Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/11206/2011**

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision Promulgated**
On 18 April 2017 and Manchester	**On 15 June 2017**
On 12 June 2017	

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

CS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hussain (Lei Dat & Baig Solicitors)
For the Respondent: Mr Harrison (Senior Home Office Presenting Officer) and Mr McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant.

Introduction

1. I have anonymised the appellant's name because this decision refers to her international protection claim, as well as the circumstances of her children.

2. This is an appeal by the appellant, a citizen of Malawi against a decision of the respondent ('the SSHD') dated 16 September 2011, in which leave to remain was refused, following her asylum claim.

3. The appellant fears that upon return to Malawi she will be subjected to ill-treatment from her estranged husband's family and her two daughters will be required to undergo female genital mutilation ('FGM').

4. The appellant's appeal to the First-tier Tribunal ('FTT') was successful on asylum and human rights grounds. The FTT accepted the credibility of the appellant's account and also concluded that it would breach Article 8 of the ECHR to require her daughters to leave the United Kingdom, in light of, inter alia, their lengthy residence here. The elder daughter has been in the United Kingdom since 2005 and the younger daughter was born here in 2009, and has never left.

Procedural history

5. In a decision dated 8 October 2012 the Upper Tribunal ('UT') held that the FTT's decision on asylum contained an error of law in failing to address serious credibility issues raised within the SSHD's refusal letter. The UT remade the asylum decision and dismissed it. In so doing, the UT questioned the adequacy of the medical evidence but refused to grant an adjournment to allow the appellant to obtain further medical evidence.

6. The appellant appealed to the Court of Appeal. In a consent order dated 11 December 2013 the Court of Appeal remitted the appeal to the Upper Tribunal:

> "to consider this matter together with the appellant's witness statement dated 21 November 2013 and the addendum report of Dr Lesley Lord dated 22 November 2013…together with the Secretary of State's response to the further evidence."

7. The statement of reasons attached to the consent order notes that permission to appeal to the Court of Appeal was granted on one ground only: whether the Upper Tribunal should have granted the appellant's request for an adjournment of the hearing after it called into question the medical evidence of Dr Lesley Lord.

Hearing

18 April 2017

8. At the beginning of the hearing the representatives agreed a number of matters, which assisted in considerably narrowing the issues for me to determine. Both representatives agreed to the following:

(i) The appellant's Article 8 claim has been resolved in her favour and is no longer before me. Indeed, the UT reminded itself that it was only concerned with the asylum claim and the Article 8 appeal has not been challenged [65 and 85]. The representatives understood that discretionary leave had been provided to both daughters.

(ii) Although only one error of law has been identified in relation to the medical evidence, the adverse credibility finding made by the UT was based upon a cumulative approach [76 and 87]. It followed that I should remake the credibility assessment in light of all the evidence available including Dr Lord's addendum report.

(iii) The appellant gave detailed evidence before the UT, which is recorded in its 25-page decision. Mr Harrison represented the SSHD at this hearing as well and has already cross-examined the appellant in some detail – see [40-47] of the UT decision. There was therefore no need for this process to be repeated. Both parties have a record of the questions asked and the evidence provided in response. It was sufficient for Mr Harrison to merely rely upon the concerns already identified without putting every matter to the appellant. Mr Hussain was well-aware of the issues of concern and he could ask the appellant to clarify these matters.

(iv) A number of factual matters are not in dispute: the appellant and her daughters are Malawian citizens; the appellant is a Christian; the elder daughter gave evidence before the FTT and UT and her evidence was accepted in its entirety [88]. Importantly, Mr Harrison also accepted that the medical evidence supports the claim that the front part of each of the inner lips of the appellant's labia have been elongated. Mr Harrison acknowledged that this was the only sensible position to take in light of the UT's findings on the issue [86 and 89] and the two medical reports from Dr Lord.

(v) The core credibility issue in dispute is as follows: is it reasonably likely that the appellant, a Christian woman, married her husband (who it is claimed was born Muslim but converted to Christianity) and his family members forcibly perpetrated the elongation of the inner lips of her vagina, prior to her marriage, in accordance with their traditions?

(vi) Mr Harrison conceded that if I accept the appellant's evidence in relation to the core issue described above, it followed that the appellant and her daughters are at real risk of ill-treatment upon return to Malawi. If the husband's family members have behaved in the manner alleged by the appellant in the past, Mr Harrison accepted that it is reasonably likely that they will seek to carry out FGM on the daughters, if they are returned to Malawi.

