the Judge appears to allow the appeals under Article 8 based on the risk posed to her daughters by forced FGM.
4. There is no Rule 24 response.

The Hearing

5. The Presenting Officer referred to the grounds and submitted that the appeal appears to have been allowed on the basis of the appellant's children suffering FGM if they are returned to Nigeria and yet the asylum claim has been dismissed and the appeal allowed under Article 8. He submitted that the decision is contradictory. He submitted that if the appellant's children are at risk in Nigeria because there is a possibility of forced FGM then they and their mother should have been granted refugee status, but the Judge has found that they are not refugees and appears to have allowed the claim under Article 8 as a consolation prize.
6. He submitted that to allow this claim under Article 8 of ECHR is confusing and contradictory when the Judge's other findings are taken into account.
7. The appellant's representative submitted that the Judge has considered the best interests of the children. I was referred to paragraphs 28, 29 and 30 of the decision and he submitted that based on the best interests of the children the Judge has allowed the claim under Article 8 of ECHR outside the Immigration Rules. He submitted that the Judge has found that the children's best interests are going to be served by their mother remaining with them in the United Kingdom. He submitted that the Judge was correct to allow the appeal under Article 8 of ECHR.
8. He submitted that the appellant's children are in need of protection and cannot return to Nigeria and the Judge was entitled to find that the

appellant was not entitled to asylum but was entitled to remain under Article 8 of ECHR based on the best interests of the children.

9. The Presenting Officer submitted that although the best interests of the children are a primary consideration they are not the primary consideration. He submitted that the Judge's decision has not specifically stated that the best interests of the children are to remain in the United Kingdom with their mother.
10. The Presenting Officer submitted that the Judge has found that the appellant should not be granted asylum on protection grounds in spite of the possible FGM situation for her children but has then gone on to allow the claim under Article 8 on the basis that the children may have to suffer forced FGM if they are removed to Nigeria. He submitted that the children either are at risk or are not at risk and an assessment has to be made of the children's private life in the United Kingdom and a proportionality assessment is required as to whether the appellant and her children can be removed as a unit.
11. He submitted that there must be a material error of law in the Judge's decision which is that the appellant's children require protection and yet asylum has not been granted. The appeal has been allowed only under Article 8 of ECHR.

Decision & Reasons

12. At paragraphs 28 to 30 of the decision the Judge has referred to the best interests of the children but she has not stated that their best interests would be to remain in the United Kingdom with their mother. Although the Judge has stated that she has taken into account the seriousness of the difficulties which they might encounter in Nigeria there is no proportionality assessment in the decision. Neither has the Judge considered Section 117B of the 2002 Act.
13. At paragraph 63 the Judge has stated that there could be the viable option of internal relocation, away from any coercive pressure or risk of enforced FGM at the hands of relatives. She finds that there are circumstances in which the appellant would acquiesce to the circumcision of her daughters in Nigeria although she would not in the United Kingdom. The Judge makes reference to the case of ***AMM & Others (Somalia)*** [2011] UKUT 445 (IAC). She states that in that case the Upper Tribunal found that the Refugee Convention cannot be construed as affording refugee protection to a person who is in favour of inflicting harm on another, whether or not the societal and religious background of that person might be responsible for her having that view, whether the harm is inflicted by that person or by someone else with her approval. Because of this decision the judge did not grant asylum to the appellant. The Judge goes on to state that if the appellant is returned to Nigeria she will take her children with her. The Judge has found that the appellant's two daughters will be placed at risk if they accompany their mother to her country of origin and so the Judge has

allowed the appellant's appeal under Article 8 of ECHR, stating that the girls' best interests outweigh the public interest in the appellant's removal. The Judge then states that it is in the children's best interests that the appellant is permitted to remain in the United Kingdom but although it is clear from the decision that the reason she finds that the appellant should remain in the United Kingdom is on protection grounds based on FGM being performed on her two daughters she has dismissed the protection claim and allowed the claim under Article 8 of ECHR. This cannot be right. If it is found that FGM is a danger for the appellant's two daughters then asylum should be granted. Article 8 leave is not appropriate.

14. The judge has confused the protection claim and the human rights claim. She has not carried out a proportionality assessment relating to Article 8 outside the Rules or referred to Section 117B of the 2002 Act. These omissions amount to material errors of law.

Notice of Decision

15. I direct that the decision of the First-Tier Tribunal is set aside. None of its findings are to stand other than as a record of what was said on that occasion. It is appropriate in terms of Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to remit the case to the First-Tier Tribunal for an entirely fresh hearing.
16. The members of the First-Tier Tribunal chosen to consider the case are not to include Judge Courtney.
17. Anonymity has been directed.

Signed

Date 02 February 2018

Deputy Upper Tribunal Judge Murray