Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13191/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 March 2019	**On 15 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

AISSAH [J]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Ostradsaffar of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Gambia born on 12 December 1990. She appeals against a decision of Judge of the First-tier Tribunal Chohan sitting at Birmingham on 11 May 2018 in which he dismissed the Appellant's appeal against a decision of the Respondent dated 9 October 2017. That decision was to refuse the applications of the Appellant and her 2 children, A born on 13 September 2010 in Gambia and N born on

19 June 2015 in the United Kingdom, for leave to remain under Article 8 of the European Convention on Human Rights on the basis of their family life in this country.

2. The Appellant entered the United Kingdom with entry clearance as a Tier 4 (General) student valid until 25 September 2014. This leave was curtailed on 16 June 2014 to expire on 15 August 2014. The Appellant applied for an EEA residence card on the basis of her relationship with her former partner, a Portuguese national, Mr [SJ] on 11 August 2014 and was issued with a residence card valid until 11 October 2019. This residence card was revoked when the Appellant made her second application for a residence card also on the basis of her relationship with her former partner. That second application for a residence card was refused on 16 June 2016. The Appellant then made a further application on 29 July 2016 for leave to remain the refusal of which has given rise to the present proceedings.

The Appellant's Case

3. The Appellant argued that if she and the two children were returned to Gambia the youngest child N would be at risk of female genital mutilation (FGM). Both the Appellant and A had been made to undergo FGM in the past in Gambia. A was now receiving primary education and had lived the first five years of her life in Gambia. The Appellant was fluent in the English language and was in employment and not dependent on the state. She had an HND in Business Management and Administration and did a one-year top up degree at Birmingham City University. She worked as a manager for 30 hours per week. The Appellant also relied on a report prepared by Warwickshire County Council Social Services department based on an assessment made in 2017 following a referral due to a disclosure that FGM had been carried out on A.

The Decision at First Instance

4. At [8] to [13] of his determination the Judge set out his findings in this case. At the outset of the hearing it had been made clear by the Appellant's solicitor that the appeal was proceeding on the basis of Article 8 only and there was not going to be a separate asylum claim in respect of the risk of FGM to N, see [5]. At [9] the Judge directed himself on the best interests of the two children which were to be with their mother. Wherever the Appellant would go the children would go with her. The only family the children knew was each other and their mother. There was no evidence to indicate that either child had any link or contact with their respective fathers. N was just under 3 years of age and A had lived in Gambia with her grandmother for approximately three years before coming to the United Kingdom. She was 5 years of age when she arrived in the United Kingdom and may have had some

memory of life in Gambia. Neither child was in poor health. Apart from the issue of FGM no other issue had been raised in the appeal about return to Gambia. The family would not be split. The bulk of the Appellant's family life had been spent in Gambia not the United Kingdom.

5. At [10] the Judge stated: "the Appellant's eldest daughter was made to undergo circumcision in the absence of the Appellant. The situation is now different. The Appellant would be returned to Gambia with her two daughters. According to the Appellant's oral evidence when she was in Gambia she had moved out of her parents' home. As such upon return to Gambia there would be no need for the Appellant to return to her family home and she could live elsewhere". The Judge also dismissed the claim in respect of private life. A's private life was limited and N was too young to have established any meaningful or independent private life. The Appellant could return to Gambia and put her education to good use there. He dismissed the appeal.

The Onward Appeal

6. The Appellant appealed against this decision arguing that the best interests of the children were inadequately addressed. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Chambers on 13 July 2018. In granting permission to appeal he wrote that: "it would appear at [10] that the finding was made that the Appellant's eldest daughter was made to undergo circumcision but that it occurred in the absence of the Appellant who now would be returning with her daughters. It is arguable that the best interests of the children were not adequately addressed in relation to the risk of FGM."

The Hearing Before Me

7. In consequence of the grant of permission to appeal the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal. If there was, the decision would be set aside, and I would make directions for the rehearing of the appeal. If there was not, then the decision of the First-tier Tribunal would stand.

8. At the outset of the hearing the Presenting Officer informed me that the Appellant had made an application for asylum on 8 August 2018 that is two months after the determination in this appeal. She had had a screening interview but had not yet had her substantive asylum interview. The Appellant had changed representatives since the appeal was heard in the First-tier and was now represented before me by another firm of solicitors Stuart and Co. They were also acting for the Appellant in her asylum application although that point appears not to have been passed on to counsel instructed for the hearing before me. I

indicated that as the case was at error of law stage and there was no application for an adjournment notwithstanding the recent instruction of the Appellant's present solicitors I would proceed with the appeal.

9. Counsel submitted that according to the medical evidence the Appellant had been subjected to type I FGM as had her oldest daughter A. The issue was whether the best interests of the Appellant's two children had been taken into consideration adequately by the Judge in his decision. At [9] when referring to the best interests of the children he had noted that the children would be returned to Gambia with their mother the Appellant. There was country guidance both in the form of the case of **K [2013] UKUT 62** and in the Respondent's Country Policy and Information Note on Gambia dated December 2016 which stated that the Upper Tribunal in **K** had found that as a general matter a person at real risk of FGM in her home area was unlikely to be able to avail herself of internal relocation. Cogent reasons needed to be given for a finding that the individual would be able to relocate safely especially given the evidence that ethnic groups were thoroughly interspersed, the country was small and ethnic groups in different parts of the country were highly interconnected.

10. The Judge's conclusion that the Appellant could relocate was wrong in law. The Appellant's parents would come to know that the Appellant and the daughters had returned and the younger daughter would be subject to FGM. Should the Appellant return to Gambia she would have to go to her parents' home as there was nowhere else for her to go and she would have to start again.

