



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/14038/2019

PA/04941/2019

PA/04942/2019

PA/04944/2019

THE IMMIGRATION ACTS

**Heard by skype for business
On 28 April 2021**

**Decision & Reasons Promulgated
On 12 May 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A1

A2

A3

A4

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr S. Walker, Senior Presenting Officer

For the Respondent: Ms L. Brakaj, instructed on behalf of the Appellant.

DECISION AND REASONS

Introduction:

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The respondent appeals with permission against the decision of the First-tier Tribunal (Judge O'Hanlon) (hereinafter referred to as the "FtTJ") who allowed the protection and human rights appeal of the appellants in a decision promulgated on the 31 December 2020.
2. Permission to appeal that decision was sought and on 26 January 2021 permission was granted by Upper Tribunal Judge Martin.
3. Whilst this is an appeal brought by the Secretary of State I intend to refer to the parties as they were before the First-tier Tribunal for ease of reference.
4. The hearing took place on 28 April 2021, by means of *Skype for Business*, which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the first appellant and the second appellant who were able to see and hear the proceedings being conducted. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

The background:

5. The appeals that had been lodged by all the appellants were listed for a hearing together in accordance with directions made by the FtT on the 7 September 2020 given that the issues were interlinked and the appeals concerned the same evidence.
6. The background to the appeal is summarised in the decision of the FtTJ at paragraphs 1-7 of the decision.
7. The appellants are listed above as A1 (first appellant), A2 (second appellant), A3 (third appellant) and A4 (fourth appellant).

8. The first appellant (who is the father of the second, third and fourth appellants) is a national of Nigeria, born xxx. The second, third and fourth appellants are also nationals of Nigeria and were born xx, xx and xx respectively.
9. The first appellant had made an application on 15th March 2018 for leave to remain in the UK on the basis of his family life as a parent of the second, third and fourth Appellants who were present and living in the United Kingdom at that time. The respondent had considered the appellant's application and had refused the same on 30th July 2019 for the reasons set out in a Refusal letter also dated 30th July 2019.
10. The second, third and fourth appellants had made applications for asylum and humanitarian protection on 6th November 2017. The respondent had considered the applications of the second, third and fourth appellants and had refused the same for the reasons set out in Reasons for Refusal letters in respect of each of the second, third and fourth appellants dated 7th May 2019.
11. The second, third and fourth appellants had appealed against the Respondent's decision and this was the hearing of those appeals.
12. The second and fourth appellants are female and their applications for asylum/humanitarian protection had been made on the basis that they feared that in the event of return to Nigeria they would be subjected to female genital mutilation (FGM) from their father's family in Nigeria. The third appellant, who is male, feared that in the event of return his sisters would be the subject of FGM and also he feared that he would be subjected to tribal markings being performed upon him and further, that he feared that his father's family's relatives would force him to work for them.
13. The second, third and fourth appellants also claimed that return to Nigeria would breach their rights under Article 3 of the ECHR.

The relevant immigration history:

14. The immigration history of the family members was summarised by the FtTJ at paragraphs [21-34] and was taken from documentation supplied by the Respondent.
15. The first appellant entered the United Kingdom on 30th January 2014 with entry clearance as a Tier 4 dependent partner valid from 19th December 2013 until 30th January 2015.
16. The appellant entered the United Kingdom on 20th September 2014 with entry clearance as a Tier 4 student valid from 11th September 2014 until 9th February 2016.

