Neutral Citation [2013] IEHC 163

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012 / 584 J.R.

Between:/

A.H.E.H. (A MINOR, SUING THROUGH HER MOTHER AND NEXT FRIEND F.M.H.) AND M.H.E.H. (A MINOR, SUING THROUGH HIS MOTHER AND NEXT FRIEND, F.M.H.) [SUDAN]

APPLICANTS

-AND-

THE REFUGEE APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 21st day of March 2013

1. The challenge to the validity of the Tribunal decision in this case has some unusual features in that there is no dispute between the decision maker and the applicant about the material facts or about country of origin information (COI) in the case. It was accepted that girls in Sudan and especially those of the Nubian race are almost universally circumcised and that the most prevalent form of female genital cutting is of the most extreme sort (described by the parents in this case as the pharaoh's way). There is equally no dispute that family and societal pressure including that from women themselves contributes to and supports the very high incidence of genital cutting referred to in this State as female genital mutilation (FGM). The challenge is to the Tribunal Member's assessment that the first applicant would not be at risk of FGM if returned to Sudan because of her parents' opposition to the procedure.

2. It is first necessary to examine the background to the parents' opposition to FGM. The first applicant A.H. is a young Nubian Sudanese girl, born in Ireland in December 2008 who through her parents claims to be at high risk of such mutilation if returned to Sudan notwithstanding her parents' opposition to the custom. Her parents came to Ireland as asylum seekers in 2005 claiming to fear persecution because of their asserted opposition to the construction of a proposed new dam on the river Nile close to their village in northern Sudan. Their claim failed on credibility grounds and in the period that they have been in Ireland they have had three children, two of whom are girls. Those girls are not circumcised. The mother was circumcised at about six or seven and she gave evidence that everyone she knows has been circumcised. The father says he would not have married an uncircumcised woman and every woman in his family is circumcised. Both parents claim that their stay here has contributed to their awareness of the problems which the invasive procedure of infibulation brings for women in pregnancy and birth. They are now aware of the dangers faced by children and women at the time of circumcision and they oppose the practice but they fear being unable to prevent family members from carrying out such circumcision if they were to be returned to Sudan. Further, they submitted through their legal advisers the RLS that their opposition to the practice might waiver and cause them to yield to the strong cultural and family pressure to circumcise their daughter AH as uncircumcised girls are deemed unmarriageable and are rejected by society.

3. The parents' evidence at their daughter's appeal hearing was that since AH was born, their own parents in their home town in Sudan had frequently enquired why she had not been circumcised. On one occasion, AH's father told his own father that girls are not circumcised in Ireland whereupon his father told him that he should bring his daughter back to Sudan and they would do it for him. When asked by the Tribunal Member whether he could tell his family he had been to Ireland and didn't want her circumcised he responded that *"They will put me under pressure, she must be circumcised"*. He then described how if not circumcised, AH would be isolated as most of her friends would be circumcised and she would not get married. He explained that it is not acceptable not to be circumcised and men will not marry uncircumcised girls. His wife described that most people in their village were not well educated and would not understand their views. However, she said she would like to live in their home town if returned to Sudan and she did not want to lose the support of her family if they chose not to have their daughters circumcised.

4. In addition to that evidence the written submissions furnished by their legal representatives in advance of the oral hearing drew the Tribunal's attention to the prevalence of the socially-sanctioned practice and to COI which outlined the reasons put forward for the practice and to the decision of the then House of Lords in *K v. Secretary of State for the Home Department; Fornah v. Secretary of State for the Home Department* [2007] 1 A.C. 412 where uncircumcised girls in Sierra Leone were considered to be a particular social group. The Tribunal was referred to *FM (FGM) Sudan CG* [2007] UKAIT00060, a country guidance determination of the UK Asylum and Immigration Tribunal (AIT) which heard expert evidence and submissions on the issue and held *inter alia* that *"it is still not possible to say as a general proposition that a girl or young woman who does not wish to undergo FGM in any form will be able to avoid it"*. Passages from COI detailing the social consequences of refusing to have one's daughter circumcised were highlighted and it was submitted that *"The Tribunal Member should also bear in mind the risk that, despite best intentions, the Appellant's parents may succumb to the severe societal pressure that will undoubtedly bear upon them if returned to Sudan which also increases the risk that she will be subjected to FGM."* A UNHCR Guidance Note on Refugee Claims relating to FGM (2009) was also highlighted in the submissions with particular emphasis on paragraphs 28-32 which state that where a claimant is from a country with a universal or near-universal practice of FGM, internal flight will normally not be considered a relevant alternative.

