Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10454/2014
AA/10455/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 4 November 2015	**On 15 January 2016**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

AMK
OWK
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Maninder Chaggar, instructed by Braitch RB Solicitors
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before the Upper Tribunal following a hearing on 4th June 2015 and our decision of 4th August 2015 in which we found an error of law in the decision of the First-tier Tribunal.

2. As we did in our earlier decision, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise,

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no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

3. To summarise the background, the appeal against the respondent's decision of 13th November 2014 to refuse to grant the appellants' asylum was dismissed by First-tier Tribunal Judge Raikes for the reasons set out in his decision and reasons promulgated on 3rd February 2015. In our decision of 4th August 2015 we had no hesitation in finding that the First-tier Tribunal failed to address the protection claim of OWK. We found that the decision of the First-tier Tribunal contained material errors such that it had to be set aside in order for the protection claim of OWK to be determined, and for an assessment of the risk upon return for both appellants to be made, taking account of sufficiency of protection and internal relocation in light of the additional findings made. We directed that the findings of First-tier Tribunal Judge Raikes otherwise stand and that the decision will be re-made in the Upper Tribunal on the material that was before the First-tier Tribunal subject to any Rule 15(2A) application, to be made no less than 21 days prior to the resumed hearing.

4. Because they are relevant to the assessment of the risk upon return to be made by us, taking account of sufficiency of protection and internal relocation in light of the additional findings that we make, it is useful at this stage for us to summarise the findings of First-tier Tribunal Judge Raikes set out in his decision and reasons promulgated on 3rd February 2015, that stand:

> "34. I will deal firstly with the issue of the Appellant's credibility. I have had the benefit of seeing and listening most carefully to the Appellant as she gave her evidence. Moreover I have compared her oral evidence today with her written accounts given in statement and interview form. Having had that opportunity, I state now at this early stage in my findings that I do not find the Appellant's claim to be credible. It contains inconsistencies, contradictions and implausible statements, the cumulative effect of which is to cast serious doubt upon reliability of the Appellant's evidence and the veracity of her case. The main examples are as follows;
>
> 35. I did not find the Appellant's claim to have been attacked outside her home in November 2010 by four men, at the instigation of her husband, to be credible …
>
> 36. … I find that her account of this incident is designed solely to enhance her claim that she would be at risk on return and unable to internally relocate not only due to her husband's actions on an individual basis but through those she describes as his spies, at his instigation …
>
> 37. In addition to this, I did not find her claim to fear Doreen as a result of the photographs she states to be in existence to be credible …
>
> 38. I have considered the e-mail which the Appellant claims supports the fact that her ex-husband is now in possession of the photographs …
>
> 39. In the first place I find this document wholly self-serving. It appears that it is intended purely to ensure that the account given by the Appellant

> that there are rumours that she is a lesbian is supported in another form. I have looked at the documentation carefully. I find it is of no evidential value particularly given the nature and way the information is stated to have been obtained and it provides no support or corroboration for the Appellant's claim to be in fear of Doreen.
>
> 41. Further whilst she has indicated that she now believes her family to be aware of the information in the possession of her ex-husband, and is assuming that this is the photographs she alleges to have been taken by Doreen, she states that none of her family have mentioned it, despite her having some contact with them. I do not find it plausible that, particularly given the stigma faced by LGBT persons in Kenya, and also the fact that she, without any evidence to support her, is stating that the village elders will be aware of the information, that her family would not have either informed her of the rumours or challenged her about this whilst she was in the UK if they were aware of them.
>
> 43. Having considered all the evidence, particularly the objective evidence produced, the evidence relating to the Gender Violence Recovery Centre, and the Respondent's acceptance of the evidence of the Appellant relating to her husband, I am satisfied that the Appellant has a well- founded fear of her husband. I am, however, not satisfied, having considered the Appellant's written and oral evidence presented today that she would be pursued on the basis of her sexuality, that she would not be able to seek the protection of the authorities given that she is formally separated from her husband and has been for some time and further that at she would not be safe from her husband, his family, Doreen or indeed any associates were she to relocate internally in Kenya. In reaching this conclusion, I have not found her account in respect of her difficulties with being ostracised on the basis of her sexuality to be credible"

