Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/05056/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 October 2017	**On 15 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS W L
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Ostad Saffar of Counsel
For the Respondent: Ms N Willocks-Briscoe, a Home Office Presenting Officer

DECISION AND REASONS

Introduction and background

1. The appellant is a citizen of Senegal who was born on 6 January 1988. The appellant claims to have married K N, a Senegalese national, on a date in 2014, which is illegible on the untranslated marriage certificate supplied. They have two children together. The first child S was born on 19 February 2008 in Dakar and the second child, A N, was born in the UK on 16 June 2015. A N's birth certificate confirms that K N is her father. The birth certificate also confirms that A N was born in the UK.

2. The appellant and K N have quite a long immigration history. However, the application, which resulted in an appeal before Immigration Judge Buchanan heard on 2 March 2017, was an application for asylum, humanitarian protection and human rights protection under Articles 2, 3 and 8 of the European Convention on Human Rights 1950 (ECHR). That application was refused by the Secretary of State for the Home Department (Secretary of State). The Secretary of State set out her reasons for refusal in a detailed letter explaining that she did not accept that the appellant's second child, who had been born in the UK, would be subjected to female genital mutilation (FGM) if she were returned to Senegal. The principal risk to the child was said to be derived from the grandmother but the Secretary of State did not accept that to be a genuine risk. Furthermore, the Secretary of State considered that there would be adequate internal relocation alternative available to the appellant to avoid seeking international protection. Even if the appellant's case were accepted the Secretary of State noted that Senegal was a country of very substantial size with a quite small population, that the appellant spoke both a tribal language called Wolof and French, which was widely spoken, and that there were several areas to which she could safely relocate if she desired to do so.

3. The appeal came before Judge Buchanan, as I have indicated, on 2 March 2017. Both parties were represented at that hearing, in the appellant's case by Ms McCrae and in the respondent's case by Mr Bell. The Immigration Judge heard detailed evidence. I have had the benefit of reading the notes of evidence. They are difficult to decipher but I have been able to see the broad thrust, at least, of the evidence and submissions before the Immigration Judge.

4. The Immigration Judge set out fully the requirements of the U N Convention relating to the status of Refugees 1951 (the Refugee Convention). He also set out the requirements of the European Convention on Human Rights (ECHR) in some detail. Unfortunately, the Immigration Judge only dealt cursorily with the matter of Article 8 of that Convention. He rejected the notion that the younger child would be subject to FGM from the grandmother and whilst he accepted that the tribal background of the appellant and her husband did lend itself to the risk of FGM, in his judgment adequate protection would be available to the appellant, if necessary, by removing herself to a different part of Senegal. In any event, he was not persuaded that the appellant's account was founded on fact. The Immigration Judge found that there had been misrepresentations made by the appellant and her witness and neither gave accounts which could be accepted at face value. He did not accept that a genuine marriage document had been provided and the appellant had failed to persuade the Tribunal that the grandmother had actually been responsible for inflicting FGM on the elder daughter who, it would appear, was still in Senegal residing with the grandmother. He was not persuaded that the mother would in any event leave her child in the care of someone who would put that child at risk of such barbaric treatment. The Immigration Judge was not persuaded that the grandmother would have the ability to trace and find the appellant anywhere else in Senegal.

Accordingly, for those comprehensive reasons the Immigration Judge dismissed the appeals on all grounds argued. In relation to human rights, having effectively dealt with the Articles 2 and 3 claims under the general head of asylum/human rights protection, the Immigration Judge merely stated that the appellant had been unable to show that the rights of the child would be breached by her return to Senegal as this had not been established to the appropriate standard. However, the Immigration Judge did not embark on a detailed analysis of the appellant's human rights protected by Article 8 of the ECHR.

5. The Immigration Judge also made an anonymity direction at the conclusion of his decision, which was promulgated on 4 April 2017.

The Upper Tribunal Proceedings

6. The appellant appealed the refusal to the Upper Tribunal on 18 April 2017, within time. The grounds are detailed and extensive. They did receive a degree of criticism by the judge who granted permission, Designated Immigration Judge McCarthy, who found a number of the references to case law to be out of date. Judge McCarthy mistakenly referred to "Judge Cassel", but in fact intended to refer to Judge Buchanan. I understand that is accepted by both parties.

