



**Upper Tribunal
(Immigration and Asylum Chamber)**
AA/11056/2015

Appeal Number:

THE IMMIGRATION ACTS

**Heard at: Columbus House, Decision & Reasons
Newport Promulgated
On: 14 July 2016 On 28 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

**ABC
(anonymity direction made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Nawaparast, NLS Solicitors

For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. This is an appeal against the determination of First-tier Tribunal Judge Woolley in which he dismissed the appeal of the Appellant, a citizen of Gambia, against the Secretary of State's decision to refuse asylum and set removal directions.

2. The Appellant arrived in the United Kingdom on 6 September 2011 and having been given leave to remain as a visitor for 6 months overstayed that leave eventually claiming asylum on 24 March 2015. Her application was refused by the Respondent on 28 July 2015. The Appellant exercised her right of appeal against this decision and this is the appeal that was heard before Judge Woolley on 5 February 2016 and dismissed. The Appellant's application for permission to appeal against the First-tier Tribunal Judge's decision was refused by the First-tier Tribunal but on renewal to the Upper Tribunal was granted on 7 April 2016 by Upper Tribunal Judge Allen in the following terms

"I note the explanation provided for the lateness of the submission of the grounds to the First-tier Tribunal. On balance I have concluded that it is in the interests of justice to admit the application. There is an arguable issue as to the judge's findings in respect of the expert evidence and that has relevance to the challenge to the credibility findings. As a consequence all points raised in the grounds may be argued."

3. By a rule 24 response dated 4 May 2016 the Respondent opposed the appeal.
4. At the hearing before me Mr Richards appeared for the Secretary of State and Ms Nawaparast represented the Applicant. No skeleton arguments were submitted.

Background

5. The Appellant is a 22-year-old Gambian citizen of the Mandinka tribe who arrived in the United Kingdom at the age of 17 travelling with her mother. The Appellant claims that she was subjected to FGM when she was 8 years old. She claims that prior to leaving Gambia she was told by her family that a marriage had been arranged and that before the marriage she would need further FGM. Not wishing to go through with the marriage the Appellant ran away from her mother whilst in the United Kingdom and her claim for asylum is based upon her fear of forced marriage and further FGM if she had to return. The Respondent refused her asylum claim not accepting her account of risk of forced marriage and not accepting that she would be forced to undergo further FGM on a return.
6. In dismissing her appeal, the First-tier Tribunal Judge found the account of forced marriage not to be credible and that it was not established that she would be subjected to further FGM. In making the latter finding the Judge noted that the expert evidence showed that FGM of category 3 or 4 would

be likely to require further or repeated FGM but concluded that it had not been established at what level her FGM has been performed.

Submissions

7. Ms Nawaparast referred to the grounds of appeal to the Upper Tribunal and to paragraph 23 to 25 of the refusal letter. The level of FGM was not thought to be in dispute so not raised at the First-tier Tribunal hearing. As such the Appellant was denied the opportunity of dealing with it. In making findings as to the level of FGM the Judge failed to consider the NHS documentation in the Respondent's bundle. The level of FGM was relevant to the risk of further FGM as highlighted in the expert's report. The Judge found (at paragraph 33) that the expert's opinion was predicated on the Appellant having undergone a particularly severe form of FGM whilst he was not satisfied that this was the case. The Judge's finding as to the level of FGM therefore undermined the expert's report.
8. For the Respondent Mr Richards said that paragraph 24 of the refusal letter showed that the level of FGM was not accepted by the Respondent. Professor Knorr's report gave the clear opinion that the risk of further FGM was present where the initial FGM was category 3, effectively a sealing of the vaginal opening. Mr Richards accepted that the medical evidence whilst not specifying category 3 did appear to support the Appellant's account of a severe form of FGM. On this basis he did not seek to address me further.
9. I said that it was my judgment that the decision contained a material error of law and could not stand and I reserved my written decision.

Error of law

10. The Appellant is a citizen of Gambia for the Mandinka tribe. The fact that she has undergone FGM is not disputed and the objective evidence shows that the rate of FGM amongst the Mandinka is up to 100%. The severity of FGM (by reference to category) is important to the issue of credibility and fear on return because FGM at categories 1 and 2 does not necessarily result in or require further FGM whilst that at category 3 does. This, according to the document NHS Choices (in the Respondent's bundle), is because category 3 involves the narrowing or sealing of the

vaginal opening which needs to be opened for sexual intercourse and childbirth. This is highlighted in the expert report of Professor Knorr submitted for the First-tier Tribunal hearing.

11. The Appellant complains that the level of FGM was not a matter thought to be in dispute or raised at the First-tier Tribunal hearing but that nevertheless the Judge had gone onto consider the level of FGM and reached the conclusion that she had not established that she had been subject to category 3 FGM. The decision shows at paragraph 30 that the Judge carefully considered the level of FGM before coming to the conclusion that the level had not been established.
12. In my judgment the First-tier Tribunal Judge fell into error in making this finding. In the first place the refusal letter records (at paragraph 2C) that the letter submitted by the Appellant from Kings Cross hospital shows that the Appellant has undergone FGM type three to four. The reference at paragraph 24 to the lack of medical evidence that further surgery is required does not refer to the level of FGM and does not appear to take into account the objective evidence from NHS Choices referred to above. It is not, in my judgement, clear from the refusal letter that the level of FGM was in dispute.
13. Secondly in examining the evidence of the mutilation carried out upon the Appellant at paragraph 30 the Judge notes that 'the vaginal orifice was too small' for an examination to be performed but nevertheless reaches the conclusion that more supporting evidence was required. This appears to fly in the face of the NHS document showing as it does that neither category one or category two FGM involve the narrowing or closing of the vagina. This is restricted to category three. A vaginal orifice too small for an internal examination to be performed may well be indicative of category three FGM.
14. Thirdly and in any event the Judge, whilst reaching the careful finding that the level had 'not been established' has in my judgment examined the medical evidence and in effect drawn a conclusion based upon that evidence that he was not qualified to reach. It is not in dispute that the evidence shows that this Appellant has undergone FGM. That conclusion having been reached, and whereas the pointers seem to indicate that the level could well be category 3, the assessment of the level is a matter for a medical expert and not for the Judge either at First-tier or Upper Tribunal level.

The Judge fell into error by failing to give adequate reasons for his findings on the material matter of the degree of the Appellant's FGM.

15. The effect of this error must be to render the credibility findings as a whole unsafe because the Appellant's claimed fear of further or repeated FGM is interlinked with her account of forced marriage.
16. Due to the nature of the error of law and in accordance with the President's direction it is appropriate for this matter to be remitted to the First-tier Tribunal for hearing de novo with no findings preserved. The First-tier tribunal will no doubt be assisted by conclusive medical evidence of the degree of the Appellant's FGM.

Conclusion

17. The decision of the First-tier Tribunal involved the making of an error of law for the reasons set out above.
18. I set aside the decision of the First-tier Tribunal and in accordance with the President's direction this matter is suitable for and should be remitted to the First-tier Tribunal.

Signed:

Date: 28 July 2016

**J F W Phillips
Deputy Judge of the Upper Tribunal**