Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10124/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th May 2019	**On 24 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

I J B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Eaton of Counsel instructed by Fadiga & Co Solicitors
For the Respondent: Miss J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against the decision of Judge BA Morris (the Judge) of the First-tier Tribunal (the FtT) promulgated on 4th January 2019.

2. The Appellant is a female Gambian citizen who appealed against the Respondent's decision dated 10th August 2018 to refuse her international protection claim. The claim was made on the basis that if returned to

Gambia the Appellant's daughter would be at risk of FGM. The Appellant's daughter was born on 15th August 2015.

3. The Judge heard the appeal on 10th December 2018 and found that the Appellant had not proved a well-founded fear of persecution on the basis of her membership of a particular social group as a parent who opposes the procedure of FGM being performed on their child. The Judge found that the Appellant had not shown that she would be at risk on return to the Gambia nor that her daughter would be at risk. The appeal was dismissed on all grounds.

4. The Appellant applied for permission to appeal to the Upper Tribunal. In brief summary this contended that the Judge had erred by failing to reach a reasoned conclusion as to whether the Appellant's daughter would be at risk of FGM. In addition the Judge had erred by failing to consider a concession by the Respondent in the refusal decision that their daughter was at risk of FGM and the judge had erred by failing to follow K (FGM) Gambia CG [2015] UKUT 62 (IAC).

5. Permission to appeal was granted by Upper Tribunal Judge Perkins in the following terms;

> "(1) The First-tier Tribunal Judge has found that the Appellant's daughter is not at risk of FGM because neither the Appellant nor her husband wanted it to happen. However the Respondent accepted that the Appellant's daughter 'would be expected to undergo the procedure'. Those findings are not incompatible. It may be that there are those who would expect the Appellant's daughter to be cut but the Appellant and her husband would prevent it. However it is arguable that the First-tier Tribunal wrongly went behind a concession by the Respondent.
>
> (2) It is also arguable that the First-tier Tribunal's finding that there would be effective protection is not sustainable in the absence of evidence of the law being enforced. It may be that any error about protection is not material.
>
> (3) For the avoidance of doubt, permission is granted on each ground."

Error of Law

6. On 4th April 2019 I heard submissions from both parties in relation to error of law. On behalf of the Appellant reliance was placed upon the grounds upon which permission to appeal had been granted. On behalf of the Respondent it was contended that the Judge had not materially erred. Full details of the application for permission, and the submissions made by both parties, are contained in my error of law decision dated 4th April 2019, promulgated on 11th April 2019. I set out below paragraphs 8-16 of my error of law decision which contain my reasons for concluding that the judge erred in law and the decision of the FtT must be set aside;

> "8. In my view the judge has materially erred in law for the following reasons. The Respondent at paragraph 42 of the refusal decision stated 'Considering your claim in the round and considering your

external consistency of traditions with FGM, it is accepted that your daughter would be expected to undergo the procedure due to tradition, but not that she has been directly threatened.'

9. At paragraph 43 which is a summary, the Respondent recorded that the following facts are accepted, that the Appellant is a victim of FGM, and there is an FGM threat to her daughter.

10. I will refer to the Respondent's acceptance, rather than a concession, but this was not considered by the judge when assessing risk. In my view the judge did fail to reach a reasoned conclusion as to whether the Appellant's daughter was at risk of FGM. The judge at paragraph 24 records that the prevalence of FGM in the Fula tribe, which is the tribe to which the Appellant belongs, is said to be 30%, although some estimates are as high as 84%. The judge records that the Appellant and her husband oppose FGM on their 3 year old daughter. The judge found that prevalence of FGM in the Appellant's family appears to be high which carries an increased risk for the daughter, but parental opposition and a family home in an urban settlement reduced the risk. The judge then concludes, 'In the light of the above, I conclude that the risk of infliction of FGM on the Appellant's daughter against the will of the Appellant and her husband is less than the rate of incidence of FGM in the Fula tribe.'

11. The judge has said that the prevalence of FGM in the Fula tribe could be 30% or as high as 84%. It is not clear whether the judge is referring to a risk of less than 30% or less than 84%. In my view these findings are not adequately reasoned.

12. The judge departed from the country guidance in K and Others because subsequent to publication of that case, there had been a change in the law in Gambia, and the Women's (Amendment) Act 2015 had been implemented. It is possible to depart from a country guidance decision if there are cogent reasons for doing so.

