



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08280/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On 15 May 2018

Decision & Reasons Promulgated
On 5 June 2018

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

OJA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter, instructed by Berlow Rahman Solicitors
For the Respondent: Mr A Govan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant who is a national of Nigeria born July 1980 has been granted permission to appeal the decision of First-tier Tribunal Judge Farrelly who for reasons given in his decision dated 20 December 2017 dismissed her appeal on refugee, humanitarian protection, human rights grounds (and under the Immigration Rules) against the Secretary of State's decision refusing her protection claim.
2. The appellant arrived in the United Kingdom accompanied by her eldest son in October 2010 as a student and has not returned to Nigeria since. Her husband joined her in 2011 but they have since separated. The appellant was awarded an information systems diploma in January 2012. She then applied for further leave as a student which

was withdrawn on 3 September 2012. On 9 January 2013 she made a human rights claim on grounds under Articles 3 and 8 which was rejected on 30 January 2013. A further application dated 5 March 2013 outside the rules on compassionate grounds was refused by the Secretary of State on 14 May 2013. It appears that reconsideration was sought on 30 January 2014 but this too led to refusal on 24 April 2014. The appellant was served with notice under IS151A as an overstayer on 8 July 2013. Her application for asylum was made on 8 February 2017.

3. The appellant had sought that protection on the basis of the risk that she as a female, and her daughter born June 2015, would be forced to undergo female genital mutilation (FGM) and that her children would endure tribal cuttings. Her parents had protected her from pressure to undergo genital mutilation whilst in Nigeria, however, they died in 2013. The appellant is a member of the Yoruba tribe. The appellant's eldest son was born in 2008 and a further son in June 2011.
4. First-tier Tribunal Judge Farrelly did not consider that the appellant had demonstrated a genuine subjective fear of FGM or tribal scarring either for herself or her children on the basis that she would be able to resist any pressure now brought. Were there excessive pressure there would be a sufficiency of protection and she additionally would have the support of her brother in Nigeria with financial support from her other brother who is based in London.
5. In respect of Article 8 the judge considered paragraph EX.1 of Appendix FM and paragraph 276ADE under the Immigration Rules as well as Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. He did not consider the requirements of the rules had been met. He took account of the best interests of the children but did not consider these demonstrated that their best interests necessarily lay with remaining here. The judge concluded that the decision of the respondent was nevertheless proportionate.
6. The grounds of challenge are discursive from which I have extracted the following:
 - (i) The medical evidence clearly indicated that the child concerned would be having surgery to remove the keloids from her ears.
 - (ii) The judge failed to note the reliance that had been placed on the country information which highlighted that FGM continues to be widely practised, is prevalent across regions and ethnic groups especially amongst the Yoruba tribe. The finding by the judge that he did not accept the parents were deceased failed to take account of the evidence.
 - (iii) The Tribunal had failed to consider that there is no sufficiency of protection in Nigeria for the appellant by virtue of the death of her parents; nobody had ever been prosecuted for carrying out FGM.
 - (iv) The Tribunal had failed to reflect on the purpose behind the seven year rule for children and ought to have given consideration to the best interests of the child. The Tribunal had not explained why its decision was in the best interests of the child.