5. The Tribunal Member accepted COI concerning the prevalence of FGM throughout all races and religions in Sudan apart from Darfur. She accepted many of the submissions on the practice and mindset of both men and women on the issue. She noted the evidence of the applicants' parents about the prevalence of circumcision. She recited COI which indicates that FGM is very common in Sudan and Somalia and that more than 90% of girls in Somalia and northern Sudan are subjected to the most severe form, that factors such as religion, tradition and sexuality are used to explain and justify the practice and that awareness campaigns and efforts to encourage eradication have made very slow progress. She noted that in societies where socio-economic support is provided to women primarily through marriage, the requirement that women must be virgins to be considered eligible for marriage contributes to the continuation of

FGM. She noted that pressure to have girls circumcised generally originates from within the family and sometimes family members other than the parents perform it, and in particular this applies to girls living with grandparents.

6. Having made those background findings, she concluded that as both parents of AH were opposed to FGM, they would be able to prevent members of their family from carrying out circumcision on their daughter. She expressed her view that COI indicated that *"unless the parents were acquiescent in the carrying out of such a procedure, the practice could not be enforced on the infant applicant"*. She further found that there was nothing to prevent the family from relocating to another part of Sudan away from their local area as no-one would know if AH was circumcised or not, since the parents and COI are in agreement that it is impolite to ask such questions of a woman over a certain age and no-one questions or refers to whether a female has undergone FGM. She also found that there was an inconsistency in the evidence given by the applicants' parents as to the age at which a child is circumcised.

7. Mr Woolfson for the applicant challenges the validity of these findings and argues that it was utterly unreasonable for the Tribunal Member to find that because the applicants' parents are opposed to FGM, the first applicant would not be at risk of FGM if returned to Sudan. In particular, he argues that the Tribunal Member failed to recognise that even if a parent is opposed to FGM, societal pressure is such that the parents may not be able to resist such pressure. This was the situation of the mother in *FM (FGM) Sudan CG* (cited above), who was *actively* opposed to FGM and yet could not be assured that well-meaning family members would not act against her wishes. This argument had been made in the written submissions furnished to the Tribunal in advance of the appeal and the evidence given by the applicants' parents at the oral hearing was that while they are now opposed to the practice and so long as they are in Ireland they will not subject their daughters to it, they fear they might submit to the practice if returned to Sudan. Mr Woolfson argued that even if they took a stand against FGM, their extended family members and peers might believe them to be acting other than in the interests of their children. The strong cultural beliefs surrounding uncircumcised girls in Sudan, the fact that a child might be subjected to FGM without the consent of her parents, and the possibility of children being enticed away from their parents with inducements or rewards when a parent might be temporarily absent are detailed in the COI which was furnished to the Tribunal Member. Even the UNHCR *Guidance Note on Refugee Claims relating to FGM* (2009) notes the difficulty in withstanding the practice.

8. The applicant further argued that the Tribunal Member's finding on internal relocation is impermissible in light of the UNHCR *Guidance Note* and Mr Woolfson further submitted that even if internal relocation was relevant, which is not the case on the facts relating to the prevalence of the practice and custom in Sudan, the Tribunal Member was still obliged to consider the reasonableness of expecting the applicants to relocate to a particular relocation site, taking account of their ethnicity and other relevant factors, as is required under the *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006). She failed to do this.

9. The respondents on the other hand view the parents' position with a great deal of suspicion in view of the history of their own personal asylum claims which were disbelieved and which are at variance with this current claim where the couple claim regular phone contact with their parents. Ms Callanan submitted that they did not claim that they would be at risk of their succumbing to societal pressure if returned to Sudan until the appeal stage. Their evidence at the s. 11 interview was that they were *vehemently opposed* to the practice and while they might in the past have had *AH* circumcised, they would not now permit her to be circumcised. Concerns about their ability to follow through on their belief that FGM was harmful for their daughter takes on an air of unreality when it is considered that they both have had a secondary school education. They say they are so opposed to FGM that have claimed asylum for her but claim that they could not move to another part of north Sudan and live apart from their families in order to avoid her being circumcised.

