Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08773/2018

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 4 January 2019	**On 8 February 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ABC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Dieu, instructed by NLS Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this discretion could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Gambia who was born on 19 October 1993. She arrived in the United Kingdom on 6 September 2011 with a six month

visit visa accompanied by her mother. Her leave expired on 1 February 2012 and the appellant, thereafter, overstayed.

3. On 24 March 2015, the appellant claimed asylum. That claim was refused by the Secretary of State on 28 July 2015. A subsequent appeal to the First-tier Tribunal (Judge N J Osborne) was dismissed in a determination promulgated on 23 November 2016. Judge Osborne accepted that the appellant had been subject to FGM in Gambia but he rejected her claim to be at risk on return as a result of a forced marriage and a further FGM procedure. The appellant was subsequently refused permission to appeal by both the First-tier Tribunal and the Upper Tribunal. The appellant became appeal rights exhausted on 8 February 2017.

4. On 1 May 2018, the appellant made further submissions to the Secretary of State which was treated as asylum and human rights claims. This included a supplementary report prepared by an expert, Dr Knorr who had provided an initial report considered by Judge Osborne. On 26 June 2018, the Secretary of State again refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

5. The appellant again appealed to the First-tier Tribunal. In a determination promulgated on 29 August 2018, Judge Davidge dismissed the appellant's claim on all grounds.

6. On 25 September 2018, the First-tier Tribunal (Judge Shimmin) granted the appellant permission to appeal to the Upper Tribunal.

7. On 1 November 2018, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision.

The Submissions

8. Mr Dieu, who represented the appellant before me as he had before Judge Davidge, relied upon the grounds of appeal. He accepted, however, that he was in some difficulty. Those grounds contend that the judge failed to consider whether the appellant was, on the basis of Dr Knorr's supplementary report, at risk of a further FGM procedure even if she were not subject to a forced marriage. Judge Davidge had found that she was not at risk of a forced marriage and that, therefore, she was not at risk from her potential partner or family of being forced to undergo a further FGM procedure, in particular one that allowed her to engage in penetrative sexual activity.

9. Mr Dieu acknowledged that, as the judge recorded in para 17 of her determination, the sole basis upon which he put forward the appellant's claim was that she was at risk of a forced marriage with a particular man. This was a risk which the judge, as had Judge Osborne before her, rejected on the evidence. He had not put forward the appellant's case on the basis that there was "any generalised risk of forced marriage".

10. Nevertheless, he drew my attention to paras 10 and 19 of Dr Knorr's report.

11. Mr Dieu accepted that the basis put forward in the grounds, had not been relied upon before Judge Davidge and that it amounted to a claim (absent any risk of forced marriage) that the appellant was at risk of persecution or serious ill-treatment contrary to Art 3 by undergoing "corrective" (my word not his) surgery through her own choice. Mr Dieu was unable to identify any case law that would support a successful international protection claim in those circumstances.

12. Mr Howells relied upon the rule 24 response. He submitted that the appellant's case had been put in a particular way before Judge Davidge which she had rejected. The grounds now sought to put forward a case, on a different basis, namely a generalised risk of forced marriage and consequent risk of a further FGM procedure. He submitted that the judge could not be criticised for deciding the appeal on the basis put forward by the appellant's Counsel and for failing to approach the appeal on a distinct basis not relied upon. He submitted that there was, therefore, no material error of law in the judge's decision to dismiss the appeal.

Discussion

13. In substance, I accept Mr Howells' submissions and reject those of Mr Dieu.

14. First, it is plain that the appellant, through her Counsel, put her claim before Judge Davidge on a certain basis. That was that she was at risk of a forced marriage with a particular man and, as a consequence, would be forced to undergo a FGM procedure. The judge rejected, and her adverse finding is not challenged, that basis for the claim. She did not accept that the appellant was at risk of a forced marriage with a particular man and therefore she did not accept that the appellant would be at risk of an FGM procedure as a result. The basis now set out in the grounds, which Mr Dieu relied upon albeit with some hesitation, was not one relied on before the judge. It is difficult, in those circumstances, to criticise the judge's reasoning or her decision to dismiss the appeal.

15. Secondly, in any event, the passages in Dr Knorr's report at paras 10 and 19, now relied upon by Mr Dieu, do not in my judgment form a sound basis for the claim as now put forward. They are in the following terms:

> "10. The re-opening of the vagina (defibulation) is often forced through sexual intercourse in the wedding night. Sometimes, a woman's vagina will be cut open by female relatives of the husband or by the traditional circumciser (*Ngamanor*) as part of the preparations for the wedding ceremony.
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> …
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> 19. Although some affluent, educated and modern families in Gambia make their daughters undergo FGC/M under more hygienic and less painful conditions (abroad), these are a) a small minority and b) not among those who practice a variety of FGC/M that involves sealing and re-opening."

16. Dealing with these in reverse order, para 19 is, in my judgment, concerned with "forced" FGM imposed by families on their daughters. Para 10,

likewise, merely describes what may occur to a person who has been subject to FGM if sexual intercourse takes place or is anticipated.

17. Thirdly, what this evidence does not establish is that if the appellant chose to undergo what is contemplated in paras 10 and 19 of Dr Knorr's report, that would entitle her to international protection.

18. Of course, the appellant has already been subject to persecutory or serious ill-treatment in the form of FGM before coming to the UK. However, it is the "forced" nature of this imposed by her husband or her family which would amount to the serious ill-treatment and, to successfully found a claim, against which the relevant state would fail to provide a sufficiency of protection.

19. In the instant appeal, as I raised with Mr Dieu during his submissions, it is difficult to see what absence of protection by the appellant's own country she relies upon if she chooses to undergo what is contemplated in paras 10 and 19 of Dr Knorr's report. The absence of protection would, in effect, amount to a claim that the relevant country should prevent the appellant exercising her choice to undergo the procedure to permit sexual intercourse to take place. Mr Dieu was unable to identify any authority that might suggest such an obligation is imposed upon the appellant's own country (and which would not be discharged) such that surrogate protection in the UK is required. Indeed, of course, any such obligation (if it were imposed upon the appellant's own country) would potentially also apply within the UK and impose an obligation upon the UK to prevent the appellant undergoing a 'corrective' procedure. In the absence of any authority, I am unpersuaded that such an obligation is imposed upon the appellant's own country such that the absence of protection mandates the surrogate protection of the UK so that that the appellant can be said to be at real risk of persecution for a Convention reason or serious ill-treatment contrary to Art 3 of the ECHR.

20. For all these reasons, therefore, the judge did not materially err in law in dismissing the appellant's appeal on all grounds.

Decision

21. Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of a material error of law. That decision stands.

22. Thus, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

16 January 2019