Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/14934/2010

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 26 January 2016	**on 29 January 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

FB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Loughran, of Loughran & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction.

1. The appellant is a citizen of Senegal, born on 15 December 1979. She made an asylum claim on 20 September 2010, based on the risk of FGM to her daughters, born on 23 January 2002 and 20 June 2006. The respondent refused her claim on 15 October 2010.

2. First-tier Tribunal Judge Mozolowski dismissed the appellant's appeal by determination promulgated on 13 December 2010.

3. First-tier Tribunal Judge Neuberger refused permission to appeal by decision dated 4 February 2011, on the view that although the judge was said to have misunderstood the evidence there was no specification of the alleged misunderstanding, and no contradiction between the background evidence and her conclusions, which did take account of past alleged persecution of the appellant.

4. Upper Tribunal Judge Storey refused permission by decision dated 8 March 2011, finding no arguable merit in any of 4 grounds proposed by the appellant.

5. The appellant petitioned the court for judicial review of the Upper Tribunal's decision.

6. A letter from the appellant's solicitors (addressed to the "Immigration and Asylum Tribunal Scotland", a non-existent body) dated 7 July 2015 states that when the appellant's "appeal" reached the Court of Session "the Home Office withdrew their opposition, on 14 May 2013." The letter says that the appellant is awaiting a fresh decision from the Upper Tribunal on her application for permission to appeal.

7. While the letter narrates that the solicitors have been in touch with the "IAT" and with the Upper Tribunal asking for a progress report, this appears to have been the first occasion on which the interlocutor of the Court dated 15 May 2013 was drawn to the attention of the Upper Tribunal by any party.

8. The interlocutor is to the effect that the Lord Ordinary, on the unopposed motion of the petitioner, reduces the decision of the Upper Tribunal dated 18 March 2011.

9. The delay in dealing further with the case is because neither party advised the Upper Tribunal of this further development (or at least did not do so promptly and clearly).

10. The appellant has provided a copy of her petition to the Court, which states at paragraph 8:

> "The grounds [on which the Upper Tribunal refused permission] do identify arguable errors in law. These include (but are not limited to) that returning the petitioner to Senegal with the serious, irreversible and traumatic *sequelae* of her genital mutilation amounts to a permanent and continuing act of persecution, that gives rise to qualification as a refugee."

11. That ground is in essence ground 4 of the applications for permission made to the FtT and then to the UT.

12. On 19 November 2015 Mr C M G Ockelton, Vice President of the Upper Tribunal, decided thus:

> "Permission is granted in light of the interlocutor of the Court of Session in this case. The parties are reminded that the Upper Tribunal's task is that set out in section 12 of the 2007 Act."

13. On 29 December 2015 the Secretary of State responded to the grant of permission as follows:

> "3 The appellant asserts in the grounds of appeal dated 21 January 2011 [the application to the UT] that the judge misunderstood the evidence of the appellant; that the findings of the FtT in respect of sufficiency of protection were contradicted by 2 extracts from reports; that the FtT did not take into account the past FGM in assessing the future risk of the daughters being similarly subjected to FGM in the future; and that the FtT has not addressed the significance of ongoing harm to the appellant resulting from FGM.
>
> 4 … The grounds … fail to identify any material error of law …
>
> 5 It is unclear from the grounds … exactly how the FtT misunderstood the evidence of the appellant and how this would have made a material difference …
>
> 6 The FtT appears to have considered all the documents before it, including the objective evidence, and reached sustainable conclusions.
>
> 7 The FtT did take into account the past FGM in reaching its conclusions."

14. I asked the Presenting Officer if he could explain why the respondent decided not to resist the appellant's petition to the Court. He advised that as far as he was aware this was on the view that ground 4 might raise an important point of principle, although the respondent's position now is that the ground has no good legal basis, and is contrary to the clear law of the UK.

Grounds argued for appellant.

15. Ms Loughran advised that she wished to argue grounds 2 and 4 of both applications (these make the same two points, although stated somewhat differently).

16. Ground 2 is that the judge erred in holding that there is sufficiency of protection against the risk of FGM being inflicted on the appellant's 2 daughters because (a) protection after the event, by way of prosecution or other recourse, is no real protection and (b) although the law forbids FGM, it is not enforced and there are no prosecutions.

17. Ground 4 in the first application is that the judge failed to take into account the evidence of past persecution of the appellant (FGM, corroborated by a medical report) in assessing ongoing harm to her and future risk to her daughters. *Demirkaya* [1999] Imm AR 498 is cited:

> "Where evidence of past maltreatment exists … it is unquestionably an excellent indicator of the fate that may await an applicant on return to her home. Unless there had been a major change of circumstances … past experience under a particular regime should be considered probative of future risk … in some, evidence of individualised past persecution is

> generally a sufficient, though not a mandatory, means of establishing prospective risks."

18. Ground 4 of the second application puts the issue in the form that the judge failed to deal with the submission that the appellant had "suffered a type of harm … irreversible and so severe [as to be] viewed as a permanent and continuing act of persecution where the presumption of well founded fear cannot be rebutted."

19. The quotation in ground 4 is from *Mohammed v Gonzales*, US Court of Appeals for the Ninth Circuit, opinion of Circuit Judge Renhardt, 10 March 2005.

Further submissions for appellant.

