



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05947/2019
(‘T’)**

THE IMMIGRATION ACTS

**Heard at Field House By BTMeet Decision & Reasons Promulgated
Me On the 28 February 2022
On the 2nd February 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**‘AOA’
(ANONYMITY DIRECTION CONTINUED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**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 her or any member of her family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Ms V Easty, Counsel, instructed by Migrant Legal Project
(Cardiff)

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This hearing was listed as a case management review hearing, to manage the future remaking of the appellant’s protection and human rights appeals. However, the respondent now accepts that her refusal of leave to remain breaches the appellant’s right to respect for her family and private life, and that the appeal should be allowed on that basis. On behalf of the respondent, Mr Kotas consented to my giving a decision

allowing the appellant's human rights appeal at the hearing and I gave an oral decision accordingly.

2. In respect of the appellant's protection claim, Mr Kotas has drawn attention in the respondent's position statement dated 20th January 2022 to the case of G v G [2021] UKSC 9. He and Ms Easty were concerned as to whether the appellant's daughters, dependant on the appellant's protection claim, should be treated as having sought protection in their own rights. Ms Easty confirmed that they should. In the circumstances, where the respondent has not had an opportunity to make separate decisions in respect of the appellant's daughters, nor have they had the right of any appeal to the First-tier Tribunal, and having considered paragraph 7.2 of the Senior President's Practice Statement, I regarded it as appropriate to remit remaking of the appellant's protection appeal only to the First-tier Tribunal (as to which both representatives were neutral). In doing so, I do not order any stay of the appellant's protection appeal, nor give any further directions as to what, if any, steps the respondent regards as appropriate to investigate the daughters' separate asylum claims. Any further directions remain a matter for the First-tier Tribunal. The remittal shall involve a complete rehearing of the protection appeal. All aspects of the protection claims must be addressed.

Notice of decision

3. **The appellant's appeal on human rights grounds is upheld.**
4. **As noted in the error of law decision annexed to this decision, the FtT's decision in respect of the protection appeal contained errors of law and was set aside, without preserved findings of fact. The remaking of the appellant's protection appeal is remitted to the First-tier Tribunal for a complete re-hearing.**

Directions to the First-tier Tribunal

5. **The protection appeal alone is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.**
6. **The remitted appeal shall not be heard by First-tier Tribunal Judge Trevaskis.**
7. **The anonymity directions continue to apply.**

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **2nd February 2022**

ANNEX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05947/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House
And via Teams
On 1st September 2021

Decision & Reasons Promulgated
On

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

'AOA'

(ANONYMITY DIRECTION CONTINUED)

Respondent

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

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the respondent: Mr S Galliver-Andrew, instructed by Migrant Legal Project

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 1st September 2021.
2. Both representatives and I attended the hearing via Teams, while the hearing was also open to attend at Field House. The parties did not object

to attending via Teams and I was satisfied that the representatives were able to participate in the hearing.

3. I shall refer to the appellant as the Secretary of State and the respondent as the Claimant, to avoid confusion.
4. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Trevaskis (the 'FtT'), promulgated on 18th November 2019, by which he allowed the Claimant's appeal against the Secretary of State's refusal of her protection claim. The Secretary of State had refused her claim in a decision dated 28th May 2019. The Claimant has an immigration history pre-dating that decision. The Secretary of State refused her earlier human rights application. Her appeal of that refusal was dismissed by a First-tier Tribunal on 10th February 2014. She has also previously claimed asylum. Her asylum claim was first refused, and the First-tier Tribunal dismissed her appeal in a decision promulgated on 30th January 2015.
5. In essence, by the time of the appeal before the FtT, the Claimant's claim had narrowed down to a single issue: whether the Claimant's two minor daughters, born on 5th May 2002 and 15th December 2003, would be at risk of female genital mutilation ('FGM') from the appellant's former husband's family members.

