Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-000139**
(PA/01780/2020)

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 1 August 2022	**On 21 February 2023**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Jagadesham

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born in 1980 and is a female citizen of the Gambia. She entered the United Kingdom in September 2006. Judge Dilks, whose decision in the First-tier Tribunal is the subject of this appeal to the Upper Tribunal by the Secretary of State, summarised the appellant's case before her as follows:

> 4. The Appellant arrived in the UK on 12 September 2006 on a student visa. She successfully renewed her student visa until 31 October 2011. Subsequent applications for further leave to remain were refused without a right of appeal. On 27 January 2015, having then been advised she should do so, the appellant claimed asylum, on the basis that she would be at risk of Female Genital Mutilation (FGM) and forced marriage in Gambia, as a member of the Fula tribe and particularly from her own father.
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> 5. That asylum claim was refused by the respondent on 27 July 2015. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge (FtTJ) McGinty in a decision dated 15 August 2016.
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> 6. The Appellant made several further applications which were refused without a right of appeal. The Appellant lodged further submissions on 4 September 2018. The pivotal evidence provided in those submissions was an expert report by Professor Jacqueline Knorr, an expert on Gambia, who concluded that the appellant would be at a real risk of serious harm since virtually all Fula women are required to undergo FGM. The appellant had never previously relied upon expert evidence.
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> 7. The Appellant claims that if returned to Gambia she would face a real risk of persecution due to membership of a particular social group as a woman who fears female genital mutilation (FGM) and forced marriage and due to membership of a particular social group on the basis of her mental illness. Further or in the alternative there would be a breach of her Article 3 ECHR rights based upon her risk of suicide and the serious deterioration of her mental health if removed and there would be very significant obstacles to her integration in Gambia which would breach her Article 8 ECHR rights.

2. Judge Dilks allowed the appellant's appeal and the Secretary of State now appeals, with permission, to the Upper Tribunal. The Secretary of State's grounds are summarised by Designated Judge Shaerf in the grant of permission:

> The Respondent seeks in time permission to appeal the decision of Judge of the First-tier Tribunal Dilks promulgated on 18 January 2022 allowing the appeal of the Appellant, a Gambian born in 1980, against the Respondent's decision of 5 February 2020 to refuse her further submissions in support of her claim for subsidiary protection based on her fear on return to Gambia of serious harm by reason of FGM and forced marriage.
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> The Grounds for appeal are that the Judge did not give sufficiently strong reasons to justify departing from (1) the guidance in *K and Others (FGM) The Gambia* CG [2013] UKUT 00062 (IAC) and (2) the findings of a previous Tribunal which had dismissed the Appellant's earlier appeal on the same grounds. The Judge at paragraph 46 of her decision acknowledged the high bar a Tribunal must cross to depart from country guidance. The written expert opinion of Prof Knorr is the sole basis on which the Judge sought to depart from the guidance in *K and Others. It* does appear that the basis for the statistics referred to in paragraphs 44, 45, 47, 49 and 51-54 might require further analysis

particularly in the light of comments made by the Judge at paragraphs 47 and 48 of her decision.

Permission to appeal is given on both grounds.

3. The headnote of *K and others* reads:

> 1. *FGM has been practised upon about three quarters of the female population of The Gambia historically. The most recent scientific evidence, based on data from 2005, showed no significant change in its incidence. There are ongoing campaigns, principally by GAMCOTRAP (Gambia Committee on Traditional Practices Affecting the Health of Women and Children), aiming to reduce and eventually to eliminate FGM. There has been some increase in published opinion in the Gambia against FGM, and there have been local declarations of renunciation, but there has been no scientific evaluation of GAMCOTRAP's effectiveness in establishing a decline.*
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> 2. *Incidence of FGM varies by ethnic group. Within the four main ethnic groups there are subgroups, within which the incidence may vary - see the table below. In no ethnic group is the practice universal; in some ethnic groups the practice is absent. Ethnic groups are thoroughly interspersed. The country is small and highly interconnected. (Where reference is made to ethnic group we include sub-groups save where specified)*
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> 3. *The evidence as at November 2012 falls short of demonstrating that intact females in The Gambia are, as such, at real risk of FGM. The assessment of risk of FGM is a fact sensitive exercise, which is likely to involve ethnic group, (whether parental or marital), the attitudes of parents, husband and wider family and socio-economic milieu.*
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> *4. There are significant variables which affect the risk:*
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> *(i) the practice of the kin group of birth: the ethnic background, taking into account high levels of intermarriage and of polygamy;*
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> *(ii) the education of the individual said to be at risk;*
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> *(iii) her age;*
>
> *(iv) whether she lived in an urban or rural area before coming to the UK;*

