Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06917/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 15 January 2019	**On 13 February 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MFE
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Chimpango, Crown & Law Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is the mother of a girl born in June 2016 who I shall I refer to as M. M was diagnosed with unilateral retinoblastoma when her mother was in the last trimester of her pregnancy. Retinoblastoma is a malignant childhood eye cancer that affects approximately 50 children per year in the UK and is therefore rare. M's affected left eye was graded the most serious (at E) and her eye was therefore surgically removed.

Background

2. The appellant's claim to remain in the United Kingdom ('UK') was based upon a fear that M would be subject to female genital mutilation ('FGM') in her home country of Nigeria and that in the alternative it would be a breach of human rights for the appellant, her husband and her daughter to be removed because of her daughter's rare medical condition. The respondent refused the appellant's application to remain in the UK in a decision dated 26 February 2018. This sets out the appellant's immigration history, which I summarise here. The appellant arrived in the UK as a student in October 2011. Her leave to remain was curtailed on 28 July 2015. She applied for leave to remain under the family / private life provisions on 24 September 2015, but this was rejected. She applied for leave under the family life provisions again in February 2016, but this was certified in a decision dated 28 July 2016. As I have indicated M was born in June 2016.

3. A further application was made to remain in light of M's circumstances in the UK as well as what was feared in Nigeria. The respondent did not accept that there was a real risk of FGM for M and did not accept that her medical condition was such that she should be allowed to remain exceptionally with her parents.

FTT

4. The appellant appealed that decision to the First-tier Tribunal ('FTT'). In a decision dated 25 October 2018, the FTT rejected the submission that M's relationship with her grandmother in the UK was sufficient to engage Article 8. The FTT also found that there was not the slightest risk that the appellant's children would be subjected to FGM if returned to Nigeria. The FTT regarded it to be significant but the appellant did not mention this when she made her previous application to remain on the basis of Article 8 and believed that the appellant had fabricated the evidence at the last resort. In any event, the FTT found that the appellant had provided no credible reason why she could not live with the rest of her family in an area away from her own and her husband's family to protect the children from any risk of female genital mutilation.

5. The FTT went on to deal with Article 8 but did not deal expressly with the submission that M's medical condition was such that it would be a breach of Article 8 and her best interest if she were to be removed from the UK. The FTT therefore dismissed the appeal on all grounds.

Appeal to the Upper Tribunal

6. Grounds of appeal prepared by Crown & Law Solicitors submit that the FTT erred in law in two respects. First, in its consideration of the risk of FGM and secondly in failing to address the submissions relevant to M's medical condition. In a decision dated 13 November 2018 the FTT granted permission to appeal. When giving its reasons for that decision the FTT said this:

> "Background evidence that suggests FGM is practised in a country is not of itself evidence that a particular individual will in fact be subject to that practice particularly when the evidence relied upon is not the most up-to-date evidence available. The judge found that the appellant's evidence her daughter would be subject to FGM was not credible and found that the appellant had not given a credible reason why they could not live separately from the family in a different part of Nigeria to avoid the risk. This was a conclusion that was open to the judge. In relation to M's medical condition the FTT however said this in its reasons for its decision. The judge did not mention the medical condition of the appellant's daughter much less make findings in relation to it or how it impacted on the best interests of the child or where they lay. The judge did not consider this evidence in his evidence of proportionality."

7. In a Rule 24 response dated 29 November 2018 the respondent noted that permission to appeal on the risks arising in relation to FGM had not been granted. In relation to the medical evidence, the respondent pointed out that the relevant material was analysed in detail in his decision letter and the FTT was not obliged to repeat this information when making its findings. The respondent also noted that the children were not qualifying children and that the family could be returned as a unit.

The hearing before me

8. At the hearing before me Mr Chimpango initially sought to place reliance upon the ground of appeal relevant to the risk of FGM. I invited Mr Chimpango to take some time to provide me with the correct procedural regime said to support an application to rely on that particular ground, bearing in mind the FTT's observations. I stood the matter down to enable him to consider this and to take instructions. Having done so, Mr Chimpango made it clear that he did not wish to pursue the ground of appeal relevant to the risk of FGM and wished to rely solely upon the ground of appeal relevant to the

medical condition of M. Mr Chimpango submitted that the FTT wholly failed to engage with the medical evidence when determining Article 8.

9. Mr Tan in response accepted there was no reasoning regarding the medical evidence albeit that the submissions that were recorded in the decision referred to that evidence. Mr Tan however submitted that had the FTT paid regard to the medical evidence it would have been obliged to dismiss the Article 8 appeal. In other words, the failure to refer to the medical evidence made no difference to the outcome.

