IAC-AH-LEM/SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41541/2014
IA/41548/2014, IA/41554/2014
IA/41563/2014, IA/41570/2014

THE IMMIGRATION ACTS

Heard at Birmingham
On 26th January 2016

Decision & Reasons Promulgated
On 18th February 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MLF (FIRST APPELLANT)
LF (SECOND APPELLANT)
AF (THIRD APPELLANT)
MLF(2) (FOURTH APPELLANT)
AF(2) (FIFTH APPELLANT)
(ANONYMITY ORDERS MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Miss E Rutherford (Counsel instructed by Cartwright King Solicitors)
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND DIRECTIONS

1. This is the appeal of all five Appellants, to the Upper Tribunal, against a decision of the First-tier Tribunal (Judge Butler hereinafter "the judge")

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promulgated on 13th February 2015, dismissing each Appellant's appeal against decisions of the Respondent of 23rd September 2014 to curtail leave and to remove them from the UK by way of directions.

2. I have decided to make anonymity orders with respect to each Appellant on the basis that three of them are minors and that one of them is said to be at risk of female genital mutilation if returned to the Gambia. I consider the appeal raises sensitive issues such that the interests of all five Appellants are best served by such an order being made.

3. Briefly, by way of background, MLF, who is a female, and LF, who is a male, are adults, are married to each other and are the parents of the remaining three Appellants. As to immigration history, MLF entered the UK on 3rd May 2008 having obtained entry clearance as a student. She has subsequently obtained further grants of leave, on a similar basis, the last period of leave having been granted up to 16th January 2014. The remaining Appellants all entered the UK in June 2010 as dependants of MLF and they too were last granted leave up to 16th January 2014. On 23rd December 2013, and therefore within the currency of the previous grants of leave, MLF applied for indefinite leave to remain as a Tier 2 (General) Migrant and applications were made, in line, by all of the other Appellants as dependants. However, those applications were all refused by the Respondent on the basis that MLF had received a caution on 26th November 2012 "for beating her children", such that, given that the caution had been issued within the 24 month period prior to the date the application was decided, a mandatory refusal ground under paragraph 332(1C)(iv) of the Immigration Rules applied. So, MLF's application was refused and the remaining applications were refused in line. Decisions were also made, at the same time, and as indicated above, to curtail leave and to remove each Appellant.

4. Notices of Appeal were lodged with the First-tier Tribunal. The Grounds of Appeal, with respect to each Appellant, were in somewhat generalised terms its being asserted that each decision was incompatible with rights under the European Convention on Human Rights (though no specific Article of the ECHR was specified), that each decision was not in accordance with the law and that, in each case, discretion ought to have been exercised differently. Thereafter, the solicitors acting for the five Appellants lodged a bundle of documents with the First-tier Tribunal which included witness statements of the two adult Appellants, a range of documents said to be relevant to issues under Article 8 of the ECHR, some background country material certain of which concerned the prevalence of female genital mutilation in the Gambia and the country guidance decision in **<u>K and Others</u> (FGM) The Gambia CG [2013] UKUT 00062 (IAC)**. That documentation was, according to a date stamp, received by the First-tier Tribunal on 18th December 2014.

5. The hearing of the five appeals (they were all heard together) took place on 16th January 2015. It appears that neither the judge nor the Home

Office Presenting Officer who had attended that hearing, had expected there to have been any argument under Article 3 of the ECHR regarding the concern that one of the Appellants, an infant female, might be subjected to female genital mutilation upon return. The judge commented at paragraph 8 of the determination;

> "At the hearing, the Appellants also included a claim under Article 3, namely that the fifth Appellant would be subjected to female genital mutilation if she had to return to the Gambia".