(v) the kin group into which she has married (if married); and

(vi) the practice of the kin group into which she has married (if married).

Also relevant is the prevalence of FGM amongst the extended family, as this may increase or reduce the relevant risk which may arise from the prevalence of the practice amongst members of the ethnic group in general.

5. *In assessing the risk facing an individual, the starting point is to consider the statistical information currently known about the prevalence of the practice within the ethnic group that is the relevant ethnic group in the individual's case, as follows:*

a. If the individual is unmarried and given that ethnicity is usually taken from the father in The Gambia, the relevant ethnic group is likely to be the ethnic group of the father.

b. *If the individual is married to a man from an ethnic group that is different from her father's ethnic group, then the relevant ethnic is the ethnic group of the husband.*

The statistics from which the prevalence of the practice of FGM within the ethnic groups in the Gambia is drawn, vary considerably given the lack of detailed research and analysis undertaken in The Gambia. From the material before the Upper Tribunal, those statistics indicate as follows:

4. The Secretary of State's second ground of appeal (that the judge failed to follow the findings of the previous Tribunal which had dismissed the appellant's appeal: *Devasseelan* [2002] UKIAT 00702*) is considered by the judge at [30]. In essence, the judge did not take issue with the previous judge's negative credibility findings but noted that the expert evidence of Professor Knorr had not been before that Tribunal. That the judge's acceptance of the expert's evidence enabled her to reach a different outcome from the previous Tribunal without offending the principles of *Devasseelan* was not challenged by Mr McVeety, who appeared for the Secretary of State at the Upper Tribunal initial hearing.

5. Judge Dilks was aware of the need to justify any departure from country guidance. At [43-45] she sets out the reasons advanced by the appellant to justify a departure from *K and others:*

> 43. With regard to the general risk of FGM, in the country guidance case of K and others the Upper Tribunal stated that; "In assessing the

> risk facing an individual, the starting point is to consider the statistical information currently known about the prevalence of the practice within the ethnic group that is the relevant ethnic group in the individual's case..”
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> 44. In the appellant’s case it is not in dispute, that the appellant will be considered Fula. With regard to prevalence of FGM in the Fula the table in the headnote of K and others states that in the Fula ethnicity the prevalence is 30 percent although some estimates are as high as 84 percent.
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> 45. It is Professor Knorr’s opinion that the appellant will be regarded as having to undergo FGM simply because she is of Fula ethnicity and Ms Mair submitted that this was based on detailed findings in Professor Knorr’s report including that 87 to 100 percent of Fula women undergo FGM in Gambia.
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> 46. I am asked to depart from the country guidance case based on Professor Knorr’s expert report. In SG (Iraq) v SSHD; OR (Iraq) v SSHD [2012] EWCA Civ 940 the Court of Appeal said that the country guidance procedure was aimed at arriving at a reliable and accurate determination and it was for those reasons, as well as the desirability of consistency, that decision-makers and tribunal judges were required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, were adduced justifying their not doing so (paras 43 – 50).