17. On 4th October 2016 the appellant applied for a visitor visa. This was refused on 5th October 2016, one of the grounds for refusal being that the appellant had provided false information that his wife and three children were resident in Nigeria when they were in fact residing in the United Kingdom.
18. On 14th October 2016 the appellant applied for a visitor visa which was refused on 19th October 2016 as the appellant had previously provided false information in an earlier visa application.
19. On 29th December 2016 the appellant applied for a visitor visa which was refused on 12th January 2017, the refusal again referring to the fact that the appellant had provided false information on an earlier application.
20. The appellant entered the United Kingdom with a visa specifying "leave to enter - outside Rules" granted on compassionate grounds and valid from 12th October 2017 until 12th April 2018.
21. The immigration history of the second, third and fourth appellants is essentially the same and the following immigration history is taken from documentation supplied by the respondent.
22. On 20th March 2015 a Tier 4 (General) dependent child visa application was submitted to the British High Commission in Nigeria. The visa was issued on 26th May 2015, valid 26 May 2015 -9 February 2016.
23. The second, third and fourth appellants entered the UK in June of 2015 to join their mother and father.
24. On 13th March 2016, the appellants were named as dependents on the asylum claim of their mother (EAO).
25. On 7th December 2016, asylum claim refused. The second, third and fourth appellants were granted discretionary leave to remain on their mother's asylum claim for a period of twelve months.
26. On 6th November 2017, asylum claim made by the second, third and fourth appellants in their own right and asylum intake interview conducted.
27. On 13th June 2018, asylum interviews conducted in relation to the second and third appellants.

The factual claims:

28. At paragraph 39 the FtTJ set out the basis of the first appellant's appeal as follows.
29. The first appellant claims to have a family life in the United Kingdom with his children, the second, third and fourth Appellants.

30. The appellant also claims to have a private life in the United Kingdom.
31. The appellant had previously been given entry clearance for a short period outside the Immigration Rules on the basis that his wife, who was living in the United Kingdom with the second, third and fourth appellants, had a diagnosis of terminal lung cancer.
32. The first appellant is the sole carer for the second, third and fourth appellants who are currently residing in the United Kingdom. The second appellant is now an adult. All four appellants live together as a family unit.
33. The first appellant has a genuine fear that in the event of return to Nigeria, the second and fourth appellants would be subjected to FGM by the first appellant's family. FGM is a tradition in the appellant's family and the clan and the tribe of which they are part. The first appellant and his late wife had previously agreed with the first appellant's family that the second appellant would be the subject of FGM as and when she attained the age of 16 but the first appellant and his late wife made arrangements for the second, third and fourth appellants to be brought out of Nigeria before the second appellant attained the age of 16 and was subjected to FGM.
34. The first appellant believes that if the second, third and fourth appellants were returned to Nigeria, if the first appellant were to return with them, the Second and fourth appellants would be subjected to FGM by the first appellant's family, notwithstanding the wishes of the first appellant that this should not take place.
35. The first appellant did not consider that he would be able to withstand the pressure from his family for the traditional FGM practice to be carried out.
36. The first appellant also feared that in the event of return his son, the third appellant, would be subjected to tribal markings being inflicted upon him.
37. The basis of the appeals on behalf of the other appellants is also set out and summarised at paragraph [42] as follows.
38. The second and fourth appellant fear that they will be subjected to FGM in the event of return to Nigeria. FGM is a traditional practice of the family of the first appellant, who is the father of the second, third and fourth appellants.
39. So far as the first appellant is aware, all female members of his family have been subjected to FGM whether or not this was with the support of their parents.

