



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08882/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5 September 2018

Decision & Reasons Promulgated
On 20 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[O E]

~~(ANONYMITY DIRECTION NOT MADE)~~

Respondent

Representation:

For the Appellant: Mr T. Wilding, Home Office Presenting Officer
For the Respondent: Ms A. Patyna, Counsel

REASONS FOR FINDING AN ERROR OF LAW

1. The application before me made by the Secretary of State is that First-tier Tribunal Judge Iqbal made an error of law in her determination promulgated on 13 December 2017 in which she allowed the appeals both on asylum grounds and on Article 2, Article 3 and Article 8 grounds of the ECHR. I shall refer to the appellant, who is a

Nigerian national born on 3 October 1980, as the appellant as he was in the First-tier Tribunal. He is the father of three children.

2. The judge found that the claim made by the parents that their three female children were at risk of FGM on return to Nigeria was made out and that they were at risk of FGM such that this would violate their rights under both Conventions. There is no doubt that if any of the children were to be subjected to FGM then that would be a violation of that child's rights. Were there to be a real risk, then the case would have been made out. However, the judge's conclusion has to be supported by adequate reasoning. The challenge made by the Secretary of State is that the judge did not sufficiently reason the three stages which were raised in this appeal, namely first, that the appellant was at risk in his home area because of the risk faced by his children; secondly, that there is an insufficiency of state protection, and thirdly that there was no reasonable prospect of relocating anywhere else in Nigeria as a result of it.
3. The judge first found that the appellant and his wife *'may well be pressured in the same way to submit their children for FGM such that this would amount to a well-founded fear of persecution in their home areas'*. The judge drew upon the fact that the mother had herself been subjected to FGM and that there was a prevalence of FGM within Nigeria.
4. The statistics make alarming reading. They are to be found, in part, in the EASO Report which was before the judge and which showed the prevalence of FGM in Nigeria. What is said is that certain tribes are more likely to carry out the practice than others. In the case of the Igbo tribe, the prevalence was said to be between 45% and 76% depending on various studies. The judge then equated that with a risk that these children would be at risk. It seems to me that the deficiency in the judge's reasoning is that the judge does not deal with the fact that these parents are utterly opposed to any form of FGM and that they would take the utmost measures in order to protect their children, as one would reasonably expect. The problem with statistical information about the prevalence of FGM is that, in many cases, if not the majority of cases, the practice is conducted by willing family members who are in agreement with the practice. They consider it a traditional tribal practice which is valued in their community and consequently that fuels the likelihood of this occurring in relation to many of the children who undergo FGM. But the circumstances are very different in a case where the children's parents are opposed to it and would take all reasonable steps to avoid their children being subjected to it.
5. In my judgment what the judge was required to do was to consider in detail what the appellant and his wife would do were they to be placed in a position where there was a suggestion that the children should be circumcised. It is not necessarily an easy task to work out what would happen in such a case but, at the most extreme, it may be that there is evidence that children are forcibly removed from their unwilling parents and subjected to FGM in spite of the opposition of their parents but the judge refers to no evidence that this is the case. The judge relies upon the fact that the wife herself was subjected to FGM but there is no evidence to suggest that her parents, or at least her family members, took any steps to prevent it. The judge does not refer to the evidence that the appellant's wife herself provided in her statement and does not therefore

provide any reasoning why the appellant and his wife '*may well be pressured*' to submit to something that is so against their wishes as far as their children are concerned.

6. The reliance therefore upon the statistical evidence of the prevalence of FGM must be seen against the background of an established mechanism by which these children, against the will of their parents, would be forced into undergoing the treatment. That might be because they would not be accepted into the home area, that might be because they would be deprived of education or services or any of the normal benefits of living in a community or that they would be shunned, but the statistics themselves do not suggest what happens to those, and it is a considerable minority, who do not undergo FGM or whose children do not undergo FGM. Even if some (say, 60%) of a particular community voluntarily undergo FGM (that is, the cutting of their children), what we need to know is the circumstances the remaining 40% who do not sanction FGM are treated by the community and whether life for them is such that it is effectively impossible for them to live a normal life by reason of the fact that they have not permitted their children to undergo the practice. The premise upon which the judge makes the finding that the appellant and his wife may well be pressured does not seem to me to be supported by adequate and sufficiently detailed reasoning as to the extent to which they could properly withstand the pressure which may be exerted upon them and still survive in the local community, as a sizeable minority do. For that reason I am not satisfied that paragraph 39 represents an inadequately reasoned conclusion that the children are at risk of FGM given the opposition of their parents to the practice.
7. The judge then goes on to say whether there is a sufficiency of state protection. It seems to me that the state protection which is afforded to those who suffer persecution by non-state actors is likely to be dependent upon what is the real risk that the appellant's children face. If the risk is that there may be a delegation from the community who are bent upon abducting these children and forcing them to submit to FGM, under the eyes of their remonstrating parents, then that is one sort of risk. There is no evidence that the police would not respond in those circumstances. The fact that FGM is so prevalent however does not necessarily mean that the police are incapable of providing a sufficiency of protection where there is that sort of real risk. The fact that in many, if not the majority of cases, the parents and the family are complicit in the practice of FGM upon their children and that this is conducted privately and in circumstances where the police have no knowledge of its happening represents an entirely different basis upon which to assess the adequacy of police protection. The latter example will result in few prosecutions but is the result of a large number, perhaps a large majority of people, who are willing to have this practice conducted. It does not indicate to me that there is an inadequacy of state protection in all cases, although it is certainly the case that the state is not currently stamping out FGM, particularly in certain areas.
8. Whilst therefore the judge paid attention to the Immigration Refugee Board of Canada's opinion in its report of 13 September 2016 (which highlighted that the state lacked capacity to protect women and girls), and which stated that, notwithstanding laws criminalising FGM, the practice remained widespread with low rates of reporting

