Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/00832/2013
AA/00835/2013
AA/00836/2013
AA/00837/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 17th May 2013

Date sent
On 29th July 2013

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ADFUNMI AGNES SHITTA
THERESA SHITTA (A MINOR)
HEPHZIBAH OLUWAJOMILOJU SHITTA (A MINOR)
BENJAMIN SHITTA (A MINOR)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M C Afzal of International Immigration Advisory Services
For the Respondent: Not represented

DETERMINATION AND REASONS

1. The appellants appealed with permission against the determination of First-tier Tribunal Judge Hague, who dismissed their appeals against the

© CROWN COPYRIGHT 2013

decision of the respondent to refuse refugee recognition or leave to remain on humanitarian protection or human rights grounds.

2. The Secretary of State was not represented at the hearing today and no written representations were received.

3. The principal appellant is an adult Nigerian citizen, and the other three appellants are her children: a daughter, T, born in 2004, now nine years old but with such severe autism that she presents as a much younger child; a son, born in 2007, now six years old; and another daughter, born in 2011 and therefore presently two years old. The principal appellant's husband, a Christian pastor, remains in Lagos, Nigeria, where his Church is, but has visited the appellants in the United Kingdom several times during 2012.

4. The appellants were in the United Kingdom in 2010, at which time they began making arrangements for the child T to go to school here and have support for her special needs. The plan was for an aunt to adopt her and be her carer. They then returned to Nigeria and did not come to the United Kingdom again until the beginning of 2012, entering as visitors and then applying for asylum and leave to remain on humanitarian protection or human rights grounds.

5. The Secretary of State refused international protection and curtailed the existing leave so that none remained. At the same time, she gave directions for the removal of the appellants under Section 47 of the Immigration, Asylum and Nationality Act 2006. Such a simultaneous direction is unlawful, following the decision of the Upper Tribunal in *Adamally and Jaferi* (*section 47 removal decisions: Tribunal Procedures) Sri Lanka* [2012] UKUT 414 (IAC).

Factual matrix

6. The First-tier Tribunal judge found that the principal appellant gave a "generally truthful account of matters, although tending to be dismissive of suggestions incompatible with her wish to remain in the United Kingdom". He accepted most of her evidence. The following is a summary of the factual matrix disclosed by the First-tier Tribunal determination.

7. The principal appellant is a woman of Yoruba ethnicity born in 1974 in Lagos, who lived there all her life before coming to the United Kingdom. The other three appellants are her minor children with her husband, a Christian pastor, David Shitta, who is a minister of the Cherubim and Seraphim Church in Lagos. The eldest and youngest children are daughters and the middle child is a son.

8. The appellant is also a Christian and when in Lagos she worshipped at her husband's Church. Her own parents live only five miles away. The couple are estranged due to a dispute in the latter half of 2012 concerning the

perceived necessity for their daughters to undergo female genital mutilation (FGM), which the husband's parents regard as essential. FGM is unlawful in Nigeria but is still practised in some places. The appellant and her husband oppose the practice, although he is more inclined to defer to his female relatives in this matter.

9. The eldest daughter, T, is severely autistic and has no speech; she is hyperactive. People in Nigeria were generally unkind to T, staring at her and calling her names. About half of the congregation of her father's church shunned her whereas the other half were kind and sympathetic. The appellant's husband's family, who were not Christians, interpreted her lack of speech and hyperactivity as indicating that T is a witch and rejected her. They asked the appellant to leave her husband and tried to harm the child. The husband's family attempted to impose FGM on the child T, when she was about two years old, but due to her hyperactivity, were unable to complete the procedure.

10. From December 2005 the appellant and her children lived with her own parents, some five or six miles away from the family compound. Her husband remained with his family, due to there being insufficient room in the appellant's parents' house. The children went to church with their maternal grandparents, a church of the same denomination. They had no contact with their paternal family. The appellant continued to attend her husband's church.

11. In the light of the family difficulties, and to give T a better life, the appellant's husband suggested that she bring the children to the United Kingdom. The appellant and her husband agreed that he would remain in Lagos, Nigeria, and continue his ministry, but would visit his family in the United Kingdom regularly. The appellant and her husband hoped that the appellant's brother, who lives in the United Kingdom, would adopt T, but the brother's wife opposed it and that part of their plan was unsuccessful.

