Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08243/2013

THE IMMIGRATION ACTS

Heard at Birmingham, Sheldon Court	**Determination Promulgated**
On 10th January 2014 , 14th March 2014 and 16th May 2014	**On 13th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

O J
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs M Chaggar (Counsel)
For the Respondent: Mr N Smart (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Deavin promulgated on 11th October 2013, following a hearing at Birmingham, Sheldon Court on 1st October 2013. In the determination, the judge allowed the appeal of O.J. The Respondent Secretary of State

applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a 31 year old citizen of Sierra Leone. She was born on 23rd November 1983. She claimed asylum on 5th April 2013. A decision of 13th August 2013 refused her application for asylum. Directions were given for her removal. It was noted that the Appellant had come to the UK on 4th April 2011, on a student visa, until 11th June 2012. Her Sponsor's licence was then revoked. She was granted further leave to remain. At its end on 5th April 2013, she applied for asylum.

The Appellant's Claim

3. The Appellant's claim is that in the UK she began living with her partner, E S, and their daughter, E. One day she heard E S talking on the phone, saying that he wanted to take E back home for female circumcision. The Appellant left the house where she was living with E S. He, however, subsequently returned to Sierra Leone. The Appellant herself does not believe in female circumcision. She belongs to the Christian faith. She is a Krio Christian. Although her, now former partner, E S, was also a Krio Christian, his mother was mixed Krio and she practised female circumcision. The threat of FGM came from her former partner's mother, if the Appellant was returned back to Sierra Leone with her daughter, E.

The Judge's Findings

4. The judge found the Appellant "to be an honest and straightforward witness" (paragraph 107). He took into account the fact that the Appellant's sole reason for not returning to Sierra Leone "is the safety of herself and, perhaps more importantly, her young daughter" (paragraph 108). The Appellant's tribe, the Christian Krio tribe, are a minority in Sierra Leone and they do not practise FGM. Indeed, "nor is her ex-partner in favour of it" (paragraph 109).

5. What the judge, however, was particularly impressed with, was the fact that, "on the evidence before me, ….. E S's mother is a woman who was circumcised and wishes her granddaughter to be similarly mutilated" (paragraph 110). The judge held that, given that he had to be satisfied only on the lower standard, the Appellant had discharged the burden of proof that was upon her (paragraph 115) and that if the Appellant were to return to Sierra Leone with her daughter, "there would be a very real risk that her daughter, in particular, would be seized and taken by E S's mother, or people acting on her behalf, and that the child would be subject to FGM" (paragraph 116). The appeal was allowed.

Grounds of Application

6. The Respondent Secretary of State applied for and was granted permission to appeal on the basis that the material upon which the judge could have concluded as he did, whether to rely upon it or to rebut the decision in the refusal letter, was not identified or evaluated by the Tribunal judge.

Further, internal relocation was not considered by the judge, although it was acknowledged to be in issue.

7. On 11th November 2013, permission to appeal was granted.

The Hearing

8. At the hearing before me on 10th January 2014, that there were submissions made before the judge that "the State Department Report said that there had been no prosecutions" of people who practised FGM and that "women want to be initiated into a society and Krio are now a minority group", but they no longer had positions of power, and "there was no realistic chance of the Appellant's daughter being able to avoid such persecution" (paragraph 105). Yet, the US State Department Report was not before the judge. Nor does the judge identify this report. Therefore, it is not clear what the judge is referring to in describing the "State Department Report".

9. Second, although it is accepted that the Krio are a minority group, this is not the issue, because the real issue is that the Appellant had a relationship with her ex-partner before they both came to the UK in 2003, and then they had separated again, and there was no evidence that there would be pressure from the Appellant's ex-partner now for their child to undergo FGM. The Appellant had come to the UK. Her partner joined her. They had lived together. Then they had separated again. The Appellant did not know where the ex-partner was. She only knew that he had returned to Sierra Leone. She had no contact with him and she had no contact with his mother. Therefore, it was not enough for the judge to record that, "she had tried to explain E S's mother's past" (paragraph 106).