The FtT's decision

6. The FtT heard the evidence from the Claimant and also considered an expert report of Professor Mario Aguilar, whose conclusions he cited at §28. Professor Aguilar expressed the opinion that the appellant's daughters would be at very high risk of FGM in Nigeria, their country of origin. The Claimant was at risk of social exclusion, financial destitution, and the possibility of domestic servitude and trafficking. In Professor Aguilar's view, the police in Nigeria would not assist, and internal relocation would not remove the risks faced by the Claimant and her children.
7. At §§30 to 37, the FtT cited extensive passages from the Secretary of State's country policy and information note ('CPIN'): Nigeria: female genital mutilation - version 2.0. These excerpts included references to the risk to women and girls of FGM; state protection available; and the viability of internal relocation.
8. At §58, the FtT considered the earlier FtT decision of 2015 (Judge Barcello). The FtT outlined the principles of the well-known authority of Devaseelan v SSHD [2002] UKIAT 00702. Critically at §61, having noted that the Secretary of State accepts that FGM is practised within the Claimant's tribe, which weighed in favour of her credibility, at §62, the FtT went on to consider that Judge Barcello had rejected her earlier claim, on the basis that the Claimant's daughters would have been subjected to FGM before they left Nigeria, had they been at risk of FGM and would therefore not be at risk if they returned now. The FtT continued:

“62. I have considered the more recent background information published since the earlier decision, in which I find evidence that the practice of FGM is not

restricted to the age range found by the earlier judge. I find that both the appellant's daughters who are unmarried are risk of FGM if they return to Nigeria.

63. The respondent claims that the evidence shows that the practice of FGM in Nigeria is in decline. Whilst that may be the case, I am still satisfied on the evidence presented to me and to the required standard that the practice is still sufficiently widespread to amount to a real risk. It is a common practice among members of the Yoruba clan. It is plausible that the practice is one which is adopted by the appellant's ex-husband's family. I therefore find that this is evidence that the appellant's children are at risk of FGM in Nigeria."

9. At §§64 to 68, the FtT considered sufficiency of protection and the viability of internal relocation. The FtT noted the cultural reluctance of the Nigerian police to intervene. The Claimant and her children would have no expectation of family support, family protection, accommodation or promise of work.

10. The FtT therefore allowed the Claimant's appeal.

The grounds of appeal and grant of permission

11. The Secretary of State lodged grounds of appeal, which I now summarise.

12. First, the FtT had erred in failing to take the findings of Judge Barcello as his starting point. In particular, Judge Barcello had made extensive adverse credibility findings about the Claimant. The FtT had given insufficient reasons at §§62 and 63 for departing from those findings.

13. Second, the FtT had materially erred in finding that the Claimant would not have a sufficiency of protection. In particular, the FtT had failed to apply the standards in Horvath v SSHD [2000] UK HL 37. This was in the context that Nigerian law prohibited FGM.

14. First-tier Tribunal Judge Simpson granted permission on 15th January 2020. The grant of permission was not limited in its scope.

The hearing before me

The issues

15. I clarified, when discussing the issues of appeal with the representatives, that it was not suggested that the Claimant's children had suffered FGM yet. Mr Galliver-Andrew was concerned that this might have been suggested, because of the way in which submissions on behalf of the Secretary of State had been written. However, Ms Isherwood accepted, and it was clear to me from the FtT's decision and the grounds of appeal, that there was no suggestion that the children were already the victims of FGM. The misunderstanding arose because while Mr Galliver-Andrew had the written submissions, he had not seen the grounds of appeal.

The Secretary of State's submissions

16. Ms Isherwood reiterated that the FtT's analysis of the Claimant's credibility was inadequately reasoned or explained. She referred to §§42(v) to (vii) of Judge Barcello's decision. Put simply, the age at which the Claimant's children would be at risk of FGM was not the sole reason for reaching adverse credibility findings about the Claimant; or the sole risk factor relating to the children on their return to Nigeria:

"42(v) At A1-2(R) and B8(R) two opportunities are provided for the appellant to raise her claim in respect of fears that her daughters will be subjected to FGM. On neither occasion does she do so. I reject her account as to why it does not appear in the statement in accordance with my comments at §42(i). This, I would expect to be something she would be anxious to advise her solicitor of if it were a legitimate concern. Equally, when provided an opportunity by the respondent to state why she could not go back to Nigeria, I would expect it to be raised.

