



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11738/2017

THE IMMIGRATION ACTS

Heard at Field House
On 1 November 2018

Decision & Reasons Promulgated
On 21 November 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

GW
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Brown, Counsel, instructed by Luqmani Thompson & Partners Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. An order for anonymity was made by the FTT and should continue in the light of the issues arising in the Appellant's case. She is a citizen of Sierra Leone and her date of birth is 9 December 1997. She came to the UK on 9 August 2014 with her stepmother (BBW) on a visit visa which was valid until 9 December 2014. On 8 May 2016 she made a claim for asylum. Her claim in summary is that BBW would force her to undergo FGM should she return to Sierra Leone and that there would be no sufficiency of protection. BBW is a Muslim and a Bondo society leader and she

wants the Appellant to succeed her. The Appellant fears the Bondo society and family members, including BBW. The Appellant is a Jehovah's Witness. Her father who resides in Sierra Leone was unable to protect her and she relied in support on an e-mail that he sent to her. The contents of that e-mail are as follows:-

"Your mum is one of the leaders and head of this society. Being her eldest child, you cannot escape the initiations because this will bring disgrace to her and what she stands for. Secondly, know she keeps saying she will teach you every so you can take after her (to take her position). For me I am fed up of going back and forth with her on this issue is. She threatening me that your life will be in danger and there is no way you can avoid the Bondo society as it is in your blood ... the ceremony will be in July after school classes. You will join other of her family members for the ceremony. Please understand that I do not want anything to happen to you, they will do everything possible to get their wish, so please let's just get this done once and for."

4. The application for asylum was refused by the Secretary of State on 17 November 2016. There was, acknowledged in the decision letter, an ongoing investigation by the Metropolitan Police regarding potential coercion to remove the Appellant to Sierra Leone to undergo FGM. On 18 October 2016 the Secretary of State was advised that there was a civil application and ongoing proceedings in relation to a FGM protection order.
5. The Appellant appealed against the decision and her appeal was dismissed by First-tier Tribunal Judge Oliver in a decision that was promulgated on 5 September 2018, following a hearing on 26 July 2018. By the time the matter came before Judge Oliver the High Court had made a female genital mutilation (FGM) protection order. The order was made on 17 November 2016, a few days after the decision of the Secretary of State. This order remains in force until the Appellant's 21st birthday.

The decision of the High Court

6. The FFT judge had before him a copy of the order the judgment of Mr Justice Peter Jackson. He made an order in the terms as set out at B2 of the Appellant's bundle. The judgment consists of 34 paragraphs. At paragraph 8 of that decision, the judge reminded himself of the task before him in dealing with FGM protection orders and that the court was dealing with the assessment and management of risk and did not need to make specific findings of fact in relation to the central question of whether FGM will or will not be performed. He stated that the court had to draw conclusions from the evidence but it is essentially a broad canvass.
7. The High Court heard evidence from the Appellant and BBW. There was evidence from the Metropolitan Police which he also considered. The above-mentioned e-mail was considered by the Judge and he drew conclusions at paragraphs 14 and 15 as set out below: -
 14. Insofar as that is concerned, my best interpretation of this message is that it is a message that was sent by the father to [the appellant], but it refers, from its context, to a threat from [G] birth mother and not from her stepmother.

That leaves open the question of whether it is giving a warning of a genuine risk or whether it is conducted to help with an immigration application. I am of the view that it is genuine, at least as being written by the father, because of the detailed message that the father subsequently sends to DC Roberts in his message of 25 October. It gives some detailed contents which explained why he was warning of a risk by the birth mother, and apologies if he was misunderstood as having referred to the stepmother. Nobody suggests that that message to DC Roberts is not a genuine message from the father, and it seems to me to be written in fairly similar language to the earlier message.