12. In February 2012, the principal appellant and her minor children came to the United Kingdom. The appellant's husband visited the family in April, July and December of 2012. In July 2012, the appellant's husband told her that his family wanted the youngest child, also a daughter, to be returned to Nigeria for FGM to be carried out. They quarrelled. By the time he visited in December 2012 they were estranged and he only came to see the children.

13. Since coming to the United Kingdom, T has made some limited progress. She was able to attend school here, had a social worker, and a charity (Time Out) gave the appellant four hours' respite a week. The child was not shunned here, and some limited progress had been made in her condition in that she has learned to say *baba* (father) and *Bob* (for Bob the Builder).

The First-tier Tribunal determination

14. After setting out the accepted facts, the First-tier Tribunal Judge's reasoning was as follows:

> "9. The COIS Report states that FGM is prohibited in Nigeria and is a criminal offence. The practice still continues however in areas where the custom is entrenched and enforcement action is patchy.
>
> 10. The appellant and her husband are both opposed to FGM as are the appellant's parents. Her husband's family favour it but it has been resisted thus far. As the children have been living only about five miles from the paternal family home it does not appear that there is a risk of force being used. The remedy to this situation is for the parents to be resident. The appearance is that the move to England and this application insofar as it relates to FGM is as much designed to avoid family discord as to prevent it occurring. When a removal of children to a house five or six miles away has secured their safety thus far it is clearly the case that relocation in a country as large as Nigeria would be as effective as coming to England. Although criminalisation of FGM has failed to eradicate the practice it is indicative of the existence of State support and protection to parents who would avail themselves of it.
>
> 11. There are a number of organisations devoted to the care and treatment of autism in Nigeria including two in Lagos and three in Abuja. They are all listed in the RRL. The appellant said that she was aware of some of them but she had not sought their assistance. It is appropriate that the resources available in her own country, be accessed before seeking international aid.
>
> 12. I accept that autistic children can be perceived as malevolent in parts of Nigeria and unkindly treated but that is not the whole picture. The appellant herself conceded that something like half of the very large population of her parent's church were kind and sympathetic in their responses. The presence of several institutions directed to the treatment of autism shows that suffers from the condition can be appropriately cared for."

The decision deals briefly with Article 8 of the ECHR and also with Section 55 of the 2009 Act as follows:

> "14. The appellant and her children would be removed as a family unit so that family life is not adversely affected by the decision. Mr Afzal argued that because the children have now enrolled in school that there is a protected family life. They are very young and adaptable and their time in the United Kingdom has been so short that I do not find that it constitutes a family life of a protected quality. Article 8 is not infringed.
>
> 15. There is a duty upon the respondent to have regard to the need to safeguard and promote the welfare of children who in the United Kingdom. It is in the interest of these children to live with their family in the country and culture of their birth".

Permission to appeal

15. Permission to appeal was granted by Designated Judge Campbell on the basis that the assessment of Article 8 and Section 55 in the determination was arguably flawed in the light of guidance given by the Upper Tribunal in *MF (Article 8 – new rules)* [2012] UKUT 00393 and *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45, and also in *Adamally and Jaferi* concerning the s.47 point. He considered that there was little merit in the appellants' challenge to the determination in relation to asylum, or humanitarian protection.

The Upper Tribunal hearing

16. At the hearing today I heard additional evidence from the appellant, some of which has been included in the summary of facts above. In addition, the following information was given:

    (i) The appellant said that although she and her husband were both opposed to FGM his traditionalist family or at least the senior members thereof were putting pressure on them.

    (ii) Most of the children in the family were now either Christian or Muslim. Some of the husband's family was in Lagos and some in Ekiti State about three hours' drive away.

    (iii) She did not know whether his sisters or his nieces had undergone FGM because she had never asked the question. She knew the family but they were not cordial. The parents would not stop the children from doing whatever they liked, except in relation to one or two traditions still considered important, such as a particular method of washing a new baby's head, and FGM itself. The way the family talked, it was her feeling that they considered that FGM was something anyone should do.

