IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000406

First-tier Tribunal No: PA/51576/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of January 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

F I
(anonymity order in place)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr T Jebb, Barrister, instructed by JMS Solicitors, Belfast
For the Respondent: Mrs R Arif, Senior Home Office Presenting Officer

Heard at Belfast on 18 January 2024

DECISION AND REASONS

1. The appellant is a national of Nigeria, born on 9 November 1989. She came to the UK in 2019 with her son, then aged 6. She has a daughter, born on 31 August 2020 in Northern Ireland. Neither the appellant nor the child has any relationship with the father. She has another daughter, born in Northern Ireland on 30 July 2023. This child's father, named on the birth certificate, is a UK citizen.

2. This decision follows on from:

   (i) The respondent's decision dated 11 March 2021, refusing the appellant's asylum claim.

   (ii) The decision of the FtT issued on 13 December 2021, dismissing the appellant's appeal on asylum grounds (it was accepted that the claim under article 2 and 3 ECHR stood or fell with those grounds).

   (iii) The decision of the Hon Mr Justice Dove, President, UTIAC, issued on 18 October 2023, setting aside the decision of the FtT.

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3. The basis of setting aside and remaking stems from section 55 of the Borders, Citizenship and Immigration Act 2009, set out at [6] of the President's decision, in terms of the duty to safeguard and promote the welfare of children and the requirement in sub-section (3) to have regard to guidance given by the SSHD.

4. The relevant case law is cited in the President's decision and need not be rehearsed again.

5. That decision explains why the appropriate course, as stated at [14], was "for the decision to be remade in order for the statutory guidance to be applied in remaking the decision". At [16] the President explained why that was apt to take place in the UT: ..

> … whilst there will be some need to give consideration to the appellant's evidence in relation to what happened to her in Northern Ireland the key elements of the appellant's case relate to the future assessments of the best interests of her children, and the application of the statutory guidance, along with the future assessment of the risk to her daughter of being subject to FGM and whether there is a sufficiency of protection along with the question of whether there is a reasonable alternative of internal relocation. The evidence in relation to all of these matters can be readily addressed by the Upper Tribunal in remaking the decision, as can the evaluation of the submissions to be made on these topics. The Upper Tribunal will specifically need to be assisted by the evidence and submissions of the parties in relation to the matters relied upon in respect of the consideration of the section 55(3) duty. Directions in this connection are set out below. The directions also provide the opportunity for applications to be made in relation to any additional evidence which the parties may wish to rely upon.

6. The appellant's position is set out in submissions dated 18 December 2023 and updated on 9 January 2024, identifying at [5] these key issues:

    (a) is it likely the appellants' daughters will be at risk of FGM if forced to return with the appellant?

    (b) is sufficiency of protection available?

    (c) is internal relocation available?

7. However, going beyond those issues, the submissions also found upon the appellant now having 3 children, on the youngest being the child of a UK citizen, and on "the best interests of all the children" being "served by granting the family unit leave to remain in the UK."

8. That raises the difficulty of being a "new matter" in terms of section 85(5) of the 2002 Act, consideration of which by the tribunal requires the consent of the SSHD.

9. Mrs Arif indicated at the outset that, having sought instructions, such consent was not given.

10. Later in the debate, in response to Mr Jebb's suggestion that absence of consent was a further breach of the SSHD's duty under section 55 (3), Mrs Arif drew attention to *Quaidoo* (new matter: procedure/process) [2018] UKUT 00087(IAC) which is headnoted thus:

> 1. If, at a hearing, the Tribunal is satisfied that a matter which an appellant wishes to raise is a new matter, which by reason of section 85(5) of the Nationality, Immigration and Asylum Act 2002, the Tribunal may not consider unless the Secretary of State has given consent, and,

in pursuance of the Secretary of State's Guidance, her representative applies for an adjournment for further time to consider whether to give such consent, then it will generally be appropriate to grant such an adjournment, rather than proceed without consideration of the new matter.

2. If an appellant considers that the decision of the respondent not to consent to the consideration of a new matter is unlawful, either by reference to the respondent's guidance or otherwise, the appropriate remedy is a challenge by way of judicial review.

11. Mr Jebb did not seek to further multiply procedure by an adjournment for such a challenge, so the UT's further decision must be made without reference to updated circumstances.

12. Mrs Arif's submissions were:

(i) It is axiomatically, and obviously, in the best interests of the two children to remain with their mother, who is their primary (if not sole) carer.

(ii) As the appellant, on her individual case, is required to return, or be removed, to Nigeria, it is in the children's best interests to go with her.