5. Notice of the resumed hearing listed on 4th November 2015 was sent to the parties on 14th October 2015. No further evidence was relied upon by the appellant and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

6. At the resumed hearing, Ms Chaggar applied for an adjournment. She submitted that since the previous hearing on 4th June 2015 matters have moved on and that OWK is now receiving counselling following a referral made by Social Services. We were told that OWK has been undergoing counselling since November 2014. Ms Chaggar submitted that given the issues that we would be considering surrounding abuse that OWK has been subjected to, a report by the therapist treating OWK would be of some assistance to the Tribunal. Ms Chaggar confirmed that no report has yet been prepared and she was unable to provide any explanation for the lack of a report to date.

7. Having carefully considered the application, we refused to adjourn the resumed hearing. Despite the on-going treatment that OWK is now said to be receiving, and is said to have been receiving since November 2014, there was no evidence before us at all, of that treatment. No steps whatsoever appear to have been taken to obtain any evidence of the treatment or therapy being received by OWK, and the reliance that the

appellants' now seek to place upon such treatment, appears to be very much an after-thought. We were provided with no explanation as to why such evidence was not relied upon before the First-tier Tribunal and no information about the author of any potential report, the timescales involved, or the relevance of such a report to our consideration of the appeal. The parties were aware of the issues that we would be considering at the resumed hearing and we had made it clear in our 'error of law decision', that we proposed to re-make the decision on submissions only, subject to any Rule 15(2A) application. No such application has been made.

8. We proceeded to hear submissions from the parties which we summarise below. Ms Chaggar confirmed that no further oral evidence was to be called on behalf of the appellants.

The resumed hearing

9. We have before us, the appellants' bundle and the respondent's bundle that was before the First-tier Tribunal containing the evidence relied upon. In her witness statement dated 14th October 2014, AMK states that in 2010, she woke up in the middle of the night and realised that her husband was not in the bedroom. As she walked towards her daughter's bedroom, she saw her husband undressed, standing in their daughter's bedroom. He followed AMK out of the room and told her that he had gone into OWK's room in order to cover her up. When she asked him why he was in his daughter's bedroom naked, he replied that he has the right to do what he wanted in his house. AMK did not speak to her daughter about this incident. AMK states that she fears for her daughter as she is sure that her husband had been sexually abusing OWK, as he did with AMK's sister. She states that whilst her daughter has never disclosed this information, she has been referred to see a child psychiatrist as a result of her being emotionally distressed.

Submissions

10. At the resumed hearing, Ms Chaggar adopted the matters set out in her written submissions dated 4th November 2015. She reminds us that the respondent and the First-tier Tribunal accepted the general allegation made by AMK of general domestic abuse and violence during her marriage. She submits that the objective evidence referred to by the respondent in her decision to refuse asylum confirms:

> "Rape and domestic violence are widespread and rarely prosecuted, spousal rape is not prohibited by law. The law criminalises rape, defilement, and sex tourism, however, enforcement remained limited, and as many as 95% of sexual offences were not reported to the police. The law does not specifically prohibit spousal rape".

11. Ms Chaggar submits that AMK sought protection by reporting matters to the police and provided copies of the investigation diary and assault report

to confirm that she had reported matters to the police. She submits that nothing was done by the police to protect AMK.

