



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08518/2016

THE IMMIGRATION ACTS

Heard at Field House
On 23 May 2018

Decision & Reasons Promulgated
On 25 July 2018

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

EA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Seddon, Counsel instructed by Turpin & Miller LLP
(Oxford)
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me following a hearing before me on 2 February 2018 which resulted in my setting aside the decision of the First-tier Tribunal ("FtT") which allowed the appellant's appeal on asylum grounds.
2. In order to put this, the re-making of the decision, into context I set out in full my error of law decision, entitled Decision and Directions, as follows:

“DECISION AND DIRECTIONS

1. The appellant in these proceedings is the Secretary of State. However, I continue to refer to the parties as they were before the First-tier Tribunal (“FtT”).
2. The appellant is a citizen of Kenya born in 1982. She arrived in the UK on 25 September 2015 as a visitor. She made a claim for asylum on 7 January 2016. That claim was refused in a decision dated 2 August 2016.
3. Her appeal against that decision came before First-tier Tribunal Judge Swinnerton (“the FtJ”) on 15 September 2017, following which she allowed the appeal on asylum grounds in a decision promulgated on 13 October 2017.
4. The respondent’s grounds of appeal in relation to the FtJ’s decision contend that the FtJ has not made lawful findings in respect of the legal and factual issues at stake. In summary, it is contended that the FtJ has not given sustainable reasons for concluding that the appellant had been subjected to persecution in the past, or would be subjected to persecution in the future. In her conclusions, she had failed to take into account the appellant’s particular background and circumstances.
5. The further background to the appeal is best illustrated with reference to the FtJ’s decision.

The FtJ’s decision

6. The FtJ recorded that the appellant had arrived in the UK on 25 September 2015 with a valid visit visa in order to attend a two-day muscular dystrophy conference.
7. The basis of the appellant’s claim was summarised by the FtJ to the effect that she was diagnosed with muscular dystrophy at the age of 14 and was the youngest of nine children and her family rejected her when she was aged 23 because of her disability. They no longer wanted to take responsibility for her and saw her as a curse on the family.
8. Her father is a subsistence farmer. The appellant’s case was that she cannot walk and uses a wheelchair all the time. When she was aged 14 she fell over by the roadside and called for help. The person who came to her assistance tried to rape her.
9. The appellant further described instances when she had been stared at by crowds due to her disability. That included an incident in early 2015 when she had been in a supermarket in her wheelchair, and an incident on leaving the house of her brother-in-law. She said that in 1996 a bus driver had deliberately accelerated when she was alighting a school bus. There was a further incident in 2014 when she was hit by a taxi that reversed into her.
10. The appellant’s husband was diagnosed with sickle cell anaemia at the age of 2 years.
11. The respondent accepted that the appellant suffered from muscular dystrophy, but the other aspects of her claim were not accepted. Furthermore, the respondent asserted that the treatment which the appellant feared on return to Kenya amounted at most to discrimination, rather than persecution.

12. The FtJ heard evidence from the appellant, who was using a specially adapted and widened wheelchair. She gave evidence through a Swahili interpreter. Her evidence included the fact that she and her husband sold their small food stall prior to coming to the UK in 2015.
13. She said that she was forced to leave the family home when she was aged 23 as her family had listened to people saying that she was disabled because she was cursed. She last had contact with her parents in December 2015 and had not reconciled with her family in Kenya, although remains in contact with her sister in the UK.
14. The appellant's husband gave evidence as to his family in Kenya, and the last contact he had with them in 2012. His evidence was that his family did not treat the appellant well due to the negative attitude generally of people in Kenya towards those with disabilities. He and the appellant did not return to Kenya after the end of the conference, as the appellant was seriously ill and pregnant.
15. There was further oral evidence from a Reverend McKay.
16. The FtJ found that the appellant suffers from limb girdle muscular dystrophy and her husband suffers from sickle cell anaemia and other conditions. The appellant's child was stillborn on 17 March 2016.
17. The FtJ also found that the appellant was rejected by her family in Kenya at the age of 23 due to her disability and maintains no contact with her family in Kenya. She has a sister in the UK with whom she has contact. The appellant has been wheelchair-bound since 2010 and is reliant upon multiple carers on a daily basis, as well as her husband who also acts as her carer.
18. At [6] (the second paragraph so marked) she referred to a report from Ms Elizabeth Kamundia, a consultant on the rights of persons with disabilities in Kenya, as well as medical evidence and background material.
19. For reasons that the FtJ explained, she found the appellant to be a credible witness and concluded that she had given a credible account of having been rejected by her family and of having been required to leave the family home due to her disability. She noted that the appellant had not been cross-examined in relation to the incidents that she said had happened to her in Kenya as set out in her asylum interview. She noted that not all of those incidents were claimed by the appellant to have been a consequence of her disability. The account of the attempted rape when she was aged 14 was, the FtJ said, a result of her inability to get up when she fell over, with the attempted rapist taking advantage of her because of her disability. The incident in 1996 involved a bus driver disregarding her safety and lacking regard for her disability.
20. However, at [9] she also said that the appellant had referred to a 'relatively limited number of incidents involving her disability spanning a relatively long period of time'.
21. At [10] she said that she found the appellant's husband to have given credible evidence in terms of the attitude of people in Kenya towards his wife, the poor treatment received by his wife from his family as a consequence of her disability, and to the negative attitude in general in Kenya towards people with disabilities.

22. In relation to the report of Ms Kamundia, she noted that there was no challenge to the evidence in that report dated 1 March 2017. She accepted the report's conclusions in terms of the situation for persons with disabilities in Kenya. To summarise, the report stated that persons with disabilities face discriminatory attitudes and treatment in Kenya and that such attitudes are especially worse towards pregnant disabled women.
23. At [11] reference was also made to the skeleton argument submitted on behalf of the appellant which contended that the appellant was at risk both from discrimination amounting to persecution and at risk of other serious harm. The lack of state housing for the appellant and the inability to access housing, with the very real risk of going entirely without care and the inability to access health care, were arguments that she accepted.
24. Noting at [12] aspects of the US State Department Report for Kenya dated 13 April 2016, she referred to its stating that the government did not effectively enforce provisions relating to discrimination against persons with physical or mental disability. She referred to a further report from the United Disabled Persons of Kenya, dated 20 April 2015, which stated that disabled women were up to three times more likely to be victims of physical and sexual abuse than their non-disabled counterparts. She also accepted that evidence.
25. In the following paragraph she gave reasons for concluding that the delay in the appellant claiming asylum did not damage her credibility.
26. The FtJ's conclusions were finally expressed at [14] and [15]. In the former, she again referred to the limited number of incidents when the appellant had been mistreated or abused in Kenya as a consequence of her disability. She repeated that she found the appellant and her husband to be "highly credible witnesses", particularly relating to the past incidents suffered by the appellant, and the ongoing difficulties faced by her in Kenya because of her disability, such as the negative and dismissive attitude of their respective families towards the appellant. She referred again to the report of Ms Kamundia stating that there was a framework to protect people with disabilities but that that framework was not enforced. She went on to state that the objective evidence provided supported the claim that 'the discrimination that would be suffered by the Appellant may amount to persecution'. She then said that the appellant is heavily dependent upon daily care from multiple carers as well as her husband, and the medical evidence provided did not appear to suggest that the appellant's medical condition is an improving one.
27. Lastly, at [15] she stated that she was satisfied that the appellant "would be at real risk if returned to Kenya" and stated that 'I accept the Appellant's claim on asylum grounds'.