10. Ms Callanan relies on COI attached to the s. 13 report which notes changing attitudes among younger parents with young fathers playing an increased role in opposing the practice. The parents here could act to protect their daughter if they wished. The respondents do not dispute that FGM is highly prevalent and almost universal in Sudan and may amount to persecution but view the claim that they could neither resist societal pressure nor relocate to another part of Sudan as opportunistic. The Tribunal Member felt that if the parents were so opposed to the practice, it would not happen and in the context of their stated opposition and COI, this was not unreasonable. While COI refers to the inability of a father to prevent his wife circumcising their child in his absence, it does not refer to a risk of FGM occurring where both parents are opposed. There are areas in the mountains of north Sudan where girls are not circumcised and the applicants' parents were not required to return to a specific place in Sudan. The rate of FGM is different in various parts of the country and determined parents could relocate to protect their daughters.

11. Finally, the respondents argue that the discrepancy in the parents' evidence in relation to the age at which the first applicant would be circumcised is significant insofar as it affects the credibility of that part of the claim. If circumcision is not carried out until a child is ready for school, one has to question the credibility of the claim that the grandparents were enquiring about circumcision so soon after she was born.

THE COURT'S ANALYSIS

12. The Court approaches this review on the basis that as previously mentioned, the Tribunal Member had no problem in accepting the objective COI presented on the prevalence of FGM in Sudan. It follows that if the applicant in this case had been born in her parents' home town in Nubia in northern Sudan she would undoubtedly be facing the horrific form of FGM expected, endured and tolerated by both sides of her family and by society in general. Unless protected, this is what she will face if returned to Sudan. The undisputed COI indicates that unlike in other parts of the Africa, anti-circumcision campaigns, training and advocacy have made little progress in persuading rural Sudanese society of the brutality of genital cutting and the life-long ill effects it has on women. While minor progress may have produced a move away from the more invasive forms of circumcision among some educated urban families, the reality is that FGM is the almost universal norm in rural areas and is an important cultural feature of life in north east Africa. The Tribunal Member accepted that girls and women who have not undergone the ritual mutilation are socially stigmatised. Obviously, the degree of ostracism and social isolation to a very large extent depends on the social and educational milieu of the uncircumcised girl or woman. The respondents accept that FGM is capable of amounting to persecution. Whether uncircumcised girls from north Sudan form a particular social group within the meaning of s. 2 of the Refugee Act 1996 was not an issue in this case. The applicants' parents do not come from a large, educated urban milieu but from a small farming Nubian community. That is an important consideration in this challenge.

13. Notwithstanding the applicants' suggestion to the contrary, it is clear that the country guidance determination of the AIT in *FM (FGM) Sudan CG* [2007] UKAIT00060 was in fact considered by the Tribunal Member as aspects of the case were quoted by her in her decision. While AIT country guidance determinations are not binding on this Court or on the Tribunal Member and cannot be considered as a source of country of origin information, they can nevertheless be of significant assistance to protection decision makers in this jurisdiction who are considering similar issues. Designated country guidance cases permit the AIT to seek out and receive the evidence of recognised experts about the country in question. Any decision maker faced with the issue of FGM in Sudan would therefore find assistance in the *FM* determination as the AIT heard and recounted the evidence of the mother, both of the daughters, and a Sudanese doctor who had been granted refugee status in the UK and it received expert evidence from two

witnesses. A report prepared by a Professor of Anthropology at California State University indicated that those who practice FGM in Sudan consider it important for the protection of morality, family honour and the avoidance of shame. The Professor indicated that FGM is so vital to family honour that family members will often have it performed even in the face of opposition from one or both of the girl's parents, and she noted that the procedure only takes a few minutes and can be – and often is – performed in the absence of a parent. If a father disapproves, the practice may occur in his absence.

14. The circumstances of the mother and daughters in *FM* differ significantly from those of the first applicant and her parents in that the first applicant AH has the advantage of two parents opposed to FGM, her parents are from a minority non-Arab tribe subject to some discrimination living in a rural area and they have not been involved in any anti-FGM activism unlike the prevailing facts in *FM.* That case involved an educated single mother returning with her daughters to an urban area in Sudan without her husband. It was of particular significance that she may have attracted the adverse attention of the Sudanese régime as an anti-FGM activist promoting women's rights while in the UK. None of these characteristics are shared by the family in this case. Nonetheless the general conclusions drawn by the AIT on familial pressure to preserve family honour are of relevance in this case as they confirm the claim made by the applicants' parents that even though they both oppose FGM as a result of exposure to different views, it does not follow that there is no risk to their daughter if returned to Sudan. No contrary country guidance determination was before the Tribunal Member nor was any COI available to her which would support a contrary conclusion.