6. It is also apparent that the Home Office Presenting Officer had suggested to the judge that, presumably on the basis of short notice, the Article 3 argument ought not to be dealt with. That is apparent from what the judge said at paragraph 30 of the determination which was;

> "I have not considered the Article 3 argument and submissions. I accept Mr Khalfey's argument that it would not be in the interests of justice in doing so given that the Respondent has had no time to consider this ground of appeal. Accordingly, I consider it appropriate to remit this to the Respondent for consideration of whether she accepts or opposes this ground of appeal. I do not consider it necessary to make further directions as the Appellants' case is clear. A further hearing will be listed to consider this ground of appeal."

7. The judge, then, limited consideration of the arguments to those made with respect to the Immigration Rules and Article 8 of the ECHR. In resolving those the judge said this;

> "21. The first and second Appellants gave credible evidence in relation to the caution explaining that the culture in The Gambia was to beat children when they were naughty. They acknowledged they could not do this in the UK and, although the children were placed in care temporarily, they were back with them and there was no further plan in place in respect of them.
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> 22. Paragraph 322 of the Rules does not give the Respondent a discretion regarding the general Grounds for Refusal. It refers to the grounds on which applications for leave to remain are to be refused and the caution is caught by paragraph 322(1C)(iv). As such, I cannot find that the refusal on this ground is not in accordance with the law. Accordingly, the appeal must be dismissed on this ground. I do not accept Miss Rutherford's submission that Section 85(4) of the Nationality, Immigration and Asylum Act 2002 effectively gives me the option to consider the fact that, at the time of the hearing, more than 24 months has elapsed since the caution, therefore, that the requirements of the Rules are now satisfied.
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> 23. In relation to the Article 8 Ground of Appeal, I must consider the interests of the children since these are relevant in assessing proportionality.
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> 24. Section 55 of the Borders, Citizenship and Immigration Act 2009 provides that, in making any immigration decision the Secretary of State must have regard to the need to safeguard and promote the welfare of children who are in the UK.

25. In **ZH (Tanzania) v SSHD [2011] UKSC 4**, Lady Hale noted that a child's interests were a primary consideration but not the primary consideration. She further stated that the best interests of children could be outweighed by other strong factors. In **Azimi-Moayed and Others (decisions affecting children: onward appeals) [2013] UKUT 00197 (IAC)**, the Upper Tribunal said the starting point in determining the best interests of children is that they should be with both of their parents.

26. I bear in mind that the third, fourth and fifth Appellants are all in full-time education in the UK and doing well at school. They will have undoubtedly developed a private life with their friends at school. On the other hand, the third and fourth Appellants began their education in The Gambia. The first Appellant in her application said, 'my children are not fluent in English as this is not their first language'. This suggests there would be little difficulty in adapting to life in The Gambia where they would be able to communicate effectively. The refusal letter notes that the fifth Appellant is young enough to be able to adapt easily to life there with the support of her family.

27. Miss Rutherford did not rely on the right to respect for family life, presumably because it is evident that it would not be interfered with if the family was removed to The Gambia. I find that the best interests of the children are to be with both of their parents whether that will be in the UK or The Gambia.

28. The issue is whether the interference with the Appellants' private lives outweighs the public interest in relation to the legitimate aim of maintaining effect immigration control and in relation to the economic well-being of the UK.

29. Having considered all the circumstances in the round, I find that the Appellants have not satisfied the burden of proof upon them that it would not be proportionate to remove them. I bear in mind that the children and the second Appellant have been in the UK for a comparatively short period of time and they should have little difficulty in adjusting to life in the country of their birth. The general Ground for Refusal of their application is a mandatory ground and outweighs the respect to their private lives and any interference with their private lives is proportionate to the public interest referred to in Article 8(2). The appeal on human rights grounds is dismissed."

8. The judge then went on to say, at paragraph 30, the words I have set out above, by way of explanation as to why the Article 3 arguments were not to be dealt with in the determination.

9. Permission to appeal to the Upper Tribunal was sought on behalf of all five Appellants. The grounds, in summary, were to the effect that the judge had erred in failing to properly consider the submission that with respect to the Immigration Rules the relevant 24 month period should be taken as being from the date of the caution to the date of the appeal hearing; had erred in purporting to remit the Article 3 issue to the Secretary of State when there was no power to do so; had made a factual error capable of translating into an error of law by failing to realise that the three minor

Appellants had a good command of the English language; had failed to consider a range of matters relevant to the Article 8 issues and had, in particular, failed to give any consideration to the risk of female genital mutilation when dealing with Article 8.