40. The question of FGM being performed upon the second appellant was raised when she was 13 years old. The issue was raised by uncles of the second, third and fourth Appellants but has the support of the extended family as this is a family tradition.
41. The third appellant fears that in the event of return of himself and his siblings to Nigeria his sisters, the second and fourth appellants, would be subject to FGM. He fears that he would be subject to tribal markings being inflicted upon him and that he would be put to work on behalf of other relatives.
42. All female members of the first appellants' family have had FGM carried out on them whether or not their parents approved of the practice.
43. The respondent issued decisions in respect of all of the claims made either on protection grounds and/or on human rights grounds. Those decisions are set out in the respondent's bundle and are summarised in the decision of the FtTJ at paragraphs [40] and at [42].
44. In summary, the respondent considered in respect of the first appellant that he could not meet the requirements of paragraph 276ADE and in particular that they were no very significant obstacles to his integration into Nigeria if required leave the United Kingdom. Reference was made to his grant of leave to enter the UK based on compassionate circumstances naming the terminal illness of his wife and thus was granted to enable him to spend time with her and then to enable the appellant and the children to relocate back to Nigeria. Whilst he is the sole care of three children and did not agree with FGM. It was concluded that the appellant would be able to protect his children whilst living with them as a family unit. The appellants children had resided in the UK since June 2015 with the help of the first appellant as the sole carer, they would be able to adapt to life in Nigeria.
45. In respect of the second and fourth appellants, the respondent considered the claim based on the fear that they would be subjected to FGM in the event of return to Nigeria and on the basis FGM was a traditional practice of the family of the first appellant. The respondent considered that there was sufficiency of protection available to the second and fourth appellant for the Nigerian authorities. In relation to the third appellant, it was not accepted that there would be a real risk that he would be subjected to tribal marking and in any event sufficiency of protection was available. The respondent concluded that all four appellants lived together and that they would return as a family unit and the best interests of the children (third and fourth appellants) would be to remain with their father who is the sole surviving parent.
46. The FtTJ had the opportunity to hear oral evidence from the first and second appellants and had witness statements from the other appellants although they were present at Court (see [43]). The FtTJ also had a

comprehensive bundle of documents containing the evidence of the appellants and also country background evidence relevant to FGM. There were also copies of the family court documents.

47. In the light of the different decisions taken in respect of the appellants and the nature of each of the appeals, the FtTJ at [49-53] set out the way he intended to approach the appeals under the heading “methodology”. The approach taken by the FtTJ is one that was readily understandable in the light of the different issues.
48. The factual findings of the FtTJ in relation to the first appellant were set out at paragraphs [54]-[67], the fourth appellant at [68-69] and third appellants at [71]-75]. The factual assessment of the appeal of the first appellant is set out at [76]-[86]. It is also right to observe that the FtTJ also carried out an analysis of the Article 8 claims of the second and third appellants.
49. In relation to the appeals relevant to the second and fourth appellants they were both based upon the claim of the risk of being forced to undergo FGM in the event of return to Nigeria. The judge observed that their claims are slightly different because whilst the second appellant was a minor at the time of the claim she was now an adult where is the fourth appellant was 10 years of age at the date of the claim but remained a minor.
50. In summary, the FtTJ considered the claim based on the risk of FGM to both the second and fourth appellants. In respect of the second appellant, the judge recorded that her claim was that she feared her father’s family and that FGM may be carried out upon her and that she had been told that that would be carried out when she was 14 or 15 years of age and the threat came from her uncles. The evidence was that FGM was first raised to her knowledge when she was 13 years of age and raised by her father’s family. Her cousins and mother and undergone FGM; her cousins being 16 or 17 at the time this was undertaken. Further evidence was given that whilst she resided with her brother and sister of the paternal grandmother’s home FGM was not performed at that time because it was understood that it will be performed when she turned 16 and an appropriate ceremony would take place. The FtTJ found the evidence to be given in a “straightforward manner without any indication of evasion on the part of the second appellant”.
51. At [57] the FtTJ considered the evidence given in support from the first appellant that was relevant to the issue of FGM. This was a tradition of his family and expected of all female members and describe the pressure from his family to accept FGM being carried out upon his daughters. The judge recorded the evidence that the entire clan in Nigeria believed FGM and two uncles who specifically maintained it would be carried out in relation to the daughters are said to be the spokesmen on behalf of the clan. The judge recorded the cross examination concerning the risk of FGM at paragraph [57] but having considered the evidence, the judge reached

a finding that “the first appellant had been consistently stated his opposition to FGM and has been equally consistent that his family are insistent that FGM shall be undergone by family female members regardless of the wishes of parents of the girls involved and his family will ensure that this took place whether or not first appellant and his wife are agreeable to this.”