9. I then heard oral evidence from the appellant. She confirmed the truth of four witness statements made in 2011, 2012, 2013 and 2017. Mr Hussain asked the appellant a number of additional questions regarding the concerns highlighted by Mr Harrison during cross-examination in the previous Upper Tribunal proceedings, as well as the concerns of the UT itself. Although this took the form of examination in chief at the hearing before me, the process was more akin to re-examination. This is because the appellant has already been cross-examined at an earlier UT hearing and the record of the evidence provided is relied upon. The UT obviously did not have the appellant's later statements before it but Mr Hussain asked the appellant to explain why her 2013 statement was different to the 2011 statement in relation to the claimed process of forced labia stretching. I asked several questions to clarify this matter as well. Mr Harrison considered that all the relevant questions had been asked and answered and did not wish to cross-examine further. He however made it clear, and Mr Hussain accepted that did not signal an acceptance of the evidence given.

10. At the end of the appellant's evidence I heard submissions from both representatives. Mr Harrison relied upon the credibility concerns set out in the UT decision together with the inconsistencies between the 2011 and 2013 statements and asked me to find that the appellant's claim is not credible. Mr Hussain invited me to make a positive finding regarding the core credibility issue. He submitted that notwithstanding inconsistencies, the appellant's explanation for the elongated inner lips of her vagina is reasonably likely.

11. At the end of the hearing I reserved my decision. After the completion of the hearing I decided that it was important to give the parties an opportunity to provide further background country evidence. This is because neither party directed me to any background evidence on the practice of FGM or labia elongation / labia stretching in Malawi. The previous UT also had very little relevant country information before it, which it summarised at [66-69]. Given the inconsistencies in the appellant's evidence and the SSHD's claim that her evidence was implausible, I considered it appropriate to give both parties an opportunity to rely on background evidence in support of their respective positions and gave directions to that effect.

12. I drew the parties' attention to background material available in the public domain relevant to the issue of labia stretching in Malawi, and directed them to file and serve relevant country background evidence they wished to rely upon and to make further submissions on the matter at a further oral hearing.

13. In compliance with directions the appellant's solicitors filed and served background evidence summarised below. It was made clear that the appellant did not wish to provide any more details "*about the stretching that she was forced to undertake*" and in the premises her previous statements continued to be relied upon.

12 June 2017

14. Mr Harrison was unable to attend the hearing and Mr McVeety made brief submissions on behalf of the SSHD. He submitted that there was little in the background evidence to support the appellant's claim that she was the victim of forced labia stretching. Moreover, he submitted that the evidence demonstrates that labia stretching is largely a voluntary act done by girls in some communities in Malawi.

15. Mr Hussain drew my attention to the appellant's own evidence of the impact of the forced stretching upon her. He submitted when all the evidence is considered in the round, and the lower standard of proof is applied, the appellant's account should be accepted as reasonably likely to be true.

16. After hearing from both representatives I reserved my decision, which I now give with reasons.

Background evidence

17. The Wikipedia entry for "labia stretching" states as follows:

> "Labia stretching, also referred to as labia elongation or labia pulling, is the act of elongating the labia minora through manual manipulation

> (pulling) or physical equipment (such as weights).[1] It is a familial cultural practice in Rwanda,[1] Malawi, Uganda, Burundi and a few other countries in Sub-Saharan Africa,[2] and a body modification practice elsewhere. It is performed for sexual enhancement of both partners, aesthetics, symmetry and gratification.[1] The early recordings of the results of the practice are perhaps among the Khoisan peoples of southern Africa, where the inner labia were seen to be several centimeters longer than the outer labia."

18. In "To pull or not to pull", an online article from the Nation Online dated 28 August 2011, it is claimed that many cultures in Malawi demand elongated labia to make the husband happy and this practice is emphasised in secondary schools and through counselling sessions held before marriage (chilangizo). It is said that during initiation ceremonies (chinamwali) girls are sometimes checked to ensure their labias are extended. Another Nation Online article dated 4 October 2013 describes the mixed views regarding labia stretching and refers to it as a tradition mainly practiced in rural areas with the support of traditional leaders but that "*as evidenced from a survey done on Facebook women have ceased to conduct this practice considered a part of Malawian culture*".