10. For her part, Mrs Chaggar submitted that while she could see that the internal relocation point had not been considered by the judge, she could not concede that this led him into a material error of law. That was the more easier point to deal with. As to the whole question of where the risk emanated from, Mrs Chaggar submitted that the judge had made enough references in the background to how the risk arose.

11. For example, the judge explained how, in relation to the Appellant, "she had never spoken to E S or his mother about her background, as this would be considered rude" (paragraph 44). She had explained that, "It would not be possible for her to live elsewhere in Sierra Leone, as there would be language problems and she would have to make herself known to the chief in the area" (paragraph 45). These were all matters relevant to whether the Appellant could relocate to another part of Sierra Leone. This was why she could not concede the issue of IFA.

12. At this stage, Mr Smart interjected to say that the refusal letter makes it quite clear that the Appellant is of the Krio tribe, her parents are of the Krio tribe, and the parents live in Freetown, which is the capital city of Sierra Leone, to which the Appellant could easily relocate. There would be no undue hardship in that.

13. Mrs Chaggar continued to say that the most important feature of this case was that the Appellant had been found to be credible. Given that the judge had found the Appellant to be an honest and straightforward witness (paragraph 107) it had to be accepted that what she said in relation to the risk to her daughter was a very real risk. The rest of the judge's conclusion falls into place once it is accepted that he had found the Appellant to be credible.

14. In reply, Mr Smart submitted that the judge may have found the Appellant to be credible, but what the judge has to consider is whether protection is available to the Appellant, because this is the basis upon which the refusal letter is predicated, failing which the Appellant could not have succeeded. It is not enough to say that, "I am satisfied to the required standard that E S's mother is a woman who was circumcised and wishes her granddaughter to be similarly mutilated" (paragraph 110). He asked me to allow the appeal.

15. I invited both representatives to indicate how, in the event of my finding an error of law, they wished this matter to be determined. Mr Smart submitted that credibility was not challenged, and the only issue was whether the Appellant could relocate to another part of Sierra Leone, and whether the risk was a real risk, in circumstances where the Appellant's ex-husband had disappeared. Mrs Chaggar submitted that if an error of law is found, and the determination is set aside, a country expert would be instructed, so that the matter could be re-heard. Both submitted that I should reserve the matter to myself to be heard for a second stage hearing.

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision. There are two reasons for this.

17. First, whilst accepting, as the judge did, that the Appellant may have come across as a "honest and straightforward witness" (paragraph 107), there is still the question whether, there is a real risk to the Appellant and in particular, her child. That risk is not made out in circumstances where the Appellant has separated from her ex-partner, Mr E S, who has not only returned back to Sierra Leone, as we are asked to believe, but with whom the Appellant maintains no contact. He, however, does not believe in FGM. That is significant. This is because the risk that it is said attaches from the mother of E S. If the Appellant has no contact with E S, it is difficult to see how she has any reason to fear his mother, who can only act through the conduit of E S. Therefore, even on a lower standard, the risk is not made out.

18. Second, and not unrelated to the first point, the Appellant is returnable to Freetown in Sierra Leone. Not only is this the capital city, with a large bustling population of a metropolis, but the Appellant's own mother and father are situated in that town, and the Appellant can readily find a home there. There has been no evidence that this is not the case. Had it

existed, the Appellant would have been in a position to present it. It was not presented before Judge Deavin.

19. Given this, I make a finding of an error of law, and set aside the decision of Judge Deavin. For the matter to be re-heard, as a second stage reconsideration hearing, it is important for there to be in evidence some objective evidence relating to the Appellant's relocation to Freetown. I accordingly, issue the following directions.

20. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge.

21. This matter to be listed at the first available date for one and a half hours before me and reserved to myself.

22. Not later than seven days before the day listed for the hearing of this appeal, each party shall serve on the other, and the Tribunal a paginated bundle, containing all documents on which the party seeks to rely, including statements from any witness that the party intends to call, drawn to a standard as evidence-in-chief, without the need for additional questions.