(iii) There is no evidence of any social services intervention or other concern in the UK over the children; nothing to indicate that their best interests require them to remain here.

(iv) There is no evidence that the girl child is at real risk of FGM being inflicted upon her, against the wishes of her mother, even in their local area.

(v) Evidence of the occurrence of that practice in Nigeria, and of higher than average prevalence in the appellant's home state, Oyo, is not evidence of a real risk.

(vi) In any event, there is legal sufficiency of protection.

(vii) Also as an alternative, internal relocation is available.

(viii) The appeal should be dismissed.

13. Mrs Arif accepted that if the child was shown to be at risk of FGM, and if sufficiency of protection and internal relocation were excluded, then the appeal should be allowed.

14. The written and oral submissions for the appellant were on these lines:

(i) The appellant has been subject to FGM.

(ii) It follows that her daughter will be forcibly subject to FGM.

(iii) The risk is enhanced by the child being at the likely age.

(iv) A parent opposing FGM is subject to discrimination, even to ostracism.

(v) Sufficiency of protection is not available in Oyo state, where the incidence of FGM in women aged 15 – 49 is between 38% and 50%.

(vi) Internal relocation is not available as the appellant is a single mother.

(vii) The respondent has failed to engage with the various agencies who may be working with the children and to adduce evidence of their best interests.

(viii) On the respondent's failure, the tribunal has the power to remedy matters by judicial investigation and case management, as stated at [94] of *CAO v SSHD* [2023] NICA 14.

(ix) Notwithstanding that the duty is the respondent's, the appellant sought to adduce 4 items of evidence [the main thrust of these, however, and the further development of the written submissions, goes to the new matter, which is not before the UT].

(x) The appeal should be allowed.

15. I reserved my decision.

16. On absence of consent to a new matter, I see why the respondent might be averse to a "first instance" decision being made at UT level, rather than beginning with the respondent; but in any event, that is purely a question for the SSHD.

17. There might be something to be said for the appellant beginning again with an application to the SSHD, based on current circumstances. However, that was a matter for her, upon advice; these proceedings might place her on a faster route to settlement; and she had little to lose by pressing this case to a decision.

18. There were submissions for the appellant on the duty passing to the UT, but no suggestion that it should undertake or direct any further investigation.

19. Those observations are incidental; but the framework of this decision becomes rather artificial.

20. It is now arid to consider whether the appellant or the respondent has the greater duty to make the case on the children's best interests. The appellant must at least draw attention to a situation which deserves enquiry. The SSHD and the tribunal have the duties explained in guidance and in case law. The Tribunal Procedure (Upper Tribunal) Rules 2008, at paragraph 2, require both parties to help in furthering the overriding objective of dealing with cases fairly and justly, and to co-operate with the UT generally.

21. The case, in the end, turns on the UT deciding issues (a) – (c) above, in respect of the appellant's second child, based on the evidence and submissions before it.

22. It does not follow from the appellant having undergone FGM that there is a real likelihood that anyone in Nigeria, against the appellant's will, may inflict that procedure on her daughter. Everyone's case is different. Times change.

23. Nor do I accept the proposition that a 38% to 50% prevalence of FGM establishes a risk to the appellant at that level. The risk to anyone varies with their own circumstances, particularly their close family circumstances, from negligible to near certainty.

24. The FtT found at [21] that the appellant failed to show that her family or her husband were likely to insist on her daughter undergoing FGM. No factual

findings were preserved, but I have been referred to no evidence by which any other conclusion should be reached.

25. Accordingly, a real risk is not shown, even in the appellant's locality.

26. The authorities in Nigeria provide legal protection from FGM, but that is patchy in practice, and mainly at federal level. If there had been a risk, I would have been reluctant to hold against the appellant only on the basis of sufficiency of protection.

27. The position on internal relocation, however, is clear. The only point advanced for the appellant is that it would be more difficult for her as a single mother, based on 2.3.9 of the respondent's CPIN of September 2021. That is true, as far as it goes, but the appellant, for all that has been disclosed, is at least as capable of looking out for herself and her children and any other young Nigerian woman. By her prior evidence, she speaks Yoruba and English, has run a business, has travelled, and has not been out of the country for so long as to pose any difficulty in reintegrating. If she had to move, that has not been shown to be unduly harsh.

28. An anonymity order remains in place, as made in the decision of the President.

29. The decision of the FtT has been set aside. That decision is remade thus: the appeal, as originally brought to the FtT, is dismissed.

Hugh Macleman
Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 January 2024