



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/11224/2017

THE IMMIGRATION ACTS

**Heard at Bradford
On 16 November 2018**

**Decision & Reasons Promulgated on:
On 6 December 2018**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

JMM

(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Holmes (Counsel)

For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, from a decision of the First-tier Tribunal ("the tribunal") which it made after a hearing of 9 May 2018 and which it sent to the parties on 16 May 2018; whereupon it dismissed her appeal against the Secretary of State's decision of 17 October 2017 refusing to grant her international protection. For the reasons set out below, I have decided to allow her appeal, to set aside the tribunal's decision and to remit for a complete rehearing. I have also decided to grant the claimant' anonymity. That had not

been done previously but it seems to me that there are aspects of the claimant's case which involve issues of some sensitivity such that a grant is appropriate.

2. Shorn of all but the essentials, the claimant's account of the events said to underpin her claim to be entitled to international protection is as follows: She is a female citizen of Kenya and was born on 15 May 1965. She is a member of the Kamba tribe and, despite its no longer being lawful in Kenya, that tribe practices female genital mutilation (FGM). In 1998 she went to live in Holland with her then husband. However, the relationship did not stand the test of time and, after an unsuccessful attempt to obtain entitlement to permanent residency in Holland notwithstanding the breakdown of her marriage, she returned to Kenya in 2012. She has, she says, been experiencing mental health difficulties since 1999 when she had what has been described as "a complete mental breakdown". Having returned to Kenya she went to live in Nairobi. She says her mental health difficulties became apparent to others and the tribal elders wished to perform FGM on her because they believed her mental health problems were likely to have resulted from her not having undergone that procedure before. She sought to evade the elders by changing her living arrangements and eventually, in 2017, leaving Kenya. Having done that she entered the United Kingdom (UK) using a false identity and a passport to which she was not entitled, in May 2017. She was apprehended and claimed international protection.

3. The Secretary of State refused her claim for reasons which are set out in a lengthy document of 17 October 2017. The Secretary of State thought the claimant's account of having been threatened with FGM was inconsistent and unpersuasive, and disbelieved it. Further, the Secretary of State thought that even if the account were true, the claimant would be able to obtain sufficient protection from the Kenyan authorities and, even failing that, would be able to take advantage of an internal flight alternative within Kenya.

4. As already noted, the claimant's appeal was heard by the tribunal on 9 May 2018. She was unrepresented at that hearing and the Secretary of State was represented by a Home Office Presenting Officer. The tribunal, in its written reasons, noted that FGM is usually performed upon females who belong to the Kamba tribe between the age of eight and twelve years. The tribunal referred to the claimed link between the claimant's mental health difficulties and the claimed insistence of the tribal elders that she be subjected to FGM, at paragraph 20 of the written reasons. This is what it said as to that:

"20. In her statement (1 May 2018) she said that her mother did not insist she had FGM. Her uncle contacted her to say she should visit the countryside having been told by her cousin about the mental illness. The passport was genuine. She is at risk of FGM despite her age due to her tribe's attitude to mental illness. She went to her relatives out of politeness and she did not think they knew of her mental illness. She stayed overnight as the witch doctor was busy elsewhere. The police in Kenya rarely help in FGM cases and have no reach in rural areas. Her health deteriorated when she moved around and there is societal stigma everywhere about it. It is hard getting jobs in Kenya. Her family cannot financially or emotionally support her in Kenya".

5. That part of the written reasons appears in a section setting out the detail of the appellant's claim. At a later point, under the heading "Findings of Fact", the tribunal went on to say this:

"38. The appellant has however failed to establish it is reasonably likely she will be the victim of FGM in Kenya for the following reasons. Whilst I accept she is a member of a tribe that performs FGM (the Kamba), she is well outside the age

range when it is usually performed (she is fifty-two whereas the usual age range is twelve to eighteen). She lived in Kenya until she was thirty-four and it was not performed when she was a child or subsequently which I am satisfied was because her mother opposed it. That indicates that the elders do not have the power claimed. I am satisfied that the fact that she went to see them when she had returned to Kenya was because she knew they had no interest in subjecting her to FGM given her age, maternal opposition, and her own opposition to it. She has speculated as to an ongoing interest in her and with regards to their "reach". Nigeria is a huge country and she was able to relocate for five years and work without any problem as a lone woman. I accept that she had used a false name for which there could be many reasons.