Anonymity

23. Anonymity order made.

Hearing on 14th March 2013

24. At the reconvened substantive hearing of 14th March 2014, when this matter was next heard, Mrs Chaggar, appearing for the Appellant was, once again in attendance. Mr Smart appeared for the Respondent. Mr Smart, however, indicated that there was an initial difficulty in proceeding with his appeal. He had been informed by Mrs Chaggar that there was a expert report, contained in a bundle dated 11th March 2014, from the Coventry Law Centre, prepared by Dr Barbara Harrell-Bond, which had not been served upon him, as the directions had required previously, seven days before the hearing.

25. This was a hefty 100 page report, which Mr Smart stated, quite simply could not be read and prepared for, in time for this morning's hearing. Mr Smart said that had it not been for Mrs Chaggar alerting him to the existence of this report, and had it not been for her to have handed him a copy of this report only this morning, he would not even have known that it existed. I pointed out that my file contained a copy of the bundle of documents dated 11th March 2014. However, it had been received by the Tribunal only on 12th March 2014. This again, was not in compliance with the directions, because it was not seven days before the hearing.

26. Mrs Chaggar could only apologise profusely. She undertook to contact the Coventry Law Centre. She spoke to Mr Bircumshaw, who quite properly admitted to the fault of the centre. He offered no explanation as to why there had been a delay in the submission of this document. He made up

no excuses. This is very much to the credit of Mr Bircumshaw. It is, if I may say so, entirely consistent with the character and reputation of Mr Bircumshaw in these Tribunals, which is that of an upright, and entirely straight practitioner in this jurisdiction. Sadly, however, matters have gone wrong, as they sometimes do in these tribunals.

27. That is not to say that not an inconsiderable degree of administrative inconvenience has been caused to the Tribunal. I accepted that Dr Harrell-Bond, the expert, was in attendance today, having travelled from Oxford, who was waiting outside the courtroom to give evidence. The witness herself was here. Mrs Chaggar was in turn also prepared to proceed. The problem however was that, through no fault of his own, Mr Smart was in no position to himself continue with this hearing.

28. Indeed, this hearing could not continue if Mr Smart indicated that he needed more than today's time, to read the report, and then revert back to the country specific experts in the Home Office, with their view in relation to this report. This is indeed what Mr Smart did say.

29. In the circumstances, bearing in mind the "overriding objective", I reluctantly decided to adjourn this hearing. I made it clear that I did so against my better judgment, and not without considerable misgivings, because, quite frankly, with directions having been given by myself in no uncertain terms, the appropriate course of action would otherwise have been for me to refuse to accept this report, because it arrived late.

30. However, given that the issue was that of IFA, and the ability of the Appellant to find relocation, and not the Appellant's own credibility, everything hanged upon the objective evidence. I should make it clear that no further quarter would be given to the Appellant's side. This matter was adjourned with the following directions.

Directions

i. The Tribunal directed that this matter was to be relisted before Deputy Upper Tribunal Judge Juss, at the first available opportunity, but subject to the availability of the expert, Dr Barbara Harrell-Bond, in Birmingham, Sheldon Court.

ii. The Respondent, Secretary of State, was to indicate to the Coventry Law Centre, if they wanted the attendance of the expert, Dr Barbara Harrell-Bond, in court when this matter was set to be relisted.

iii. The twenty page report of Dr Barbara Harrell-Bond, which was dated by her 2nd March 2014, was to be filed and served again upon this Tribunal and upon the Respondent Home Office, so as to ensure that it did indeed arrive seven days before the hearing, as the expert report that was to be relied upon for the substantive hearing which was to take place in Birmingham, Sheldon Court.

iv. The Respondent Secretary of State was to reply to the report of the expert, Dr Barbara Harrell-Bond, seven days before the next hearing, should that be deemed appropriate by the Respondent Secretary of State.

v. The Appellant was to serve a typed version of her handwritten witness statement of 1 4th March 2014, which was handwritten on the same day as this hearing, and simply handed up, so that a typed version of that same witness statement was to be ready for consideration before the Upper Tribunal in Birmingham when this matter was again relisted.

vi. No further evidence was to be adduced.

