Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/10590/2016
PA/10594/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 July 2017	**On 20 July 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EIO
NEO
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondents: Ms L Appiah, Counsel instructed by Apex Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellants who are citizens of Nigeria born in November 1999 and September 2004 as the appellants herein. They were granted multi visit visas to the UK as accompanied children on 5 August 2014. They entered

the UK on 27 August 2014. They applied for asylum on 21 March 2016. Their applications were refused on 15 April 2016.

2. The appellants claim that they would be at risk of undergoing FGM if returned to Nigeria from their paternal aunts who had visited the family home from early 2014 in relation to the children undergoing FGM. The parents did not support such a practice and arranged for the appellants to travel to the UK.

3. The respondent did not accept that the appellants had given a credible account. The respondent noted that the appellants had been notified of a decision to grant them leave to enter the UK on 27 August 2014 but had not claimed asylum until 21 March 2016 and that the claim did not rely wholly on matters arising after they were notified of the decision since it was claimed that family members had been putting pressure on their parents in early 2014. While the appellants were children they were accompanied by their mother and it was reasonable to expect her to make an asylum claim on their behalf. This was particularly so when taking into account the claim that their parents had arranged for them to travel to the UK to avoid FGM. Reliance was placed by the respondent on Section 8(5) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

4. A point was also taken by the respondent on the ensuing delay in making a claim – the appellants had travelled with their mother and had been residing with their maternal aunt in the United Kingdom. Reference was made to **TP (credibility) Zimbabwe [2004] UKIAT 00159**.

5. The Secretary of State noted that the appellants' parents had made no attempt to relocate and it would have been reasonable for them to do so. Both the appellants' parents were currently working in Nigeria. They had already demonstrated the capability of relocating to the United Kingdom where they had limited ties. They could not meet the relevant requirements of the Rules and there were no exceptional circumstances. In considering the best interests of the appellants it was considered that the best durable solution was for them to return to Nigeria where they could live with their family.

6. The appellants appealed and their appeals came before a First-tier Judge on 16 January 2017.

7. The appellants were then unrepresented.

8. The judge records that he was satisfied that the appellants had told the truth and that their evidence was credible in paragraph 34 of his decision. He was satisfied that the parents had sent the appellants to the UK for their protection and the determination continues:

> "36. It follows that I am satisfied that the Appellants were the subject of attempts by their paternal aunts to perform FGM on them. I am satisfied that this pressure was based upon cultural practices

within the Yoruba tribe and was pursued vigorously by those aunts. I am also satisfied that the Appellants parents, who had used various strategies to protect the Appellants, sent them to the UK in the hope that their absence from Nigeria would remove the pressure from the aunts and would allow the Appellants to return to Nigeria in safety. I accept that this hope was not fulfilled and that the aunts remain intent on performing FGM on the Appellants."

9. The judge did not consider that recent changes in the law relating to FGM in Nigeria would remove the risk. The judge then states as follows:

"39. I have considered the Appellants' cultural and tribal heritage as members of the Yoruba tribe. The Home Office Country Information and Guidance Nigeria: 'Women facing gender based harm or violence' dated August 2016 makes it clear that the Yoruba tribe is one of the six largest tribes in Nigeria and they practice FGM. I have noted the following extract from that Guidance:

2.3.7 Although against the law and in decline, female genital mutilation (FGM) continues to be practiced with differing prevalence rates and type across Nigeria and by ethnic group, religion, residence (urban/rural), state, education and socio-economic class. A 2013 UNICEF report found that 27% of women had undergone FGM, although in the last 20 years the prevalence among adolescent girls has dropped by a half. FGM is usually inflicted on a child before she can give her informed consent but it may also be difficult for adolescent girls and women, who have not had FGM, to refuse social and extended family pressure to have the procedure."

40. This recent information suggests that a female child has a one in four chance of suffering FGM. In certain tribes and areas it will be higher. The Appellants have cited the figure of 54.5% of all females between the ages of 15 to 49 in the Yoruba tribe have undergone FGM. I am satisfied that if the Appellants were returned to Nigeria they would become the subject of intense interest from their extended family to meet what are considered to be the cultural requirements of their tribe."

