



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/03312/2013

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 15 July 2013

Determination Sent  
On 30 September 2013

Before

MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE CLIVE LANE

Between

MAM SAINY EFFICENY NJIE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Miss M Anderson, Immigration Legal Advice Centre  
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant, Mam Sainy Efficeny Njie, was born on 1 September 1990. She entered the United Kingdom as a student on 28 September 2009. She subsequently submitted three applications for further leave to remain as a student (on 27 August

2010, 26 October 2010 and 19 January 2011 respectively) which were refused. She claimed asylum on 11 April 2011. On 10 May 2011, a decision was made to refuse the appellant's application for asylum and to remove her from the United Kingdom. The appellant appealed to the First-tier Tribunal (Judge Hemingway) which, in a determination promulgated on 2 September 2011, dismissed the appeal. Permission to appeal to the Upper Tribunal was refused. The appellant was detained and served with removal directions.

2. The appellant subsequently made an application for judicial review and, on 29 February 2012, the respondent decided to treat further submissions made by the appellant as a fresh claim for asylum. That fresh claim was refused by the respondent in a decision dated 18 March 2013. On the same date, a decision was made to remove the appellant from the United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed against that decision to the First-tier Tribunal (Judge Birkby) which, in a determination promulgated on 22 May 2013, dismissed the appeal on asylum and human rights grounds but allowed it to the limited extent that the decision to remove under Section 47 be remitted to the respondent for reconsideration. The appellant appealed to the Upper Tribunal which granted permission to appeal on 11 June 2013.
3. The grounds of appeal are brief:

“The Immigration Judge has assessed the appellant's evidence (namely the report of Dr Lord and the GAMCOTRAP report) using too a high a standard of proof. His reasoning at paragraph 49 of the appeal determination is indicative of a higher standard than the established 'reasonable degree of likelihood' test. The report from Dr Lord was also not considered to the full and correct extent.

The Immigration Judge failed to consider Miss Fishwick's oral submissions regarding the future risk the appellant faces by virtue of the tribal scarification marks on her chest and back. These marks provide a very clear visual marker to anyone viewing them that the appellant is Mandinka, even if it is not accepted that she is ethnically so. These marks put her at future risk of FGM [female genital mutilation] as she would be perceived to be a Mandinka, affecting her future marriage prospects and overall quality of life.”

4. Granting permission, Judge J M Lewis wrote:

“From the judge's Record of Proceedings this submission [i.e. that made by Miss Fishwick - see above] seems to have been made. At paragraph 50 the judge did not accept that the appellant's scars were Mandinka scars. At paragraph 51 he adopted the findings of his predecessor Judge Hemingway, including specifically those at paragraph 44 to similar effect. However, it does seem that he did not go on to consider whether, whatever the nature and source of the scars, they were sufficient to place the appellant at real risk. It is arguable that this is an error of law. Permission to appeal is granted.”

### Judge Birkby's Determination

5. Judge Birkby at [17] noted that the appellant claimed that:

“If she were returned to Gambia she would face mistreatment as she would be forced to undergo female genital mutilation (FGM) and she would be forced into a marriage and to change her Christian religion to that of Muslim. The appellant’s claim was that she is of Woloff ethnicity and she is a Christian. Her father was also a Woloff Christian. He had a relationship with the appellant’s birth mother when he lived in Lower River Division. The appellant’s mother’s family disapproved as they were Mandinkan Muslims. They arranged for the appellant’s mother to give up the appellant at birth to her father. Her father returned to live in the Western Division.”

When she was about 17 years of age, the appellant had re-established contact with her birth mother and began to visit her during the holidays. The appellant had claimed that, in the summer of 2009, she was forcibly marked with Mandinkan scars on her body “by an old lady” and told by her mother that she would be forced to marry a Mandinkan man. The appellant was also told that she would have to undergo FGM. The appellant’s father “came to collect her and was angry when he saw the marks on [the appellant’s] chest” [22]. However, the appellant and her father were told that the appellant’s birth mother’s uncle (Waa Juwara) was “a political figure who was friends with the Gambian President. He would make her mother’s wishes happen.” Subsequently, the police came looking for the appellant in order to compel her to comply with her birth mothers wishes. By that time, however, the appellant had already left using her own passport to study in the United Kingdom.