15. While the undercurrent of extreme scepticism felt by the decision makers in this case as to the true depth of the parents' opposition or revulsion to the practice of FGM is apparent, the fact remains that it is not the strength of the parents' opposition to FGM which fell to be assessed by the Tribunal Member but rather the degree of likelihood that this young girl would be at risk of FGM if returned to Sudan. Against the undisputed background of almost universal acceptance of infibulation as a desired and beneficial procedure, the case made by the parents and their legal representatives was that it would be difficult to resist family pressure to have their daughter cut. If they expressed their opposition family members might have the procedure carried out in their daughter's perceived best interests. Even if they persuaded their family members to refrain from performing the procedure, they could not be confident, no matter where in Sudan they lived, that they themselves might come to accept that their personal beliefs were harming their daughter's happiness and marriage prospects and might give in to that pressure although they now view FGM as harmful. The applicants' parents fear that they may not have the strength of conviction to protect their daughter from the sea of social disapproval which will follow from the stand they have adopted only since they have been in Ireland. The Tribunal Member failed to consider this broader fear that the opposed parents might falter in their opposition to FGM because their extreme minority view might in the minds of the majority detrimentally affect their daughter's position in society.

16. It is not difficult to envisage how the parents' attitude to FGM changed. There can be little doubt that during the mother's three pregnancies and deliveries in Galway, she must have experienced strongly expressed disbelief and amazement from health workers at the absence of her external genital organs and she must have been influenced by their abhorrence of FGM and by the general view that such procedures serve no positive purpose. The condemnation of any form of female genital cutting in Ireland must have influenced Mr H too and must have contributed to his change in attitude. While under the sway of the strong negative mind-set in Ireland where there is open discussion and condemnation of the practice, the parents could genuinely have come to share the developed world's disapproval of the procedure. However, this review is not about their views held in Ireland but whether their present opinions could reasonably be relied upon to protect their daughter when exposed to the near-universal, diametrically opposite views on FGM held in Sudan. The question for the Tribunal Member should have been whether in all the circumstances, it would bet reasonable to expect that these parents would, when living in their own country where such customs are ingrained, hold out against the tide of approval when the time comes for such rite of passage to be performed and if they pass that hurdle could they resist social pressure relating to their probable social exclusion?

17. The view taken in this State and throughout the EU of FGM is that it is an abomination. Forced FGM is viewed as amounting to persecution within the meaning of s. 2 of the Refugee Act 1996. As was held by Murray C.J. in *Meadows v. The Minister for Justice* [2010] IESC 3, FGM is *"a wholly reprehensible practice and carrying it out forcibly on any person would be a grave crime."* Further, s. 1 of the *Criminal Justice (Female Genital Mutilation) Act 2012* defines female genital mutilation as *"any act the purpose of which, or the effect of which, is the excision, infibulation or other mutilation of the whole or any part of the labia majora, labia minora, prepuce of the clitoris, clitoris or vagina of a girl or woman"*. Subject to limited exceptions, it is a criminal offence for any person to do or attempt to do an act of female genital mutilation and to remove or attempt to remove a girl or woman from the State where one of the purposes of the removal is to have an act of FGM done to her. While in Ireland, it might not take much courage for the applicants' parents to accept the generally held view on FGM..

18. A different consideration arises when assessing the strength of the parents' opposition to FGM on a return to Sudan. That opposition should have been assessed in the context that they were not anti-FGM activists before they came to Ireland. It would be fair to say that the issue was not even a live one at that time as they had no children and no reason to consider their personal position on FGM. The wife was circumcised and seems to have accepted that this was something that had to be done and the husband's attitude at that time was that his wife had to be circumcised to be acceptable to him in marriage. Their opposition to FGM was only acquired with the birth of their second child, a girl. Their acquired change of view could not in any way be fairly characterised as *"vehemently opposed"* as found by the Tribunal Member. They have not shared their views with their family in Sudan. They gave evidence that they seek to avoid the subject by minimising phone contact with their parents. Their opposition to FGM could therefore come as a surprise to their family and friends and their views could be treated in Sudan with disbelief commensurate with the disbelief held in Ireland that any parent would allow FGM to be performed on their children. It therefore seems to the Court that in light of what is known of the applicant's parents and in light of the voluminous COI on FGM in north Sudan, the UNHCR position paper and the UK AIT country guidance determination, the Tribunal Member did not in fact have any evidence from which to infer that a couple such as this one could withstand family and societal approval of the custom and maintain their resolution if returned in Sudan.

