IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001331
First-tier Tribunal Nos:
PA/52851/2020
IA/00787/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS KMA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Moksud (Counsel)
For the Respondent: Mr McVeety (Senior Home Office Presenting Officer)

Heard at Manchester Civil Justice Centre on 14th June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge J Austin, promulgated on 7th October 2021 following a hearing at Manchester Piccadilly on 28th September 2021. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Nigeria, a female, and was born on 10th September 1980. She appeals against the decision of the Respondent dated 9th December 2020 refusing her asylum and protection in the UK on the basis that she is the mother of two children, a boy and a girl, a single mother, and has a well-founded fear of persecution on account of the risk of female genital mutilation (FGM) to her young daughter. She also fears her ex-husband's family in Nigeria.

The Appellant's Claim

3. The Appellant arrived in the UK on 27th July 2016, and alleged that she comes from a strict Muslim family, living in Lagos in Nigeria. She had been granted a multiple visitor visa and had travelled with her partner and her son on a holiday visit. Her partner is by the name of Ibrahim Akinja. Her son was born on 12th June 2014, prior to her coming to the UK in 2016. He was now aged 7 years. On 13th February 2017 the Appellant was served with a RED.0001 form and in 2017 she gave birth to a daughter, a German national through her father, following a brief relationship with the Appellant. When the Appellant's application on 10th October 2018 for a non-EEA family member residence card was refused she on 11th April 2019 applied for asylum. The basis of the claim is the risk of FGM to her daughter, a German national born in the UK since the Appellant's arrival. She alleges that due to the family pressure on her to have FGM carried out on her daughter upon return she fears persecution.

The Judge's Findings

4. In a short judgment, where the Respondent was not represented, the judge heard the evidence of the Appellant and concluded that, "The Appellant was credible when saying that her own mother had summoned her back to Nigeria so that FGM could be carried out on the new daughter" (paragraph 33). The judge held that the Appellant would be returning to Nigeria as a vulnerable single mother of two young children with no experience of any area other than Lagos, and would face language issues. The background evidence confirmed that the police will not interfere in family arguments over FGM (paragraph 34). Therefore, there were "significant obstacles to her return to Nigeria under section 276ADE" (paragraph 35). The judge concluded that, "the Appellant is a Nigerian Muslim from a strict Muslim background" (paragraph 39). She also held that she would accept that the Appellant had been "in an abusive relationship and sought a way of leaving it by coming to the UK with her husband and then refusing to return to Nigeria with him" (paragraph 40). She went on to hold that, "I accept the Appellant's account that as a young person she too was subjected to FGM" (paragraph 41). In short, the judge concluded that "the Appellant (was) a credible witness" (paragraph 42). This is because "She was open and direct in her evidence, stating that she had always hoped to remain in the UK following her holiday visit with her husband and son, and in refusing to return to Nigeria with him to escape from a violent and abusive relationship" (paragraph 42).

5. The appeal was allowed.

Grounds of Application

6. The grounds of application state that the judge allowed the appeal under both asylum and humanitarian protection grounds, even though the claim under the Refugee Convention had not been made. The judge also made a decision based on her own perception of FGM rather than the objective evidence. Further, the judge accepted the Appellant had undergone FGM without evidence. Fourth, that the judge did not adequately address the risk on return and internal relocation. Fifth, the judge failed to resolve the background information regarding the partner's entry clearance.

7. On 7th December 2021 permission to appeal was granted by the First-tier Tribunal specifically on the basis that the judge erred in allowing the appeal both on asylum and humanitarian protection grounds, when the asylum claim had not been raised. Furthermore, it was unclear how she reached her conclusions on there being a risk on return, and if so from whom, and why, without proper reasoning being given.

Submissions

8. At the hearing before me on 14th June 2023 Mr McVeety submitted that the decision was not sustainable and should be set aside for the following reasons.

9. First, the judge had allowed the appeal on the basis of the Refugee Convention when it was not open to her to do so.

10. Second, the judge referred to the country information, "Nigeria – Female genital mutilation" (August 2019), which makes clear that although FGM is practised on girls up to the age of 5, "after that the risk is low" (paragraph 44). If that was the case, then the judge had to explain why in this particular case the Appellant's child was at risk of FGM, from whom, and why. The judge had referred (at paragraph 45) to the August 2019 report which makes clear (at paragraph 2.4.16) that "decision makers need to consider each case on its facts" and yet there had been a broad brush approach adopted here without specific consideration being given to the facts of this case. This was important because there was no evidence of anything untoward occurring since 2017. No one from the Appellant's family had contacted her. She had not been threatened in any way. In any event, the Appellant did not complain to the authorities, which one would have most naturally have expected her to do. In addition to this, FGM was very much in decline in that country.

11. There was also a concern in relation to the Appellant's own credibility. During her asylum interview, she had repeatedly been asked whether she had been subjected to FGM herself. She had declined to confirm that this was so and had prevaricated between one answer to another, which was all the more reason for why the judge should have given an explanation for why it was felt that her statement at the hearing that she had been subjected to FGM, was a credible one.