Submissions

28. The submissions on behalf of the respondent relied on the grounds and the respondent's skeleton argument. Two cases set out in the skeleton argument, namely cases C-199/12, C-200/12 and C201/12, *XY and Z*, and *RS and Others (Zimbabwe - AIDS) Zimbabwe* CG [2010] UKUT 363, were not relied on.

29. It was submitted that the FtJ's decision did not provide a lawful assessment of how the background evidence engaged the Refugee Convention. It was further submitted that the only real reasoning in this respect was in terms of the negative attitude from the appellant and her husband's family, a limited number of incidents that occurred to her, the expert evidence and background evidence. However, at [14] it was not clear what background evidence was being relied on by the FtJ for her conclusions.
30. In any event, the evidence did not establish that the appellant would be at risk of persecution. At [14] there was a conflation of issues in terms of the dependency on daily care and the issue of persecution.
31. Mr Jarvis relied on *HL (Malaysia) v Secretary of State for the Home Department* [2012] EWCA Civ 834 in terms of the issue of protection from persecution, as opposed to discrimination. I was referred to Article 9 of the Qualification Directive (2004/83) in relation to the meaning of acts of persecution. It was submitted that the FtJ did not go on to consider whether the acts of discrimination that the appellant referred to amounted to persecution. This was to be assessed in terms of whether the authorities deliberately failed to act against high level discrimination, or whether there was discrimination from the state which was deliberate.
32. It was argued that the appellant would not be able to show persecution on the basis that Kenya was simply doing its best with the resources that it had. The expert evidence would need to have gone further than to show a lack of enforcement. It would be surprising for the Kenyan government to lay out an extensive framework to protect people with disabilities, and to sign up to a number of Conventions, if the underlying motive was to do the opposite.
33. Ms Mellon submitted that there were a range of undisputed facts which the FtJ took into account. There was no challenge to the appellant's account. The incidents of persecution were set out at [4] of the FtJ's decision. Ms Mellon further referred to various aspects of the FtJ's decision to support the proposition that the FtJ was entitled to come to the conclusions that she did in terms of past persecution and future persecution.
34. It was accepted that perhaps clearer, or more detailed, reasons could have been given by the FtJ as to her conclusions in relation to the risk of persecution, and what amounted to persecution, but she did not need to refer to the cases relied on by the respondent.
35. It was submitted that the FtJ plainly did take into account the appellant's personal circumstances or specific characteristics, although she did not at [14] refer to those matters relied on on behalf of the respondent. She indicated at [6] that she had considered all the documentation provided.
36. It was submitted that the respondent's grounds simply amount to an attempt to re-run the respondent's case, as set out in the decision letter.
37. In reply, Mr Jarvis submitted that the FtJ's findings in terms, for example, as to a lack of housing available to the appellant, did not explain how that made a person a refugee. The lack of availability of services does not establish that fact. Although at [12] the FtJ referred to evidence that disabled women are up to three times more likely to be victims of physical and sexual abuse than

their non-disabled counterparts, that does not establish how likely such abuse is.

38. Furthermore, it was reiterated that there was no engagement with Article 9(2) of the qualification Directive. The FtJ had not looked at the position that prevailed in more recent years, namely that the appellant and her husband had been running a business and had had a flat in Nairobi for six years.

Conclusions

39. At the conclusion of the hearing before me, I announced that I was satisfied that the FtJ's decision was vitiated by error of law such as to require her decision to be set aside. These are my reasons.
40. The issue before me, to summarise, is whether the FtJ's decision engages, or lawfully engages, with the issue of whether the treatment that the appellant fears amounts to persecution. Past persecution is of course relevant to the question of the risk of future persecution. I have considered the appellant's witness statement, the background material and the asylum interview, as well as the other documents provided in support of the appeal.
41. In order to assess the issue of persecution, it is necessary not only to have regard to established authority on the point, but also to have regard to Article 9 of the Qualification Directive. Article 9 as to the meaning of acts of persecution states as follows:

'Acts of persecution

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature.

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.'

42. It is clear that there must a connection between the reasons for the persecution and the acts of persecution.
43. Nowhere in the FtJ's decision is there any analysis of whether the acts that the appellant complains of having suffered in the past amount to persecution. The authorities relied on by the respondent in the grounds before me are apposite. Discrimination alone cannot amount to persecution. It is not evident from the facts put before the FtJ that the appellant was subjected to acts of persecution as described in Article 9(2), which is admittedly not an exhaustive description of the acts that may amount to persecution.
44. The appellant has, according to the FtJ's findings, been subjected to the risk of harm on some occasions. For example, when she was 14 she fell and a would-be rescuer turned out to be a person seeking to take advantage of her due to her vulnerability, and attempted to rape her. However, not only was that incident over 20 years ago, it is not indicative of harm directed towards the appellant *because* she was disabled, but indicative of an act of opportunism, taking advantage of her vulnerability.
45. In her asylum interview, the appellant said in answer to question 50, that since that attack there have been no further attacks, although she was always in fear. In relation to an incident in 2014, when she was alighting a taxi, the driver of the taxi did not check that she was already inside the house and reversed the car which hit her (question 59 of the asylum interview). She went on to say in the interview that she believed that it was an accident. She also referred to an incident with a bus, whereby the bus driver did not wait for her to alight. As a result she fell. She said in the interview that she thought that the bus driver had done it deliberately, although he apologised which is why she did not report him.
46. Other than that, she refers to incidents when she has been stared at by crowds because of her disability.
47. There is no evidence of deliberate discrimination against people with disabilities by the authorities. The fact that the provision for disabled people is patchy or lacking in enforcement, is not sufficient to amount to state persecution. The societal attitudes to which the appellant refers, again on the basis of the information before the FtJ, could not be said to reach the threshold of persecution. As was said in *HL (Malaysia)*, 'The contracting states did not undertake to protect them against discrimination judged according to the standards in their own countries'.
48. In addition, I consider that there is merit in the argument advanced on behalf of the respondent to the effect that the FtJ did not take into account all the appellant's personal circumstances as they existed in Kenya before she came

to the UK. The fact is that she lived with her husband (who admittedly also has health problems) and he ran a small business, a fast-food stall. They had accommodation; her husband had employment and which the appellant says in her witness statement supported them both. The appellant's evidence was that their life was difficult, and that she was dependent on the assistance of her husband on a daily basis, but that when he was at work there was no-one to look after her. Nevertheless, notwithstanding that the appellant states that she was in fear when on her own in their flat, the evidence before the FtJ in my judgement did not support a conclusion that she was at risk of persecution in Kenya, or that she had suffered acts amounting to persecution.

