Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11461/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 19 June 2013	**on 21 June 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

VA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr C McGinley, of Gray & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a 2 year old citizen of Nigeria. Her mother is a citizen of Nigeria who has exhausted her asylum appeal rights. Circumstances have changed with the passage of time, and rather conflicting information about the family unit has been given, but the case now appears to be put on the basis of a family unit comprising the appellant, her mother, her older brother, her younger sister (born since this case began) and her father, a citizen of Nigeria with no immigration status in the UK.

2) An application was made (apparently on instructions through her mother) for the appellant to be recognised as a refugee because if returned she

would be at real risk of enforced FGM, as a member of the Yoruba tribe, to which her mother belongs, against the wishes of her parents.

3) The respondent refused the claim by letter dated 11 December 2012. The respondent considered that a medical report by Dr T Groom did not support the claim that the appellant's mother had been subjected to FGM; that the appellant would not be at risk of enforced FGM; and that in any event she could relocate to Abuja, or elsewhere in Nigeria.

4) First-tier Tribunal Judge Agnew dismissed the appellant's appeal by determination dated 11 March 2013. The judge recorded the conclusion of the medical report:

> … we felt there is no evidence of major female genital mutilation, however the appearance could be consistent with minor cutting affecting the right labia (this would be classified as a Type 4 FGM).

5) The judge did not give credit to the appellant's explanation that she had forgotten to mention her own experience of FGM, and said at paragraph 21:

> Having considered … the report of Dr Groom with the other evidence … it has not been established to the low standard of proof … that [the appellant's mother] was forced to undergo FGM in Nigeria.

6) The judge found it incredible that the parents of the appellant would be unable to protect her from the risk of FGM; did not accept that the appellant, through her mother, would need to resort to a women's shelter; and found that the family could relocate.

7) The appellant's grounds of appeal to the Upper Tribunal focus on the judge's treatment of the medical report. It is asserted that Dr Groom had the necessary expertise to make a finding regarding FGM, that she was fully aware of her instructions, and that the Tribunal speculated and reached an irrational finding. The further point raised is that in finding it significant that the appellant's mother said she had forgotten that she had been circumcised, the Tribunal "failed to take into consideration the personal history of [the appellant's mother] who had been found to have been the victim of sexual trafficking to the UK", and that there was a failure to give anxious scrutiny to this point.

8) Designated First-tier Tribunal Judge Wilson granted permission to appeal, saying:

> The grounds … argue that the judge failed to give sufficient weight to a medical report … Whilst I grant leave on this issue it appears that the appellant's mother's own asylum appeal has been refused … but no copy of any … decisions were before the judge. Arguably they should also have been considered if this was a new factual assertion not previously raised by the appellant's mother. Both parties should take immediate steps to file such decisions …

9) The appellant's solicitors in response to the grant of permission produced a copy of a First-tier Tribunal determination by Judge Wood TD, promulgated

on 8 March 2010. The appellant at that stage herself forward as a single female with an infant (male) child, basing her claim upon having been trafficked to the UK for purposes of prostitution. The determination records at paragraph 29 that the judge was referred to reports by Dr S Copstick, Consultant Clinical Neuropsychologist, to the effect that although the appellant was able to function on a basic level, her understanding of timescales, calendars and the like was particularly poor and she had a tendency to agree with authority without offering explanations, which might make her behaviour seem irrational. The report said, "This woman thinks slowly, markedly slowly. Give plenty of time for answers and do not force answers because this woman will conform to authority ... she is not being difficult".

10) At paragraph 37, the judge fully set out Dr Copstick's conclusions. He took them into account in reaching his positive credibility findings. However, there was no evidence of a real risk of being re-trafficked. It was accepted that the appellant would have a number of difficulties as a single mother with a child and having been a victim of trafficking, and being of low education and low intellect, but her appeal was not made out.

11) Permission to appeal was granted for absence of consideration of the Article 8 aspect. The case came before Designated Judge Murray in the Upper Tribunal on 1 September 2010. The appellant's position then was that she would be returning with her son, born in March 2008, and with another child not yet born. The judge noted that there had not been found to be any credibility issues in the previous determination (paragraph 46) but concluded that the appellant could relocate in Nigeria to get away from her uncle, if necessary, and that for her and her child to return to Nigeria would not be disproportionate in terms of Article 8.

12) At the outset of his submissions on 19 June 2013 Mr McGinley also filed a copy of the record of the substantive asylum interview on 17 November 2009 of the appellant's mother. Q/A 40-42, 47-48 and 77 show that her account in her own case included the infliction of FGM against her will after her uncle decided that she was to marry one of his friends, a 75 year old Muslim who already had many wives.

13) Mr McGinley said that at the time of the determination by Judge Wood the appellant had only her son. By the time of the determination by Judge Murray she was pregnant, and subsequently gave birth to the appellant. She now also has another daughter, who would be in exactly the same position as the appellant. An examination of the previous determinations, the evidence of Dr Copstick and the interview record of the appellant's mother showed that the findings reached on credibility were unsustainable. These matters were fundamental to the risk faced by the appellant in Nigeria. Judge Agnew rejected the account given by the appellant's mother of her enforced FGM through a misapprehension. It was accepted that it would have been preferable had these materials been before the First-tier Tribunal, but the question was one of essential fairness to a child appellant.