42(vi) In respect of her FGM claim, her account simply does not bear scrutiny. She sought to suggest that her husband and his family would force the children to have FGM. However, the children lived with the husband from birth aged five and 10 years of age without any attempt to perform the ceremony. The objective evidence suggests that most FGM takes place before the age of one year old. This in itself does not determine the issue against the appellant as it is also clear that the ceremony can also be carried out until after the birth of the first child. However, that was not the explanation of the appellant. When questioned about this issue by Mr Howells, she stated that the reason the FGM did not take place was because her eldest daughter had been sick from the time of her birth until they were planning to leave the country. In her full interview at C35(R) she suggested they had not been circumcised because she did not accept it. I find her account given in evidence incredible. Had the husband wished to have the girls circumcised, there have been opportunities to do so, both when the appellant was living with him and when she lived in Lagos from October 2010 until July 2012, leaving the children in the sole care of their father other than those occasions when she visited. From at least February 2012, the appellant's husband knew (and had given permission) that the appellant intended to take the children to live in the United Kingdom.

42(vii) Further in respect of the FGM claim I do not accept the suggestion that the husband's family, were they (contrary to my findings in the above paragraph) intent upon the circumcision being completed, have any such influence to force it to take place. According to the appellant her former husband has now left the country. Her own family reside in Lagos, rather than Ibadan where the husband's family live. There is no evidence to support the view that the husband's family could enforce such a practice in Lagos, should that be where the appellant resided, particularly with the ex-husband out of the country."

17. Ms Isherwood continued that the FtT analysis simply failed to engage with Judge Barcello's broader credibility findings. Instead, the FtT had stated at §54:

"It is submitted by the respondent that the appellant's claim is not credible because it contains inconsistencies; those which are relied upon by the respondent in this decision are set out in full in the reasons for refusal."

18. The FtT had erred in basing his conclusion on the background evidence of the risk of FGM (tribal prevalence and ages of victims), without engaging with or explaining the lack of plausibility or credibility identified by Judge Barcello (extended periods of time spent by the children solely in their

fathers' care; and lack of influence of the ex-husband's family in Lagos). The FtT's lack of engagement in evidence relating to the Claimant's children's circumstances was exemplified in his analysis at §63:

"The respondent claims that the evidence shows that the practice of FGM in Nigeria is in decline. Whilst that may be the case, I am still satisfied on the evidence presented to me and to the required standard that the practice is still sufficiently widespread to amount to a real risk. It is common practice among members of the Yoruba clan."

19. The FtT did not explain why, if the practice of FGM were declining, the fact of widespread practice translated to that risk crystallizing in the cases of the Claimant's children.
20. Moreover, bearing in mind Judge Barcello's findings already referred to, there was simply no explanation by the FtT for his finding at §65 that the Claimant and her children would be unable to look to her family for protection from FGM; or for financial support.

The Claimant's response

21. In response, Mr Galliver-Andrew urged me to consider two points. First, the appeal had resolved an assessment not so much of the Claimant's credibility about her own circumstances but in relation to her children. The risk could be objectively sustained, even if the Claimant was not credible.
22. Mr Galliver-Andrew went into detail in relation to the structure of the FtT's decision, which had recited at length the evidence. It had been carefully structured, dealing with the law from §3; the nature of the claim from §8; a discussion of credibility; risk on return; and the evidence of Professor Aguilar at §28; a social worker assessment report at §29; and a lengthy recitation of the evidence at §30.
23. Professor Aguilar had referred to the high risk to the children. The FtT was unarguably entitled to consider this, particularly the lack of intervention by the Nigerian police and the social exclusion that the Claimant would face. It was important not to take particular phrases or analysis in isolation. In particular, the FtT had considered the Claimant's delay in claiming asylum at §53; the credibility indicators in the Secretary of State's own policy at §57; and had correctly reminded himself of the principles of Devaseelan at §58.
24. The FtT had also correctly identified the core of the appeal, namely the risk of FGM by the Claimant's ex-husband's family, at §60. His analysis and conclusions at §§61 to 69 were unarguably open to the FtT reach. They were, by way of example, emphasised by the independent evidence of a social worker who had referred to harm to the children, if returned to Nigeria.