10. In his response, Mr Chimpango submitted that it could have made a difference and it could not be said that the outcome would inevitably have been the same if the medical evidence had been taken into account. He submitted that there was the requirement of more than just monitoring of M's condition post-surgery. I invited him to take me to the medical evidence to support his submission that there was a necessity for medical treatment that went over and above monitoring. Mr Chimpango was only able to submit that monitoring was necessary to check whether there would be any deterioration in the other eye and that it was right and proper that M continued to receive that monitoring from those professionals who had been involved in her care. He invited me to find that this is a case that involved very exceptional circumstances and as such could not be said to inevitably lead to the conclusion that Article 8 would not succeed.

11. I also invited Mr Chimpango to take me to any evidence relevant to Nigeria to support the submission that M would not have the medical oversight or monitoring of her condition there that is necessary for her care. Mr Chimpango indicated that there was very limited evidence on the medical facilities in Nigeria but that what was available was set out within the respondent's decision letter.

Error of law discussion

12. I wholly accept that having set out the submissions from both parties regarding the medical evidence concerning M, the FTT failed to take that medical evidence into account when making its Article 8 assessment. That is a prima facie error of law. The parties agreed that I should in these circumstances consider whether the decision to dismiss the appeal on Article 8 grounds would have been inevitable, if the medical evidence was taken into account. It is important to note, as accepted by Mr Chimpango, that M is not a qualifying child and there are no qualifying children in the family. The test of reasonableness therefore does not apply. This means that there is a need for unjustifiably harsh circumstances for M if she is returned to

Nigeria in order for any argument based on Article 8 to succeed. Mr Chimpango accepted that this is the correct way to approach the matter but submitted that there were very exceptional circumstances. This turns on the medical evidence to which I now turn.

13. The medical evidence is very limited indeed. It is to be found in a letter dated 11 July 2018 from the retinoblastoma team of the Birmingham Woman's and Children's Hospital. This describes the removal of M's left eye having been successfully undertaken and that this was followed by an uneventful recovery. The management is said to include inoculation of the left eye on 10 October 2018. No further details are given regarding that. The letter describes M as having been diagnosed from a very early age of having malignant childhood eye cancer that is very rare but that it was only found in her left eye. The letter also states this:

> "Research informs us that retinoblastoma carries a genetic factor for all children with tumours in both eyes and a small percentage of those with only one eye affected. M's genetic results show that she has the non-genetic form of retinoblastoma and will require regular monitoring of her socket and remaining eye until she is 10 years of age. The assessment of M's socket and fitting of artificial eyes will also mean lifelong appointments for M. Having only one seeing eye means that M and her parents will need to take care of her remaining eye in regards to playing and sporting activities as well as visual acuity."

14. It is very clear from this evidence that since her operation, M has only required monitoring of her socket and remaining eye. In other words, nothing more was envisaged other than continued monitoring of her socket, her remaining eye and the possible fitting of an artificial eye (albeit with no time period or further particulars) and that that would continue until she was 10 years of age. As I have already indicated Mr Chimpango was unable to take me to any evidence in relation to Nigeria to support the submission that monitoring and the procedures I have summarised, could not be accessed there. M had her successful operation to remove her left eye as long ago as October 2017, according to the respondent's decision letter. That decision letter also refers to the availability of medical treatment in Nigeria. It may not be at the same level of the facilities in the UK but it is available. The respondent also referred to M being able to travel and that there was no evidence that she required any urgent treatment. The respondent concluded her condition to no longer be life threatening and there was no evidence that she would face any detriment upon return to Nigeria.

15. These are all matters that the FTT would have been obliged to take into account had it engaged with the limited medical evidence. When all of that evidence is considered in the round, and viewed at its highest, I am satisfied that it is inevitable that the FTT would have

come to the conclusion that the medical evidence only supported continued monitoring, which could take place in Nigeria. There being no other compelling or exceptional circumstances in the case, it is inevitable that the FTT would have reached the same conclusion on Article 8, given the current legal framework (as summarised by the FTT at paragraphs 52 to 59).

Conclusion

16. I therefore conclude that although the FTT committed an error of law in failing to properly engage with the medical evidence, the decision should not be set aside. This is because the error of law was not material, in that had the medical evidence been engaged with, the decision would inevitably have been the same.

Notice of decision

17. The FTT decision does not contain an error of law such that it should be set aside.

Direction regarding anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed Date

UTJ Plimmer
Upper Tribunal Judge Plimmer 31 January 2019