Hearing on 16th May 2014

31. At the substantive hearing on 16th May 2014, which was a continuation of the previous hearing of 14th March 2014, I had the assistance of a well-compiled Appellant's bundle from the Coventry Law Centre, dated 1st May 2014, together with the Appellant's witness statement of 23rd April 2014. I also had in attendance the expert, Dr Barbara Harrell-Bond, whose report appeared at pages 1 to 20, together with an addendum at pages 20A to 20D, as well as three cases that were also in the same bundle, for the assistance of the Tribunal. Ms Chaggar, who appeared on behalf of the Appellant on 16th May 2014, got the Appellant to adopt her witness statement and there were no further questions asked of her.

32. In cross-examination by Mr Smart, the Appellant was asked whether she knew the expert, Dr Barbara Harrell-Bond. The witness said that she did not. Mr Smart submitted that this was important because the expert did not explain in the report how she got the information upon which she based her conclusions. The witness said that she had been interviewed once by Dr Harrell-Bond and this is how the information was given.

33. There was no re-examination by Ms Chaggar.

34. The second witness on 16th May 2014 was the expert herself, Dr Barbara Harrell-Bond, and she adopted her report dated 30th March 2014 as well as her addendum of 16th March 2014. No further questions were asked by Ms Chaggar of this witness in evidence-in-chief.

35. In cross-examination by Mr Smart, the expert was asked how she had come across the information that she had included in her report, and the witness replied that she had interviewed the Appellant. She confirmed she had seen the refusal letter and had seen all the relevant documents. The witness was asked by Mr Smart whether she was aware that FGM as a whole was in decline in Sierra Leone and other countries of Africa.

36. The expert replied that this fact had to be placed in the context of the increasing power of the "Bondo" society in Africa (see page 7). Although the reference to the "Bondo" was not explicitly explained in the expert report, Dr Harrell-Bond explained in evidence, that this was a society of women, for women, set up to propagate and perpetuate the particular status of women in society as a whole.

37. Mr Smart asked the witness about the section in her report (at page 2) headed "the prevalence of FGM in Sierra Leone" where she explains that

88% of girls and women in Sierra Leone are mutilated. She was asked about the "Sowei", who are women who specialise in cutting girls, and make their living by cutting girls, and the witness explained that they do very well out of this vocation because they can charge up to $200 per cutting.

38. She was asked who would pay a Sowei to cut a girl, and the expert said that it would be either the father, or the mother normally, but there was a high degree of enthusiasm for this practice, and so money could be collected. In this case the influence of the grandmother was significant as she would pay for it.

39. The witness was then asked why it was implicit in her report that the grandmother was a Sowei. The witness said that she had assumed that the grandmother was a Sowei. She herself had undergone FGM and she was in favour of inflicting the same on the Appellant's child.

40. Mr Smart asked the witness why she thought, in a patriarchal society, where the men control the purse strings, women would have access to pay $300 for an FGM cutting. The expert witness explained that women retained control over all the household income, because they have to buy grain, and given the high importance attached to FGM, they would be able to find the money for the FGM mutilation.

41. She was asked why FGM would not be decided by the men in a patriarchal society. The expert explained that the reason for this was the influence of "Bondo society" where the women handled everything relating to women.

42. There was no re-examination.

43. In his closing speech, Mr Smart directed my attention to the US Human Rights Report at page 20 (referring to paragraph 3) and to page 25 and 26, which demonstrated that FGM was in decline. He submitted that the important fact here was that Sierra Leone was a patriarchal society. Therefore the attitude of the father was everything. The father was against FGM. Moreover, the family belong to the Krios tribe, and as such, of the sixteen tribes in Sierra Leone, this was the only one that did not practice FGM, so that the chances of this being inflicted on the Appellant's child were remote.

44. Furthermore, no-one had taken evidence from the father and found out what his wishes were. He was against it. In fact, Dr Harrell-Bond's report was based upon the assumption that the father's mother was herself a "Sowei".

45. However, there was no evidence of this. Even though she herself may wish the child to go through FGM, this could be vetoed by the male members, especially the father who was against it.

46. Finally, guidance was set down by the Tribunal in **K & Others (FGM) The Gambia CG [2013] UKUT 00062**, which could be followed in this case.

47. For her part, Ms Chaggar, in her closing speech referred to her skeleton argument. She said that an error of law was found on the issue of internal flight relocation. She read out her skeleton argument at paragraph 11 which was to the effect that,

> "Deputy Upper Tribunal Judge Juss has in the determination preserved the findings of credibility, the only question which remains to be determined is risk on return (given the Appellant and the father of her baby are no longer in a relationship) and internal relocation" (paragraph 11).