11. In reply, the Respondent argued that there was no material error of law. The case was not put sufficiently at the First-tier Tribunal. There was not enough to re-argue the point. It had not been argued at the First-tier that the Appellant's family would be able to find her.

12. In conclusion counsel argued that the risk was real, and one could not go behind that. Relocation was not viable. An incorrect standard of proof had been applied and even on an Article 8 only basis there would be an interference with the best interests of the children which had not been properly assessed by the Judge. The local authority had expressed concerns in their report that the younger child might be subject to FGM upon return.

Findings

13. I indicated to the parties that one of the difficulties in this case was that because the Judge had been told by the Appellant's advocate at first instance that this was an Article 8 appeal only and not an Article 3 appeal he was obliged to apply the ordinary civil standard of proof of the balance of probabilities not the lower standard of proof that was more applicable

to either an asylum claim as the Appellant had now made or an Article 3 claim. In those circumstances and subject to argument, I envisaged there were two courses of action. Either to find a material error of law and remit the appeal back to the First-tier to be heard again in some way linking in with the asylum application made by the Appellant (if that was practicable) or assessing this case on the basis of the balance of probabilities under Article 8. In the event that the determination was upheld it would have to be made clear that that of itself should not prejudice the Appellant's asylum claim which would need to be looked at in more detail than had been possible thus far with the limited arguments put to the Judge in the First-tier.

14. The Respondent's CPIN states at 3.1.3 that if a person is at real risk from non-state agents in their home area it is unlikely they will be able to relocate to a part of the country where they would not be at risk but each case must be considered on its own facts. In the case of **K** the head note states, inter-alia, that the evidence as at November 2012 fell short of demonstrating that intact females in the Gambia were as such at a real risk of FGM. The assessment of risk of FGM was a fact sensitive exercise which was likely to involve the ethnic group, whether parental or marital, the attitudes of parents, husband and wider family and socio-economic media.

15. The head note also listed significant variables which affected the risk and gave some indication of the risk to members of particular ethnic groups within Gambia. The Appellant's witness statement does not state from which ethnic group in Gambia she comes. The report from social services relied upon by the Appellant stated at page 12 of 16 that should the family be deported to the Gambia this would mean that N [the youngest daughter] would become a victim as well and the Appellant would be unable to stop the procedure from being carried out on her. In her witness statement the Appellant had said that she had learnt that her oldest daughter A was made to undergo FGM without her consent when she the Appellant left A in Gambia to come to the United Kingdom and she had regretted the decision ever since.

16. There is no doubt that the infliction of FGM would amount to treatment contrary to Article 3 and would certainly not be in the best interests of a child. The test under Article 3, as I have indicated, is whether to the lower standard there is a real risk of such harm being inflicted. The test under Article 8 by contrast is whether on the balance of probabilities it is more likely than not that there would be a derogation from the best interests of the child. The Judge found that there would not be because the Appellant would be present and able to protect her daughter. FGM on A had been inflicted when the Appellant had been absent. On the balance of probabilities, I would accept that that is an analysis that does not demonstrate a material error of law, as far as it goes.

17. The Appellant has now made an asylum claim and that will be considered by the Respondent to the lower standard. I do not consider that anything in the determination of the First-tier in this case should be taken as definitive of the risk under Article 3 since the case proceeded on the basis of Article 8.

18. There is one further relevant point I need to address. Notwithstanding the submissions made to him by the Appellant's solicitor at first instance, should the Judge nevertheless have said that the Article 3 risk in this case was "Robinson obvious" and regardless of the submission should he have proceeded to consider the point in any event? There are three difficulties with that argument. Firstly, these were adversarial proceedings not inquisitorial proceedings and the Judge was obliged to deal with the case that was presented to him by the advocate who may or may not have had a good reason for his submission but in any event it was not for the Judge necessarily to enquire into it.

19. The 2nd difficulty is that an analysis of the Article 3 risk would involve an investigation into the factors set out in **K** which would have involved substantially more evidence than was put before the Judge and as a result, on the limited evidence the Judge did have, might have led to a very imperfect analysis of the risk to N. Thirdly the Appellant has now made an asylum application and all matters can be considered properly rather than the incomplete investigation that would have been carried out if the Judge had decided to deal with this matter under Article 3 on a "Robinson obvious" basis.

20. Although not cited to me, I have had regard to the Court of Appeal decision in **KC Gambia [2018] EWCA Civ 2847**. The Court described the case before them as one where "the Secretary of State's decision was centrally based upon a rejection of the truth of KC's assertions about the risks she faced in the Gambia. When that account was vindicated by the FTT, the Secretary of State fell back on her alternative arguments relating to internal relocation and state protection. When these too were rejected, the appeal to the UT was based upon narrow forensic arguments concerning the reasoning of the FTT. After the UT, wrongly in my view, allowed itself to intervene in a case that it considered to be finely balanced, the Secretary of State has been driven to seek to bolster that decision with yet more elaborate arguments by way of a Respondent's Notice."

21. **KC** turned on the credibility of the Appellant's claims of the likelihood of harm upon return. It was decided to the lower standard in the course of an asylum claim and an Article 3 claim. Relocation had not been found to be an option for the Appellant in that case. The position was thus very different from the case before Judge Chohan in this appeal.

22. I therefore dismiss the appeal in this case because I consider that it is more likely than not that the Judge was correct in law to find that the

Appellant could protect her daughters upon return. However, an Article 3 or an asylum analysis would have to probe the case in more detail looking at the factors set out in **K** and applying a different standard of proof. As illustrated by **KC Gambia**, the position may then be very different. That will be a matter for the parties, subject to the observations that I have made in this determination.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 26 March 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 26 March 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge