Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06869/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 November 2018	**On 29 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MISS MOTLHATLHEDI MMAPULA PATRICIA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Imamovic, of Counsel instructed by Pickup Scott Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Botswana, born on 5 September 1971, who appealed to the First-tier Tribunal against the decision of the respondent dated 22 May 2018 to refuse the appellant's claim for asylum and humanitarian protection. In a decision promulgated on 17 July 2018, Judge

of the First-tier Tribunal Grimmett dismissed the appellant's appeal on all grounds.

2. The appellant appeals with permission on the following grounds:

Ground 1 – failing to take into account a material matter in respect of the finding that the appellant has her sister and her son in Botswana and in failing to take into consideration the appellant's physical and moral integrity in having her personal and intimate physical care administered by her son or her sister.

Ground 2 – failing to take into account a material matter in rejecting the appellant's private life claim, basing this solely on the availability of the appellant's son and her sister. The appellant's private life and her ability to reintegrate is not simply limited to her care needs or medical conditions.

Ground 3 – failing to take into account a material matter in relation to the judge making an assessment, at [27], that the appellant had no real private life whereas the appellant had lived in the UK for thirteen years, had worked and formed relationships, and there was a finding that she is in a relationship with her partner which forms part of her private life. It was submitted that the appellant is unable to show further private life because of her three major strokes and current medical condition and the judge failed to take this into consideration.

Ground 4 – failing to take into account a material matter in respect of the appellant being able to speak English before her strokes whereas her inability to speak English, and indeed her inability to speak at all, was unfairly used against her when this is something that she did not have control over.

Background

3. The appellant first entered the UK as a visitor in or around October 2005 and subsequently overstayed. She claimed asylum in November 2016 on the basis that she claimed to be at risk from a former partner and that as a lone female she would be at risk of female genital mutilation. The appellant also suffers from aphasia, which means she finds it difficult to communicate orally and can no longer read or write as a result of strokes in 2015 and 2016. The appellant claimed that her removal would breach her right to respect for private and family life in the UK. The respondent and the First-tier Tribunal Judge rejected her asylum claim and there is no challenge to those findings. The appellant did not give evidence or produce a statement for her appeal due to her communication difficulties. The appellant's partner provided a statement. The First-tier Tribunal Judge was not satisfied that the appellant's health difficulties reached the Article 3 threshhold and found that it would not be a disproportionate interference with her private life (the judge not being satisfied that there was family life for the purposes of Article 8, the appellant's partner living in Sweden) for the appellant to return to Botswana.

Submissions

4. Ms Imamovic expanded on the permission grounds, submitting that there was no evidence to support the judge's findings that the appellant has her sister and her son in Botswana and the judge had referred to the appellant having contact with her sister whereas there was no such evidence before the Immigration Judge. However, as I indicated at the hearing, the appellant's partner's statement indicated, stated at page 9, that:

> "Naturally Mmapula has tried to maintain some sort of clandestine contact with some individuals in Botswana for reason other than to Threat level she faces if she were to return (sic). As a mother who has a child left to fend for himself she simply could not cut off communication, but surely maternal instincts would drive her to enquire about her son who she knows is in dire straits and probably being affected emotionally by the whole unfolding saga".

The statement also went on to say that:

> "it is not a given that such people she communicates with are people who would be of any value and provide support structures, as they are also struggling to fend for themselves in most cases ..."

5. Whilst Ms Imamovic accepted that this is indicative of current contact, she submitted that this was part of the overall difficulties that there were in obtaining instructions from the appellant because of her lack of ability to communicate and that the evidence came from her partner who is based in Sweden and also unable to attend the hearing. She referred me to page 3 of his statement where the appellant's partner had stated that: "she lost her memory then and lost her speech up to now that it's not easy to understand what she wants to say." The appellant: "can't speak read and write anymore and I am so patient to hear her when she wants to tell me something".

6. Ms Imamovic submitted that even if it was found that the appellant did have some contact, what the judge did not do was consider the appellant's moral and physical integrity and whether it was appropriate for her family to undertake the care of the appellant. She submitted that there was no evidence of contact and no evidence of effective contact.

7. In terms of private life and integration Ms Imamovic expanded on her grounds that the appellant's ability to form relationships and to seek employment were not adequately considered and this was relevant to her ability to integrate. She submitted that the appellant did not speak either English or Tswanan. The judge did not assess the appellant's ability to integrate.

8. At [34] the judge identified the factors that she had to look at and found that the appellant's inability to speak English would "hamper her integration" in the UK. Ms Imamovic said it was therefore a contradiction to say that a woman who has been away from Botswana for thirteen years

and whose language skills are such that this would hamper her integration in the UK can properly integrate in Botswana and submitted that she was unlikely to have the support that she has in the UK. It was submitted that the judge had not properly assessed paragraph 276ADE despite citing it at [35]. Ms Imamovic referred, as she had in the grounds, to the fact that the appellant had worked as a carer and only stopped because of her health difficulties and that the judge had accepted that the appellant had a relationship with her partner (although it was not contested that the couple have never lived together and this partner is currently residing in Sweden).