12. Given that the refusal letter (at paragraph 28) emphasises how contradictory the Appellant's evidence in relation to her own FGM was, it was not enough for the judge to say that no medical evidence was needed in regard to FGM, because whereas that was clearly true, plausible evidence nevertheless had to be tendered.

13. Thirdly, Mr McVeety submitted that there was a big question mark as to whether the Appellant did indeed come from a "strict Muslim family" (at paragraph 39) as the judge had found because there are numerous letters in support of the Appellant from Christian churches, but not a single letter from a mosque despite the Appellant claiming to be a Muslim woman. There was every reason to suspect that she was indeed a Christian lady. In fact, if one looks at the letter from the pastor (at pages 7 to 8 of the Appellant's bundle) he refers to her having been "integrated and entrenched in the community" which is a far cry from her claim that she is from a "strict Muslim family".

14. Finally, the judge does not even consider why the Appellant would not be able to get sufficiency of protection in Nigeria upon return. It is not clear how she is regarded as a credible witness. It is not clear why she is in a special category. It is not clear why it is deemed that she is giving consistent testimony.

15. For his part, Mr Moksud submitted that the letters from the churches do not say that the Appellant has converted to Christianity. What they are addressing is the fact that the Appellant, being in an impecunious state, has been frequenting churches for food (see also page 70 of the Appellant's bundle). None of the people from Nigeria who are writing in support of her have stated that she is a Christian. She was a woman from the Yoruba tribe in Lagos. Her previous husband was "Ibrahim Amusa" and the judge had drawn attention to the well established case of **Kaja [1995] Imm AR** which had established that a decision maker can conclude which evidence was certain, which was probably true, and which they could attach some degree of credence to. This is what the judge had done. Second, the fact that the Refugee Convention had been mentioned was an error by the judge but not one that would vitiate the ultimate decision. Third, the Respondent had no evidence that the Appellant was with her partner in the UK. Fourth, the Appellant was under no obligation to provide evidence that she herself had been subjected to FGM. Fifth, the judge did address the existence of "sufficiency of protection" (at paragraph 47) and had concluded that internal relocation would not be available to the Appellant upon return.

16. In reply, Mr McVeety submitted that, although paragraph 45 refers to the August 2019 Country Information Report, the judge does not explain why there is no sufficiency of protection available to the Appellant when what the report leaves open is the question of sufficiency of protection being available. The report is clear (at paragraph 2.4.17) that "it is still necessary to consider whether the particular person will face a real risk of serious harm sufficient to qualify for Humanitarian Protection". The judge also had not considered why the Appellant's family would be so powerful as to be able to track her down.

Error of Law

17. I am satisfied that the making of the decision by the judge did involve the making of an error of law, such that the decision falls to be set aside. My reasons are as follows. First, in her asylum interview, the Appellant had repeatedly been asked whether she had been subjected to FGM and she had failed to confirm that that was the case. In the circumstances, whereas medical evidence is clearly not needed, the fact that the Appellant had contradicted herself in her own evidence in relation to her own case, was something that the judge had to specifically address, before coming to the conclusion that she was a credible witness.

18. Second, it is not enough to say that the Appellant "came from a heavily traditional Muslim family", where "the practice of FGM was widespread in her group" (at paragraph 25). It was still necessary to establish where the risk of persecution, in the form of forced FGM came from.

19. Third, the judge erred in her finding that "the Appellant was credible when saying that her own mother had summoned her back to Nigeria so that FGM could be carried out on the new daughter". This is because the credibility issue had been raised by the Respondent, and the judge was wrong to conclude that this "was not with force because the Appellant had first attempted to regularise her situation by applying for residence and only when refused had she applied for asylum" (paragraph 33). If anything, the opposite is the case. It is because the Appellant's application for a residence permit had been refused, that she had then sought to apply for asylum.

20. Fourth, the finding by the judge that, "I accept the Appellant's evidence that she was in an abusive relationship and sought a way of leaving it by coming to the UK with her husband and then refusing to return to Nigeria with him" (paragraph 40) needed a fuller explanation as it is not inconceivable that precisely this could happen where the parties are not in an abusive relationship.

21. Finally, the Appellant's interview record threw up a number of inconsistencies that really needed proper examination. For example, the first time that the Appellant is asked why she is claiming asylum in the UK (at Q.26) she replies "The reason is my life is in danger ... my ex-husband will force me to marry him". When she is asked who she fears she states "My family and my ex-husband" (Q.27). Even more significantly, when she is asked whether she herself had been subjected to FGM (Q.51) she replies "I don't know, I was a baby". The questioner continues with the question, "Did your mother tell you if you underwent FGM procedure?" (Q.52). She replies, "If I ask her she would tell me: don't ask". The questioner persists with the question whether she was unsure about having undergone an FGM procedure (Q.53) and she replies that she was a baby, had not been born in a hospital, "I was born in a traditional place". What is even more significant is the question as to, "Have all your female family members had this procedure?" (Q.54), to which she replies, "I can't ask them anything. I don't know because no one listen to me and just say: do this, do that".

Decision

22. The decision of the First-tier Tribunal involved the making of an error of law, such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed and remitted back to the First-tier Tribunal to be determined *de novo*, by a judge other than Judge Austin.

Satvinder S. Juss

Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

2nd December 2023