19. The appellant also relied upon evidence from an online article published by Pushpa Jamieson describing secretive initiation ceremonies in Malawi, where FGM "*is very quietly happening*" and more generalised evidence regarding FGM.

20. In "Elongation of the Labia Minora: A Violation of women's bodily autonomy" by Chanda Katongo, 9 January 2014, the author describes the practice of labia stretching in southern Africa, focusing on Zambia, from a more academic point of view.

Summary of the appellant's evidence

21. The appellant relies upon her witness statements and the oral evidence provided before me. It is only necessary to summarise her claim. She is a Catholic. She met her husband, a Muslim at college in 1990 and became pregnant in 1995 when she was 20 years old. Her elder daughter was born in May 1996 and they got married in October 1996. She claims that her labia was forcibly stretched by her husband's relatives before their wedding. As set out above, it is agreed that the claim to be at prospective risk turns upon what is alleged to have taken place immediately before the marriage.

22. In her 2011 statement the appellant describes some of her husband's female relatives as having forcibly grabbed and undressed her and forcibly pulled the lobes of her vagina with some sort of device. They explained to her that 'circumcision' would be delayed until after the wedding. The appellant's

husband came to the UK in 2004 and she joined him in 2007. They had another daughter, born in the UK in 2009. The marriage broke down in 2011. The appellant claimed that her husband was violent to her and together with his family members was pressuring her to return to Malawi for the elder daughter to be 'circumcised'. She left the family home, scared for their safety, and was rehoused by social services.

23. In her 2013 statement the appellant states that after the initial stretching with a device, she was checked on a daily basis, for the next 5-7 days to ascertain whether she had been stretching herself. If they believed she was not, she would be pinched and forcibly stretched.

24. As indicated above the elder daughter gave evidence before the UT and this was accepted. This evidence does not advance the main account of what happened to her mother in Malawi in any meaningful manner – she cannot remember anything about being in Malawi as she was only 8 when she left.

Medical evidence

25. Dr Lord has provided two reports dated 28 October 2011 and 22 November 2013. The first report describes the appellant's clitoris as present, as were the inner lips but "*the front part of each inner lip was long in proportion to the rest*". Dr Lord regarded this to be highly consistent with the appellant's account. In the 2013 supplementary report, Dr Lord acknowledged that the appellant only described "*one time when her labia was stretched*" for the purposes of the 2011 report. Dr Lord referred to the appellant's 2013 statement and opined that the appearance of the labia is typical of the activity described.

Factual findings

Approach to the evidence

26. In making my factual findings I have applied the lower standard of proof applicable to asylum claims and considered all the evidence in the round.

27. The evidence adduced on behalf of the appellant is not particularly clear in relation to whether she has been a victim of FGM. In some of her statements she claims that she is a victim of FGM. At the hearing this was clarified: the appellant claims to have been a victim of forced labia stretching; she has not been 'cut' or 'circumcised' in a manner consistent with what is known to be the more invasive types of FGM. FGM generally entails the removal of at least part of the female genitalia for non-medical reasons. Some sources refer to labia stretching as

meeting the definition of FGM. As observed by FTT Judge Birrell at [64] labia stretching qualifies as FGM in the broader sense of the term. It is not in dispute that forced labia stretching constitutes an egregious form of serious harm. For this reason, it matters not whether it meets the definition of FGM.

28. The label given to forced labia stretching is not as important as the substance of the claim. However, it is important that correct labels and terminology are used to avoid confusion and misunderstanding. For the avoidance of doubt, I do not draw any adverse inferences from the appellant using FGM and forced labia stretching interchangeably. The appellant has clarified that she has not been 'cut' or had any part of her genitalia removed. She claims to have been a victim of forced labia stretching only. In this decision I shall refer to the appellant's claim to have had her labia forcibly stretched by her husband's relatives as forced labia stretching. This is to be distinguished from labia stretching that takes place in Malawi amongst some girls as a voluntary act. The appellant claims that she has been a victim of forced labia stretching but fears that her husband's family will carry out FGM on her daughters. By this she means that their genitalia will be 'cut' or 'circumcised', and they will also be the victim of forced labia stretching, like she claims she was.