9. In respect of ground 4, it was submitted that at [34] the appellant's inability to speak English was not assessed fairly. The judge failed to weigh out the reason why she failed to speak English, this was not a choice and it was disproportionate to take this into consideration in the wider proportionality balance.

10. Mr Whitwell submitted in relation to the final ground that under Section 117B the judge was required to take into account whether or not the appellant spoke English and whether she was financially independent and there was no provision for a weighing of reasons and that there was no error in the judge taking into consideration that the appellant could not now speak English.

11. In respect of grounds 2 and 3 Mr Whitwell submitted that the judge, in terms, at [35] referred to paragraph 276 and had noted that the appellant had not lived in the UK for twenty years and ostensibly the consideration therefore that was being undertaken was paragraph 276ADE(vi) and the judge addressed whether there were very significant obstacles to her integration and found that there were not, considering the evidence as a whole. This had to be considered in light of the judge's previous findings including in relation to findings on the appellant's asylum claim and on her private life in general. At [27] the judge took into consideration that the appellant sometimes attends church and continues to have contact with a social worker and with the NHS. At [30] the judge noted that the appellant can travel independently and was able to get a bus with no difficulty and walk unaided in Leicester city centre using public transport. Mr Whitwell submitted this was equally applicable to the appellant's ability to integrate into Botswana and it was not indicative of someone who cannot integrate anywhere because of her medical difficulties.

12. Mr Whitwell submitted, that at [30], the extent of the involvement of Social Services which amounts to 11.25 hours' assistance in her home and two hours outside of her home per week, does not speak to someone who has difficulties to the extent that they cannot integrate at all. Mr Whitwell submitted that most importantly the judge took into consideration and made findings that the appellant had family and those findings were reasoned and wholly adequate.

13. In respect of ground 1 Mr Whitwell submitted that the evidence did not support the submission that the partner's evidence indicated that she was not in communication with her family. Page 9 of the partner's statement referred to current contact. Mr Whitwell submitted it was open to the judge to make the findings she did therefore, that the appellant was in contact with her family.

14. In reply Ms Imamovic submitted that in terms of Section 117B she was not submitting that there was no evidence to find that she did not speak English. However when coming to weigh up the overall proportionality she submitted the judge had failed to consider why this was the case in the wider proportionality balance. Whilst she accepted that the judge did consider paragraph 276ADE at [35] and had made findings at [28] and [29] as to her medical conditions, the consideration was very narrow and in considering whether there were very significant obstacles the judge failed to consider that the appellant cannot read or write or speak and that she had lived in the UK for thirteen years and so that her ability to continue her private life will be very significantly hampered including her ability to form relationships which is an integral part of her private life.

Consideration and Conclusions

Ground 1

15. I am not satisfied that any of the grounds are made out. In respect of ground 1, it is not the case that there was insufficient evidence on which the judge based her findings that the appellant would be cared for by relatives in Botswana.

16. The judge gave adequate reasons for reaching the findings she did. The judge took into consideration that the appellant has a partner who lives in Sweden and found that that relationship did not engage Article 8 and made alternative findings, if she was wrong, in that regard. Having dismissed the appellant's asylum claim, including on credibility grounds, the First-tier Tribunal went on to not be satisfied that the appellant would be returning as a lone female given that she has a son in Botswana. The judge took into consideration the evidence that the son lives a hard village life and is helped by "some relatives" and the judge reached the conclusion that the appellant was still in contact with him prior to her strokes because the appellant's partner was aware of his movements and that it was clear that he was not the only relative she has in Botswana. I am not satisfied that that finding can be properly challenged including given what was recorded in the partner's written statement. This statement suggests ongoing contact between the appellant and family/friends in Botswana and I note that the judge has recorded, at [31], that the appellant can now communicate to some extent in her own language, Tswana, according to the observations of the social worker who carried out the assessment and observed the appellant and her partner together. Although Ms Imamovic referred to page 3 of the partner's statement as recorded in paragraph 5 above, that refers to it not being

easy for her partner to understand 'what she wants to say' which suggests she can be understood with some difficulty. This supports a finding of ongoing contact, as opposed to the only contact being between the partner and family members. Even if that were not the case and the only contact was from the appellant's partner on her behalf, the judge's findings, that the evidence indicates ongoing contact with family, cannot be faulted.

17. The judge went on to find at [21] that the appellant had not shown that her sister was no longer in Botswana and gave clear and adequate reasons for those findings. Although the appellant claims the sister is in Zimbabwe having married a Zimbabwean citizen, the judge pointed out the flaws in that evidence including her earlier statement at D1 of the respondent's bundle, the appellant noting her sister had returned to Botswana where she had been working and this did not suggest any move to Zimbabwe. The sister's marriage certificate noted she married in Botswana and there was no adequate reason given for the appellant not producing evidence that her sister was in Zimbabwe when such ought to have been available.