15. On 28 April, there was an incident between [G] and her stepmother. Both agree that there was an incident. [G] said that the stepmother slapped her, causing a slight cut. The following day, 29 April, [G] reported to a teacher at her college that she had been assaulted, and also produced the email from her father. When the police came, she gave an account of the assault, but she did not produce the email, which was instead provided to the police by the teacher. At that point, the police began their involvement and a statement was taken from [G] and the mobile phones of the stepmother and [MB] were also seized. Those messages show that there was discussion between all three adults about the immigration status of [G]. In the case of [MB], it was on 19 and 24 April. In the case of the stepmother, there was a series of messages dated 2 May, referring to conversations with a friendly solicitor about something the stepmother referred to as a 'fake plan'. I find it difficult to take anything reliable from those messages.

8. He also stated the following: -

20. I have from Ms Carter-Manning a useful attempt to balance up the various speeches of the evidence, which I shall read with some adjustments for information subsequently received. Elements that might support the allegation of a risk of FGM are firstly the father's emails, which I find to emanate from him and, secondly, the fact that the stepmother and possibly the birth mother, are from tribal backgrounds which have or do practice FGM and, indeed, that both ladies have themselves been victims, which is a significant risk factor. Thirdly, that [G] herself has given evidence of conversations with her stepmother in which she says the threat of FGM was raised and, lastly, that the stepmother gave evidence in a way which did not encourage confidence that she would be a protective kind of person. It is, I add, certainly true that her own distress, which contrasted markedly with [G's] composure, seemed to focus most on the very difficult experiences that she has had this year having been held in England as a result of criminal proceedings, very recently dropped, and finding herself now in the midst of what is undoubtedly a family crisis, involving not only her relationship with her stepdaughter, but also her relationship with her husband.
21. As against that evidence that might support the allegation that FGM has been concocted, are these. Firstly, the immigration position was certainly a very live issue just before the allegation surfaced. Secondly, the evidence of the witnesses, [A] and [K] about the probabilities of [G's] level of knowledge. Thirdly, the fact that FGM was not a feature of [G's] earlier

applications for leave to remain. Fourthly, the inconsistencies in the account given by the father, and the somewhat surprising lack of any communication, since the lifting of the bail conditions, between the stepmother and the father, to present a clear account of what has been going on.

22. Coming to my conclusion, it is the court's normal task to consider all the evidence and the arguments and give a clear account of what has happened in any particular situation. Where the court can do that, it is of great assistance to those involved in the litigation and to others who may be considering the rights of those concerned. Having given my best consideration to the information with which I have been provided, I find that the task of providing a clear account of what has happened here is an impossible one.
23. I have heard evidence from [G] and from her stepmother which, if each was heard on its own, might readily be accepted, but they are in fact in contradiction. The normal means by which one might draw conclusions as to who was and who was not telling the truth are hard to find. Even if, at times, I might have suspected one or the other of the witnesses was not telling the full truth, I would have no means of knowing what conclusions to draw from that.
24. There is here an absence of sufficient evidence. There is a triangle involving the father, the stepmother and the child, possibly even a further point involving the birth mother. It is, I regret to say, impossible for me to tell what the real family dynamics are here. The absence of evidence from the father is a crucial matter, and, indeed, there is no evidence of any kind whatever from the birth mother. To add to that, the stepmother has not been legally represented, and has not even had formal interpretation, although by the good offices of Mr Suleiman Bah, I am satisfied that she has had a fair opportunity to present her case. In such confused and unsatisfactory circumstances, the court can only do its best, and I must, I believe guard against going further than would be safe.
32. Having reviewed matters in that way, I return to consider all the circumstances including the need to secure the health, safety and well-being of [G]. I do consider, in agreement with the submission made by the police, that [G] is a young person who requires the protection of a female genital mutilation order. She is someone who is in the middle of a family conflict that has proved very hard to penetrate. She has a mother and a stepmother who have themselves been subjected to female genital mutilation. She has a father whose motives and ability to protect her are not known, and her ability to remain in this country is similarly uncertain.
33. I therefore consider that there is a risk and that an order is necessary for her protection. However, I do not consider that the order should have, as a respondent, [MB]. If he was considered to be somebody who increased the risk, he would fall to be made, but in this case I do not find him to fall into that category. I will therefore make the order directed to Ms Binta Bah Williams. Subject to any further submissions, I consider that the order should last until Gladys is 21 years of age.