10. Permission to appeal was initially refused by a Judge of the First-tier Tribunal but was granted by a Judge of the Upper Tribunal on 2nd July 2015. The salient part of the grant reads as follows;

> "The Grounds of Appeal are not arguable in relation to the First-tier Tribunal's findings relating to paragraph 322 of the Immigration Rules for the same reasons given by Designated Judge Garratt when he initially refused permission to appeal. However, I find that the Grounds of Appeal are arguable in relation to the First-tier Tribunal's treatment of the Article 3 claim. It is difficult to see how the First-tier Tribunal could properly assess the best interests of the children without considering this issue. If the Respondent considered that proceeding with this new issue might cause unfairness the First-tier Tribunal Judge should have considered whether an adjournment was necessary rather than purporting to remit the matter to the Respondent (which the judge had no power to do in any event). For these reasons it is at least arguable that the judge's findings relating to Article 8 may be flawed".

11. The Respondent lodged a "Rule 24" response in which it was contended that, on a proper reading of Regulation 30 of the determination, the judge had not remitted to the Respondent for the Article 3 claim to be considered but, rather, had "adjourned the appeal on that aspect, whilst making a decision under the Rules and Article 8", such that he had decided there would be a further hearing which would be limited to a consideration of the Article 3 claim only. It was said that that was a permitted course of action and did not amount to any procedural or other form of error.

12. The matter came before me so that it could be considered whether or not the judge had erred in law and, if so, what should follow from that. Representation was as stated above and I am grateful to both representatives for their assistance.

13. Miss Rutherford indicated that she would take what she described as the "pragmatic course" of not pursuing the arguments concerning the Immigration Rules. I think it was appropriate for her not to do so and, in particular, would observe that the wording of paragraph 322(1C)(iv) does, on my reading, clearly contemplate that any conviction or caution bites if it was received within a period of 24 months up to the date the relevant application was decided under the Rules. However, in the circumstances, I need not say anything further about that argument. She did, though, rely upon the other grounds. Mrs Pettersen, it is fair to say, did not energetically seek to resist the contention that the judge had erred in consequence of a failure to consider the arguments surrounding female genital mutilation when deciding the Article 8 issues. Given Mrs Pettersen's conciliatory stance, discussion moved on to the question of the

remaking of the decision. Miss Rutherford urged me to remit to the First-tier and suggested, if I was to do that, I might wish to make directions limiting the scope of the rehearing to the human rights issues. Mrs Pettersen did not oppose that suggestion.

14. I am satisfied that the decision of the First-tier Tribunal did involve errors of law such that the determination must be set aside. I explain why below.

15. The first thing I would have to say, in this context, is that it seems to me that neither the judge nor the Home Office Presenting Officer ought to have been caught by surprise when Miss Rutherford, at the hearing before the judge, sought to pursue Article 3 arguments based upon the risk of female genital mutilation to the female infant Appellant. I note, in this context though, that Miss Rutherford, in her Grounds of Appeal to the Upper Tribunal, did seem to suggest that, at the hearing before the judge, she had made an application to vary the Grounds of Appeal. If so, I do not think that would have been strictly necessary given that the very wide wording of the, admittedly rather uninformative Grounds of Appeal to the First-tier Tribunal, were drafted sufficiently widely to encompass Article 3 arguments. More importantly, though, as indicated, the Appellants' bundle of documents filed for the purposes of the hearing before the judge contained witness statements of both adult Appellants which contained references to the risk of female genital mutilation to the relevant child. For example, the witness statement of MLF addressed the issue at paragraph 16 of her statement and the witness statement of LF addressed the same issue at paragraphs 15 and 16. That bundle was received by the First-tier Tribunal something in the order of a month before the date of the hearing. I would assume that the bundle was sent to the Home Office Presenting Officers' Unit around the same time. I fully appreciate that the witness statements did not contain a great deal of detail regarding the claimed risk of female genital mutilation and it might, I suppose, be thought to be surprising that a matter of such potential importance and gravity was not addressed in somewhat more detail. Nevertheless, the concerns the two adult Appellants claimed to have about this were sufficiently addressed for it to have been clear that there was likely to be some argument about it at the hearing. There was also, as I have indicated, the background country material regarding the issue and the country guidance determination which also addresses it.