18. The judge's ultimate conclusion therefore that the appellant, who the judge did not find credible in her asylum account, had not shown that she had no-one to return to in Botswana, was one that was available to him on the evidence. The judge's findings, that her son was there and that her sister and her sister's family were there as well as distant relatives, could not be said to be irrational.

19. The judge found that there was no evidence that medication was not available in Zimbabwe or other similar medication and such was not challenged before me and the judge was satisfied that the appellant would have the support of family members and took this into account in her findings that Article 3 was not engaged. The fact that such assistance the appellant may receive in Botswana may involve the appellant's family members undertaking intimate care, amounts to no more than a disagreement with the judge's conclusions (and it is evident the judge was aware of the nature of assistance she currently receives including as detailed in the reports before her) including given that there is nothing to suggest that the appellant had raised any difficulties with having strangers undertake such intimate care in the UK.

20. I take into account that if an Article 3 claim medical fails, it is unlikely Article 8 could prosper without some separate or additional factual element and that although the courts have not said Article 8 can never be engaged by health consequences of removal, the circumstances would have to be truly exceptional before such a breach can be established (see most recently **SL (St Lucia) [2018] EWCA Civ 1894).** No error of law is disclosed in ground 1.

Grounds 2 and 3

21. Although Ms Imamovic criticised the judge's approach to Article 8, and in particular the alleged failure to assess the appellant's claimed inability to integrate in Botswana because of her limited mobility, memory and reduced speech and her medical condition, that is to misrepresent the judge's findings.

22. The judge was aware of, and set out (paragraphs [28] to [31], the appellant's limitations (including in communication and in self-care) following her strokes, as well as detailing the appellant's abilities, including to access community facilities, have phone calls, walk confidently and independently get the bus ad walk unaided in Leicester city centre. Those factual findings, which were not disputed, were relevant tot eh judge's ultimate conclusion that there were no very significant obstacles to her integration and that such integration would be assisted by family members in Botswana.

23. The judge also took into consideration that the appellant had been in the UK for thirteen years, of which she only had leave for six months and that there was:

> "No information about her private life save that she is now living in NASS supported accommodation. She sometimes attends church. She continues to have contact with a social worker and with the NHS. There was no evidence from any friends in the UK".

24. There was nothing before me to suggest that the judge was factually incorrect in that assessment. Whilst that may not specifically mention the fact that the appellant previously worked as a carer, the judge at [34] refers to the appellant's illegal working and that she was financially independent at that point.

25. The judge cannot be properly criticised for her assessment of the appellant's limited private life, and that her relationship with her partner did not amount to family life. Although Ms Imamovic drew attention to the appellant's vulnerability, the judge took into consideration, including at [2] that the appellant suffers from aphasia, which means that the appellant claims that she finds it difficult to communicate orally and can no longer read or write as a result of strokes in 2015 and 2016. The judge clearly had those difficulties at the forefront of her mind in the consideration of the appellant's Article 3 and Article 8 claims and took into consideration the appellant's needs and her abilities, including that she can walk confidently and that she can prepare her breakfast and use the microwave although she cannot read instructions, and that she has undertaken travel training and as already noted was able to travel independently and get the bus with no difficulty.

26. The judge also took into consideration the appellant's ability to communicate to some extent in her own language. In assessing all of that evidence, the judge reached the conclusion that the appellant would not be able to live entirely independently because of the difficulties she faces,

but was satisfied that her close relatives would be able to assist her. That conclusion was evidence-based and a finding that was available to the First-tier Tribunal. There are no material errors identified in grounds 2 and 3.

Ground 4

27. In respect of the judge taking into consideration that the appellant did not speak English and was not financially independent, Ms Imamovic conceded that the judge was required to do so. However, the judge clearly had in mind, in the wider proportionality balance, the reason for the appellant's difficulties and there was no error in her not specifically stating that when considering Section 117B. I do not agree with the submission, which is not made out, that the judge 'used the appellant's disability against her' in the public interest consideration.

28. Although it was submitted that, for example, it was unfair of the judge to take into account the appellant's lack of financial independence whilst apparently not considering why she could not work, as also noted by the judge, the appellant did not have permission to work in the UK in any event which would be a relevant factor in financial independence. There was no error therefore in the findings, made on the basis of the medical evidence, that there was 'no evidence to show that she will be able to be financially independent in the future'.

29. It is not the case, contrary to submissions, that the judge's consideration of paragraph 276ADE(vi) and the judge's wider consideration of Article 8, was limited to the one sentence in [35]. This has to be considered in light of the judge's general findings in relation to the appellant's availability of relatives in Botswana, her limited ability to communicate in her own language, the capabilities that the appellant has together with her needs, which the judge was entitled to conclude were not exceptional.

Notice of Decision

30. The First-tier Tribunal decision does not contain an error of law and shall stand. The appellant's appeal is dismissed.

No anonymity direction was sought or is made.

Signed Date: 20 November 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT

FEE AWARD

The appeal is dismissed. No fee award is made.

Signed Date: 20 November 2018

Deputy Upper Tribunal Judge Hutchinson