The Decision of the FTT

9. The FFT judge heard evidence from the Appellant and her cousin, R, and reached the following conclusions: -

34. The appellant has stated that her stepmother first mentioned FGM when she was nine years old. She has given no reason why she did not take seriously the several warnings her stepmother gave about her intentions and as late as the eve of journey to the United Kingdom still thought that her stepmother was joking. Her grandfather had protected while he was alive. He died in 2007 and she remained in Sierra Leone from the age of 10 to 17, prime FGM years, during which the practice was not enforced. She stated at one point that her stepmother had only recently become the leader of the Bondo Society, but at another that that had occurred in 2011. The practice was clearly not universally accepted in the appellant's family. It was not only her grandfather who was strongly opposed to the practice, but also [R's] mother. While I accept that the reference in her father's email, if it is genuine, does not necessarily imply that she has siblings, it does assert that the leadership of the Bondo Society is passed from mother to eldest daughter. There is no evidence of the circumstances in which the appellant's stepmother inherited the role. On any view, however, it is surely unrealistic that the leader of the society would seek to pass on that role to someone who did not believe in the practice and who had not even undergone the practice herself. Furthermore, it would be known that the appellant came from a family which had embraced the Jehovah's Witnesses. Whereas the Bondo Society appears to be closely linked to Muslim beliefs, the Jehovah's Witnesses are clearly against the practice. Their website declares:

Many mothers, however, have come to realize that there is no legitimate reason – religious, medical, or hygienic – to support this painful practice. The Nigerian documentary Repudiating Repugnant Customs reveals that many mothers have courageously refused to subject their daughters to it.

35. I find the judgement of the High Court to be of no help in establishing the genuineness of the appellant's claim because any judge, in the absence of any evidence against the making of such an order, would have made one on the receipt of any possibly credible evidence that such an abhorrent practice would be carried out.

36. The appellant did not seek the assistance of the authorities in Sierra Leone, which included not only the police but also NGO organisations. Nor did she seek assistance from the Jehovah's Witnesses, who may be heavily outnumbered by Muslims there, but nevertheless have a number of congregations in the country.

37. I note too the opportunities that the appellant had prior to calling the police to make a claim. Taking into account all of the circumstances, including section 8, I find that the appellant's claim has been fabricated and that the email has been sent disingenuously by her father to support a false claim. Had I any fear that her claim might be true I would unhesitatingly have allowed the appeal (*Fornah v SSHD; K v SSHD [2006] UKHL 46*).

10. The judge essentially did not accept the Appellant's evidence. He gave the following reasons; he found that she did not give a good reason why she did not take seriously the several warnings that BBW gave her and why she thought that she was joking; the Appellant's grandfather had on her evidence protected her whilst he was alive and he died in 2007 and yet she remained in Sierra Leone from the age of 10 to 17 which were "prime FGM years"; the Appellant's evidence at one point was that BBW had only recently become the member of the Bondo society but elsewhere in evidence she stated that she became the leader in 2011 and FGM was not universally accepted in the Appellant's family (her grandfather was strongly opposed to it, as was R's mother).
11. The judge concluded that the father's e-mail did not necessarily imply that the applicant had siblings and therefore was not necessarily at odds with the Appellant's own evidence, but found that there was no evidence of the circumstances in which the BBW inherited the role. The judge concluded that it was unrealistic that the leader of the society would seek to pass on that role to someone who did not believe in the practice and who had not even undergone the practice herself. The judge stated that it would be known that the Appellant came from a family which had embraced Jehovah's Witnesses whereas the Bondo society had close links to Muslim beliefs.
12. The judge found that Jehovah's Witnesses are clearly against the practice and he cited an extract from what he described as the Jehovah's Witness website at paragraph 34 to support this conclusion. There is also reference to the "JW website" at paragraph 32. What is recorded at paragraph 32 may be a summary or a quote from that website but it is not entirely clear.
13. The judge said that the judgment of the High Court was of no help to him for the reasons he gave at para 35 (see above).
14. The judge considered that the Appellant did not seek the assistance of the Authorities in Sierra Leone which included not only the police but NGO organisations. She did not seek the assistance from the Jehovah's Witnesses who may be heavily outnumbered by Muslims as found by the judge, nevertheless have a number of congregations in the country. The judge attached weight to delay in the context of Section 8 of the 2004 Act at paragraph 37.