49. Whilst I accept that the evidence before the FtJ did disclose discrimination suffered by the appellant, that plainly is not a sufficient basis from which to conclude that she would be at risk of persecution on return.
50. In addition, I also accept the respondent's contention that at [14] of the FtJ's decision there is a conflation between the care that the appellant needs and the risk of persecution. At [14] the FtJ said that the 'objective' evidence which she was asked to consider, as well as the other evidence before her, did support the claim that the discrimination that would be suffered by the appellant 'may amount to persecution'. In the next sentence she referred to the appellant's dependence upon daily care and multiple carers, and that the medical evidence provided did not appear to suggest that the appellant's medical condition was an improving one. The FtJ's decision in this respect gives the impression that the appellant's need for care is linked to her claimed fear of persecution, when the two matters are entirely separate.
51. Accordingly, the FtJ's decision containing the error(s) of law to which I have referred, her decision is set aside. I do not consider it appropriate for the appeal to be remitted to the First-tier Tribunal for a fresh hearing, there being limited further fact-finding that needs to be undertaken. Certain findings of fact can be preserved. Accordingly, the decision will be re-made in the Upper Tribunal.
52. The re-making of the decision will involve consideration of the grounds of appeal that were not dealt with by the FtJ, namely Articles 3 (health) and 8, in so far as they are still pursued on behalf of the appellant. Whilst I do not rule out further argument in relation to the asylum ground of appeal, it will be evident from this decision that on the basis of the evidence presently relied on I consider that something more will need to be offered in terms of evidence to make good the case for persecution.
53. The parties are to have careful regard to the directions set out below."

3. At this, the resumed hearing, I discussed with the parties what findings of fact made by the FtT could be preserved. Those are identified below.
4. On behalf of the appellant there was a further skeleton argument and a supplementary bundle of documents consisting of witness statements of the appellant and her husband. There was also a medical report dated 21 May 2018 from a Dr Andria Merrison, a Consultant Neurologist, in respect of the appellant. Ms Ahmad indicated that if the appellant and her husband were called to give evidence she would seek to

cross-examine them in relation to matters pertinent to Article 8. Mr Seddon declined to call either the appellant or her husband as a witness and indicated that he would rely on their written statements. Accordingly, the hearing proceeded by way of submissions only.

Submissions

5. In his submissions Mr Seddon relied on the skeleton argument and the facts as found by the FtJ. It was submitted that on return to Kenya the appellant's husband would be unable to work and the appellant would be left alone all day, unable to go to the toilet and having to go without food and water in order to avoid soiling herself. Even if her husband stayed at home he could no longer provide the care that the appellant needs, and if he did not work they would be destitute.
6. In this context reliance was placed on the appellant's witness statement dated 9 March 2017, which was before the FtJ. In the UK she receives help from carers who visit four times a day to assist with washing, dressing, using the toilet and to operate the hoists for transfers from bed to chair and from wheelchair to commode. It was submitted that the position would now be even worse because the appellant's husband would no longer be able to assist her in the way that he did in Kenya. Even then he was only just about able to lift her to a standing position and they sometimes fell, and the appellant was left on the floor overnight and in the morning he had to try to find people to help lift the appellant. Not everyone would help. Thus, the appellant on return to Kenya would not even have the minimal care that her husband had been able to provide for her.
7. In addition, the appellant has in the past been the subject of ill-treatment as found by the FtJ and as set out in the witness statements. There is also the rejection of the appellant by her and her husband's family to take into account.
8. It was further submitted that their wish to have a family would mean that returning them would infringe their right to a family life. Their family life had not yet been fully established in terms of their wish to have children. It would, in effect, be impossible for them to have a family if they are returned to Kenya. In that context reliance was placed on the evidence that they had been trying for some six years to have children before the appellant became pregnant in 2015, and the fact that that pregnancy ended in stillbirth in March 2016. The appellant had developed pre-eclampsia during pregnancy despite the high degree of care and life-saving treatment received at the John Radcliffe Hospital in Oxford. She had been advised that any future pregnancy would carry a high risk for both her and the child. Any pregnancy would need to be very carefully monitored due to the appellant's history of high blood pressure, pre-eclampsia and Limb Girdle Muscular Dystrophy.
9. It was submitted that there was evidence of positive adverse treatment in relation to the healthcare system in Kenya. Thus, the case was advanced in terms of adverse treatment, rather than an absence of treatment in terms of their family life. It was submitted that this was a conventional *Soering* approach (*Soering v United Kingdom* [1989] 11 EHRR 439). That therefore, was distinct from the *N* line of cases. Reliance

was placed on the expert report of Elizabeth Kamundia dated 1 March 2017, the conclusions of which the FtJ accepted. I was referred to various aspects of the background evidence in the appellant's bundle.

10. In terms of asylum, the respondent accepts that as a disabled person in Kenya the appellant falls within a particular social group. It was submitted that she is at risk of serious harm and discrimination amounting to persecution. The background evidence was once again relied on in this connection. It was submitted that not all people with disabilities in Kenya are at risk of persecution but each case is fact-specific. There is the potential for violence in relation to this appellant and there was the risk of ill-treatment when seeking healthcare. The broad "swathe" of attitude in Kenya is to view persons with disabilities as having an affliction. The decision in *Sepet and Another v Secretary of State for the Home Department* [2003] UKHL 15 was relied on, in particular at [22] in terms of the reasons for persecution. The appellant's disability only has to be one of the reasons for the persecution it was submitted. Furthermore, the treatment that the appellant had been subjected to in the past is relevant to what is reasonably likely to happen in the future.
11. In relation to Article 3, it was submitted that it was the treatment at the hands of the health authorities, not the absence of treatment, that would infringe the appellant's Article 3 rights. It was accepted that the appellant's was not an 'N-type' case.
12. In relation to paragraph 276ADE of the Rules in terms of the appellant's private life, reliance was placed on what was said at [14] in *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813 in relation to "integration". Even if the concept of integration was limited to the ability to find a job or to sustain life, this appellant would succeed. On the clear findings of fact already made, it was submitted that it was impossible to find that the appellant could integrate. Hers is not the typical sort of case in which this issue is raised by a person who has been in the UK for a number of years. There would be no proper private life for this appellant in Kenya in the light of her particular disability and the lack of infrastructure for it to be dealt with.
13. In her submissions Ms Ahmad relied on the respondent's decision and the respondent's grounds in relation to the FtJ's decision. Various aspects of the background material were referred to in terms of the availability of treatment for the appellant, societal attitudes and the approach to disability and healthcare by the authorities in Kenya. It was submitted that there was clearly an effort and intention on the part of the authorities and aspects of society to integrate disabled persons and provide treatment.
14. So far as asylum is concerned, it was submitted that the threshold for persecution was not met. The background evidence did not support the contention that the appellant would be subjected to persecution on return.
15. Similarly, although it was said that the appellant does not rely on Article 3 in terms of the N line of cases, there was still a high threshold to be met. I was referred to *Akhalu (health claim: ECHR Article 8) Nigeria* [2013] UKUT 400 (IAC), *GS (India) & Ors v*

Secretary of State for the Home Department [2015] EWCA Civ 40 and *AM (Zimbabwe) & Anor v Secretary of State for the Home Department* [2018] EWCA Civ 64.