12. Insofar as the protection claim of OWK is concerned, Ms Chaggar drew our attention to five documents in particular that were before the First-tier Tribunal. The first is a "Post Rape Care Form" issued by the Nairobi Women's Hospital following an examination of OWK on 6th January 2014 that is to be found at page [38] of the appellant's bundle. The form records that the alleged perpetrator is a "known" male and that the chief complaint is "suspected defilement". The form states "Mother reports child was visiting father at the … and has been complaining of stomach upsets and vomiting". General examination revealed that the outer genitalia, vagina and anus were normal, and that the hymen was intact. The second document is a letter from the Gender Violence Recovery Centre dated 30th May 2014 that is to be found at page [39] of the appellant's bundle. That letter refers to both of AMK's children and states:

> "… the above named minors have been attending counselling sessions at the Gender Violence Recovery Centre at the Nairobi Women's Hospital following secondary trauma suffered due the parents' separation.
>
> The children, who are currently under the care of their mother, are having a hard time dealing with the tug-of-war between the parents, in addition to dealing with the breakdown of their family unit. The counselling sessions have been on-going since March 20l2, with the aim of helping them cope with the resultant stress and anxiety."

13. The third document is a "Parental Responsibility Agreement" dated 17th June 2011 issued by the Ministry of Gender, Children and Social Development that is to be found at page [53] of the appellant's bundle. The agreement records discussion and agreement between AMK and her husband who have:

> "… agreed mutually without any coercion on either party from anyone else to enter into an agreement on the Parental Responsibility and legal custody of their children as follows:
>
> 1. That AMK shall have custody of the children during the period of separation;
> 2. That AMK's husband shall have access to the children twice a month during weekends
> 3. …"

14. The fourth document is a "Separation agreement" signed by AMK and her husband in June 2011 which provides *inter alia:*

> 1.1 In 2002 the HUSBAND had an affair with the WIFE'S sister in their matrimonial home, and the WIFE found the HUSBAND in her sister's (B) bedroom at night while naked. B was in college then and living with the couple.

...

3.1 The WIFE shall have custody of the children during the period of separation;

3.2 The HUSBAND shall have access to the children twice a month during weekends;

15. The fifth and final document relied upon was a manuscript letter said to have been written by OWK that is to be found at page [92] of the appellant's bundle. In that letter OWK states that she does not want to return to Kenya because she is very scared of her father. She sets out in that letter the abuse that she claims to have been subjected to at the hands of her father. We do not set out the detail in this decision, but we have had careful regard to the content of that letter.

16. Ms Chaggar submits that OWK is left vulnerable to on-going contact with her father, notwithstanding the disclosure that she has made, of abuse. She submits that OWK is at risk of harm from her father upon return to Kenya because she will have to have contact with him, exposing her to continuing abuse.

17. Ms Chaggar also relies upon the agreement reached between AMK and her husband with regard to the arrangements for their children and contact, in support of the protection claim made by AMK. She submits that the protection claims are inextricably linked and that in light of the contact agreement that is binding, AMK will be unable to cut off all ties with her husband and AMK will therefore remain at risk of further abuse, wherever she goes in Kenya, without sufficient protection being available to her. It is submitted that if AMK cannot get protection, OWK is equally unlikely to be protected by the state.

18. In reply, Mr Mills submitted that it is a matter for the Tribunal to make a finding as to the credibility of the account of abuse advanced on behalf of OWK. He reminds us that no concession has been made by the respondent that OWK was abused in any way by her father, and he submits that the evidence in support of the claim is very limited.

19. Mr Mills drew our attention to the limited information provided by AMK at the screening interview on 20th June 2014 when AMK was asked to briefly explain why she could not return to Kenya. She had simply explained that she feared her ex-husband because before she moved out in 2011, she had caught him in her daughter's bedroom with no clothes, and she had become worried that that had been the same room in which she had previously caught him, with her sister. He also drew our attention to the answers provided by the appellant at interview on 16th October 2014. In particular, when AMK was asked *(at Q. 123)* whether apart from being in their daughter's room naked, her husband had done anything else to her daughter, AMK replied "No he was not violent to her. Only sometimes shouting, she was very scared of him". He submits that the account provided by AMK in her statements is vague and the documents that are

relied upon by the appellants are broadly based upon claims made by AMK to professionals. Mr Mills submits that the manuscript letter that is said to have been written by OWK is unclear and that it is far from clear that it was OWK who wrote that letter. He submits that at it's highest, the letter has been produced by OWK with the assistance of her mother, who herself has been found, in part, to have fabricated her account of events in Kenya. He submits that in any event, there is no evidence of any further disclosure having been made by OWK, and that evidence that could have been provided in support of her protection claim, has not been adduced.