13. In this case I do not find that the judge has given adequate reasons for departing from the country guidance case. This is because although there has a been a change in the law, it is acknowledged, and noted by the judge at paragraph 27 that since the 2015 Act was adopted, records show that only two cases of FGM have been brought before the courts, and there is no information concerning any convictions. The judge therefore fails to set out on what basis the situation in Gambia had actually materially changed, and does not take into account the Respondent's CPIN at paragraph 2.4.1 which was before the FtT, which records that 'FGM remains a deeply entrenched practice and concerns have been expressed that the criminalisation of FGM may force the practice underground, or into neighbouring countries where it is not criminalised'.

14. For the reasons given above I conclude that the judge erred in law, and the decision of the FtT must be set aside.

15. It was suggested by the representatives that if a material error of law was found, it would be appropriate to have a continuation hearing in the Upper Tribunal to consider risk on return, so that

the parties could have the opportunity to make further submissions and supply updated background evidence.

16. In my view it is not appropriate or necessary to remit this appeal back to the FtT. I find it is appropriate for there to be a continuation hearing before the Upper Tribunal, for the purpose of considering risk on return in relation to FGM, and the Appellant's daughter."

Re-Making the Decision

7. At the resumed hearing the Appellant attended but was not called to give oral evidence. I ascertained that I had received all documentation upon which the parties intended to rely, and this consisted of documentation that had been before the FtT. I had the Respondent's bundle with Annexes A-G, and the Appellant's bundle which contained 16 pages of subjective evidence, and 138 pages of objective evidence, together with the Appellant's skeleton argument that had been before the FtT. Neither party submitted any further documentary evidence.

8. I heard oral submissions from the representatives which I have recorded in my Record of Proceedings and will summarise very briefly below.

9. On behalf of the Respondent reliance was placed upon the refusal decision dated 10th August 2018. I was asked to find that the situation in Gambia had changed since the country guidance decision was published.

10. I was asked to note that if the Appellant returned to Gambia, she would re-join her husband and they would live together as a family unit with their three children. Both parents opposed FGM. I was asked to note that FGM has now been made illegal, which amounts to a significant change in circumstances. It was submitted that because FGM is illegal, there is now a sufficiency of protection in Gambia. It was submitted that even if the country guidance case was followed, paragraph 122 of that decision indicates that the evidence falls short of demonstrating that intact females in Gambia are, as such, at real risk of FGM. The assessment of risk of FGM is a fact-sensitive exercise, which is likely to involve the ethnic group, the attitudes of parents, husband and wider family and socio-economic milieu.

11. At paragraph 118 of the country guidance decision it is stated that the evidence falls well short of demonstrating that young females in the Gambia in general are at real risk of FGM. There are significant variables which affect the risk.

12. I was asked to dismiss the appeal.

13. On behalf of the Appellant reliance was placed upon the skeleton argument. I was asked to note that the Respondent accepted in the refusal decision that the Appellant's daughter would be expected to undergo FGM. At paragraph 45 it was accepted that the Appellant had demonstrated a genuine subjective fear on return to Gambia.

14. I was asked to find that FGM is prevalent in the Fula tribe to which the Appellant and her family belong. It was submitted that the starting point should be the country guidance decision on FGM and I was asked to find that although FGM had been made illegal subsequent to that decision being published, there was in practice not such a change of circumstances to indicate that the country guidance decision should not be followed. The Appellant herself had been subjected to FGM, and her family, with the exception of her husband, particularly her mother and aunt had indicated that FGM should be carried out on her daughter. The Appellant's evidence was that her father had contacted her, and told her to return from the UK to obey her mother's wishes in relation to FGM being carried out upon her daughter.

15. I was asked to follow the country guidance decision and allow the appeal. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

16. I have considered the evidence in the round. The burden of proof is on the Appellant, to the lower standard, that being a reasonable degree of likelihood. I find that the Appellant arrived in the UK on 5th February 2018 having been granted a visit visa. She travelled with her husband and two children, her daughter born 15th August 2015 and son born 4th August 2017. The couple had left their oldest child in Gambia. On 5th March 2018 the Appellant's husband left the UK to return to Gambia and the Appellant remained in the UK with the two younger children and made a claim for asylum.