16. The appellant is unable to meet the family life requirements of the Article 8 Rules. So far as private life is concerned and paragraph 276ADE, *Miah* (section 117B NIAA 2002 – children) [2016] UKUT 131 (IAC) refers to the relevance of Home Office Immigration Directorate Instructions (“IDIs”). The IDIs themselves were referred to and relied on, on behalf of the respondent. It was submitted in particular, that the appellant had lived in Kenya for over 30 years where her husband had supported her. She speaks the language there. Healthcare is available. Although their circumstances may be difficult, 64% of disabled people have access to healthcare. The appellant’s husband would be able to establish his business again. It could not be suggested that they have no contacts there at all, given that they had lived there for over 30 years before coming to the UK. They had only been in the UK since 2015.
17. The appellant had been able to access health services in the UK which indicates that she is proactive in relation to her health.
18. In relation to Article 8 outside the Rules, s. 117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) was relevant in terms of the appellant’s immigration history, the fact that she came to the UK as a visitor and remained and that all her leave has been precarious. Language was also a relevant issue and she is not financially independent.
19. In reply, Mr Seddon contended that a significant proportion of the submissions made on behalf of the respondent sought to go behind the findings made by the FtJ. In relation to healthcare, her evidence is that she has not had access to healthcare so far. Her first access to healthcare was when she was 14 years of age but otherwise she has not been able to afford it. Various points were made in relation to the background material in reply to the submissions made on behalf of the respondent in that context.
20. In terms of the appellant and her husband seeking to have children, the respondent’s submissions missed the point that the real difficulty in relation to the appellant having a child was discovered since the appellant had been in the UK. The pre-eclampsia was a separate condition and was complicated by her muscular dystrophy. The John Radcliffe Hospital had said that they had never treated someone with both conditions.
21. As regards the appellant’s private life and the respondent’s reliance on the decision in *Miah*, it was clear from *Miah* at [16] that the IDIs are not law and in that case the Tribunal was treating the IDIs as a further safety net in addition to the requirements of the Rules. As regards Article 8 outside the Rules, the same arguments and factors as previously argued were relied on. The appellant’s explanation for overstaying her visa was that she discovered that she was pregnant after she had arrived in the UK and she could not return to Kenya because of the seriousness of her condition. The FtJ accepted that explanation.

The expert's report and background material

22. So far as the background material is concerned, I summarise those aspects of it to which I was referred on behalf of the parties in submissions but I have also taken into account the references to the background material as set out in the appellant's skeleton argument.
23. In her report Ms Kamundia refers to the legal framework on the rights of persons with disabilities, describing it as a "robust legal framework". She goes on to state that the main barrier to rights enjoyment by persons with disabilities is poor implementation of existing laws and policies, attributed to factors such as low awareness of rights, financial barriers and poor rights enforcement mechanisms. She states that laws and policies address disability over a variety of issues including non-discrimination, social assistance, accessibility of buildings and transport, accessible communication, access to assistive materials and devices, health, education and employment.
24. The report at section 4 however, continues that despite the significant protection of the rights of persons with disabilities in terms of laws and policies, persons with disabilities continue to experience discrimination and exclusion in all spheres of life. At 4.1 she states that the Government of Kenya does not make any provision for the majority of people who are unable to work due to disability. For a small minority of those unable to work due to disability the Government has designed a Cash Transfer Programme. That provides 2,000 Kenyan shillings per household per month delivered every two months. However, receipt of the amount on a monthly basis is not guaranteed.
25. The eligibility criteria under the programme for persons with severe disabilities includes, a household with a person with severe disability and extremely poor households. Persons with severe disabilities are defined as those who need permanent care including feeding, toiletry, protection from danger from themselves or other persons and from the environment. They also need intensive support on a daily basis which therefore keeps their parents and guardians/caregivers at home or close to them throughout. Ms Kamundia suggests that it is highly likely that the appellant would not be eligible for the programme because she is still able to feed herself, albeit with difficulty. Even if she did qualify, the amount that she would receive would be insufficient compared to the needs occasioned by her disability. The report suggests that public transport would be inaccessible to the appellant.
26. So far as suitable medical care is concerned, paragraph 4.5 states that persons with disabilities experience significant barriers in accessing healthcare. According to a survey in 2015 by United Disabled Persons of Kenya ("UDPK"), 36% of persons with disabilities could not access healthcare services due to physical barriers, distance to health facilities, and negative attitudes of health staff and lack of family support. The Government apparently recognises that its efforts are by no means sufficient and highlights that it partners with private hospitals and dispensaries which are quite expensive.

27. In the same section of the report it states that there are less than 20 neurologists in Kenya, the majority of whom work in Nairobi and other urban areas. In the course of research for the report 11 neurologists were asked whether they currently have a client who has muscular dystrophy and whether they have in the past dealt with such a person. Seven of the neurologists replied that they do not currently and have not in the past dealt with persons with muscular dystrophy.
28. The report concludes therefore that it is unlikely, given the kind of specialist care that the appellant needs, that she would be able to access medical care in Kenya. Other individuals interviewed, whose details are given in the report and whose detailed responses are set out, indicated that there was a lack of awareness about muscular dystrophy amongst doctors in Kenya. The report continues that there is limited suitable medical care for persons with Limb Girdle Muscular Dystrophy. In that section of the report a figure of between 12 and 20 is given for the number of neurologists there are in Kenya. As to the affordability of healthcare for persons with muscular dystrophy, one doctor responded that treatment for muscular dystrophy is not easily accessible for the average Kenyan as it is very expensive. Information is given in the report as to the costs of obtaining medical care on a private paying basis. I note that one of the tables of costs of treatment indicates that assistive devices such as hoists and commodes are not available in Kenya.
29. At paragraph 4.6 the issue of attitudes towards disabled people, in particular disabled women and pregnant disabled women, is addressed. The report states that generally negative attitudes prevail against persons with disabilities in Kenya. The United Nations Human Rights Office Report from 2010 states that disability in Kenya was and still is viewed by some members of society as a curse, taboo and a burden. Persons with disabilities are often concealed from the public and subjected to physical and psychological abuse due to ignorance, poverty and lack of awareness. Ms Kamundia states that there are discriminatory attitudes against women with disabilities in Kenya and in many cases such attitudes are worse when a woman with a disability is pregnant.
30. The report from 2014 by the Kenyan National Commission on Human Rights states that on reproductive health, women with disabilities complained that their visits to hospital seeking services, especially on pre-natal and ante-natal care, were “a nightmare”. The nurses were reported to be using demeaning language which implied that getting pregnant or giving birth by women and girls with disabilities was like a tragedy. That report is dated 2014. A 2012 public inquiry into violations of sexual and reproductive health rights in Kenya reported that pregnant women with physical disabilities informed the inquiry that they suffered abuses from the health providers who stigmatised them “and showed sympathy with their ‘double tragedy’ of being disabled and pregnant”. Ms Kamundia’s report states that according to a Team Leader of the Muscular Dystrophy Society in Kenya following an interview in January 2017, there is also the misconception that women with disabilities cannot be sexually active and they may at times be ridiculed when seeking reproductive health services.