7. On 28 August 2017 Judge McCarthy carefully went through the grounds of appeal. He did not give permission to appeal against the refusal of asylum, concluding that the grounds of appeal had not identified any arguable error of law. He considered that the lower standard of proof had been correctly applied by the Immigration Judge. Having carefully considered all the case law, of which Judge McCarthy was also aware, he concluded that the Immigration Judge had reached sound decisions on all matters argued before him including the adequacy of state protection and the availability of an internal relocation alternative to seeking asylum abroad. However, Judge Mc Carthy was critical of the Immigration Judge in relation to his cursory consideration of Article 8. Noting that the respondent had fully considered the issues of family and private life in her refusal, unfortunately, it appeared to Judge McCarthy that there was no evidence of the Immigration Judge having done likewise and there was no indication in his decision and reasons or elsewhere that suggested that the ground of appeal against the respondent's decision to fail to recognise the appellant qualified under Article 8 was withdrawn. Judge McCarthy therefore found that ground to be properly arguable. He limited the ground to considering the best interests of the appellant's daughter and the alleged failure to engage with evidence and arguments relating to Article 8. It was important, in Judge Mc McCarthy's view, to establish whether the best interests of the child lay in her removal from the UK.

8. The Secretary of State provided this a Rule 24 response on 4 September 2017, which opposes the appellant's appeal. In summary, the respondent states the First-tier Tribunal (FTT) directed itself appropriately. A N was not yet 2 years old at the date of the hearing and, given the asylum account had been completely rejected, it had not been shown that the

child's best interests outweighed the interests of proper immigration control. Any error that was made was immaterial to the outcome of the appeal.

The hearing before the Upper Tribunal

9. The Upper Tribunal was assisted by the helpful oral submissions of Ms Ostad Saffar. However, with respect to her, no doubt in the best interests of her client as she saw them, she tried to argue a number of points which were considered but rejected by the First-tier Tribunal. I reminded her at the outset of her submissions that her client had been refused permission to appeal on all grounds other than Article 8. Nevertheless, she sought to argue that A N would be at risk at risk of female genital mutilation (FGM) if she returned to Senegal with the appellant. I explained to her and reiterate here that this issue had been fully considered by the First-tier Tribunal. There had been no application to renew the permission by way of a second application, which could have been made, or by way of challenging the grant of permission by applying for judicial review. Therefore, procedurally, I took the view that she was effectively barred from arguing matters which had already been raised before the First-tier Tribunal but rejected. Notwithstanding this indication, Ms Ostad Saffar then sought to argue that the Immigration Judge had applied too high a standard of proof, that there had been too much focus on her relationship with her husband. She submitted that there was inadequate protection for the child in Senegal. The grandmother could not be relied on not to commit female genital mutilation and the objective evidence had not been properly considered. She argued that there was a great deal of evidence of the extent of the barbaric practice of FGM within Senegal. As far as Article 8 was concerned, the correct avenue for her attack on the decision of the FTT, she submitted, that very little analysis or space was devoted in the decision to this aspect. There is really no dispute between her and the respondent on this. Ms Ostad Saffar then went on to submit that the Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") had not even been mentioned in the decision. Furthermore, she submitted that there was no justification for the interference with the appellant's human rights had been put forward. There was no safe place for her to return to. There were very significant obstacles for her reintegration into life in Senegal. For example, no monetary support would be available. Although she accepted her arguments were primarily related to economics they were nevertheless of great practical importance given that her client would be returned to a poor country such as Senegal. She repeated that the grandmother was a potential abuser of her child.

10. In response Ms Willocks-Briscoe said that the arguments Ms Ostad Saffar had raised were an attempt effectively to re-argue points which had been rejected by the FTT. Furthermore, the appellant's husband's status was

dependent on her own. Her husband did not have any right to stay in the UK. The family would be returning to Senegal as one family unit. In any event, the child had Senegalese nationality by virtue of her parents' birth there and the Immigration Judge had not accepted that the eldest child had been subject to FGM, that the grandmother was a potential abuser or indeed that the younger child would be subject to such barbaric treatment. There was nothing in the submissions before me, or indeed in the evidence before the First-tier Tribunal, which would have enabled the FTT to conclude that the removal of the family unit would constitute an unlawful interference with their human rights protected by Article 8. There had simply been no evidence to support the establishment of a private life in the UK in the short period they had been here. I was helpfully taken to two recent leading authorities, which will be referred to in greater detail below. Those authorities suggested that very young children tend to look to their parents for their support, rather than their peer group. There was no evidence that this young child would in fact know very much about the fact that she had been in the UK for her short lifespan. She was only aged 1 at the time of the hearing and she had only recently turned 2 at the date of the hearing before the Upper Tribunal. Furthermore, there was a family support network in Senegal and I was referred to several family members including both grandparents. If I accepted the First-tier Tribunal's conclusion that the maternal grandmother was not an abuser she would be able to provide support for the family. The appellant's husband also had a sister who was referred to the appellant's witness statements. Article 8 hardly featured in the evidence at all. I reminded the parties that, judging from the notes of the hearing, the rights of the child and Section 55 of the Borders, Citizenship and Immigration Act 2009 had been briefly referred to. However, but I find no reference to any detailed submissions on either Article 8 or the rights of the child. With respect, therefore, I would describe it as something of a "makeweight" to add to the main arguments in relations to the various alleged human rights abuses/risk of FGM on return. Also, I noted that the child's Article 8 rights did not did not feature in the witness statements to any material degree.

