Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02920/2020**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Decision & Reasons Promulgated**
On the 16th March 2022	**On the 13th April 2022**

Before

UT JUDGE MACLEMAN
DEPUTY UT JUDGE DOYLE

Between

AS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Winter, advocate, instructed by Latta & Co, solicitors
For the Respondent: Mr M Diwnycz, senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and her family, are granted anonymity because of the young age of the appellant's children. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead

members of the public to identify the appellant, her partner, or their children, without that individual's express consent. Failure to comply with this order could amount to a contempt of court.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Stevenson promulgated on 11 May 2021, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 17 February 1978 and is a national of Gambia.

4. The appellant entered the UK on 15 December 2006 as a visitor. On 8 December 2014 she made an unsuccessful application for leave to remain in the UK. On 5 December 2016, the appellant claimed asylum. The respondent refused that application on 2 June 2017. The appellant appealed that decision unsuccessfully; her appeal was dismissed on 26 July 2017

5. The appellant made further representations to the respondent on 21 January 2020, which the respondent treated as a fresh protection claim. The respondent refused the appellant's fresh protection claim on 17 March 2020.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Stevenson ("the Judge") dismissed the appeal against the Respondent's decision.

7. Grounds of appeal were lodged. On 9 November 2021, Upper Tribunal Judge McWilliam gave permission to appeal stating

> 1. The Judge arguably erred in his assessment of the background evidence relied on by the appellant in respect of state protection/risk. Ground 1 is arguable.
>
> 2. Ground two is the weaker of the two grounds. However, permission is granted on all grounds.

The Hearing

8. Mr Winter moved the grounds of appeal. He did not press the second ground of appeal but focused on the first ground of appeal.

9. Mr Winter told us that there were two strands to the appellant's protection claim, the first is that the appellant claims to be at real risk of forced marriage, the second is a claimed risk of FGM to the appellant's children. The focus in the appeal before us was the risk of FGM to the appellant's children.

10. Mr Winter took us to [42] to [46] of the First-tier Tribunal's decision. He told us that although the Judge considered the background materials the Judge did not follow the country guidance case of K and others (FGM) The Gambia CG [2013] UKUT 00062(IAC) and gives no reason to depart from the country guidance. Instead, at [43] of the decision, the Judge finds that background materials say that FGM has been criminalised in Gambia and there have been prosecutions there.

11. Mr Winter told us that the Judge's decision was reached in the belief that the appellant's children are thought to be members of the Serer tribe, rather than the Mandinka tribe. He told us that was a material error of fact, because it is not seriously disputed that the children will be thought to be Mandinka and K and others (FGM) The Gambia CG says there is a higher incidence of FGM in the Mandinka tribe.

12. Mr Winter told us that it is not disputed that the appellant is a victim of FGM, that the appellant's stepdaughter is a victim of FGM, and that the appellant's two daughters are Mandinka. He urged us to set the Judge's decision aside and to substitute our own decision allowing the appeal.

13. For the respondent, Mr Diwnycz told us that the force of the respondent's rule 24 note diminished whilst Mr Winter was addressing us. He conceded that the Judge's decision is tainted by material error of law.

Analysis

14. It is now agreed that the Judge's decision is tainted by material errors of law. The Judge provides a carefully reasoned analysis of the background materials, but he does not take guidance from K and others (FGM) The Gambia CG [2013] UKUT 00062(IAC), nor does he give reasons for departing from the guidance given there by the Upper Tribunal.

15. In R and Others v SSHD (2005) EWCA civ 982 the Court of Appeal endorsed Practice Direction 18.4 which states that any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as a ground for review or appeal on a point of law. The Court of Appeal said that it represented a failure to take a material matter into account.

16. A determinative factor in the Judge's decision is the tribal membership of the appellant's children. The Judge approaches that section of his decision on the basis that the children will be perceived to be members of the Serer tribe, when it is not disputed that the children will be perceived to be Mandinka.

17. The decision is therefore tainted by material error of law. We set it aside. There is sufficient material before us to let us substitute our own decision.

The Agreed Facts

18. The appellant is a Gambian National. In a decision promulgated on 26 July 2017 her appeal against the respondent's decision to refuse to grant international protection was dismissed. At the date that decision was promulgated, the appellant lived with her partner and one daughter, who was born on 6 November 2016.

19. The appellant gave birth to their second daughter on 26 September 2018.

20. When the appellant suffered FGM when she was 7 years old. The appellant's partner has a daughter who remains in Gambia. The appellant and her partner are opposed to the practice of FGM. The appellant's partner's daughter is a victim of FGM.

21. The two daughters of the appellant and her partner are members of the Mandinka tribe. According to UNICEF, the female genital mutilation prevalence rates among the Mandinkas of the Gambia is the highest at over 96%. Some surveys (including the Gambia Committee on Traditional Practices) estimate FGM is prevalent among 100% of the Mandinkas in Gambia.

22. FGM was criminalised in Gambia in 2015, but there is still no reported successful prosecution for contravening that law.

23. There is a real risk that, if returned to Gambia, the appellant's two daughters would have FGM forced on them by extended family and tribe members.

24. The appellant is therefore a refugee as a member of a particular social group.

Humanitarian protection

25. As we find the appellant is a refugee, we cannot consider whether she qualifies for humanitarian protection. Therefore, we find the appellant is not eligible for humanitarian protection.

Human rights

26. We have found the appellant has established a well-founded fear of persecution. By analogy, we find her claim engages article 3 of the Human Rights Convention because her daughters would face a real risk of inhuman or degrading treatment if she were returned to her country of origin.

Article 8 ECHR

27. The appellant cannot meet the requirements of appendix FM of the immigration rules. Because of a combination of her age and the length of time the appellant has been in the UK the appellant cannot meet the requirements of paragraph 276 ADE(1)(i) to (v). To meet the requirements

of paragraph 276ADE(1)(vi), the appellant has to establish that there are very significant obstacles to re-integration into Gambian society.

28. We find that the appellant cannot return to Gambia because she establishes a well-founded fear of persecution for a convention reason. We find that removal from the UK and return to Gambia will breach the appellant's rights on article 3 ECHR grounds. For the same reasons, we find that there are very significant obstacles to the appellant's reintegration into Gambian society. The appellant therefore meets the requirements of paragraph 276 ADE(1)(vi) of the rules.

29. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…"

30. Section 117B of the 2002 Act tells us that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

31. TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 tells us that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1). As the appellant meets the requirements of paragraph 276ADE(1)(vi) of the rules, the respondent's decision must be a breach of his right to respect for private life.

32. This appeal succeeds on article 8 ECHR grounds.

Decision

The decision of the First-tier Tribunal promulgated on 11 May 2021 is tainted by material errors of law and is set aside.

We substitute our own decision.

The appeal is allowed on asylum grounds.

The appellant is not entitled to Humanitarian Protection.

The appeal is allowed on article 3 & 8 ECHR grounds.

Signed Paul Doyle Date 18 March 2022

Deputy Upper Tribunal Judge Doyle