- (v) The Tribunal had failed to consider all of the family circumstances including the eldest son having only ever lived in Nigeria for two years.
 - (vi) The judge's conclusions regarding the length of time the eldest child had been in the United Kingdom within the context of the rules.
 - (vii) As to Section 117B of the 2002 Act there was no question that both boys were qualifying children, being under 18 years and having been here for over seven years by the date of the decision. With reference to paragraph 276ADE (and Section 117B) the only question was whether it is reasonable to expect the children to leave the United Kingdom, the judge had erred in taking into consideration the parents' disregard for immigration law.
7. It is also argued in the grounds that the judge failed to note reliance on two bundles and "objective evidence" highlighting the use of FGM in particular by the Yoruba Tribe. It is further argued that the judge failed to consider that the only people to provide protection were her deceased parents and that there was an absence of prosecutions and indifference by the authorities to the problem.
8. Mr Winter explained at the outset of his submissions that he did not pursue the grounds relating to the children and relied on protection grounds only in (ii) above. He explained that he had only been instructed late and understood the desirability of notifying the Tribunal early of a shift in grounds. He also acknowledged there was insufficient evidence to support the claim in respect of facial cutting. Accordingly grounds (i), (iv), (v), (vi) and (vii) fall away. The only observation I make in respect of those grounds is that in fact the judge accepted that the appellant's parents had died.
9. In the course of his submissions Mr Winter clarified after taking instructions that the appellant had appealed against the decision refusing leave to remain dated 14 May 2013 and the appeal was heard on 23 January 2014 in London with representation. First-tier Tribunal Judge Petherbridge allowed the appeal on the basis that the decision refusing her leave to remain on the basis of her family and private life in the United Kingdom was not in accordance with the law:
- "... to the limited extent that the appellant's application has been considered under the parent and partner's dependency requirements of Appendix FM and not the adult dependency requirements and that, therefore, the decision is remitted back to the Secretary of State for a consideration of the application under the requirements of E-CDR.1.1."
10. Mr Winter also accepted the grounds erroneously referred to a failure by the judge to have regard to two bundles of country evidence. There was just the one bundle containing the Home Office CPIN on Nigeria: FGM dated February 2017 as well as other country evidence. There was no other bundle and it is not the case that the judge overlooked any of the evidence. A further point for clarification was that the grant of permission made no reference to the protection claim but since no ground was excluded, I consider that I had jurisdiction to deal with the sole surviving aspect of the challenge.

11. Mr Winter clarified that the appellant's brother who lives in the United Kingdom where he practises as a dentist in London did not give evidence. In the course of his submissions, Mr Winter referred to the CPIN report which he contended supported the risk the appellant feared. He corrected his initial misapprehension that it is the appellant's "uncle" who wanted her to undergo FGM and not her other brother who lives in Nigeria. That brother had sent a copy of a letter from the "uncle" to the United Kingdom although the letter had not been produced at the hearing. By way of response Mr Govan argued that the appellant had grown up in a family that had avoided FGM in her case but it was unclear why she would now be subject to it. The judge had taken into account all relevant evidence and had not made a material error. Mr Winter had no further submissions by way of reply.

12. The appellant's statement explains at [17] as to her subjective fear:

"Since the death of my parents, I have been contacted by my father's brother, N A, he said I should remember that I have to return to Nigeria to be circumcised. I was contacted on my mobile number. When I gave birth to my daughter, I was contacted again to be told that my daughter also needs to be circumcised. I was last contacted on 25th February 2017 from a different number so I answered the call and realised it was my father's brother, once again, he told me that my daughter and I have to come to Nigeria to be circumcised otherwise we will not be considered a part of the family. He also recently sent a letter to my brother in Nigeria telling him that I must have return to have circumcision and tribal markings. He sent a letter to my brother in Nigeria asking for the letter to be sent to me. My brother in Nigeria sent the letter to my brother in the UK because I would not give him any details of my address here. My brother in the UK was really concerned and sent it to me so that I could read the letter. This made me more scared and worried about returning back to Nigeria with my children."

13. The record of interview reveals the presence of the appellant's brother in Nigeria and that she was raised in Ibadan Oyo state. In addition, it records her education there to university level and her subsequent employment in Osun state until 2006. She married on 2008 and the birth of her first child. Her parents died in 2013 as accepted by the judge. She refers also to someone in addition to her brother akin to an uncle whom she describes as "like [my] fathers junior brother and when my parents were alive he is always with us". He is reported to want her to return and "do the FGM". Her father supported her mother's opposition to FGM. As to why her "uncle" now wanted it done, the appellant explained that "they" tried to persuade her mother but apparently unsuccessfully.

14. The CPIN report indicates that the following factors should be considered in such claims.

"2.3.6 The factors to be taken into account by decision makers when assessing risk include but are not limited to:

- the ethnic background of the person taking into account high levels of intermarriage;
- the prevalence of FGM amongst the extended family, as this may increase or reduce the relevant risk which may arise from the prevalence of the practice amongst members of the ethnic group in general;

- the region of Nigeria she lived before coming to the UK;
 - whether she lived in an urban or rural area before coming to the UK;
 - her age;
 - her and her parents' education;
 - the practice of the ethnic group and extended family into which she has married (if married).
- b. Parents who resist/oppose FGM for their minor children.