Discussion and conclusions

25. I am conscious that any assessment of credibility is a nuanced one and that the FtT will have had the benefit of considering all of the evidence before him in detail, in a way that I have not.
26. I am also conscious that it is important that I do not substitute my view for what I would have decided for what the FtT has decided. In that context, it is only appropriate to set aside the FtT's decision where there has been a material error of law.
27. It is also important to consider the FtT's decision in the round, and not focus on isolated phrases or analysis.
28. I now turn to the question of whether the FtT did materially err, particularly in relation to his analysis and explanation for taking Judge Barcello's findings as his starting point, not regarding them as a straitjacket but departing from them on a principled and properly reasoned basis (see: R (MW) v SSHD (Fast track appeal: Devaseelan guidelines) [2019] UKUT 00411 (IAC)).
29. The FtT structured his decision clearly and set out the evidence at length. The practical difficulty with it is that it largely recites the evidence, rather than analysing and explaining the conclusions that are reached. Professor Aguilar's report is referred to and summarised at §28. The social worker assessment is referred to and very briefly summarised at §29. There is then a very lengthy recitation of the extract of the CPIN at §§29 to 37, running to some 15 pages. In contrast, there follows some brief analysis at §53, which deals with the Claimant's delay in bringing her asylum claim. The remainder of the analysis, findings and conclusions are at §§60 to 68, of approximately a page in length. While their length alone does not present any problem (I highlight it simply to contrast it with the recitation of evidence), what is problematic is the lack of engagement with Judge Barcello's analysis that even if FGM is prevalent within the Yoruba tribe and the Nigerian police are unwilling to intervene, the Claimant's specific circumstances: the Claimant is opposed to FGM; her ex-husband is no longer in Nigeria; and her ex-husband's family, based in Ibadan, would not be able to pursue FGM were the Claimant to return to Lagos, where she and her family lived.
30. I accept the force of Ms Isherwood's criticism that while the Claimant's alleged fear may be consistent with general background evidence, this did not take away the need for the FtT to explain and resolve the adverse credibility concerns, which related directly to personal (as opposed to generic) risk.
31. Moreover, while the FtT concludes that the Claimant would be unable to get support from family members, a job or accommodation (§§65 to 67), it is unclear of why he reached those conclusions, beyond the statement of them, when Judge Barcello had concluded that it was viable for the Claimant to return to Lagos, where she had lived. It may be that the FtT's conclusions are linked to Dr Aguilar's evidence, but if so, that link remains unexplained and, in my view, inadequately analysed.

32. The core error in the FtT's decision is that while there are clearly stated conclusions, the analysis and route by which those conclusions are reached are not sufficiently clear. Such clarity is particularly important when, taking as his starting point, the FtT had before him Judge Barcello's decision. He was not bound by that decision but needed to explain why it was appropriate to depart from those earlier findings.

Decision on error of law

33. In my view there are material errors here and I must set the FtT's decision aside, without preserved findings.

Disposal

34. With reference to paragraph 7.2 of the Senior President's Practice Statement, despite credibility being the core issue, the evidence and disputed facts are very narrow, if important. Given the limited scope of the disputed issues, it is appropriate that the Upper Tribunal remakes the FtT's decision which has been set aside.

Directions

35. The following directions shall apply to the future conduct of this appeal:

35.1. The Resumed Hearing will be listed via Teams **for 3 hours**, without an interpreter, on the first open date, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

35.2 The Claimant has leave to apply to adduce any additional evidence on which she seeks to rely, by way of update since the last evidence in relation to the protection claim (there is no human rights appeal). For the avoidance of doubt, the Secretary of State is not obliged to consent to any "new matter" being considered.

35.2 The Claimant shall no later than **4 PM, 14 days prior to the Resumed Hearing**, file with the Upper Tribunal and served upon the Secretary of State's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which she intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

35.3 The Secretary of State shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the Claimant's evidence; provided the same is filed no later than **4 PM, 7 days prior to the Resumed Hearing**.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside. The Upper Tribunal shall remake the decision.

The anonymity directions continue to apply

Signed J. Keith

Date: 6th September 2021

Upper Tribunal Judge Keith