19. It is implicit in the appeal decision that it was accepted that female circumcision is considered by Sudanese society at large to be in the best interests of girls to encourage chastity and cleanliness and to enhance their marriage prospects and to promote societal cohesion. The parents' evidence was that if they refuse to have their daughters circumcised, their families will consider this a matter of deep shame and both their parents and their children will fall out with them and will be deprived of family support and will possibly be shunned by the community. In those circumstances, it is not at all clear how or why the Tribunal Member considered that this couple were of such phlegm and fortitude that they could and would stand up to parental and societal pressure to prevent the occurrence of FGM with or without their approval. Further, the Tribunal Member does not appear to have countenanced the other possibility or indeed the probability highlighted in written submissions at the appeal stage that intense societal pressure might weaken their resolve. Therefore, the finding that they as a couple could ensure their daughter's safety is unreasonable and in error of law.

20. It cannot be said that this case was not made at the appeal stage. The written submissions stated that *"The Tribunal Member should also bear in mind the risk that, despite best intentions, the Appellant's parents may succumb to the severe societal pressure*

that will undoubtedly bear upon them if returned to Sudan which also increases the risk that she will be subjected to FGM." Similarly, it would be unfair to hold that the parents did not make a similar case. While they may have been less eloquent, the couple in many ways described the lack of weight which would be attached to their opposition to female circumcision in their family and society at large. For example, the mother said *"I will tell them no but my family will force me into doing it to my daughter"* and the father said *"They will put me under pressure, she must be circumcised"* and *"She must be circumcised. Anywhere she goes it's the same culture there – not accepted."*

21. It may well be that because the Tribunal Member was focussed on the parents' current objection to FGM, she simply overstated the strength of their ability to protect their daughter in face of the sheer volume of cultural support for FGM in Sudan or underestimated the extent of the risk of the applicants' extended family or community taking the matter of the first applicant's circumcision into their own hands. In the judgment of the Court, the Tribunal Member did not properly assess the strength and force of such cultural influence and unreasonably attributed strength of character and personality to the parents to withstand those cultural attitudes.

22. In light of the foregoing the Court will quash the decision of the respondent Tribunal relating to the first applicant and will remit her appeal for fresh determination by a Tribunal Member who is not familiar with the case but who ought to be made aware of the Court's reasons for quashing the decision.

Postscript
23. The Court was informed that a separate asylum application has been made on the same basis on behalf of the applicants' infant sister who has recently been the subject of a negative recommendation by the Commissioner. It may be preferable that both appeals are heard together. There also seems little point in proceeding with the brother MH's case until the sisters' cases are determined. Clearly, if their appeals succeed, his appeal may become of academic interest only in light of the obligations of the State pursuant to s. 18 of the Refugee Act 1996.

24. Having considered the COI presented with this appeal and judicial review, the Court is persuaded that there is a high risk of FGM being performed on girls of Sudanese or Somali nationality whose parents are lawfully resident here. Many if not most women from those two countries (apart from Darfur) have already undergone circumcision at the hands of their parents or of extended family members. There is no obvious volume of applicants from those countries seeking to establish a fear of the practice. There is clear unequivocal support from women for the practice. Their daughters may well be exposed to the abhorrent procedure.

25. The Court is aware that the Department of Health has signalled that in addition to caring for women who have been subjected to FGM, it plans to take steps to prevent FGM being carried out here. The recognition of refugee status for those who have escaped the fear of FGM would be set at nought if parents were then coerced, persuaded or willingly engaged in visiting the appalling torture on their daughters, under the shield of custom and culture. To give effect to the laws prohibiting FGM there must be regular medical checking of such girls and a comprehensive education programme outlining the criminal nature of the practice. It is hoped that a system whereby at-risk children are monitored and assessed is in position.