52. At [58] reference is made to the evidence provided by the appellant’s mother and the judge took into account the evidence set out in the family proceedings which included the mother’s fear the second appellant would be made the subject of FGM and the ensuing protection orders that were made in relation to the second and fourth appellants (at [59]).
53. At paragraph [60] the judge analysed the evidence relating to the threat of FGM which included the emails which had been sent from the uncle of the second and fourth appellants. The content of the emails were described at [60] and the judge expressly noted that “the respondent does not challenge the authenticity of these communications.”
54. At paragraphs [62]-[63] the FtT] set out the country materials relied upon by the respondent and the appellant relevant to the issue of FGM. Relevant to the consideration was that whilst the respondent made reference to the list of tribes performing FGM which did not include the tribe of the appellants, the evidence before the judge and upon which he placed his findings were that the evidence was that the threat to carry out FGM came from the family.
55. At [63]-[64] the FtT] reached conclusions on the claim and having taken into account the individual factors referred to in the CPIN. The judge was satisfied that the second appellant would be at risk of persecution in the event of return to Nigeria as she would be at risk of FGM at the hands of her father’s family. The judge further found that the first appellant would be against FGM and whilst he may be able to give some form of protection, the family pressures to enforce family traditions may be too much for him to resist. Further reasons were given at [64].
56. The issue of state protection and sufficiency of the same was set out at [65] and [66] and by reference to the country materials but found that whilst legislation prohibited FGM that had not been passed in all states of Nigeria, that the police were reported to treat the practice of FGM as a family or community affair and may not intervene at all and that it was difficult to obtain protection in all states outside Abuja where FGM is prevalent. The judge also took into account that the first appellant had sought to access state protection from the local authorities but no action was taken (at [65]). The judge concluded that state protection will not be available to the second appellant to prevent FGM.
57. It is also right to set out that in relation to the fourth appellant, the evidence relied upon was substantially the same and as a result of the

factual findings an assessment of the evidence, her case was also satisfied on the basis of risk.

58. The last issue addressed by the FtTJ was that of internal relocation at [67]. The place of relocation was expressly stated by the respondent to be Abuja and it was submitted that there was no evidence that the family were powerful or influential enough to trace them on return. However the judge took into account the relevant paragraphs of the CPIN and relevant to Abuja which referred to FGM as prevalent there. Having considered the question of internal relocation in accordance with the requirements of paragraph 3390 of the immigration rules, the judge considered this in the light of the threats in the emails from the second appellant uncle which were recorded at [60] and [67] and which were not challenged by the respondent (see [60]) and concluded that whilst it was the case at the first appellant's family may not be aware of the current whereabouts of the first appellant and his children, the only other area Nigeria other than the appellant's home area to which the first appellant had any connection was the very place that FGM was the most prevalent. The judge found on the fact that there was a "real risk" that the first appellant's family can make successful efforts to locate the second appellant and her siblings and their father in the event they all returned as a family unit. Further findings are made that it was not reasonable to expect the second appellant to return to Nigeria after her length of residence in the UK and to relocate to an area that she had no connection.
59. At paragraphs [71 - 75 the FtTJ addressed the circumstances of the third appellant who was also a minor. In summary the judge found that he determined that his two sisters should be granted asylum and would therefore remain in the UK. In the light of that finding, the refusal of leave to remain would breach the third appellant's rights under article 8 and result in unjustifiably harsh consequences for him in the context of separation from his siblings and taking into account they had always resided together in the relatively recent death of their mother.
60. The last set of factual findings an assessment of the evidence related to the first appellant and its human rights claim at paragraphs [76 - 86].
61. Thus the FtTJ allowed the appeal of the first and third appellants on Article 8 grounds and the second and fourth appellants appeals were allowed on asylum and on human rights grounds.
62. Following the decision the respondent sought permission to appeal and permission was granted by UTJ Martin.
63. The grounds of challenge sought to challenge the assessment made by the FtTJ that related to internal relocation. The written grounds of challenge asserted that the judge had erred in law by failing to give adequate reasons for his conclusion that the appellant would be at risk on return to Nigeria should they relocate to another area of the country. The