31. The report continues that while it is unlikely that a disabled woman would be turned away from accessing healthcare services on account of having a disability, encounters between women with disabilities and medical professionals in ante-natal and maternity care are markedly negative. It is stated that the more important barrier to actual access to reproductive healthcare services is lack of expertise of health professionals who are trained on high-risk pregnancies and physical inaccessibility of hospitals and hospital equipment.
32. According to paragraph 4.7, the Kenyan Government rolled out a free maternity services programme on 1 June 2013 through a Presidential declaration. The report however states that there are few specialists on high-risk pregnancies in public hospital and even fewer specialists with expertise on the specific situation of women with Limb Girdle Muscular Dystrophy. According to an interview with a particular gynaecologist on 9 February 2017, Kenya does not have adequate specialist ante-natal and maternity care services for women with disabilities. Most specialists on high-risk pregnancies are said not to be easily available in public hospitals and most operate on a private basis. The Team Leader previously referred to stated that they do not have specialist 'Obs-Gyn' for women with muscular dystrophy and the specialist that she met on high-risk pregnancies knew next to nothing about the specific care of women with muscular dystrophy. The report then gives information on the cost of specialist ante-natal care and maternity services for disabled women on a private paying basis.
33. At paragraph 4.8.1, under the sub-heading "Provisions for disabled people in cities such as Nairobi" it states that healthcare facilities in Kenya are for the most part inaccessible although such accessibility is better in towns than cities such as Nairobi, compared to rural areas.
34. Paragraph 4.8.2 states that negative attitudes towards disabled persons are rife in Kenya although the situation is better in urban areas such as Nairobi compared to rural areas. The State Report to the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") Kenya noted that there had been a slow but noticeable improvement in public perception towards and treatment of persons with disabilities even in employment, as persons with disabilities are increasingly holding more positions of responsibility in society. It was acknowledged however, that a lot still needed to be done to ensure that all Kenyans recognised and upheld the rights of persons with disabilities. A report by The Equal Rights Trust and Kenya Human Rights Commission stated that the lives of persons with disabilities in Kenya are marked by experiences of discrimination, prejudice and inequality.
35. In her summary of conclusions, Ms Kamundia states, amongst other things, that there is no provision of state-funded home carer and/or assisted living services in Kenya and the cost of obtaining assisted living services on a private paying basis would be unaffordable for the appellant. In addition, she would not be able to access care of a similar standard to that in the UK. She concludes that the appellant would experience significant barriers in accessing healthcare in Kenya such as high cost of care, physical barriers, long-distance to health facilities in the light of inaccessible transport, and

negative attitudes of health staff and the lack of family support in the event that she is unwell at the same time as her husband has a sickle cell crisis.

36. The 2015 US State Department Report on Human Rights in Kenya states that the law prohibits discrimination against persons with physical or mental disabilities in employment, education, access to healthcare or the provision of other state services. However, the Government did not effectively enforce those provisions it states. The constitution provides legal safeguards for the representation of persons with disabilities in legislative and appointive bodies. The law provides that persons with disabilities should have access to public buildings and some buildings in major cities had wheelchair ramps and modified elevators and restrooms. However, the Government did not enforce the law and new construction often did not include accommodations for persons with disabilities. Government buildings in rural areas generally were not accessible for persons with disabilities. According to NGOs, police stations remained largely inaccessible to those with mobility disabilities.
37. In a 2014 report to the UN Human Rights Council it was estimated that there were seven million persons with some form of disability in the country. There was limited societal awareness of persons with disabilities and significant stigma attached to disability. According to a 2014 survey by the NGO Handicap International on the rights of persons with disabilities, 85% of persons with disabilities experienced verbal abuse related to their disability and 17% experienced gender-based violence. Of those who reported abuse, 47% neither reported the incident to police or other authorities nor sought medical help or counselling, citing being misunderstood as their reasons. The majority reported the incidents to community elders rather than police, of those who reported abuse to some authority. Authorities received reports of killings of persons with disabilities as well as torture and abuse, and the Government took action in some cases.
38. Persons with disabilities are said in the report to face significant barriers to accessing healthcare and there was a perception that they should not engage in sexual activity. Aspects of the US State Department Report reflect the information in Ms Kamundia's report. The US State Department Report states that the association for the Physically Disabled of Kenya carried out advocacy campaigns on behalf of persons with disabilities, distributing wheelchairs, and worked with public institutions to promote the rights of persons with disabilities. As a result it was noted that awareness of the rights of persons with disabilities increased in some counties but the Government was faulted for not ensuring equal protection of the rights of persons with disabilities throughout the country. Nominated and elected parliamentarians with disabilities formed the Kenya Disability Parliamentary Caucus in 2013 and issued a strategy statement focusing on improving economic empowerment and physical access for persons with disabilities as well as integrating disability rights into county Government policies.
39. A report by the Swedish International Development Co-operation Agency entitled "Disability Rights in Kenya", of 2015 states, on page 3 that a National Council for People with Disabilities was established in 2004. It is a semi-autonomous Government

Agency under the Ministry of Labour, Social Security and Services. Its 21 members represent various disability organisations and Government ministries. The Council is also engaged in administration of educational grants and cash transfer schemes, in awareness raising and in monitoring and evaluation. It is overseeing the implementation of the action plan of the African Decade of persons with disabilities 1999-2009, extended until 2019. The Council has established the National Development Fund for Persons with Disabilities, provided for in the 2003 People with Disabilities Act. The fund supports organisations of and for, persons with disabilities. On the same page of that report, it states that the Ministry of Health is responsible for provision of health services and the system offers a number of specialised services for persons with disabilities including assistive devices, occupational therapy and physiotherapy through the Division of Rehabilitative Health Services. However, accessibility to these services is limited for poor and for men and women with particularly severe disabilities. A survey in 2007 and a report from Handicap International both indicated that the ignorance and insensitivity of [the] health service is a major obstacle.

40. Page 4 of the same report states that the disability movement in Kenya has quite a long history and human rights actions by disabled people's organisations began in the late 1950s. The first was established in 1959 and in the 1980s the Kenya Society of the Physically Handicapped, amongst others, was established. It is said that traditionally many of the organisations have been charity-based and the medical rehabilitation model with homes and centres for people with disabilities has to a large extent dominated the scene. However, there had been a shift towards a more human rights based movement in recent years with self-advocacy organisations coming to the forefront.
41. A report which appears to be dated 24 October 2016 entitled Cultural Stigma and Myth: Disabled Women in Kenya are Vulnerable to Sexual Violence, states that a recent study by the Federation of Women Lawyers in Kenya, a women's rights advocacy organisation that works for gender equality through Legal Aid, revealed that disabled women are up to three times more likely to be victims of physical and sexual abuse than their non-disabled counterparts. The study stated that disabled women in Kenya are abused sexually under the pretext of culture and myths. Reference is made to a belief that if one sleeps with a disabled woman there are chances of a cure for Aids. Page 2 of that report gives examples of the sexual abuse that the interviewees reported and the anecdotal evidence of this being an everyday occurrence. The report states that society's negative perceptions and ostracism of women with disabilities affords them an invisible status, resulting in increased exposure to violence and fewer opportunities for recourse.
42. A report dated 20 April 2015 from the UDPK refers to it as a non-profit making, non-political and non-partisan organisation. It is an umbrella body for persons with disabilities and comprises 120 member organisations being disabled persons' organisations, associations and groups of persons with disabilities. Its core mandate is said to be to advocate for the formulation of disability-friendly policies and legislations locally, nationally and internationally geared towards improving the

livelihood of persons with disabilities in Kenya. Since 2010 it is said to have been implementing a project on raising awareness and monitoring the implementation of the CRPD.