20. Mr Mills submits that even if we find that OWK has been subjected to abuse in the past by her father, we should consider whether she remains at risk upon return. He submits that the "Parental Responsibility Agreement" dated 17th June 2011, is a voluntary agreement entered into by AMK and her husband and there is no evidence to confirm that the agreement is binding upon the parties, or would be enforced by the authorities in Kenya without further investigation. Furthermore, the separation agreement is an agreement reached with the assistance of family and friends. Mr Mills submits that AMK has in the past lived in Nairobi and when she did so, she did not hide from her ex-husband. They remained in contact with each other, and she facilitated contact between him and the children. Mr Mills submits that if it is established that her father has subjected OWK to abuse in the past, there is no reason to believe that AMK would now remain in contact with her ex-husband and permit contact between him and OWK. If OWK's father were to insist upon contact, it would be open to AMK to bring the abuse of her daughter to the attention of the authorities who would investigate the claim. He submits that the authorities in Kenya are unlikely to enforce any previous agreement, if the abuse is brought to their attention.

21. In reply, Ms Chaggar submitted that AMK has maintained her claim that her daughter was abused at the hands of her father throughout, and that the contact order is an official document that is enforceable. She submits that OWK's father could insist upon contact in accordance with the agreement and that will expose OWK and AMK to a risk or harm. She referred us to the operational guidance note on Kenya and submitted that protection would be lacking in the event that the abuse of OWK was brought to the attention of the authorities. She submits that the objective evidence establishes that there is no effective protection available to OWK and AMK.

THE BURDEN AND STANDARD OF PROOF

22. We remind ourselves that the burden of proof rests upon the appellants to show that at the date of the hearing before us, there are substantial grounds for believing that they meet the requirements of the Qualification Regulations and that they are entitled to be granted humanitarian protection in accordance with paragraph 339C of the Immigration Rules. Additionally, the burden of proof rests upon the appellants to show that removing them to Kenya will result in a breach of their rights under the

1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The appellants must discharge the burden of proof placed upon them to the lower standard. This lower standard of proof can be expressed as a ‘reasonable likelihood’, ‘a real risk’ or a ‘serious possibility’.

FINDINGS UPON OWK’s PROTECTION CLAIM

23. We have carefully considered the submissions made by the parties as to the protection claim made by OWK, and having considered all of the evidence before us in the round, we are satisfied that OWK has been the victim of abuse at the hands of her father. We make that finding for a number of reasons;

(a) In her decision of 13th November 2014, the respondent accepted, in light of the evidence relied upon by the appellants, that AMK has been internally consistent and has shown a well founded fear of her husband in Mombasa, Kenya. That concession was made by the respondent having regard to the evidence from the Gender Violence Recovery Centre and the post rape claim form that refer to OWK.

(b) Although at times lacking detail, the appellant has been consistent in her claim that she believes OWK to have been abused by her father. In particular, she has consistently claimed that before moving to Nairobi she had found her husband naked, in their daughter’s bedroom.

(c) The claims made by AMK that she believes OWK to have been subjected to abuse by her father are supported by the disclosure made by OWK herself. We accept that we can only place limited reliance upon the manuscript letter that is said to have been written by OWK, but in our assessment of the evidence at the lower standard, we are satisfied that the content of that letter provides some corroboration to the account maintained by AMK throughout.