10. The judge was further not satisfied that the fact that the appellants had reached adolescence would reduce the risk. FGM could be forced upon a woman before marriage. They would be prejudiced in maintaining their cultural identity. Their parents would not be able to provide long-term protection. Relocation would not be an option as FGM was practised by all but one of the sixth largest tribal groups in Nigeria which would cover the majority of the country. Reference was made at paragraph 45 to the Home Office Country Information. At paragraph 46 the judge refers to **Januzi v**

Secretary of State for the Home Department [2006] UKHL 5. The judge noted the appellants were still children and would be vulnerable in Nigeria unless they continued to have the close support of their family. The judge continues:

> "…As a result relocation for them would not be feasible unless their parents relocated with them. The difficulty is that at the present time their parents are settled and employed in their current location in Nigeria. Relocating would mean that they would likely have to relinquish that employment and face an uncertain financial future. The Appellants have submitted, and I accept, that the prospects of finding new jobs in Nigeria would be difficult in the current economic climate. In addition, if they relocate to an area with a Yoruba population I am satisfied that the pressures to comply with cultural practices would continue to some extent and that if they move to an area without a significant Yoruba presence the family will face additional difficulties by reason of not being part of the local tribal structures. As a result I am satisfied that it would be unduly harsh to expect the Appellants to relocate to Nigeria."

11. The judge accepted that the best interests of the appellants would be to remain with their parents but that this would give rise to the risk of FGM. Their best interests were served by living apart from their parents and remaining in the UK. Accordingly the judge allowed the appeal.

12. The Secretary of State applied for permission to appeal noting that it was not clear who else apart from the paternal aunts were determined to have the appellants subjected to FGM. The Secretary of State noted that the parents had hitherto prevented the aunts from doing so and the evidence why they could not continue to do so in the future was unclear. The Secretary of State noted that it was a striking feature of the case that there was absolutely no evidence from the parents – the mother had brought the appellants to the UK to stay with their aunt. It was not clear why the aunt had not given evidence either.

13. The positive findings made by the judge were "devoid of adequate reasoning". On the judge's generalised findings any young female in Nigeria would be at risk, *per se*. The practice was illegal and in decline. Among adolescent girls the practice had dropped by about half. There was no generalised risk. In relation to internal relocation the Secretary of State submitted:

> "5. The consideration of internal relocation with all due respect to the learned judge is completely inadequate. The judge finds that the appellants' parents cannot relocate with them because they are settled and employed in their current location and relocation could entail relinquishing current employments and would mean facing uncertain financial future [46]. The judge accepted the elder appellant's assertion that it would be difficult to find a new job in Nigeria in the current economic climate. It is

not clear as to how and why the judge accepted such a self serving assertion from the adolescent appellant without any reference to background evidence and particularly when there was no evidence from the appellant's parents. The older appellant stated at interview at q.76 (E11) that the family home was new and that they were not planning on moving. It is clear that the family have the financial means to relocate. Furthermore even if the assertions made with respect difficulties in finding new employments for their parents were correct it is submitted such eventuality cannot amount to being unduly harsh."

14. A point was additionally taken that the judge had not engaged with Section 8 of the 2004 Act.

15. The appellants filed a response on 3 July 2017 in which it was submitted that the judge had engaged with the evidence as given by the appellants and his findings had been consistent with the objective evidence. Reliance on the Section 8 issue had not been made out and was immaterial to the judge's overall decision to find in favour of the appellants. There was no material error of law. Permission to adduce further material was sought from members of the appellants' family.

16. Mr Clarke submitted that the major concern in the grounds was the lack of reasoning. No reasons were given for the positive credibility finding. There had been no engagement with the points made in the refusal letter in paragraphs 22 to 30 in relation to the credibility of the appellants' account. The respondent did not consider that the claims had remained consistent and the appellants' parents had made no attempt to relocate. The explanation why their father was not planning to move was neither reasonable nor consistent given that the appellants continued to live in Nigeria and did not apply for a visa until 25 July 2014 and had not left the country despite the visa being issued on 5 August 2014 until 27 August 2014. The appellants' account had not remained internally consistent and was not generally supported by objective sources.

17. Although it was apparent from the answer given to question 88 at the asylum interview that the appellants knew their parents' numbers no attempt had been made to get any evidence from either of them before the First-tier Judge. The judge's interpretation of the Home Office country information in paragraph 40 was "bewildering". The judge had misinterpreted the statistics.

18. In relation to internal relocation both the appellants' parents were self-employed and well-educated. The First-tier Judge had noted that the older appellant was articulate. The parents had protected them. The figure of 27% of women having undergone FGM had been misinterpreted to include children. The error in relation to Section 8 was an obvious one. It would not be unduly harsh in all the circumstances for the appellants to relocate with their parents. The determination should be set aside.