48. In this context, the findings of the original judge were important. The grandmother of the Appellant's child had undergone FGM, was in favour of it, and intended to inflict the same on the Appellant's child as well. The Appellant's witness statement (which appears at C1 to C2, at paragraph 6) confirms that the Appellant walked into a room and saw her ex-husband speaking with his mother on the telephone confirming his intention to hand over his child to his mother so her FGM could be performed.

49. In these circumstances, submitted Ms Chaggar, IFA is going to be difficult for the Appellant and the child.

Remaking the Decision

50. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal for the following reasons.

51. First, the Krios are the only tribe in Sierra Leone that do not practice FGM. The Appellant is opposed to it. Her former partner, E S, is opposed to it. The evidence before the original judge was ambivalent in that, although E S was opposed to it, the judge had gone on to find that he would have surrendered up his own daughter to his mother so her FGM could be performed. This was the evidence in the Appellant's witness statement. It was accepted by the original judge. That being so, it must be accepted by this Tribunal. Even so, the fact is that the Appellant now claims to have been separated from E S. Indeed, as has been stated above in the findings on the error of law, she does not even know where he is. Therefore, the Appellant will return back into Krios society. If not, she would return to Freetown in Sierra Leone. It is simply not plausible to suggest that there would not be any possibility of internal relocation in that capital city free from the risk of FGM.

52. Second, the expert report of Dr Barbara Harrell-Bond is predicated on the child's grandmother being a "Sowei". The original judge did not so find. This was not the substantiated claim of the Appellant in the evidence below. There is no reason to believe that is the case even if the grandmother herself had undergone FGM. Therefore, even assuming that the Appellant could not find IFA elsewhere in Freetown, the grandmother would just be a person who herself had undergone FGM and wanted the same for her grandchild.

53. Third, and still more importantly, the "Sowei" make their living by cutting, on a remunerative basis, and are paid up to $200 per cutting, a sum of money which would have to be found, and there is no evidence that, in circumstances where the Appellant's ex-partner is against the practice, he would provide such monies.

54. Fourth, and in any event, Sierra Leone is a patriarchal society, as Mr Smart submitted. The men control the purse strings. The women may have monies for the purposes of buying grain, as Dr Barbara Harrell-Bond stated, but money for grain is not the same as money for FGM, and that would be an additional expense. The practice, as the COI makes clear is in any event in decline.

55. Importantly, one must not overlook the fact that the Krios do not practice it. There may be the increasing importance of the "Bondo society" as the expert stated in evidence, but the Krios do not practice FGM.

56. It is in this respect, that the guidance given by the Upper Tribunal in **K & Others (FGM) The Gambia CG [2013] UKUT 00062**, is invaluable. The following points are relevant. First, the assessment of risk of FGM is fact-sensitive, and as it is likely to involve an ethnic group, the attitudes of parents, husband and wider family are important. Second, there are significant variables, which include the practice of the kin group of birth, the ethnic background, the education of the individual, whether she lived in an urban or rural area, and so forth. Third, in assessing the risk facing an individual such as the Appellant's child, the starting point is to consider the statistical information with respect to the prevalence of the practice within the ethnic group in question, namely, in this case the Creole. None of these considerations suggest that the Appellant and her child are at risk in the manner suggested.

57. All of them point to a conclusion that return back into their kinship group is a feasible proposition, and if that is not the case, certainly, return back to Freetown is entirely reasonable and feasible.

58. In the circumstances, and bearing in mind the objective evidence that Mr Smart brought to my attention, when balanced against the expert report of Dr Barbara Harrell-Bond, I am not satisfied that the Appellant discharges the burden of proof that is upon her.

59. The report of Dr Barbara Harrell-Bond is useful in showing the prevalence of FGM in Sierra Leone, and the context in which it is carried out. It does not, however, persuade me that the Appellant and her child, who come from the only tribe which do not practice FGM, cannot find safe and reasonable relocation in Freetown in Sierra Leone.

Decision

60. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.

61. Anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 6th June 2014