6. Following a detailed examination of the statistical evidence addressed by Professor Knorr, the judge concluded at [54]:

> 54. I bear in mind that Professor Knorr’s opinion has not been tested in oral evidence but also that the respondent does not take issue that she is an appropriate expert. In my assessment given the range of sources Professor Knorr refers to including UNICEF reports and that a number of those sources and in particular two of the UNICEF reports post-date K and others and also the comments of the Upper Tribunal at paragraph 5 of the headnote in K and others about the evidence before them, I am satisfied that there are strong and cogent reasons to depart from the country guidance case and I find that I can place great weight on Professor’s Knorr opinion. Accordingly I find that, the Fula women in Gambia are required to undergo FGM and that the percentage of Fula women undergoing FGM in Gambia is around 87 percent with prevalence as high as 100 percent in some groups and locations.

7. The Secretary of State’s challenge to that conclusion is concise:

> It is submitted that the FTTJ has erred in finding that the view of one expert amounts to strong enough grounds to depart from the Country Guidance relating to the prevalence of FGM amongst the Fula ethnic group. It is noted at [54] of the determination that Professor Knorr’s evidence was also not subject to cross examination. It is submitted that the FTTJ has erred in finding that that the untested view of one expert amounts to strong grounds or cogent evidence to depart from the previous conclusions in K and others.

8. I find that the judge has provided sufficient reasons for departing from *K and others.* I reach that finding for the following reasons. First, as the grounds acknowledge, the judge was alert to the fact that the evidence of Professor Knorr had not been tested by cross examination. It is not clear from the decision or the bundle whether the respondent sought to cross examine the expert but the judge does record that the respondent considered Professor Knorr to be an 'appropriate' expert. That statement is not challenged in the grounds. I assume for the purposes of my analysis that the Secretary of State chose not to ask to cross examine the expert because she did not take issue with the contents of her report. Indeed, the grounds do not challenge the contents or conclusion of the expert report *per se*. Rather, the respondent complains that the judge should not have departed from country guidance on the basis of only one expert report which had not been tested by cross examination. That complaint is unfounded. The respondent chose not to cross examine the expert. There was no obligation on the appellant to bring the expert to court as a matter of course and without any indication that she would be cross examined. As a result, it was open to the judge to accept the contents of the expert's report.

9. Secondly, I was not directed to any principle of law which provides that a judge cannot depart from country guidance on the basis of only a single expert report or, indeed, expert evidence which has not been tested by cross examination. In my opinion, the judge was entitled to accept the expert's findings and has gone on to provide sufficient reasons for using those findings to depart from *K and others.* The parties agreed that the appellant is a Fula woman. The Tribunal in *K and others* noted that some estimates put the incidence of FGM in Fula women as high as 84%. The evidence on which the expert relied post-dated that considered in K; the Tribunal in K itself noted that '*The assessment of risk of FGM is* ***a fact sensitive exercise, which is likely to involve ethnic group****'* and that '*the starting point is to consider the statistical information* ***currently known*** *about the prevalence of the practice within the ethnic group that is the relevant ethnic group in the individual's case'* [my emphasis]. Whilst some of the evidence considered by Professor Knorr had been before the Tribunal in *K and others,* some evidence was new and enabled the expert to assess the <u>current</u> prevalence of FGM in the Fula ethnic group. Whilst (to the limited extent concerning Fula women only) the judge may have departed from the conclusions of *K and others,* she followed in her analysis the very methodology proposed by the Tribunal, that is approaching a '*fact sensitive exercise'* by considering what is '*currently known'* about the risks facing Fula women.

10. I agree with Mr Jagadesham, who appeared for the appellant at the Upper Tribunal initial hearing, that the judge has not undertaken a general reversal of *K and others.* Her analysis addresses only Fula women and even then in the context of the particular circumstances of the appellant. I find that the judge did not err in law by departing from country guidance in this appeal. The Secretary of State's second ground of appeal falls away

for the reasons given in [4] above. Accordingly the Secretary of State's appeal is dismissed.

Notice of Decision

The Secretary of State's appeal is dismissed.

Signed Date 30 September 2022

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.