20. On ground 2, Ms Loughran referred to paragraph 39 of the determination. The judge says that even taking the appellant's account at highest, there is sufficiency of protection, and that complete efficacy can never be guaranteed. She goes on:

> "An important element of sufficiency of protection is the existence of laws banning FGM and the willingness of the state to prosecute. The background evidence all clearly indicates this to be the case in Senegal."

21. Ms Loughran accepted that there are laws banning FGM, but she went through the background evidence to demonstrate that there are no records of prosecutions.

22. On ground 4, it was accepted that US authority is not binding on a UK tribunal. She submitted, however, that the judgment in *Mohammed v Gonzales* illustrates a sound principle which ought to be followed as such, not because it is a precedent. Various passages are highlighted in the copy filed of *Mohammed v Gonzales.* The principle is summarised thus at paragraph 11 on page 3088:

> "In sum, because Female Genital Mutilation is, liked forced sterilisation, a "permanent and continuing" act of persecution, our precedent dictates the conclusion that the presumption of well founded fear in such cases cannot be rebutted. *Cf. Qu* … "

Submissions for respondent.

23. Mr Matthews firstly pointed to the structure of the determination. At paragraph 30 the judge sets out as much as she is prepared to accept of the appellant's evidence. Subsequently, and in particular at paragraphs 31 to 38, she explains why she does not find the essential parts of the claim to have been established to the necessary standard. Paragraph 39 on sufficiency of protection is clearly in the alternative. The judge might be wrong about willingness to prosecute, but that makes no difference. In any event, the judge goes on to find at paragraphs 41 to 42 that the claim would be defeated by internal relocation. That is not challenged in the

grounds, so any error about whether prosecutions take place pales further into insignificance.

24. On ground 4, Mr Matthews acknowledged that the determination records a submission for the appellant based on *Mohammed v Gonzales* but does not explicitly answer it. He referred to *ML* [2014] CSOH 54 and *DL* [2014] CSOH 147 to show that the opinion of a foreign court is at best persuasive, and to *AX* [2012] UKUT 97 as an example of the Upper Tribunal considering international case law. These cases showed also that the legal approach in the USA to family planning policy issues is different to that in the UK, and US case law is not a good guide. This case was another example, although on a different issue. Further, the rule applied in *Mohammed v Gonzales* came from previous US authority, which the appellant did not cite. In any event, it does not reflect the law of the UK, which does not contain any such presumption. Our law is as stated at paragraph 339K of the Immigration Rules:

> 'The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.'

25. That principle could not apply to the risk to the children, because the First-tier Tribunal found as a fact that there is no such risk. The harm to the appellant has been carried out. She did not and could not allege a fear of repetition. The proposition that the act itself amounted to a continuing act of persecution did not square with paragraph 339K, and did not reflect the law of the UK.

26. This argument was supported also by reference to the Qualification Directive, 2004/83/EC, Article 4(4), which is effectively in identical terms to paragraph 339K.

27. In the light of these principles, it was irrelevant that the judge had not resolved the submission recorded at paragraph 29 of the determination. It could not assist the appellant.

<u>Reply for appellant</u>.

28. The appellant said in her witness statement that she feared not only her own and her husband's families but also in general the tribe to which they belong, the Foula, a major group found not only in her home area but throughout the country. On ground 4, the judge failed to resolve the submission and the appellant was entitled to rely on continuing persecution to establish her case. There had been medical evidence to show that she was still suffering ill-effects in 2010. A letter received only recently (but undated) from the Sandyford Clinic, NHS Greater Glasgow and Clyde, states that a speciality doctor is still seeing the appellant "for

ongoing psychosexual counselling as a direct result from having [to] undergo FGM against her will."

Discussion and conclusions.

29. I raised with representatives whether there is any relevant principle about whether persons who have suffered particularly atrocious forms of persecution may be expected to return, even if the conditions giving rise to their fear no longer exist. Mr Matthews said that he was not aware of authority for that principle, and that the appellant had not made that argument. Ms Loughran submitted that return amounted to a continuing act of torture, and referred to *Fornah* [2006] UKHL46, which she had produced in her bundle of authorities.

30. *Fornah* is not an authority on the issue I had raised, or otherwise helpful, being a case on the definition of "particular social group".

31. On reflection, what I had in mind is Article 1C(5) of the Refugee Convention, which provides that cessation of refugee status shall not apply to someone who is "able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality." This has been thought to apply to persons who should not have to return to the scene of atrocities suffered, even after conditions have changed. There is nothing in this principle which helps the appellant to make out her grounds of appeal.

32. There is a slip by the judge at paragraph 39. The evidence did not indicate willingness of the State to prosecute, rather the opposite. However, the finding is plainly in the alternative. For the reasons given by the Presenting Officer, correction of this error would not change the outcome.

33. A presumption that FGM constitutes a permanent and continuing act of persecution so as to give rise to protection appears to be part of the law of the USA, but it is no part of the law of the United Kingdom. It is immaterial that the judge recorded but failed to resolve the submission. It does not affect the fact that the claim was defeated (a) for lack of credibility and (b) on the alternative of internal relocation.

34. Ms Loughran in submissions sought to resurrect the argument of a country-wide risk, but the judge dealt at paragraph 42 with the claimed fear of the entire Foula tribe. The grounds contain nothing which shows these crucial conclusions to be legally flawed.

35. The making of the decision of the First-tier Tribunal did not involve the making of an error on any point of law, such as to require it to be set aside.

36. No anonymity order has been requested or made

Upper Tribunal Judge Macleman

28 January 2016