29. If, as claimed, labia stretching was forced upon the appellant i.e. in the context of pre-wedding initiation arrangements, then the SSHD accepts that this constitutes serious harm, and her daughters are at real risk of FGM. This is because their paternal family have demonstrated an ability and willingness to forcibly carry out demeaning and risky procedures in the past, in the name of religious / cultural traditions, and there is a real risk of the paternal family forcing FGM upon the daughters in the future. If, on the other hand, the appellant's claim that she was subjected to forced labia stretching is not accepted, then it is also agreed that the risk of the paternal family seeking to carry out FGM on the daughters is not reasonably likely – the family have not shown any interest in carrying out traditional practices in the past. Much therefore turns on the credibility of the appellant's claim as to what happened before the wedding, to which I now turn. Before doing so, it is important to underline that when making specific findings regarding the forced labia stretching claim, I have not done so in isolation. I have considered all the evidence in the round including all the appellant's statements, the elder daughter's accepted evidence, the appellant's oral evidence, the asylum interview, the medical evidence and the country background evidence.

Forced labia stretching claim

30. I have significant concerns regarding important aspects of the appellant's evidence relevant to the core of her claim. There is an obvious inconsistency between the appellant's account in her 2011 statement and her supplementary 2013 statement. In the 2011 statement the appellant said that on one occasion before her wedding in 1996, her husband's family members used force to extend the lobes of her vagina against her will. The appellant went on to say that they wanted to "*take off something*" but she resisted and kicked out. She then said they discussed it and decided that as she was getting married soon and "*it would take a long time to heal that it wouldn't be a good idea to do it now as people would notice so they would do it later on*".

31. Dr Lord's 2011 report describes what she was told happened before the wedding in the following terms:

> "She was in a relative's house and two people held her down on the ground. A third then started pulling at her inner lips in order to stretch them. They wanted to also cut her but she was struggling so much that they did not manage to do this"

32. The appellant saw Dr Lord on 27 October 2011 after her asylum interview on 5 August 2011. Her 2011 statement was made shortly after this in December 2011.

33. The 2011 statement and Dr Lord's 2011 report were before UT Judge Chalkley when he dismissed the appellant's appeal after a hearing on 31 August 2012. In his decision UT Judge Chalkley noted at [73] that Dr Lord did not give any indication as to the likely duration of stretching in order for the inner lips to be permanently stretched, and he had a difficulty with the account that her labia was only stretched on one occasion at [86]. He noted that Dr Lord's report does not rule out it having been caused by some other means, by the appellant herself or some other congenital defect.

34. It is only after this finding was made in the 2012 UT decision that the appellant adds to her evidence in her 2013 statement, that she was forcibly pinched and stretched over the course of 5-7 days before the wedding. Prior to this, all the evidence provided by the appellant pointed to a 'one-off' forced act against her by her husband's relatives before the wedding: see the asylum interview at Q93-102, Dr Lord's report and the 2011 statement.

35. The asylum interviewer seems to have assumed that the appellant was 'circumcised' in the sense that she was 'cut'. The appellant did not clarify the position at the asylum interview. I draw no adverse inferences from this. This is

because it would have been very difficult to explain the detail of what happened to her to a stranger and to distinguish between circumcision, cutting and labia stretching. However, the surrounding circumstances of the asylum interview can be distinguished from the circumstances of providing information to a qualified medical expert and her own solicitor. The appellant would have been in a position of trust and confidence with Dr Lord and her solicitors. The 2011 statement is a detailed document that addresses very sensitive and difficult matters. The 2013 statement provides no explanation for the failure to refer to important aspects of what happened to her in the 2011 statement or when she saw Dr Lord. At the hearing before me the appellant explained that she just answered the questions she was asked and did not volunteer any additional information. I gave her an opportunity to expand on this and asked her to explain why she did not describe the whole experience to Dr Lord. She said "*they just told me to answer questions asked*". I do not accept the appellant's explanation for omitting the repeated forced attempts to elongate her labia in her 2011 statement or when seen by Dr Lord. This was significant, relevant information. It related to a sensitive subject but the appellant had already disclosed that she had been the victim of forcible stretching. The appellant has failed to provide a credible explanation for this significant omission.