6. Following the principles set out in the case of Devaseelan [2004] UKIAT 000282, at [46] Judge Birkby adopted Judge Hemingway’s findings as the basis for his own analysis of the evidence. He noted that Judge Hemingway had been “unable to accept that the appellant has provided a truthful account of events in Gambia.” At [34], Judge Birkby quoted in full Judge Hemingway’s summary of his findings of fact:

- “(a) I find that the appellant is a national of Gambia. This had been accepted by the respondent.
- (b) I find that the appellant is of Woloff ethnicity. I find she is not of mixed Woloff and Mandinka ethnicity.
- (c) I find the appellant does not have a mother who is a member of the Mandinka tribe. I do not believe that, when she was aged 17, she came into contact with her real mother.
- (d) I find that the appellant has not been threatened with FGM. This is not something practised by the Woloff tribe and I find she has not come under the influence of the Mandinka tribe.
- (e) I find that the appellant has not been threatened with forced marriage.

- (f) I find that when the appellant came to the UK she was not fleeing for her safety in the Gambia. Had she been she would not have willingly returned to that country as she did.
- (g) I find that the appellant was motivated to come to the UK for the purposes of study which she has subsequently decided, for reasons unconnected with her personal safety, and she would prefer to remain in the UK.
- (h) I find the appellant does live with her aunt as is indicated. I also find that she has undertaken some studying whilst in the UK."

7. At [33] Judge Birkby summarised the fresh submissions made by the appellant subsequent to Judge Hemingway's determination. First, the appellant sought to rely on a report from Dr Lesley Lord dated 21 February 2012. Secondly, she had submitted a report from GAMCOTRAP, and thirdly a newspaper article from the Freedom Newspaper entitled, "*Governor Waa Juwara Promoted To Ministerial Position*". Judge Birkby indicated that he had "considered carefully the report of Dr Lesley Lord". He noted that Dr Lord considered that the appellant's scars "had the typical appearance of tribal marks." He quoted in full paragraphs 15 and 16 of Dr Lord's report:

"15. Miss Njie's scars have the typical appearance of tribal marks. Although the pigmentation is fading the characteristic prominence of the scars is still present and will persist (note the fine lines in photo 16). They do not look like the scars typical of traditional healing methods. Her father, a Christian, was more religious than traditional and they lived in a city where such practice was not done.

16. As stated above, once the wounds are healed it is not possible to say when they occurred and therefore it is not possible to say whether these marks were made all at the same time. Because of how these cuts are made, pinching the skin before the cut, it is not possible that she could have made the marks on the back of her neck herself."

- 8. As Judge Birkby recorded at [49] Dr Lord had not excluded "other possibilities as to how the marks were made".
- 9. The GAMCOTRAP (Gambia Committee on Traditional Practices Affecting the Health of Women and Children) report is entitled "*Scarification in the Form of Tribal Marks (The Gambia)*". The report notes that the Gambia has a population of 1.7 million and a "variety of ethnic groups" including the Fula, Woloff, Jola, Serhule, Serers, and Bianunkas. The largest group is the Mandinka. Scarification is generally practised by the two largest ethnic groups, the Mandinkas and the Fulas. The report states that "the tribal marks of the Mandinka are a stroke of three to five lines on their chest, both breast and back."
- 10. Judge Birkby considered the evidence regarding Governor Waa Juwara to be "generic in essence". He did not consider that it assisted the appellant's claim [47]. That finding is not challenged in the grounds of appeal to the Upper Tribunal so we shall make no further reference to it.

11. At [50-51] Judge Birkby concluded:

“50. Immigration Judge Hemingway’s analysis and rejection of the Appellant’s credibility in his determination at paragraphs 32 to 47 is particularly detailed. I adopt that analysis of Immigration Judge Hemingway (sic). Such lack of credibility as has been found by Immigration Judge Hemingway leads me now to the conclusion in spite of the new evidence that it is certainly possible that the appellant has arranged for someone to inflict those scars on her in order to make it appear that she has Mandinkan scars. The credibility of my judgment has been so undermined by Immigration Judge Hemingway’s findings and analysis that I cannot accept the appellant’s assertions with regard to the scarification and the origins of that scarification, even though there is no more evidence to associate it with the Mandinka. I do not accept the scars were inflicted on her in the way that she has stated.

51. Although there has been new evidence I do not conclude that such evidence is sufficient to undermine any of Immigration Judge’s Hemingway’s findings and conclusions which I adopt in their entirety and in particular as stated above at paragraphs 34 and 35 of this determination and with the section of paragraph 44 of the Immigration Judge’s determination which I have cited above. I have furthermore found the respondent’s conclusions as stated in the most recent refusal letter to have been sound and I adopt those conclusions.”