    (iv) She accepted that FGM was illegal in Nigeria but the attitude of Nigerians to laws was that they existed but there was no need to abide by them.

17. In submissions for the appellant, Mr Afzal relied on the special needs report and a school report on the child T and reminded me of the factual matrix. He submitted that the best interests of the children required that they remain in the United Kingdom and in particular that T would be shunned on return which was inhuman and degrading treatment. Nigeria was not a protected environment for her and she would not receive the same treatment as she was receiving in the United Kingdom. The Tribunal in the First-tier had erred in failing to consider the new Article 8 Rules before moving to consider Article 8 outside the Rules but he could not indicate how the new Rules were likely to have been favourable to the appellant. I reserved my decision.

Evidence Concerning T’s Difficulties

18. The Home Office bundle contains the following evidence concerning T:

(a) A letter of appointment by Southwark Health and Social Care on 21st December 2010;

(b) a letter of 24th December 2010 referring the child to the social communication clinic;

(c) A statement of special educational needs prepared on 29th October 2010. When her needs were assessed by Southwark she had not yet been enrolled at any school. Her maternal aunt was planning to take up guardianship and seek a school place for the child. The family were staying with the aunt, who referred to herself as T’s carer. There were difficulties because T’s cousins were unwilling to play with her.

(d) The SEN statement recorded that while in Lagos, T attended a special school, the Creative Children’s School, from which a report had been made available to the Children’s Services at Southwark. She had been receiving three hours’ therapy at home before coming to the United Kingdom, which, according to her mother, had made a big difference. A report from the Country of Origin Information Service indicated that there were a number of special schools for children with special needs in Nigeria including for autistic children and gave various internet links to the relevant schools.

(e) The child T was assessed as having many behaviours and tendencies indicating quite severe difficulties, in particular with the development of speech, language and communication, social interaction, fine and gross motor development as well as cognitive abilities. T had no receptive or expressive language, very little interest in others and in interacting (which indicated a delay in her emotional and social development), exhibited much repetitive and self stimulating behaviour, with a lack of awareness of her environment and dangers around her. T preferred to be alone and would not share things and she did not seem to suffer pain. There were suspected problems with her vision and hearing as well as autistic spectrum disorder; and

(f) A letter on 4th January 2011 about admission to a local authority school.

19. The appellant and her children must have returned to Nigeria after that visit because their present stay in the United Kingdom began in February 2012, on visit visas valid until 9th June 2013: that leave was subsequently varied so that none remained.

Country evidence

20. The respondent's Country of Origin Report of January 2013 notes that according to the 2008 Nigeria Demographic and Health Survey (NDHS), which is the latest such survey, 30 percent of Nigerian women had been subjected to FGM which was most prevalent in the southern region among the Yoruba and Igbo. Most women were subjected to FGM before their first birthday, although the age could vary. Nigerian law criminalised the removal of any part of the sexual organ from a woman or girl except for medical reasons. FGM appeared to be declining. At paragraph 3.9.4, the respondent's January 2013 OGN says this:

> "3.9.4 FGM is a phenomenon found in large parts of Nigeria, but there is great variation in how it is practised. There is a clear tendency that the share of girls and young women subjected to FGM is decreasing with every generation. FGM is practised by all larger ethnic groups in Nigeria, but other social factors influence the practice and cause great variation within these ethnic groups. FGM is a criminal offence in a number of Nigerian States, but no cases of legal prosecution of people who have subjected girls or women to FGM have been recorded. Projects against FGM, run by both State authorities and NGOs, focus on information to the general public and consciousness building. Differences in the prevalence of female circumcision by age indicate that the practice has become less common over time. Women aged 45-49 are nearly twice as likely as women aged 15-19 to have been circumcised (38 percent compared with 22 percent)."