36. Mr Hussain invited me to find that the flashbacks that followed the appellant's treatment by her husband's relatives would not have happened if her account is not true. I accept that the appellant has referred to having suffered mentally, as a result of the forced labia stretching. However, there is no medical evidence supportive of the claim to have suffered flashbacks. Although Dr Lord described the appellant's 'present state' in the 2011 report, no meaningful reference was made to any adverse mental state or psychological effects.

37. I bear in mind that the wedding took place a very long time ago in 1996 and it is therefore necessary to consider the passage of time when assessing the credibility of what is said to have happened before the wedding. At no point has the appellant blamed the passage of time or any difficulty in recalling detail. She has simply said she was not asked a direct question and therefore only disclosed one incident of forcible labia stretching. I do not accept that explanation, for the reasons I have already provided.

38. I do not accept the appellant's evidence that her husband and his family have followed up interest in 'circumcising' her children since they have been in the UK. This is an additional factor undermining the appellant's claim that the family acted in the manner they did before the wedding. The appellant claimed that she was told that she would be cut another time

yet no attempt was made to commit FGM between the wedding in 1996 and 2007 whilst the appellant was in Malawi after the marriage. The appellant confirmed this during the course of cross-examination at the previous UT hearing – see the UT decision at [42].

39. In addition, the appellant's claim that her husband wanted to have the children and also wanted FGM to be carried out upon them is inconsistent with him having no contact whatsoever with them from the day he left in 2011 (see Q 70-79). He did not even attempt contact with them at school. The appellant has explained that her husband was too scared to do so whilst they are in the UK. This explanation does not explain the inconsistency in the one hand claiming that her husband is determined that the daughters belong to him and his failure to take any steps to have contact with them whatsoever, on the other hand. The appellant also claims that her husband's sisters have contacted her to request the elder daughter return for FGM, yet this has not been pursued by the husband at all.

40. I have considered the inconsistencies identified above together with all the relevant evidence before me, and in the context of the background evidence. The background evidence supports the appellant's claim that traditional practices continue and this includes FGM. There is little to support the appellant's specific claim that she was subjected to forced labia stretching over the course of many days. I note that 'counselling' and 'initiation' sessions are held prior to marriage and this can include checking that labia stretching has taken place and FGM. I also note the evidence that secrecy and silence surrounding FGM can make it difficult to paint an accurate picture of what happens at such sessions. However, in this case, the appellant repeatedly highlighted that her husband's family forcibly stretched her labia because they are Muslim, and as a Christian she and her family do not support the practice. This claim is not supported by the background country information drawn to my attention. There was no cogent evidence to support the claim that labia stretching takes place in Malawi's Islamic communities and not the Christian communities. Rather, the evidence suggests that labia stretching takes place as a traditional as opposed to a religious practice, in mainly rural communities in Malawi. One article referred to Churches being called upon to "*sensitize women on the importance of having their labia stretched*".

Conclusion

41. Drawing the threads of all the evidence together and applying the lower standard of proof, I do not accept it to be reasonably likely that the appellant's labia was forcibly stretched in the manner that she has claimed. I accept that her labia has been

stretched, as described by Dr Lord but do not accept that there is a reasonable degree of likelihood that it was done forcibly by members of her husband's family as part of an 'initiation' before the wedding or any other time.

42. I have also considered whether it is reasonably likely that the events described took place at another point but it is difficult to see what opportunity there might be for this to take place outside of the pre-wedding arrangements / initiation.

43. For the avoidance of doubt, I do not accept the appellant's claim that any member of her daughters' paternal family has maintained an interest in them having FGM. Their father has played no role whatsoever in their lives and seems to have relinquished all interest in them from as long ago as 2011. Although the appellant has claimed that the family demonstrated continuing interest I do not accept the credibility of this claim. It is inconsistent with how the family has acted in the past. In my judgment, the paternal family permitted their son to marry the appellant even though she is a Christian. There is no reasonable likelihood that the appellant's labia stretching was caused in the manner that she has claimed. I therefore reject her claim that that she has been the victim of forced labia stretching and the claim that she was threatened with FGM and her daughters have been threatened with FGM.

44. It follows that I do not accept the credibility of the appellant's evidence on the core issue in dispute, and it follows, with the agreement of the representatives, that her asylum appeal must be dismissed.

Decision

45. I dismiss the appellant's appeal under the Refugee Convention and Article 3 of the ECHR.

Signed:
Ms M. Plimmer
Judge of the Upper Tribunal

Date:
15 June 2017