16. It seems to me, then, that even if Miss Rutherford did think it was necessary for her to apply to amend the grounds, there was sufficient material before the judge and before the Home Office Presenting Officer to have enabled them to have realised that arguments regarding female genital mutilation were likely to be canvassed at the appeal hearing whether falling within the ambit of Article 3, Article 8 or both. I appreciate that judges and, perhaps, Presenting Officers too, often only have the opportunity of seeing and reading documentation shortly prior to an appeal hearing even where that documentation is filed significantly in advance of the hearing date. It is understandable that errors are made.

Nevertheless, it does seem to me that in the above circumstances the judge did err, however understandably, in thinking that the female genital mutilation issue had only been raised, for the first time, at the hearing, when that was plainly not the case. As such, the judge did err in my view in declining to deal with it.

17. I am also satisfied that the judge erred in dealing with the Article 8 arguments, which encompassed an assessment as to what was in the best interests of the children, without addressing the issue of the risk of female genital mutilation to the female infant Appellant. As was suggested in the grounds, it is really very difficult to see how a full assessment of the best interests of that particular child could have been undertaken without deciding what risk might await her upon return. In this context, it does not seem to me that the sort of risk claimed could be said to be exclusively an Article 3 issue as opposed to, also, a part of the Article 8 issues. I appreciate that that directly impacts upon the arguments surrounding one Appellant only but it seems to me that it, inevitably, would have a knock-on effect with respect to the Article 8 claims of the other Appellants because, of course, if one Appellant could not safely be returned to The Gambia but the others were so returned, that would lead to a separation of siblings and a separation of two parents from an infant child.

18. In light of the above, it does seem to me that the determination of the First-tier Tribunal has to be set aside.

19. As to how the decision ought to be remade, my first thoughts had been that the case should remain within the Upper Tribunal on the basis that, since Miss Rutherford was abandoning the Immigration Rules arguments, that part of the determination could be preserved such that not everything which the judge had decided was being set aside. However, I was ultimately persuaded that remittal to the First-tier Tribunal was the proper course of action. That is because the bulk of the issues in dispute will have to be re-decided, there will be a requirement for extensive fact-finding regarding the human rights arguments and, in particular, those relating to the risk of harm to the female child Appellant, because the First-tier Tribunal is an expert fact-finding body and because remittal will not unnecessarily reopen the Immigration Rules arguments, bearing in mind that I am able to give directions concerning the scope of the First-tier Tribunal's consideration of the appeal upon remittal. The directions follow.

Directions to the First-tier Tribunal upon Remittal

A. The appeal shall be heard by a Judge of the First-tier Tribunal other than Judge Butler at the Birmingham Hearing Centre with a time estimate of three hours.

B. The hearing which will take place consequent upon this remittal will address human rights arguments under Article 3 and Article 8 of the European Convention on Human Rights only. The part of the original

decision of the First-tier Tribunal dealing with the appeals under the Immigration Rules shall stand.

C. If either party wishes to file further witness statements, further background material or other documentary evidence, then this should be put in the form of an indexed and paginated bundle, with a schedule of essential reading if appropriate, filed with the First-tier Tribunal and served upon the other party at least five working days prior to the date which will be fixed for the next hearing.

Notice of Decision

The decision of the First-tier Tribunal involved errors of law and is set aside. The case is remitted to a new and differently constituted First-tier Tribunal so that the decision may be remade.

Anonymity

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any family member. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed Date

Upper Tribunal Judge Hemingway