



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

Appeal Number: PA/13413/2016

**THE IMMIGRATION ACTS**

**Heard at Glasgow**

**Decision & Reasons  
Promulgated**

**On 20<sup>th</sup> February 2018**

**On 8<sup>th</sup> March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DEANS**

**Between**

**Y D  
(Anonymity direction made)**

Appellant

**and**

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

Respondent

Representation:

For the Appellant: Miss D Friel, McGlashan MacKay, Solicitors

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This appeal is brought against a decision by Judge of the First-tier Tribunal McManus dismissing an appeal on protection and human rights grounds.
2. The appellant is a national of the Gambia. She has a son and a daughter. Her son is a British citizen and on the basis of this the

appellant has discretionary leave to remain. She claims a fear of persecution on the grounds that her daughter is at risk of incurring FGM in the Gambia.

3. I had before me amended grounds of appeal submitted on the same day as the notice of appeal to the Upper Tribunal. Although the grounds are detailed, in the course of the hearing the focus turned to ground 4, in particular. This ground arose from the judge's finding as to the ethnic group to which the appellant would be regarded as belonging and the risk of FGM in this group.
4. The appellant's mother is Mandinka. This is an ethnic group with a high incidence of FGM, according to the country information. The daughter's father was a Fula - an ethnic group in which, according to the judge's findings, the incidence of FGM is significantly lower than among the Mandinka.
5. The judge based the finding as to the daughter's ethnicity on the headnote of the reported decision in *K and others (FGM) Gambia* CG [2013] UKUT 62. The headnote states at paragraph 7:
 

"Thus, it is possible to arrive at a conclusion that the risk faced by an individual is less than, or more than, the rate of incidence of FGM in the ethnic group of the individual's father (if unmarried) or her husband (if married)..."
6. The judge noted that the appellant was not married to her daughter's father. The judge found that as the daughter's father was Fula, the daughter would be regarded as Fula.
7. Ms Friel argued that this was an error by the judge. Paragraph 7 of the headnote was derived from paragraph 124 of the Tribunal's decision, which reads:
 

"In assessing the risk facing an individual, the starting point is to consider the statistical information currently known about the prevalence of the practice within the ethnic group that is the relevant ethnic group in the individual's case, as follows:

  - a. If the individual is unmarried and given that ethnicity is usually taken from the father in The Gambia, the relevant ethnic group is likely to be the ethnic group of the father.
  - b. If the individual is married to a man that is different from her father's ethnic group, then the relevant ethnic group is the ethnic group of the husband..."
8. Miss Friel's first point was that these *dicta* refer to the marital status of the individual who fears being forced to undergo FGM. The judge erred by applying the *dicta* not to the daughter but to the daughter's mother. The judge found that because the daughter's mother and father were not married the daughter would be treated

as having her father's ethnicity, i.e. Fula. The daughter, whom it is feared is in danger of FGM, is only three years of age.

9. This point might not of itself be material. It is not disputed that the daughter's father is of Fula ethnicity. Reliance by the judge on paragraph 7 of the headnote, however, compounded the error. While the headnote refers in more or less unqualified terms to the ethnicity of an unmarried woman following her father, the actual text of the Tribunal's decision, at paragraph 124, is more nuanced. What is stated at paragraph 124 is that ethnicity is *usually* taken from the father and the relevant ethnic group is *likely* to be the ethnic group of the father (italics added). This is not at all the same as the finding made by the Judge of the First-tier Tribunal at paragraph 24 of the decision, where the judge stated: "According to **K & Others** at point 7 above, the relevant ethnic group where the parents are unmarried is the individual's father's (Fula)."
10. Not only did the judge err by treating headnote 7 as referring to the marital status of the parents of the individual alleged to be at risk, rather than the individual herself, but the judge did not have proper regard to the qualified language of paragraph 124 of *K and others* indicating that it was no more than "likely" or "usual" for a girl's ethnicity prior to her marriage to follow that of her father.
11. The judge referred, at paragraph 18, to a submission for the appellant that while the daughter's ethnic group was likely to be taken from the father this was not determinative. It depended upon the particular facts and circumstances. When, however, the judge came to consider this question further, at paragraphs 24 and 25 of the decision, the judge found a "...lack of background information to support the position that the child would be regarded as being from the Mandinka..."
12. This finding really pinpoints the judge's error. By misinterpreting the headnote at paragraph 7 the judge assumed that because the parents of the girl potentially to be subjected to FGM were not married to each other then the girls' ethnicity must be taken to be the same as her father's. Having decided on this erroneous basis that the girl's ethnicity was that of her father, the judge proceeded on the basis that, as this was the approach laid down in a Country Guideline case, the judge could not reach any other conclusion unless there was "background information" to support it. The evidence of the appellant herself was not sufficient.
13. By reasoning this way the judge erred twice over. Not only did the judge err by misreading the headnote but the judge further erred by assuming that the headnote laid down a finding which had to be followed in the absence of country information to the contrary. In fact what paragraph 124 said, in the body of the Upper Tribunal's

decision, was that it was likely a girl's ethnicity would follow her father. Assessing the girl's ethnicity involved looking at all the relevant evidence. There was no finding by the Upper Tribunal of how to ascertain ethnicity which could be dislodged only by country information. Accordingly the judge erred by failing to have proper regard to the appellant's evidence, and to the submissions made on her behalf, as to why the appellant's daughter would be regarded as Mandinka and not Fula.

14. There were a number of other matters that were referred to me. One of these was that the judge did not properly interpret the statistical information as to the incidence of FGM among the Fula. Not all of the sub-groups of the Fula had a comparatively low incidence of FGM. In this context Mr Matthews submitted that it should be considered significant that the girl's father had not identified to which sub-group of the Fula he belonged. Having heard submissions on these points I did not consider it necessary to reach a decision upon them. These were matters which may properly be addressed at a further hearing before the First-tier Tribunal.
15. I am satisfied for the reasons stated above that the Judge of the First-tier Tribunal erred in law in making findings as to the ethnicity of the appellant's daughter. These errors render the judge's conclusions unsound. There are not sufficient reliable findings to allow me to re-make the decision. The proper course is for the appeal to be remitted to the First-tier Tribunal, with no findings preserved, for the appeal to be reheard before a different judge.

## **Conclusions**

16. The making of the decision of the First-tier Tribunal involved the making of an error of law.
17. The decision of the First-tier tribunal is set aside.
18. The appeal is remitted to the First-tier Tribunal with no findings preserved for the decision to be re-made before a differently constituted Tribunal.

## **Anonymity**

The First-tier Tribunal did not make a direction for anonymity. Having regard to the subject matter of this appeal being the protection of a child, and bearing in mind the need to preserve the positions of the parties pending a final decision in the appeal, I make a direction for anonymity. Unless or until a court or tribunal directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant or any member of her family. This direction applies to the appellant and to the

respondent. Failure to comply with this direction may lead to proceedings for contempt of court.

Deputy Upper Tribunal Judge Deans  
March 2018

7<sup>th</sup>