- 2.3.7 Studies show that Nigerian mothers generally have ambivalent perceptions of the practice of FGM but many in society believe that uncircumcised females will become sexually promiscuous (see Societal attitude to FGM).
- 2.3.8 A person who is the parent of a minor child who is opposed to them undergoing FGM within communities that practice it may face societal discrimination and ostracism for going against cultural or family traditions. Decision makers need to consider each case on its facts. However, in general, this treatment is unlikely to reach the threshold to constitute persecution or serious harm."

15. The judge's conclusions on the protection claim are at [22] to [26] of his decision:

- "22. I do not find the appellant has demonstrated a genuine subjective fear of FGM or tribal scarring either for herself or her children. The practice of FGM and scarring is a cultural event undertaken on occasion willingly and in accordance with the family's wishes. There is societal pressure in certain situations because of the cultural norms. This of course will be dependent upon the individual circumstances.
23. The evidence does not support the claim that FGM or scarring would take place to either the appellant or her children if the appellant opposed this. She has not undergone scarring or FGM. Her elder son did not undergo scarring whilst in Nigeria. She only referred to scarring at a late stage. She claims that the issue of FGM in relation to her daughter only arose after her parents died and her father's brother was the source of the pressure. I do accept that her parents are deceased. However, it is my conclusion that the appellant would be able to resist any pressure now brought. I do not place much reliance upon the letter submitted from him. I believe this is an attempt to bolster the appellant's claim and that he in fact is supporting the appellant.
24. I appreciate the appellant has not been back to Nigeria since she arrived here and did not attend her parent's funeral. However, painful as it was for her to miss their funerals, the reason she did not attend I believe was because she appreciated if she did leave the UK she would not be able to get back in. I do not believe it was out of any fear of FGM. Had the appellant a genuine fear she would have mentioned this much earlier. Notably, she made an earlier unsuccessful application to remain as her brother's dependent. Clearly she had legal advice and did not mention this at that stage. The appellant is well educated and I find she has the ability to resist any societal pressures.
25. I do not find it established that scarring or FGM would take place against her wishes. Should there be excessive pressure than I am satisfied that there is

sufficiency of protection. She has the independence and ability to contact the authorities. Should there be the need she can live independently of her family. Her brother in Nigeria is supportive. She said that her brother in London provided her with financial support and also supported her brother in Nigeria. He could also be a source of support if she relocated. I believe his failure to attend the hearing is not due to lack of support but is because he is a professional man and does not want to compromise himself. She has been able to adapt to living in the United Kingdom and could similarly adapt to living in her home country.

26. In summary I do not find the appellant or her children are at any risk as under the Refugee Convention or under articles 2 or 3 in respect of FGM or tribal scarring.”
16. My conclusion is that the judge did not err in his analysis of the evidence and came to a conclusion properly open to him on the facts in finding that the appellant herself did not believe that she would be at risk of FGM. It is an unsurprising conclusion in the light of the delay by the appellant in bringing her asylum claim bearing in mind the precarious nature of her immigration circumstances. It is significant that at the hearing of her appeal in London she was legally represented and was therefore aware of the availability of specialist legal support. Her daughter was born after the death of her parents whom she had considered were in a position to offer protection and it is significant she did not make her claim until two years later. Furthermore, it is also significant that the appellant had not produced the letter setting out the demands of “uncle” demands nor did her brother who lives in the United Kingdom provide any support for the claim.
17. The paragraphs from the judge’s determination which I have set out above clearly show that he took into account all the material factors in the risk assessment. I conclude that the judge was rationally entitled to decide that FGM would not take place against the appellant’s wishes. The ground of challenge summarised at [5(ii)] above refers to reliance having been placed on country evidence. The judge noted the country evidence at [9] of his decision in summarising the submissions. There is no reason to believe that he did not have this in mind when concluding that the appellant did not have a subjective fear. Mr Winter did not pursue any argument based on the ground summarised at [5(iii)]. This ground effectively relates to the judge’s consideration of country evidence which I have dealt with and is otherwise a disagreement with a factual finding rather than the identification of error.
18. Whilst the country evidence points to FGM still being practised with some frequency in Nigeria and a lack of enthusiasm by the state to intervene, on the facts of this case, I am satisfied the judge was entitled to conclude that the appellant would not be at risk for the reasons given in his decision without legal error.

NOTICE OF DECISION

The appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated: 4 June 2018

UTJ DAWSON

Upper Tribunal Judge Dawson