Now that the papers had been located, the determination should be set aside. The Upper Tribunal should remake the decision on the basis of the skeleton legal argument which had been relied upon in the First-tier Tribunal. The appellant derives a Yoruba ethnic identity from her mother. There is a 54.8% prevalence of FGM in that ethnic group, which indicates more than a real risk. A decision should be substituted in her favour.

14) Mrs O'Brien submitted that the judge made no error of law on the case placed before her. At paragraph 19 the judge noted that the appellant's mother had not raised her experience of FGM "… when further submissions were made on 4 May 2011. When asked [at the hearing] why not … [she] said that she had forgotten she had been circumcised." The judge contrasted that with an interview where the appellant's mother said that FGM was an experience which "… you can never forget … for the rest of your life. So I don't support it at all." That looked at what the appellant's mother said in an interview and what she said at the hearing before Judge Agnew, which was not a false comparison. The documents how produced were irrelevant to those findings. The judge was entitled to reject the explanation by the appellant's mother that she forgot about such a significant matter.

15) I queried whether the absence of the determinations and Dr Copstick's report might be regarded as inadvertent procedural unfairness, amounting to error of law, through no fault of the judge. The determinations would have been available to the Secretary of State. Mrs O'Brien submitted that there was no unfairness, because the case related to the appellant and not to her mother. She further submitted that the matters raised made no difference to the outcome. Whether or not the appellant's mother had been subject to FGM, it had not been shown that there was any such real risk to the child. In any event, the risk was at worst local, from extended kin, and could be avoided through internal relocation, as argued in the refusal letter and as held by Judge Agnew.

16) Mr McGinley in response pointed out that the documents did not raise any matters which were new to the Secretary of State. It was commonplace for the Secretary of State to rely on previous negative findings of credibility. In this case there were positive credibility findings regarding a highly significant witness, and unfairness had arisen through these being overlooked. Taking the findings in the determination together with the conclusions by Dr Copstick regarding the intellectual difficulties of the appellant's mother, there was a legal error which should lead to the decision being reversed.

17) I reserved my determination.

18) Mr McGinley did not seek to advance the argument that there was error of approach to the medical report. I am satisfied that there was no such error. The weight to be given to any item of evidence is very much a matter for the judge. On whether the appellant's mother had undergone FGM the

report was, as Mrs O'Brien pointed out, inconclusive. The judge was entitled to look at the report in the context of the history of being forced into prostitution, having been subject to sexual violence, and having had children.

19) The issue now argued was not raised in the grounds of appeal, and there has been no application to amend, but Mrs O'Brien accepted that it should be resolved on its merits. The question is whether legal error has arisen through the judge not having had sight of the prior determinations and the psychological report relating to the appellant's mother.

20) Mrs O'Brien's first argument was that these documents do not bear on the judge's reasoning. Mrs O'Brien was correct to observe that the precise comparison the judge drew was between evidence from the appellant's mother at an interview and at the hearing, which presented a contradiction which would still have had to be explained away.

21) The judge went on to find this discrepancy extremely damaging not only to the claim that the appellant's mother had undergone FGM, but also to the claim that her daughter might be forced to undergo FGM. Reading the determination as a whole, I do not think it could safely be said that the same conclusion on the credibility of the appellant's mother would have been reached had the two determinations and the psychological report been before Judge Agnew.

22) That does not necessarily mean that legal error arose. If it did, it can only be constructive so far as the judge was concerned. It has not been suggested that she was under a duty to call for further materials.

23) This is not the typical case of inadvertent procedural oversight amounting to legal error, which is administrative failure to link evidence timeously to a file before a judge reaches a decision without an oral hearing. What occurred here could only amount to legal error if there was a positive duty on the respondent to trace and to link the materials relating to the case of the appellant's mother.

24) The application to the SSHD was put forward by agents who had not previously acted for the appellant's mother, without reference to materials which have now come to light, although there were included such items as Dr Groom's medical report.

25) I do not think the SSHD can be criticised for having dealt with the claim exactly as it was put forward, particularly where the representations were made through professional representatives of long experience in this jurisdiction. It would be imposing a very high legal duty to expect the Secretary of State to have delved further for materials to support the appellant's case.

26) If error of law had been found, that would not necessarily result in a decision in the appellant's favour. Whether her mother was subject to FGM was relevant, but not decisive. The critical finding was not that the appellant's mother had not been subject to FGM, but that there was no risk of FGM being enforced upon the appellant against the will of her parents, who could relocate in Nigeria if necessary, without undue hardship. Mr McGinley based his arguments on the prevalence of FGM among the appellant's ethnic group, but the prevalence of a practice is not the same as the risk of its enforced infliction. The evidence was not cited to establish a risk of that nature. There are no grounds of appeal directed at the relevant findings, which are at paragraphs 31 to 33.

27) The determination of the First-tier Tribunal did not involve the making of an error on a point of law. In any event, if constructive error had been found in relation to the prior determinations and the psychological report on the appellant's mother, the conclusions reached by the First-tier Tribunal on absence of risk of enforced FGM, on availability of relocation, and on Article 8, including the best interests of the children, are all legally sound. Those conclusions were properly decisive of the appeal.

28) The determination of the First-tier Tribunal shall stand.

19 June 2013
Judge of the Upper Tribunal