(d) The reports of AMK and OMK as to the abuse of OMK by her father have been taken seriously by their GP and Social Services

CONCLUSIONS

24. As we have set out in our previous decision, the assessment of the likelihood of AMK being located by her husband on return is inextricably linked to the risk of OWK being sought by her father. We have found that there is a reasonable likelihood that OWK was subjected to sexual abuse at the hands of her father. The question that arises is whether any interest that her father has in OWK, on her return to Kenya will be rekindled, and what if any steps, AMK and OWK could take to seek the protection of the authorities and or internally relocate.

25. We have considered those issues in light of the finding we have made that OWK has been the victim of abuse at the hands of her father and having

reminded ourselves of the findings previously made by the First-tier Tribunal that we have summarised at paragraph 4 of this decision. We have also had regard to objective evidence relied upon by the appellants. That is, the respondent's Operational Guidance Note ("OGN") relating to Kenya of December 2013. We have carefully considered section 3.16 of that note relating to women and domestic and gender based violence. We note that rape and domestic violence are widespread and rarely prosecuted, and the law does not specifically prohibit spousal rape. The law criminalises rape, defilement, and sex tourism but enforcement remained limited, and as many as 95 percent of sexual offenses were not reported to the police. We note that traditional dispute mechanisms were frequently used to address sexual offenses in rural areas, with village elders assessing financial compensation for the victims' families.

Sufficiency of protection and internal relocation

26. It is now well established that an asylum seeker who claims to be in fear of persecution is entitled to asylum if he or she can show a well-founded fear of persecution for a Refugee Convention reason *and* that there would be insufficiency of state protection to meet it; **Horvath [2001] 1 AC 489**. Sufficiency of state protection, whether from state agents or non-state actors, means a willingness *and* ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear.

27. We reject the submission made by Ms Chaggar that OWK is left vulnerable to on-going contact with her father, because of the agreement reached between AMK and her husband with regard to the arrangements for their children and contact. We do not accept that AMK will be unable to cut off all ties with her ex-husband, and that AMK and OWK would be returning to Kenya without a willingness or an ability on the part of the Kenyan authorities, to provide through the legal system, a reasonable level of protection from ill-treatment.

28. We have carefully read the "Parental Responsibility Agreement" dated 17th June 2011 issued by the Ministry of Gender, Children and Social Development. As it's heading and the recitals imply, it is an agreement between the parties, entered into by their mutual consent and without any coercion from anyone else. We accept the submission of Mr Mills that the parental responsibility agreement is a voluntary agreement entered into by AMK and her ex-husband and there is no evidence to confirm that the agreement is binding upon the parties. Furthermore there is no evidence that such an agreement would be enforced by the authorities without some further investigation, providing AMK a good opportunity to refer to the abuse that OWK has been subjected to in the past, at the hands of her father.

29. We have also very carefully read the "Separation agreement" signed by AMK and her ex-husband in June 2011. We note that the parties, also entered into that agreement by consent, and it appears, with the assistance of family and friends. In our judgment, upon return to Kenya in the event that her husband insisted upon re-instating contact with OWK in reliance upon the two agreements, it would be open to AMK to draw the abuse that OWK has been subjected to in the past, to the attention of the authorities as a good reason why any agreement previously reached, should not be enforced.

30. Whilst we acknowledge that law in Kenya does not prohibit spousal rape and that rape and domestic violence are widespread, AMK is now formally separated from her husband and has been for some time. In any event, the law criminalises rape, and defilement and whilst many do not report sexual offences to the police, AMK claims that in the past she has made such reports. The OGN relied upon by the appellant notes that the police have launched a special unit to investigate and address gender-based violence, although its effectiveness remains to be proven.

31. There has been some progress in Kenya and we find that there is a sufficiency of protection given the material that has been placed before us. The state is both willing and able to afford protection. There is no objective evidence to establish that the authorities in Kenya do not take steps to prevent abuse of children, whether by their parents or others.

