



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

Appeal Numbers: HU/11153/2017  
HU/03319/2018  
HU/03322/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 25 January 2019**

**Decision & Reasons  
Promulgated**

**On 07 February 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**(1) MA (NIGERIA)  
(2) TO (NIGERIA)  
(3) IA (NIGERIA)  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr Aborisade, Partner, OA Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appeal from the decision of the First-tier Tribunal (Judge Paul sitting at Taylor House on 29 June 2018) dismissing their appeals against the decision of the Secretary of State for the Home Department ("the Department") to refuse their human rights claims in which the central question was whether it was reasonable to expect the third

appellant, who had been born in the UK in September 2010, to leave the UK with her parents, neither of whom had an independent right to remain.

2. The First-tier Tribunal did not make an anonymity direction. However, since the sole issue in this appeal to the Upper Tribunal is whether the Judge erred in law in his disposal of a new allegation made at the hearing that the third appellant faced a risk of FGM in Nigeria, I consider that an anonymity direction is appropriate for these proceedings in the Upper Tribunal in order to protect the third appellant from harmful publicity.

### **Relevant Background Facts**

3. The first appellant and the second appellant are partners, and the third appellant is their daughter. The parents are overstayers. In early 2016 the parents sought to regularise their status and that of their child by making an application for leave to remain outside the Rules. The applications were refused without a right of appeal, but following an application for a judicial review, the Department agreed to reconsider its decision, and the applications were refused upon reconsideration on 12 September 2017 and 16 January 2018 respectively, in both cases with a right of appeal. The refusal of 12 September 2017 related to the first appellant, and the refusal of 16 January 2018 related to the second and third appellants.
4. The Department's case in respect of the third appellant was that she was aged 5 years and 4 months at the date of application, and so she did not come within the scope of Rule 276ADE(1)(iv). On the topic of the child's welfare and well-being, the Department asserted that family and friends were financially supporting the family in the UK, and there was nothing to prevent them from continuing to do this on the family's return to Nigeria. It was accepted that the best interests of a child whose parents were facing removal from the UK was best served by that child remaining with her parents and being removed with them. The mother had not provided any evidence that indicated that she would not be able to maintain her daughter in Nigeria, or that she would be unable to provide for her safety and welfare. The mother raised the fact that she suffered from high blood pressure. But this condition did not appear to be life-threatening, and it was not an illness of the type of severity that would found a claim to remain in the UK.
5. OA Solicitors settled the grounds of appeal to the First-tier Tribunal. These grounds ran to three closely-typed pages. They pleaded that returning the family to Nigeria would disrupt the third appellant's education. A good standard of education was not as accessible as it was in the UK unless an extortionate amount of money was paid for education at a private school.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

6. Before Judge Paul, the appellants were represented by Ms Sobande of OA Solicitors, but there was no Presenting Officer.

7. In advance of the hearing on 22 June 2018, the appellant's solicitors filed with the Tribunal a bundle of documents containing witness statements from the parents. In his witness statement dated 19 June 2018, the first appellant said that returning him and his family to Nigeria would expose them to hardship and destitution as he would not be able to return to his family house, and his wife had no family house to return to. This would also jeopardise their safety and security. In her witness statement, dated 19 June 2018, the second appellant said the same. It would not be possible for them to continue receiving in Nigeria the help and assistance that they had been receiving from family and friends here.
8. In his subsequent decision, Judge Paul gave an account of the evidence given by the parents at paragraphs [8]-[10] and he recorded the thrust of the closing submissions of Ms Sobande at paragraphs [11]-[15].
9. At paragraph [10] the Judge recorded the following evidence given orally by the second appellant:

"This lady, when she gave evidence, also said that if her daughter was taken back to Nigeria she might well be circumcised. She described this as being a consequence of the community that she and her husband came from, and that circumcision would be the inevitable consequence of her daughter having to live in Nigeria."
10. The Judge set out his findings at paragraphs [16]-[22]. These included the following findings at paragraph [19]:

"However, there is nothing in the evidence before me to suggest that the third appellant - who is a young, bright and keen child - will suffer as a result of leaving the UK. Young children regularly move around the world, as part of the modern global workplace. In this case, the third appellant - who clearly has Nigerian parents who are, for all practical purposes, embedded within the Nigerian community in the UK by reference to their church activities and family friends - would simply be replicating that life in Nigeria. No evidence was advanced which demonstrated that the first and second appellants' living conditions would be significantly worse in Nigeria because, on their own case, they were dependent upon handouts here, and in Nigeria would be able to work and support their daughter."
11. At paragraph [21], he observed that while it was correct to say that wrongdoing should not be inflicted on the child, the family unit would be returning as a whole in circumstances where there was no evidence to show that their living conditions - both for the adult appellants, or the third appellant - would be any worse.

### **The Reasons for the Initial Refusal of Permission to Appeal**

12. On 10 October 2018 First-tier Tribunal Judge Lambert refused permission to appeal, finding *inter alia* as follows:

“The decision displays adequate evidence-based reasoning. The grounds are disingenuous in arguing failure to address the safety of the child and the appellant’s evidence that there was a risk of FGM being inflicted on her in Nigeria. If safety were a real issue, it is for the appellant to make a claim or appeal on that basis. There is no asylum or Article 3 claim or ground of appeal, and there is no record of any argument on this basis in the skeleton argument or in the ROP.”