17. The Respondent accepts and I find as a fact that the Appellant underwent FGM when she was a child. She and her family are members of the Fula tribe. The Respondent's Country Policy and Information Note on female genital mutilation in Gambia published in December 2016 is contained within the Appellant's bundle. At paragraph 6.4.2 the prevalence of FGM in the Fula/Tukulor/Lorobo ethnic group is said to be 87.3%. At paragraph 6.4.10 a report confirms that the Mandinka, Fula, Sarahole and Djola ethnic groups practise FGM extensively, with prevalences in the range of 94.3% - 96.7%. I do note however that that particular report is dated June 2013. In the country guidance decision of K, the prevalence of FGM in the Fula tribe may be as low as 30%, although some estimates are as high as 84%.

18. The Appellant's fear is of her mother and aunt, and the Respondent accepted in the refusal decision at paragraph 41 that FGM is a tradition in the Appellant's family, although direct threats had not been substantiated, and the Respondent accepted that the Appellant's daughter would be expected to under FGM but not that she had been directly threatened. It was accepted that the Appellant had demonstrated a genuine subjective fear on return to Gambia.

19. I must consider whether that fear is well-founded. The most recent country guidance decision is K, and that therefore is my starting point. I must follow a country guidance decision unless there are cogent reasons not to do so.

20. I accept that since K was published, FGM has been made illegal in Gambia by the Women's (Amendment) Act 2015.

21. K does not indicate that all females in Gambia are at risk of FGM. Considering risk is a fact-sensitive exercise.

22. In my view the background evidence indicates that the prevalence of FGM in the Fula ethnic group to which the Appellant belongs is high. I also accept that FGM is practised within the Appellant's immediate family and the Appellant when she was a child was a victim of that practice.

23. I find that the Appellant and her husband oppose FGM which lessens the risk, and in Gambia the Appellant moved from a rural area to a more urban area. However my conclusion is that the Appellant's daughter would be at risk of being forced to undergo FGM from her own family if she returned to Gambia, taking into account it has been established that that is the practice of the Appellant's family.

24. I must therefore consider whether there would be a sufficiency of state protection, and/or, a reasonable internal relocation option.

25. It was found in paragraph 8 of the head note to K, that there was no reliable evidence to suggest that a female who may be at real risk of FGM can avail herself of effective state protection or that her father or husband could invoke such protection on her behalf. That however was before FGM was specifically criminalised.

26. I do not find that criminalisation of FGM indicates that there is effective state protection. Both representatives referred me to background and objective evidence, and both accepted that since the criminalisation of FGM, there have only been recorded two arrests in relation to individuals accused of carrying out FGM. The evidence does not indicate that there have been any convictions. I conclude that the lack of evidence of arrests, does not provide cogent reasons for departing from the conclusion in K, that there is no effective state protection in Gambia in relation to FGM.

27. Paragraph 9 of the head note in K relates to internal flight, and provides that as a general matter, an individual at real risk of FGM in her home area is unlikely to be able to avail herself of internal relocation, although this is always a question of fact. Cogent reasons need to be given for a finding that the individual would be able to relocate safely, especially given the evidence that ethnic groups are thoroughly interspersed, the country is small and ethnic groups in different parts of the country are highly interconnected. I do not find, following this guidance, that the Appellant and her family would have a reasonable option of internal relocation within

Gambia. In my view the evidence indicates that the Appellant's daughter would be at risk wherever she lived in the Gambia.

28. I therefore find that the Appellant's subjective fear, which is accepted by the Respondent, is objectively well-founded. I believe there is a real risk that the Appellant's daughter would be subjected to FGM if returned to Gambia. I therefore conclude the Appellant is entitled to a grant of asylum as the member of a particular social group.

29. Because the Appellant is entitled to a grant of asylum she is not entitled to humanitarian protection. For the same reasons as I find that the Appellant is entitled to asylum, I find that there would be a real risk of the treatment that would breach Article 3 of the 1950 Convention if the Appellant and her children return to Gambia.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. I substitute a fresh decision.

I allow the Appellant's appeal on asylum grounds. Therefore the Appellant is not entitled to humanitarian protection.

I allow the Appellant's appeal on human rights grounds with reference to Article 3.

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 them 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 Date: 17th May 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

I do not make a fee award. The appeal has been allowed because of evidence considered by the Tribunal which was not before the initial decisionmaker.

Signed Date: 17th May 2019

Deputy Upper Tribunal Judge M A Hall