21. The OGN concludes:

> "3.9.6 **Conclusion** Whilst protection and/or assistance are available from governmental and non-governmental sources, this is limited. Case owners will need to ensure that each case is considered on its own merits, however in general those who are unable or, owing to fear, unwilling to avail themselves of the protection of the authorities, can safely relocate to another part of Nigeria where the family members who are pressurising them to undergo FGM would be unlikely to trace them. Women in this situation would if they choose to do so, also be able to seek protection from women's NGOs in the new location."

Discussion

22. The proper approach to Article 8 both within and without the Immigration Rules has been controversial. The effect of both *Izuazu* and *MF (Nigeria)* is that the decision maker must always give consideration to Article 8 both within and without the Rules. However, since Mr Afzal has been unable to identify any area of the domestic Article 8 formulation within the Immigration Rules which was likely to have made a difference to the outcome of the appeal, I do not consider that there is any error of law by the First-tier Tribunal in dealing only with Article 8 outside the Rules.

23. The s.47 decision, with which the First-tier Tribunal did not deal in the determination, is unlawful.

24. The real question is whether, having regard to Article 8 and to the best interests of these very young children, pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009, removal of these children and their mother to Nigeria breaches the United Kingdom’s international obligations. The best interests of the children are a primary factor but not necessarily determinative, especially where, as here, they are very young and have not yet formed strong connections outside the home.

25. Turning to Article 8 without the Rules, the appellants put that in three ways: first, in relation to the special needs of the child T, second, in relation to the FGM risk to T and the youngest child, also a girl; and thirdly, in relation to private and family life generally.

26. Dealing first with the position of T, the evidence before the respondent showed that special needs support for autism was available in Nigeria. T was receiving special education and three hours’ home support in Lagos, whereas in the United Kingdom she is receiving education and her mother gets four hours’ respite support. The difference does not seem to be sufficiently grave to engage the provisions of Article 8. T’s engagement with the outside world is very restricted: she feels no pain, shows no interest in others, is very self-absorbed, and hums to herself. Only two identifiable words have emerged while she has been in the United Kingdom. She will be no better and no worse off in Lagos than in the United Kingdom.

27. The next question is the risk of FGM in Nigeria if the oldest and youngest daughters return with the appellant now. The principal appellant, a Christian, is implacably opposed to FGM and has become estranged from her husband when he suggested it be carried out on their second daughter. FGM is unlawful in Nigeria and both of the child’s parents are opposed to it, albeit the opposition of the child’s pastor father may be weakened by the pressure from his parents.

28. The principal appellant has the support of her parents. The evidence is that all the appellants lived with the principal appellant’s parents just five or six miles away from her husband’s family compound and his family, before coming to the United Kingdom, and during that time, the second, third and fourth appellants had nothing to do with their father’s family. The principal appellant was able to continue attending her husband’s church, while her children attended her parents’ church, until the family left Nigeria. Her husband’s family were unable to enforce FGM: after an abortive attempt to perform FGM on the child T when she was 2 years old, which is now seven years ago, their influence has been confined to social and family pressure on the appellant’s husband.

29. The only area where the principal appellant’s evidence appeared to me to be evasive was when I asked her whether her sisters-in-law and her nieces had undergone FGM. I do not believe that the appellant would be unaware of the answer to that and I consider that her answers may not have been

entirely straightforward. Given that all of her sisters-in-law are either Christians or Muslims, it is reasonably likely that they and their daughters fall into the increasing group of Nigerian women who have refused to cooperate with FGM.

30. The third way in which Article 8 is put is on the basis of family and private life. The only family life experienced by the appellant and these children is amongst themselves and with the children's father. As to private life, the children are very young with the exception of T, who although she is older because of her poor communication presents as a much younger person and does not engage with the world around her at all. There is therefore no good reason why they could not all return to Nigeria and either continue living in Lagos with the appellant's parents or relocate to, say, Abuja and begin afresh, away from the pressure of her husband's parents.

31. For all the above reasons this appeal is dismissed, save in relation to the s.47 direction.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

I remake the decision in these appeals, dismissing them on asylum, humanitarian protection, and human rights grounds. The appeals against the respondent's decisions to remove the appellants pursuant to s.47 are allowed.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Date: 17 September 2013 Signed:

Judith Gleeson
Judge of the Upper Tribunal