43. In part 2 of the report it states that it is commendable that Kenya developed and submitted its Initial State Report on the CRPD which proved that Kenya was open and transparent about its efforts in the realisation of the rights of persons with disabilities. It states that it wished to commend the Kenyan Government for the efforts it had put in place to address the rights of persons with disabilities and particularly the passing of the constitution of Kenya 2010 that prohibits discrimination on the basis of disability. It refers to various actions taken by the Government.
44. Under a section entitled Women with Disabilities it is said that research indicated that the consequences of disability are particularly serious for women and girls. They are likely to be sexually violated with impunity and there are high rates of rape, defilements and other forms of gender-based violence. It is also said that women and girls with disabilities are verbally and physically attacked and raped in the public sphere and in private, by family members, by teachers, by neighbours, and by strangers. Such violence is rarely addressed by the authorities and women and girls with disabilities rarely report crimes against them for fear of further violence by the perpetrators.
45. Further in that section it states that women with disabilities face a lot of challenges in accessing reproductive health services. There have been cases of forced sterilisation (five in number) or women with disabilities being discouraged from having children "as they can pass the disability to their child". Also, stereotypes from healthworkers when women with disabilities attempt to access reproductive health services are one of the challenges they face. Public ridicule of women with disabilities goes unabated by the public and public officials, as illustrated by an example in the report. In 2012 an 18 year old girl with mental disability was assaulted by a public transport operator. She was dragged to the bush in broad daylight and sexually assaulted by the man. Members of the public rescued her and took the man to the police. However, he was not charged and the police released him without any charges.

Preserved findings

46. As already indicated, the issue of what findings of fact made by the FtJ could be preserved was canvassed at the resumed hearing. There was some limited disagreement between the parties in relation to this issue. In the light of my error of law decision and having reviewed the FtJ's decision again, I set out below what I have decided are the findings of fact made by the FtJ that can be preserved. Those findings are as follows:
 - The appellant came to the UK in September 2015 with her husband, with a visit visa to attend a two day conference relating to muscular dystrophy.
 - The appellant suffers from Limb Girdle Muscular Dystrophy and her husband suffers from sickle cell anaemia and other conditions.

- Their child was stillborn on 17 March 2016.
- The appellant was rejected by her family in Kenya at the age of 23 due to her disability and maintains no contact with her family in Kenya. She has a sister in the UK with whom she has contact.
- The appellant was the subject of an attempted rape when she was 14. On another occasion a school bus purposely accelerated as she was alighting the bus. A taxi reversed into her in 2014. She was stared at by crowds in public, such as at a supermarket.
- She has been wheelchair-bound since 2010 and is reliant upon multiple carers on a daily basis, as well as her husband who acts as a carer to her.
- At the time of the hearing before the FtJ the appellant was under the care of neurologists at Southmead Hospital. At that same time there was no definitive diagnosis of the type of Limb Girdle Muscular Dystrophy that she has.
- Medical evidence in relation to the appellant's husband was to the effect that it was quite likely that he would have recurrent episodes of cholecystitis, increasing his chances of having repeated sickle crises and he would benefit from cholecystectomy. Her husband suffers from a sickle cell disorder and is receiving ongoing medical treatment for that condition and other medical conditions.
- The appellant was a "very credible" witness. She gave credible evidence about having been rejected by her family and being required to leave the family home due to her disability.
- The appellant's account of the attempted rape when she was aged 14 referred to her inability to get up when she fell over and the attempted rapist therefore taking advantage of her due to her vulnerability resulting from her disability.
- In 1996 there was deliberate disregard for her safety by a bus driver and lack of regard for her disability.
- The appellant's accounts of those incidents were credible, as were the other incidents detailed in her asylum interview.
- In relation to the incidents referred to by the appellant, they were a relatively limited number of incidents involving her disability spanning a relatively long period of time.
- The appellant's husband was a credible witness. He gave credible evidence as to the negative attitude in general in Kenya towards people with disabilities and the poor treatment received by his wife from his family.
- The expert report of Elizabeth Kamundia was "quite thorough" and fairly balanced.
- The delay in the appellant claiming asylum had not damaged her credibility.
- The appellant and her husband were highly credible witnesses, particularly relating to the past incidents suffered by the appellant and the ongoing

difficulties she faces because of her disability, such as the negative and dismissive attitude of their respective families towards her.

- The appellant is heavily dependent upon daily care from multiple carers, as well as her husband. The medical evidence does not appear to suggest that her condition is an improving one.

47. The disagreement between the parties in relation to the FtJ's findings related to the report of Ms Kamundia. The FtJ, in addition to stating that her report was thorough and fairly balanced, stated that she accepted its conclusions. In addition, the FtJ said at [12] that the "objective evidence" was not challenged and she accepted it.
48. Strictly in terms of the FtJ's acceptance of the conclusions of the report of Ms Kamundia, and of the country background evidence, I do not consider that those should be the subject of preserved findings given that the expert report and the background evidence are so intimately connected with the reassessment of the FtJ's decision to allow the appeal and the error of law to which I have referred.

Assessment and Conclusions

49. In relation to the incidents that the appellant had suffered, the skeleton argument that was before me provides supplementary or additional information in relation to events that had befallen the appellant. I have considered the sources referred to and would add to the findings made by the FtJ the following additional findings. In relation to the attempted rape when the appellant was 14 years old, two women who heard the appellant screaming came to her rescue. The man ran away and the two women who had saved her helped her to get up and took her home.
50. As regards the incident when the appellant was getting off the bus in 1996, the driver of the bus heard the appellant ask him to wait so that she could descend the steps to the street. He agreed to wait but then accelerated when she was stepping on to the first step. The appellant's belief was that he did this deliberately to show his impatience and that she was wasting his time by getting off the bus too slowly. The appellant found the incident a humiliating experience because she was unable to get herself back up after having fallen. Some other passengers on the bus tried to lift her up but they did not know the safe techniques for lifting disabled people and as a result she was pulled "all over the place" by her arms and legs. She was badly manhandled, which was painful and humiliating. She did not dare to use public transport again after that.
51. In addition to the incidents referred to in the asylum interview, there have been other examples of incidents when the appellant fell and needed help and when people laughed at her.
52. When she was 16 or 17 years of age, crossing a railway line on her way to school, she fell on the railway line and could not get up again by herself. Where she fell was similar to a train station, although not a proper station. It was a place where people would wait to catch the train. People saw her fall but did not come over to help her

but instead laughed at her and called her names. Her school friends helped her up. The appellant had been openly mocked and ridiculed by adults.