### **The Reasons for the Eventual Grant of Permission to Appeal**

13. Following a renewed application for permission to appeal to the Upper Tribunal, on 10 December 2018 Upper Tribunal Judge Martin granted permission to appeal for the following reasons:

“It is arguable that the Judge erred in failing to deal with the claim that the daughter would be subjected to FGM if returned when considering whether it was reasonable for her to return with her parents.”

### **The Hearing in the Upper Tribunal**

14. At the hearing before me to determine whether an error of law was made out, Mr Aborisade agreed that the FGM allegation had not been foreshadowed in any way. It was first made by the mother when she gave her oral evidence. However, the allegation having been made, it was incumbent on the Judge, he submitted, to analyse the evidence and to make a specific finding on the allegation in his subsequent decision. Alternatively, The Judge should have remitted the matter to the Secretary of State for consideration in accordance with section 55 of the 2009 Act.
15. I put to Mr Aborisade that the FGM allegation constituted a new matter for the purposes of section 85(5) of the 2002 Act, and that accordingly the First-tier Tribunal Judge, had no jurisdiction to consider it, as the Secretary of State had not given the First-tier Tribunal consent to do so. Mr Aborisade’s initial response was to the effect that the FGM allegation was not an allegation of serious harm which engaged Article 3 ECHR. Ms Everett interjected that it was the Department’s policy to treat allegations of FGM as engaging Article 3 ECHR. Mr Aborisade submitted that nonetheless the Judge ought to have addressed the FGM allegation as part of his assessment of the claim under Article 8 EHCR.
16. Having heard from the Legal Representatives, I ruled that no error of law was made out. I give my reasons for so finding orally in short form, with extended written reasons to follow.

### **Discussion**

17. The Judge clearly did not ignore the oral evidence of the mother about the asserted risk of FGM on return to Nigeria, as the Judge highlighted this oral evidence in his account of the proceedings.

18. Although the Judge did not specifically refer to the FGM allegation when making his findings, it would be unreasonable to infer that the findings he made in paragraph [19] do not cover the FGM allegation. In short, when the Judge says that there is nothing in the evidence before him to suggest that the third appellant will suffer as a result of leaving the UK, this should be taken as including a finding that there is no credible risk of her suffering female circumcision.
19. I accept that there is no overt analysis of the second appellant's oral evidence on this issue, but I do not consider that an absence of analysis is material to the outcome. The FGM allegation was made at the hearing without prior warning, and without there being a shred of supporting evidence for it. The allegation was not even supported by the first appellant, who had already given his evidence without raising the FGM allegation. Under those circumstances, it is difficult to see how any reasonable Tribunal properly directed could have done anything else other than attach no weight to this late and unsupported claim.
20. An additional consideration is that the Judge does not record Ms Sobande as relying on the FGM allegation in her closing submissions as fortifying the case that it would be unreasonable to expect the third appellant to return to Nigeria with her parents. On the face of it, she ignored the allegation, which would be consistent with her recognising that procedurally it could not be relied on in the current appeal (see below).
21. Alternatively, if the Judge erred in failing to explain why the FGM allegation did not make it unreasonable to expect the third appellant to return to Nigeria with her parents, I do not consider that his error was material, having regard to sections 85(5) and (6) of the 2002 Act.
22. The general rule, as set out in 85(4), is that on an appeal against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision. But under 85(5) the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so. A new matter is defined in 85(6). A matter is a new matter if (a) it constitutes a ground of appeal of a kind listed in section 84, and (b) the Secretary of State has not previously considered the matter in the context of - (i) the decision mentioned in section 82(1), or (ii) a statement made by the appellant under section 120.
23. The allegation that the third appellant might face a risk of female circumcision on return to Nigeria is a world away from an allegation that her education will be disrupted; or that the family will face destitution and hardship for economic reasons. As submitted by Ms Everett, the mother's allegation that her daughter faced a risk of FGM was an allegation that her daughter faced a real risk of serious harm, and therefore it disclosed an asylum claim or request for international protection which, if refused, would afford the third appellant a right of appeal under section 82(2)(a).

She would have a right of appeal on the ground that her removal from the UK would breach the UK's obligations under the Refugee Convention. Alternatively and in any event, Rule 327 defines an asylum applicant as a person who makes a request to be recognised as a refugee under the Refugee Convention *or who otherwise makes a request for international protection*.

24. It is no answer to say that because the third appellant was already pursuing a Human Rights appeal, the FGM allegation did not constitute a new matter so far as a putative Human Rights claim under Article 3 ECHR was concerned. The Secretary of State had not previously considered the FGM allegation when deciding the application and it had not been raised in a statement under section 120.
25. Thus, the Judge had no jurisdiction to consider the FGM allegation which had not been relied on in the application or in the grounds of appeal; and in respect of which the consent of the Secretary of State had neither been sought nor obtained.
26. As a result, the Judge did not err in law in not explicitly addressing the FGM allegation when assessing whether it would be reasonable to expect the third appellant to return with her parents to Nigeria.

### **Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

This appeal to the Upper Tribunal is dismissed.

### **Direction Regarding Anonymity**

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 or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 26 January 2019

Deputy Upper Tribunal Judge Monson