### Discussion

12. Miss Anderson submitted that Judge Birkby had applied too high a standard of proof in his analysis of the evidence. In particular, he had been “seeking perfection” as regards evidence of scarring. She also submitted that Judge Hemingway had made “plausibility findings” rather than proper findings of fact. We asked Miss Anderson if she could direct us to photographs of the appellant’s scarring; those photographs contained within the appellant’s bundle had been photocopied so poorly that they are unintelligible. Mr Diwnycz, for the respondent, referred to a number of other photographs which appear to have been before Judge Hemingway but Miss Anderson did not seek to rely upon those photographs nor are they contained within the bundle she had prepared for the hearing. We were left, as a consequence, with no clear idea whatever of the appearance of the scars on the appellant’s body although we accept that she has been scarred as recorded by Dr Lord who had the opportunity of examining her.
13. Miss Anderson submitted that Judge Birkby had failed to consider Dr Lord’s report and that from GAMCOTRAP together and that, had he done so, he would have concluded that the appellant would present as a Mandinkan female who would be at risk of FGM and forced marriage. She acknowledged that she had no evidence of the scarification generally employed by members of the Woloff tribe. She was aware that the Woloff did not practise FGM.
14. We reject all of Miss Anderson’s submissions. Dr Lord has recorded the scarring on the appellant’s body but, other than observing that it was likely, in her opinion, to be of a tribal nature, she quite rightly offered no further opinion given that she has no

expertise on the subject of the tribal scarring of Gambian females. No evidence has been adduced by the appellant to indicate what scarring is employed by the Woloff tribe. Further, no evidence has been adduced by the appellant from any expert who would be able to offer an opinion that the appellant's scars would be likely to mark out the appellant as a member of any particular tribe in the Gambia. Contrary to what Miss Anderson told us, the GAMCOTRAP report is of little assistance. The authors of that report have, of course, offered no opinion regarding this particular appellant's scarring and the report's description of Mandinkan scarring ("a stroke of three to five lines on their chest, both breast and back") is somewhat vague and arguably at odds with Dr Lord's observation that the appellant had been scarred on her neck (rather than her back). Miss Anderson appeared to wish us to proceed on the basis that, because Dr Lord had indicated that the scars had not been self-inflicted, the appellant must necessarily have been scarred by members of the Mandinkan tribe. In light of our observations recorded above as to the inadequacy of the evidence adduced, that submission is wholly without foundation. We accept that the scars have not been self-inflicted and are probably not accidental, but the evidence which has been adduced takes us no further than that. We repeat that there was no evidence which can lead us to conclude that the scars on the appellant's body link her to any particular tribe in Gambia or elsewhere.

15. We reject also Miss Anderson's submission that Judge Hemingway's findings of fact were not reliable. Judge Hemingway's findings (paragraph 6 *supra*) are not in any way inconsistent with the new evidence which the appellant has adduced. Judge Hemingway's determination was not successfully challenged by the appellant and we consider that Judge Birkby acted properly in starting his own analysis of the evidence upon the basis of Judge Hemingway's findings of fact. We consider that Judge Birkby was entitled to find that "the scars were [not] inflicted on [the appellant] in the way that she has stated." [50]. If anything, we find that Judge Birkby has taken too generous a view of the appellant's new evidence; his statement at [50] that "there is now more evidence to associate [the appellant's scarring] with the Mandinka" is, for the reasons we have set out above, not supported by the evidence.
16. We were concerned that Miss Anderson made no attempt whatever to address the basis upon which permission to the Upper Tribunal had been granted, that is "*whether, whatever the nature and source of the scars, they were sufficient to place the appellant at real risk*" [our emphasis]. It was open to the appellant to seek expert evidence to show how her scars (however they may have been inflicted) would be perceived by different tribal groups in Gambia and whether any such group would be likely to harm her. The evidence which has been adduced does not enable us to reach any sensible conclusion on that matter. As we remarked at the hearing, we regard with the greatest concern the type of persecution which the appellant claims may threaten her. That does not, however, mean that cases should be determined otherwise than in accordance with the evidence.
17. At the end of the hearing, we notified Miss Anderson of our concerns regarding the preparation of the appellant's appeal. The appellant's representatives have failed to take the obvious steps of providing clear and unambiguous photographs of the

appellant's scars. They have failed to obtain expert evidence which might indicate whether those scars would reveal the appellant as being a member of the Mandinka or any other tribe and whether that, in turn, would expose her to a real risk of harm. It is not for the Tribunal to fill in the gaps in the evidence created by poor preparation. In this appeal, we are concerned only with considering whether Judge Birkby erred in law such that his determination falls to be set aside. For the reasons we have given, we have concluded that he did not. It may be that the appellant will wish to take further action in the light of what we have said about the preparation of her appeal but that is a matter for her and her advisers.

**DECISION**

18. This appeal is dismissed.

Signed

Date 31 July 2013

Upper Tribunal Judge Clive Lane