Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/16207/2016
HU/17510/2016

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 1 November 2018	**On 13 November 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DEBORAH [O]
MISS E O
(ANONYMITY DIRECTION MADE IN RESPECT OF SECOND APPELLANT ONLY)

Respondents

Representation:

For the Appellant: Mrs H Aboni, Home Office Presenting Officer
For the Respondents: In person

DECISION AND DIRECTIONS

1. The respondents (hereafter the claimants) are citizens of Nigeria. In a decision sent on 16 October 2017 Judge Frankish of the First-tier Tribunal (FtT) allowed their appeals on Article 8 grounds. The grounds on which the appellant (hereafter the

Secretary of State or SSHD) was granted permission took principal aim at what the judge wrote at paragraphs 20-21.

> "20. Thus far, I find the balance not to tip in favour of the appellants. The point of most concern to me in this case is tucked away at §29 of the appellant's witness statement. It received not a mention from anyone else. It is there that the appellant reveals that she is from a family that practices female circumcision, or FGM. There is no medical evidence to this effect. Nonetheless I find that, on the balance of probabilities, it is the case. In the first place it emerges in her evidence solely in passing as a digression to the husband's objections to her lack of sexual response. It is set in a context where she thought she was circumcised but thought she should check with her mother because her husband took it so seriously, the mother confirming that she was. There is the telling point as to the husband lamenting that he was deceived into marrying her and that she was a fraud. Finally, the fact that the appellant has totally failed to rely upon this significant point further supports my conclusion that she has undergone FGM.
>
> 21. Obviously, FGM is a process which is normally undergone at a very young age. That was no less obviously the case in respect of the appellant as she had no memory of it but merely accepted it as a fact. That potentially counts as an adverse factor against the second appellant facing the same fate. Nonetheless, as a small-scale trader when in Nigeria, and the cleaner in the UK, the appellant would be totally dependent upon her family until she finds her feet. Although Christian, I have found her to be from an FGM-practising family, she herself having undergone the procedure. As such, once back under the complete control of her family, I conclude that there is on the balance of probabilities, let alone a reasonable likelihood, a prospect of FGM being inflicted upon the second appellant. I am aware that I may be seen to have completely gone out on a frolic of my own in this consideration. However, my conclusions relating to the appellant's FGM lead me inexorably to the question of the same facing the second appellant even though it appears nowhere, in its own right, as part of the appellants' case. That being so, it cannot be reasonable to expect the appellant to leave and the first appellant must stay with her."

2. It is submitted that risk of FGM to the second claimant was not a matter relied on by the claimants and no medical evidence had been produced to support the judge's conclusion that the first claimant had undergone FGM.

3. At the hearing before me the first claimant appeared unrepresented. Her representatives had sent a letter to the Upper Tribunal explaining they could no longer represent due to lack of funds. The first claimant indicated she was able to proceed and I explained to her that I would do my best to ensure her case was considered properly notwithstanding her lack of legal help. I then heard submissions from Mrs Aboni. In the course of these submissions Mrs Aboni agreed with me that in addition to the failings on the part of the judge raised in the Secretary of State for the Home Department's grounds, the judge had also failed to apply to the second claimant the guidance set out by the Court of Appeal in **MA (Pakistan)** [2016]

EWCA Civ 705 in respect of the second claimant who appears to have resided in the UK since December 2008, i.e. over nine years.

4. I then heard briefly from the first claimant who said she believed that she was entitled to succeed in her appeal given the fact that the best interests of her daughter were to remain in the UK with her mother.

5. I reserved my decision.

6. I have no hesitation in concluding that the FtT judge erred in law in paragraphs 20 and 21. The claimants had not expressed a fear of the second claimant being at risk of FGM on return and the judge's decision did not establish a sufficient factual matrix to justify a finding that she would face such a risk objectively. Despite accepting that the previous Tribunal had made adverse findings on the claimant's previous asylum appeal, the judge was prepared to accept that at the time the first claimant had been the subject of an abusive relationship. Why that finding should extend to acceptance that the first claimant's family were FGM-practising Christians or that the first claimant had been subject to FGM, is wholly unclear. The judge not only accepted that he may be seen in paragraphs 20, 21 to have gone on "a frolic of my own", his "frolic" had no rational basis.

7. I would add that the judge's decision is flawed for another reason which potentially could have affected the outcome of the appeal, had the judge not allowed it on the basis of risk of FGM. The second claimant was a child who had resided in the UK for over seven years and hence the judge was required to consider whether pursuant to **MA (Pakistan)** there were strong or powerful reasons to expect the second claimant to depart the UK. Not only had the judge failed to undertake such a consideration but he also failed to make any evidence-based findings in respect of the precise circumstances the two claimants would face if returned to Nigeria.

8. In light of these failings I conclude that the case should be remitted to the FtT so that factual findings can be made on the claimants' likely circumstances on return to Nigeria. It will be open to the claimants to produce further evidence. If (since the issue has now been raised) the first claimant wishes to rely on risk to her daughter of FGM she should submit a further witness statement detailing why such a risk is said to exist and why it would not be avoidable.

9. Whilst the next FtT judge may well decide (like Judge Frankish) to accept that the first claimant has been in an abusive relationship it would still be necessary to consider whether previous adverse findings made on her credibility should continue to apply against her when assessing her claim about family circumstances in Nigeria.

10. For the above reasons:

The decision of the FtT judge is set aside for material error of law.

The case is remitted to be heard by the FtT (not before Judge Frankish).

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

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

Signed H H Storey Date 7 November 2018

Dr H H Storey
Judge of the Upper Tribunal