grounds asserted that there had been no evidence advanced by any of the appellants would suggest the extended family would have any reach outside of their home village as such to find that the risk exists across the whole of Nigeria and that was an error in law. It was further asserted that no findings had been made as to why the appellants would be unable to access protection from the authorities in any area of relocation particularly in Abuja where the act of FGM had been criminalised.

64. The second written ground was that the judge had erred by dealing with each appellant individually and that this had resulted in a flawed conclusion. As the appellants will be returning as a family unit, the decision failed to take into account the protection support they provide to each other.
65. The last point raised was that the judge had found that the female appellants were at risk but it was unclear as to how the judge reached the conclusion that the only risk factor was that of the family and that the vast majority of girls are subject to the practice prior to the age of five. The grounds assert that the tribe is recorded at paragraph 62 were not ones who are known to practice FGM.
66. At the hearing Mr Walker on behalf of the respondent identified factual mis-statements in the grounds. He stated that whilst the grounds appeared to advance the appeal on the basis that the judge erred in law by referring to the tribe and that they were not ones to practice FGM, that ignored the factual basis found by the judge that this was a practice that was family-based rather than tribally based. Furthermore, whilst the grounds made reference to there being no evidence to suggest the family would have any reach outside the home village, and that assertion ignored the evidence of the threatening emails set out at paragraph 60 and 67 which were not challenged by the respondent .
67. After having had the opportunity to consider the bundle of documents Mr Walker also made reference to the problems with the grounds where it was raised that FGM would not be a risk for these particular appellants based on their age and relying on the objective material whereas it was clear from the evidence in the appellant's bundle that the appellant's wife had undergone FGM at 15 and therefore the practice took place over the age of five and contrary to the respondents assertion in the grounds. He submitted that the grounds that had been advanced on behalf of the Secretary of State were no more than a disagreement with the factual findings reached by the judge and that on a clear reading of the decision that the judge had considered all of the points raised and the grounds did not stand up to any close scrutiny when the evidence was read. Thus he did not seek to advance the appeal.
68. Ms Brakaj was in agreement with those matters raised by Mr Walker and also provided to the tribunal the record of proceedings which she submitted demonstrated that the issue of internal relocation was properly

dealt with by the FtTJ As set out in the witness statement of the first appellant and the oral evidence and that Abuja was the only area identified on behalf of the respondent for internal relocation and that the family was there and the first appellant was already in contact with the family and therefore if he moved from the UK where he was known to be, that would trigger the search for him. Ms Brakaj also indicated that the appellant had given evidence relating to sufficiency of protection that he had gone to the local authorities who are unwilling to assist him in this had also been recorded in the decision of the FtTJ who were plainly aware of the relevance of that. She further submitted that the FtTJ looked the specific risk and in the context of the family having undergone FGM at an older age and that the country information did not preclude individual families and how they practised FGM. Thus she submitted all aspects of the evidence were dealt with.

69. In the light of the position taken by the respondent at the hearing, the grounds are no longer not advanced. I have set out above a summary of the factual findings made by the judge in the context of the claim made on behalf of the appellants principally the second and fourth appellants and the risk of FGM to them which the judge found was a real risk upon return to Nigeria. The decision of the FtTJ was a careful, comprehensive, and considered decision which took account of all the evidence and analysed the relevant issues in accordance with that evidence. Consequently, as the grounds are no longer pursued, it must follow that the appeal of the Secretary of State is dismissed and the decision of the FtTJ shall stand.

Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and the decisions stand.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. 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: 29 /4 / 2021

Upper Tribunal Judge Reeds

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.