19. Counsel relied on her Rule 24 response. The judge had taken into account the age of the appellants. He had been satisfied that they spoke the truth. He had noted the direct manner in which the first appellant had answered the questions. In the light of that the judge said it followed that he was satisfied that the appellants had been the subject of attempts by their paternal aunts to perform FGM on them in paragraph 36 of his decision. It had not been necessary to refer to every point taken in the refusal letter. The early part of the determination had set out the Secretary of State's case. Reference had been made in this connection at paragraph 10 to reliance by the respondent on Section 8. While Counsel accepted there was no direct reference by the judge to Section 8 in his reasoning she submitted that in paragraph 36 of the decision there had been implicit reference. The appellants had been sent to the UK on a temporary basis in the hope that they could subsequently return in safety. When asked about the delay in claiming asylum the appellants said that they had thought the pressure from the aunts would stop. It was accepted that the judge had not dealt with Section 8 under a separate heading.

20. The judge had set out relevant parts of the decision and guidance in the determination. Even if the figure had dropped by half it would still represent a risk on return for the appellants. The background to the case was important. The judge was entitled to conclude that the risk facing the appellants had not decreased having found them to be credible witnesses. In relation to internal relocation it was necessary to take into account the individual circumstances. While the reference to the parents being employed might be an error it was not a material one. While it was accepted there were no witness statements it was not clear what they would add. All the cases had been set out by the first appellant. There had been few questions at the hearing. The grounds showed no error of law. The children had been litigants in person.

21. Mr Clarke submitted that paragraph 36 of the decision did not deal with Section 8 – there had been a nineteen month delay between arrival and making the claim. The judge had not grappled with the Section 8 issue. The judge had misinterpreted the statistics. It was not one in four children but one in four women who would be at risk.

22. Both representatives were in agreement that if a material error of law was identified the appeal should be remitted for a fresh hearing before a different First-tier Judge.

23. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Tribunal if it was materially flawed in law.

24. This is a case where the respondent expressly raised the issue of the appellant's credibility under Section 8(1):

> "In determining whether to believe a statement made by or on behalf a person who makes an asylum claim or a human rights claim, a

deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies."

25. It is not argued that Section 8 does not apply in the circumstances of this case. It is accepted by Counsel that apart from making an appearance in the judge's summary of the reasons for refusal there is no further reference to the effect of Section 8 in this case. Reliance is placed on paragraph 36. It is submitted that Section 8 is dealt with by implication. I do not find that it is possible to read into paragraph 36 an engagement by the judge with the mandatory requirements of Section 8. The judge expressly accepted that the parents had sent the children to the UK for protection. This is a case where although the appellants came to this country as children there was no statements from the appellants' parents or evidence at the hearing from their maternal aunt and no explanation for the delay in bringing their case to the attention of Secretary of State – a delay which as Mr Clarke points out was substantial. The points made by the respondent summarised at paragraph 3 above were ones which called to be dealt with and were not. This is one of those cases where the positive findings made in respect of the appellants are, as is submitted in the grounds "devoid of adequate reasoning".

26. Even if the judge had not erred in his credibility assessment, he failed to give adequate reasons why the appellants' parents could not reasonably relocate. At interview the appellants' father was said to be self-employed, a businessman, selling scoreboards used in stadiums and projectors. The appellants' mother was a computer operator. There was no basis for the judge finding that relocation would be unduly harsh.

27. The judge's findings appear to have been based on a statistical misinterpretation as submitted by Mr Clarke. The risks facing the children would have been much less than calculated by the judge and of course they would have their parents with them even if they did not relocate.

28. As Mr Clarke points out the refusal letter is lengthy and detailed in its analysis of the appellants' case and the judge failed properly to grapple with it quite apart from the issue taken by the respondent in relation to Section 8.

29. I have carefully taken into account the arguments advanced by Counsel but in my view the respondent's complaint that the judge's decision is flawed and inadequately reasoned as contended in the grounds is made good. The errors are material. Both sides were in agreement that in that event a fresh hearing would be required before a different First-tier Judge at which the fresh material referred to in the response would no doubt be relied upon.

30. A fresh hearing is required with none of the findings of fact to stand. The appeal is remitted to be reheard before a different First-tier Judge.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The First-tier Judge made no fee award and I make none.

Signed Date 18 July 2017

G Warr, Judge of the Upper Tribunal