Conclusions

15. The first ground is that the judge erroneously rejected the evidence of the order and judgment of Mr Justice Peter Jackson and his conclusions about that evidence are irrational. The judge referred to the judgment of the High Court at paragraph 35. I accept that the judge did not properly engage with this evidence. Whilst there are obvious limitations in terms of the corroborative value of it, it is undoubtedly a piece of evidence which is capable of supporting the Appellant's case. The reason the judge gave for effectively attaching no weight to it, was that in his view the High Court had no alternative but to make the order. This does not properly reflect the

decision of the High Court and does not take into account that the High Court heard evidence from the Appellant and her stepmother. I agree that the judge's conclusions at para 35 are irrational.

16. Ground 2 asserts that the judge failed to assess the evidence and/or provide adequate reasons. There is substance in this ground considering the extent of the Appellant's evidence contained in her witness statement. The judge heard evidence from R. She also provided a witness statement. The judge recorded R's evidence at paragraph 27. This is a piece of evidence that was capable of supporting parts of the Appellant's account. However, there are no clear findings about this evidence. I accept that the judge's attention was drawn to background evidence relating to FGM in Sierra Leone and there has been no proper engagement with this.
17. Ground 3 asserts that the judge made findings that are not grounded in the evidence with reference to paragraph 34 where the judge found that it was "surely unrealistic that the leader of the society would seek to pass on that role to someone who did not believe in the practice and who had not even undergone the practice herself". There is some merit in the ground of appeal. If it was the only ground of appeal it may not in itself cause me too much concern. However, it is an example of the judge having not properly engaged with the Appellant's evidence (see paragraph 5 of her witness statement) and overlaps with ground 2.
18. Ground 4 asserts that the judge relied on post-hearing evidence from a Jehovah Witness website. My attention was drawn to EG post-hearing internet research Nigeria [2008] UKAIT 0015 and AM fair hearing Sudan [2015] UKUT 00656. It is without doubt that the judge in this case relied on evidence that was not before the parties. It was not relied on by the parties. He did not give the parties the opportunity to consider it. In addition, it is not made clear from the decision exactly what website the judge was relying on. This is a procedural irregularity giving rise to unfairness.
19. I have taken on board Mr Whitwell's submissions that any errors are not material. In support he highlighted the findings of the judge that are not, in his view effected by the alleged errors. These are the judge's findings in relation to the Appellant's age, that the Appellant would not be of interest to her stepmother, the issue of delay and the findings in relation to the father's e-mail. I do not agree with Mr Whitwell. My view is that the grounds are made out. It is not possible for me to conclude that had the errors properly identified in the grounds not been made out, the judge would have reached the same conclusions.
20. For the reasons I have given, I set aside the decision of the judge to dismiss the Appellant's appeal on asylum grounds. Part of the material error arises from a procedural irregularity which results in unfairness. In these circumstances, with reference to the Practice Statement 2012, I remit the matter to the First-tier Tribunal to be reheard afresh. None of the findings should be maintained.

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 *Joanna McWilliam*

Date 19 November 2018

Upper Tribunal Judge McWilliam