39. The appellant has therefore failed to establish she would need to seek police protection or to internally relocate and I am satisfied that she would not have to go to a rural area and there is a functioning police force which tackles FGM".

6. The claimant, by that stage aided by the Manuel Bravo Project, asked for and obtained permission to appeal to the Upper Tribunal. The central contention made in the grounds was that the tribunal had erred, in its rejection of her claim that she would be subjected to FGM, through failing to address her specific contention that, notwithstanding she was outside the usual age range, there was nevertheless a risk because of the belief of the elders concerning the link between her not having been subject to FGM and her suffering from mental illness. Permission having been granted largely for that reason (though the grant was not stated to be limited) there was a hearing before the Upper Tribunal (before me) for a consideration as to whether or not the tribunal had erred in law and, if so, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative. Mr Diwnycz did not seek to dissuade me from a contention that the tribunal had erred in the way it was thought it might have done when permission was granted.

7. It is right to say that a central part of the claimant's case was that she was at risk of FGM wholly or substantially because it was thought by the elders that her mental illness had been caused by her not having had that inflicted upon her before, such that there was a desire to impose it upon her now. She had, by way of example, made that particular and discrete claim in answering question 43 of her substantive asylum interview. She had made a similar claim in a handwritten statement of 12 September 2017. It appears she made a similar assertion, orally, at the tribunal hearing. As is apparent from what was said at paragraph 20 of the written reasons, the tribunal was aware that she had made that contention. But during the course of its key reasoning as to why it was rejecting the appeal (I have in mind in particular paragraph 38 of the written reasons) it did not revisit that aspect of the claim. Had it done so it is possible that it might have regarded the link made by the tribal elders (if it believed what was said about that) as plausibly explaining why she might be subjected to FGM despite being outside the usual age range. It is possible it might have found that such was an explanation as to why the tribal elders would wish to have her subjected to the practice now, despite its not having been performed upon her at an earlier stage. It may well be, I think, that the tribunal was simply disbelieving the claimant about the village elders having made such a link at all. But, if that was so, the tribunal did not say so. In the circumstances I have concluded that the tribunal did err through failing to make a finding as to the veracity or otherwise of what the claimant was asserting to be the truth regarding her contention about the elders.

8. I did wonder whether it might be argued (although it was not) that what the tribunal went on to say at paragraph 39 amounted to a sound alternative finding to the effect that since there is “a functioning police force” there would be a sufficiency of protection. However, if the tribunal was finding that, it was a finding which it made without reasons. Indeed, it seems clear, in context, that the tribunal was really taking the view that it was not required to evaluate matters regarding sufficiency of protection or internal flight because, in view of its primary findings, such was simply not necessary. So, I have concluded that the tribunal did err in law and that it did so in a way which was capable of impacting upon the outcome. I have decided, therefore, as I informed the parties at the hearing, that its decision has to be set aside.

9. There was then a brief discussion regarding disposal. Both representatives were of the view that the most appropriate course of action would be remittal to the tribunal for a complete rehearing. I agree and that is what I have decided to do. As to that, I would simply direct that there be a complete rehearing of the appeal, before a differently constituted tribunal, on a date to be fixed. I shall leave any other directions for the appropriate Judge within the First-tier Tribunal.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. Further, the case is remitted to the First-tier Tribunal for reconsideration by way of a complete rehearing.

M R Hemingway
Judge of the Upper Tribunal
3 December 2018

Anonymity

The claimant is granted anonymity under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings shall identify the claimant or any member of her family. This grant applies to both the claimant and the Secretary of State. Any breach may lead to contempt of court proceedings.

M R Hemingway
Judge of the Upper Tribunal
3 December 2018