and prosecution (even where states have enacted legislation), this misses the point if a complaint is made by parents that their child is about to be subjected to FGM against their will. The fact that the police are unable to prosecute many cases because the parents do not report their own crime does not materially assist the appellant in a case where he would be vocal in his reporting the matter to the police.

9. But perhaps the most problematic part of the determination of the First-tier Tribunal Judge is in the treatment of internal relocation. We have to bear in mind that Nigeria is a large country and that there are parts of the country where FGM is not as prevalent as in others. There are communities which do not practice FGM. The judge reasoned properly that the test for relocation was whether it would be unduly harsh for this particular family to relocate. However, I do not consider that the reasoning provided by the judge in the three bullet points found in paragraph 46 is sufficient. First, it is said that the appellant's wife suffers from PTSD. That is of course a factor which is to be taken into account but it does not go so far as to deal with whether it is therefore unreasonable for the wife to relocate as a result of her medical condition. It assumes that there is no treatment or no adequate treatment available or that her condition is such as to prevent her from living a life which is similar to the life that she lives in the United Kingdom. It has to be borne in mind that she suffers from PTSD in the United Kingdom. The issue before the judge was whether that condition prevented her from relocating to another part of Nigeria and, if so, why.
10. The second bullet point relied upon by the judge is that the eldest child suffers from chronic lung disease and pulmonary hypertension. It was said that there was no evidence before her that the child could not receive such treatment in Nigeria. The judge relied upon the fact that her potential removal would alter the environment in which the child has stabilised. A changed environment is the inevitable result of removal and if that alone were the criterion, then there could be no removals at all. There is a reference in the determination to a letter which unfortunately the parties were not able to produce to me but that letter does not appear to be significant because the judge herself says that this issue has limited weight.
11. In bullet point 3, the judge refers to the fact that the appellant's wife had previously relocated to Lagos when her former husband had moved there. The determination does not go on to describe why a return to Nigeria would be unreasonable. Indeed, it might be said that the wife would be returning to a place with which she was familiar. Instead, the judge refers to the fact that the appellant has no family in Nigeria and his wife no contact with her family and therefore they would have no support network. Of course, support networks are sometimes vital, but this is a family that would return to Lagos or another part of Nigeria as a family unit with the same opportunities to find accommodation and work as other Nigerians. The judge assessed those matters as being factors which would render relocation unreasonable by saying:

“If they were required to return with the children there would be difficulties not only in relation to accommodation but also to initial financial support and the appellant and his wife have limited opportunities for employment given their level of education. The appellant only went to primary school and has never worked in Nigeria. His

employment in the UK was limited to labour work which he said would be restricted in Nigeria as he did not have relevant contacts”.

It seems to me that this is an acceptance by the judge that the appellant has the capacity to work as a labourer somewhere in Nigeria and he will not be deprived of that opportunity were he to be returned. It may well be that at the moment he has not got any settled job to return to in Nigeria but the judge’s underlying reasoning as to what is possible for the appellant in the United Kingdom but is not possible for the appellant were he to return to Nigeria, is lacking. It has to be said that work is available in Nigeria; accommodation is available in Nigeria. Of course, the accommodation requires payment to be made but that is the reason why Nigerian men find work. There is therefore no detailed analysis of what difficulties the appellant would face or indeed his family members would face. There will be disruption. The family have been in the United Kingdom for a number of years but that does not mean that they cannot relocate to another part of Nigeria if the home area is one in which they are at risk. Accordingly I do not consider that the judge’s reasons in paragraph 17 support her conclusion in paragraph 47 that it would be unreasonable to require them to relocate elsewhere within Nigeria without the relevant support network. There is no authority to say that a family returning to Nigeria requires a relevant support network. In this case the judge identifies no further reasons than the ones that I have already pointed out.

12. For these reasons I consider that the determination of the judge is not sufficiently reasoned and amounts to an error of law. In those circumstances I set aside the determination and require the matter to be reheard. Since it does require a wholesale revisiting of the evidence I find that the preferable route is to place it in the First-tier Tribunal. The matter was heard at Hatton Cross and it should be heard again there.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

Date 18 September 2018