53. On another occasion, in 2010, she fell down in church and could not get up. She was lying on the floor in the church waiting for someone to help her. People in the congregation started laughing at her when they saw that she could not get up off the floor. She started to cry and asked for help but only a few people came forward to help her off the floor. The rest of the people continued to stand there and laugh at her.
54. The appellant's account of the incidents to which the FtJ referred was found by her to be credible. No submissions were made before me in terms of any adverse assessment of the appellant's credibility. Accordingly, I too accept that the appellant has given a credible account of those incidents.
55. Ms Kamundia's expertise and experience has not been questioned. Her experience and qualifications are set out at Appendix 1 of her report. I accept that she is qualified to give an expert opinion on the appellant's situation on return to Kenya.
56. Her conclusions are summarised at section 5 of her report. Those conclusions which I accept without further analysis are as follows. There is no accessible housing available in Umoja Innercore, the area where the appellant and her husband lived whilst in Kenya. There is no provision of state-funded home carer and/or assisted living services in Kenya. Further, for the most part public transport in Kenya is inaccessible. In rural areas the terrain is for the most part rugged and uneven making it difficult for individuals who use wheelchairs to move from place to place. In addition, there are limited pedestrian-friendly walkways in Nairobi generally, and in Umoja Innercore in particular, let alone disability accessible ones. The amount charged by private accessible vehicles is out of reach for a person who is not well-off.
57. So far as suitable medical care is concerned, the report concludes, and I accept, that the appellant would not be able to access care "of a similar standard" in Kenya. She would experience significant barriers in accessing healthcare in Kenya, such as high costs, physical barriers, long distance to health facilities in the light of inaccessible transport and negative attitudes of health staff and lack of family support.
58. I also accept the conclusion of the report that persons with disabilities face discriminatory attitudes and treatment in Kenya and that such attitudes are especially worse in relation to pregnant, disabled women. Although Kenya has robust anti-discrimination legislation, the same is not enforced by the state.
59. Lastly in terms of the report by Ms Kamundia, I accept her conclusion that specialist ante-natal care and maternity services for disabled women is extremely limited, particularly in public hospitals. Those services are mainly available to privately paying patients. There is limited state-funded benefits for people with disabilities who are unable to work.
60. In my error of law decision at [41] I quoted Article 9 of the Qualification Directive as to the meaning of acts of persecution. What is described in Article 9 of the ways in

which persecution may take place is not an exhaustive list but is illustrative. It is uncontested but that the appellant is a member of a particular social group. The appellant's skeleton argument identifies the social group as disabled persons or disabled women. It seems to me that the appellant is a member of a particular social group for either or both of those reasons.

61. It is also as well to reiterate that past persecution is relevant to the risk of future persecution.
62. I agree with what is advanced on behalf of the appellant in terms of the need for an assessment of the reasons for any persecution. So much was explained in *Sepet* at [22] as suggested in the appellant's submissions. In *R. v The Immigration Appeal Tribunal & Anor ex p. Rajendrakumar* [1995] EWCA Civ 16 it was concluded that the issue of whether a person or a group of people have a well-founded fear of being persecuted "raises a single composite question". The question should be looked at in the round and all the relevant circumstances brought into account. The relevant circumstances would plainly include an individual's particular circumstances and characteristics.
63. I have already set out the events or incidents which have befallen the appellant over the years in Kenya. Putting aside for the moment, the incident of the attempted rape, I cannot see that any of those incidents, either individually or collectively, could be said to amount to persecution, having regard to the nature and circumstances of those incidents and reflecting on the non-exhaustive terms of Article 9 of the Qualification Directive. There is much that could be said about the attitude of those involved in the incidents which variously caused the appellant pain, humiliation and embarrassment. However, in terms of 'persecution' I am not satisfied that they could be said to be sufficiently serious by their nature of repetition as to constitute a severe violation of basic human rights, or an accumulation of various measures, including violations of human rights which are sufficiently severe as to affect an individual in that manner.
64. It is not necessary to isolate each incident or type of incident and offer a detailed analysis of it. It is important to bear in mind that it could not be said to be the case that all members of the public who witnessed the incidents were a party to the harm that the appellant experienced, whether physical or psychological/emotional. Individuals did help her. Furthermore, in relation to the bus incident in 1996, the appellant's skeleton argument is, I think, rather misleading in terms of it stating that the appellant was badly manhandled back to her feet. It is true that that is what the appellant said but the manhandling was plainly, on her account, not deliberate. It is not an example of intentional acts by individuals designed or intended to cause her suffering.
65. As regards the attempted rape, I said this at [44] of the error of law decision:

"The appellant has, according to the FtJ's findings, been subjected to the risk of harm on some occasions. For example, when she was 14 she fell and a would-be rescuer turned out to be a person seeking to take advantage of her due to her vulnerability, and attempted to rape her. However, not only was that incident over 20 years ago, it is not indicative of harm directed towards the appellant

because she was disabled, but indicative of an act of opportunism, taking advantage of her vulnerability."

66. To some degree I accept the implied criticism of that aspect of my error of law decision, contained in [24] of the appellant's skeleton argument. The proposition there is that decision makers are not concerned to explore the motives or purposes of those committing acts of persecution; they must label or categorise the reason for the persecution and the decision in *Sepet* is cited as authority for that proposition. Thus, the appellant's submission is that what I said at [44] does not represent the whole picture on the issue of persecution in this respect.
67. It is important to take into account the circumstances of a particular incident judged, amongst other things, against, for example, the background evidence. That is what I have done. The appellant has not suggested that she was targeted because she was disabled. For example, her attacker did not attack her until she fell. There is no evidence from the appellant that the attacker said anything about her disability. I remain of the view that that incident was not indicative of harm directed towards the appellant because she was disabled, but indicative of an act of opportunism, taking advantage of the appellant's vulnerability at that moment. It is also worth pointing out as part of the general picture, that members of the public intervened to assist her.
68. I am not satisfied that the appellant has been subjected to acts amounting to persecution. I do accept that she has been the subject of discrimination but not discrimination amounting to persecution. Even if I am wrong, and the attempted rape was in law an act of persecution, it is important to bear in mind that that incident was over 20 years ago. The background evidence indicates that there is an increasing awareness on the part of individuals and the state of the needs of disabled persons. True it is that more could be done, and enforcement of anti-discrimination laws could undoubtedly be more effective. The evidence however indicates that progress is being made by the state, and by society in general, albeit slowly.
69. Nor do I consider that the evidence reveals that the appellant is at real risk of persecution on return. The background evidence which I have extensively reviewed does not support that proposition at all. There is plainly no state persecution of disabled persons. Whilst negative attitudes of individuals in society are very much in evidence, those negative attitudes do not reveal a risk of persecution, or for that matter serious harm. The discrimination that she is likely to face does not amount to persecution or serious harm.
70. Whilst I accept the evidence that there is a greater than usual risk of sexual assault for disabled women, what is the starting point, or base point, for that assessment of risk is not evident in terms of the female population. Furthermore, the appellant would have her husband with her, even if not at every moment.
71. It is undoubtedly the case that the medical treatment that the appellant would be able to receive is very much inferior to that which she receives in the UK. That is a feature of a lack of provision in relation to healthcare services generally, and also specifically in relation to conditions such as hers. I do not consider that the evidence reveals that

that is based on discrimination amounting to persecution on the basis that the appellant is disabled.