32. Based upon the objective evidence before us and the findings that we have set out, we find that the authorities, in the event of any on-going threat from AMK's ex husband and OWK's father, would protect AMK and OWK.

33. We also find that the appellants on return to Kenya, could live in one of the major cities as they did before their departure to the UK, should they choose to do so. Kenya is not a small country. It has a large population. The appellants have been away from Kenya and away from their family for some time, with some, albeit limited, contact. AMK's ex-husband believes them to be in the UK and her evidence before First-tier Tribunal Judge Raikes was that he has not contacted her in the UK due to the fact that he has no number for her, and he is unaware of her whereabouts. It would not be clear how he would know of their return to Kenya, but even if he were to become aware of their return, as we have set out above, AMK and OWK would be able to seek sufficient protection from the authorities in the event of any on-going threat from AMK's ex husband and OWK's father.

34. Furthermore, in our judgment, it would not be unduly harsh for AMK and OWK to return to live elsewhere in Kenya should they choose to do so. We reject AMK's claim that it would be unduly harsh for her to relocate to other parts of Kenya because of her tribal affiliations. AMK is an industrious woman with property in Kenya. We note the objective evidence in respect of women in Kenya and note that despite discrimination remaining an issue in certain circumstances, there are

widening opportunities for women there. AMK has been very successfully employed in the past. She was also able to move from Mombasa to Nairobi previously with her two children. She has family remaining in Kenya and there is no reason why they could not assist her, if required.

35. In the end, we agree with the ultimate conclusions reached by First-tier Tribunal Judge Raikes. We too are not satisfied even to the low standard of proof that the appellants have an objectively well-founded fear of persecution in Kenya. They have failed to demonstrate that there is a real risk on return that engages either the Refugee Convention or the ECHR .

36. As to the Article 8 claims of both appellants, it is uncontroversial that the appellants cannot succeed under Appendix FM and paragraph 276ADE of the Immigration Rules. We have carefully considered the detailed freestanding consideration of First-tier Tribunal Judge Raikes at paragraphs [57] to [70]. The finding that we have made in respect of OWK's protection claim does not impact upon the thorough assessment of the Article 8 claim, by the First-tier Tribunal Judge. We agree that the proposed removal of the appellants would be an interference with the appellants' right to respect for their private and or family life and that the removal of the appellants' from the United Kingdom will inevitably interfere with their private and/or family life. The interference is in accordance with the law and necessary in a democratic society. The crucial question is whether the interference is proportionate to the legitimate end sought to be achieved.

37. We have had careful regard to the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 and note that the best interests of AWK must be a primary consideration. We have also had regard to the matters now set out in section 117B of the Nationality, Immigration and Asylum Act 2002.

38. We are satisfied that upon return to Kenya in the event that her husband insisted upon re-instating contact with OWK, it would be open to AMK to draw the abuse that OWK has been subjected to in the past, to the attention of the authorities as a good reason why any agreement previously reach should not be enforced. There is no evidence that the authorities in Kenya would enforce that agreement or insist upon contact between OWK and her father, against a background of sexual abuse. As above, it is not our conclusion that either appellant has shown that they will face mistreatment on return on any basis.

39. It is also our view that the appellants can be expected to re-establish themselves in Kenya as AMK is a professional woman who has lived and worked there previously in a number of locations before and has family who have shown a willingness to offer some assistance, caring for her son in her absence, for example. For these reasons and on the basis of those already been set out in the decision of First-tier Tribunal Judge Raikes, and which were not challenged before us, we find that the removal of AMK and

OWK to Kenya would not amount to a disproportionate interference with their right to a family and or private life.

Notice of Decision

40. We re-make the decision in the appeals and dismiss the appeals on asylum grounds, humanitarian protection grounds, and human rights grounds.

Signed Date

Deputy Upper Tribunal Judge Mandalia