11. Ms Ostad Saffar responded to the submissions made by Ms Willocks-Briscoe by stating that the support of the grandmother could not be relied upon given her continued contention that she had been responsible for abuse of the elder child. There would be significant pressure on the appellant to carry out FGM on the younger child and there was no proper consideration of the risk on return by the Immigration Judge. Without considering FGM it was impossible to consider Article 8 in isolation. Nevertheless, Ms Ostad Saffar suggested that section 117B of the 2002 Act, and the case of **Rhuppiah** [2016] EWCA Civ 803, indicated that one can establish a private or family life precariously. I was invited to look at paragraph 35 of that decision. Although I have not been supplied with a copy of that decision, I have since had an opportunity to remind myself of the facts of that case, which has been subject of the grant of permission to appeal to the Supreme Court.

Discussion

12. As I have indicated, there was no application to enlarge the permission to appeal in this case to cover the more substantial human rights arguments presented before the First-tier Tribunal. Those arguments were rejected by the FTT. Judge McCarthy refused permission to appeal against those aspects of the Immigration Judge's decision. It was incumbent upon the appellant to put forward evidence to support an Article 8 claim. Assuming the appellant had formed a family life with her husband and children in the UK, the respondent had the burden of showing that Article 8(2) was satisfied. However, I am not persuaded that any material evidence was put forward that the child's best interests would be advanced by remaining in the UK. Given the nationality of the parents and their children and the fact that they would be returning as a family unit, it was plainly open to the FTT to conclude there would be no unlawful interference with the appellant's or her daughter's protected human rights. The interference with the family life formed between the appellant and her children in the UK was justified by the need for effective immigration control. I have regard to recent case law, including the case of **Moayed UKUT 00197** before the Upper Tribunal sitting in Bradford. In that case, where both parents were to be removed as one family unit, it was held that exceptional factors would be needed to show why the economic best interests of society would not justify removal.

13. I was also referred to paragraph 58 of the case of **EV (Philippines) [2014] EWCA Civ 874**. An assessment of the best interests of the children must be made based on the facts. In the "real world", where one parent has no right to remain, but the other parent does the assessment is to be conducted against that background. If neither parent has the right to remain then the ultimate question will be, is it reasonable to expect a child to follow the parents?

Conclusions

14. The removal of the younger child would not be contrary to her best interests, given the probable simultaneous removal of the parents. Accordingly, there is no proper basis for interfering with the findings of the FTT. I considered whether the lack of reasoning in relation to Article 8 might constitute a material error of law. However, I am persuaded by the respondent's submissions that in fact there is no real basis for finding that a fuller consideration of that Article would make any material difference to the outcome of the decision. If the Immigration Judge had considered the case law on Article 8 in greater detail, it is likely that he would have reached the same conclusion. Therefore, the absence of detailed consideration of Article 8 was immaterial to the decision.

15. Even If I am wrong about that, I have not been invited to hear any fresh evidence. The appellant was given notice that if she wished to refer to any evidence which had not the before the First-tier Tribunal it was necessary for her to make an application indicating the nature of that evidence and explaining why it was not submitted to the FTT no later than

10 working days before the hearing. I have therefore decided this appeal based on the evidence before the FTT.

16. My conclusion is that the respondent was able to show before the FTT that the interference with the appellant's private or family life in this case, which had only been recently formed since her arrival in 2014, was justified by economic factors and in particular the need for a balanced system of proper immigration control. The public interest, in my view, outweighed the right to respect for a private or family life in this case.

Notice of Decision

17. I find there was no material error of law in FTT and I dismiss the appeal to the Upper Tribunal. The decision of the First-tier Tribunal therefore stands.

Anonymity

I continue the anonymity direction made by the First-tier Tribunal and direct that no party may in fact report these proceedings

Fee Award

I continue to make no fee award in this matter.

Signed Date

Deputy Upper Tribunal Judge Hanbury