72. Specifically in relation to pre-natal and post-natal healthcare, again the evidence reveals that there are negative attitudes, even in healthcare workers. The evidence however, is that disabled persons are not turned away from pre-natal and post-natal healthcare on the basis of their disability. In any event, this feature of the appellant's appeal is dependent on the proposition that she would once again become pregnant. She is not pregnant at the moment and notwithstanding what is said about their wish to have children, that matter does not arise for consideration. Even if it did, as I say, the evidence does not support any contention that the appellant would be persecuted on account of her disability in those circumstances. Furthermore, the evidence does not support the proposition that healthcare professionals in Kenya would deliberately inflict harm on the appellant or ill-treat her because of her wish to have children.
73. In submissions on behalf of the appellant it was submitted that the appellant's circumstances were distinct from the *N* line of cases, as summarised above. However, I am not satisfied that the evidence reveals that the appellant would be subjected to a breach of her Article 3 rights on return. Firstly, insofar as the Article 3 aspect of the appeal mirrors the asylum argument, no potential breach of Article 3 is apparent. Otherwise, whilst it is clear that the appellant's condition is a serious one, and one that is not improving, she would be returning with her husband. Although undoubtedly he has his own health problems, the appellant's situation does not reach the high threshold for a breach of Article 3 (see, for example, *GS (India) & Ors v Secretary of State for the Home Department* [2015] EWCA Civ 40 and *AM (Zimbabwe) & Anor v Secretary of State for the Home Department* [2018] EWCA Civ 64).
74. What it seems to me is absent from Ms Kamundia's report is reference to the various organisations that the appellant could potentially turn to as a source of support. These are identified at pages 217, 219-292 and 301 of the appellant's bundle. There is merit in the argument advanced on behalf of the respondent in submissions before me to the effect that in the UK the appellant has been able to advocate for herself. She is familiar with the customs and culture of Kenya and there is no reason to suppose that she would not be able to do the same, i.e. to advocate for herself, to seek help, on return to Kenya.
75. It is true that accessible accommodation is non-existent. The appellant would be living in conditions which would not be suitable for her medical needs. That again however, does not elevate the appellant's case to one in which it could be said that there would be a breach of her Article 3 rights on return.
76. I note what is said in the appellant's husband's most recent statement dated 15 May 2018 about his need for the removal of his gall bladder to eliminate the possibility of future episodes of painful stomach pains and that it has now been indicated that gall bladder removal surgery would not be straightforward. It is the case however, that the appellant's husband worked whilst they were in Kenya.

77. Admittedly, he states that he would be unable to work because of the appellant's worsening condition which now needs more attention than before and that looking after her is now a full-time job. He states that he would not be able to get sufficient rest or have time to look after his own health needs if he had to look after his wife, which in any event he says he is unable to do by himself. However, it is to be remembered that the threshold for a breach of Article 3 is a high one. Notwithstanding everything that the appellant and her husband say, that threshold is not reached in this case.
78. I do not accept that the appellant and her husband would be homeless on return to Kenya. Ms Kamundia does not say so in her report, albeit that she does describe in detail the lack of "accessible housing" in terms of the appellant's disability. I do accept that the accommodation that the appellant and her husband would have to live in would be unsuitable for their needs, principally because of the appellant's disability. However, again, that does not indicate that her return to Kenya would amount to a breach of her Article 3 rights. There are in addition, various organisations that exist to support those with disabilities in various respects, as my review of the background evidence reveals, for example the 120 member organisations within the UDPK.
79. Furthermore, although not determinative of my conclusions on the appeal, I do not accept the proposition that the appellant would not be eligible for the Cash Transfer Programme, as suggested in Ms Kamundia's report. The basis upon which it is said she would not be eligible for the programme is that she is able to feed herself, albeit with difficulty. In her witness statement dated 9 March 2017 at [18] the appellant states that as at that date at least, she could still feed herself because she has an assistive table which was provided as part of her care package. The table is higher than a normal table and is adjustable and thus can be raised up and positioned very close to her face. Therefore, so long as her husband leaves her food on the table where she can reach it she could feed herself. In order to feed herself she would use her left hand to support her right and can only lift her hand a short distance. Thus, having the food on the table which is already very close to her face makes it possible for her to feed herself.
80. The description of the Cash Transfer Programme in Ms Kamundia's report suggests that the appellant would be eligible for the programme. Quoting from that report she states at 4.1 that:
- "The eligibility criterion under the Cash Transfer Programme for Persons with Severe Disabilities includes '[a] household with a person with a severe disability and extremely poor households'. Under this programme the government defines persons with severe disabilities as referring to:
- [T]hose who need permanent care including feeding, toiletry, protection from danger from themselves or other persons, and from the environment. They also need intensive support on a daily basis which therefore keeps their parents and guardians/caregivers at home or close to them throughout."
81. The wording suggests that the eligibility criteria do not mean that a person must meet *all* the requirements, i.e. feeding and toileting etc, given that any one of those descriptors may suggest a severe disability and the appellant does need permanent

care in toiletry. Further, in terms of feeding, even assuming that the appellant would be provided with an assistive table, she still needs permanent care in feeding in terms of the food being provided for her and to the point of it being put on the assistive table. She is unable to feed herself without that permanent care.

82. Whilst I accept that the amount provided under the programme would be insufficient to cater for her disability, there is no reason to believe, and no evidence was put before me to suggest, that the funds provided could not be used towards obtaining accommodation, however inadequate that accommodation may be.
83. In all the circumstances, I am not satisfied that it has been established that the appellant would be at real risk of a breach of her Article 3 rights in terms of inhuman or degrading treatment, along classic *N* lines, or otherwise. Her living conditions would be likely to be very poor and her health would undoubtedly suffer. However, she would have her husband with her to provide the care that he is able to. The limitations on what he is able to provide do not raise the appellant's circumstances to the high threshold required for a breach of Article 3.
84. I have considered very carefully everything that the appellant and her husband say in their witness statements about the extent of their isolation, or more particularly the appellant's, prior to their coming to the UK and what the appellant says about how she would be isolated on return. In terms of Article 8 under the Immigration Rules with reference to private life, paragraph 276ADE(vi) is one of the ways that the requirements for a successful Article 8 claim can be met. That requirement is that the person:
- "subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".
85. It is said that the appellant's circumstances on return would be such that there would be very significant obstacles to her integration. Mr Seddon necessarily sought to suggest that the appellant's circumstances were outside the paradigm of such cases. The paradigm is generally a case in which an individual has been in the UK for many years and has lost significant connections with their home country, such that it could be said that there were very significant obstacles to their integration. As was said in *Kamara*, the statutory language is generally all that needs to be considered. That was said in the context of a consideration of s. 117C(4)(c) of the 2002 Act but the principle remains the same.
86. I cannot accept that there would be very significant obstacles to the appellant's integration in Kenya. Undoubtedly the extent of her integration would be limited. However, the appellant is plainly very familiar with the culture and customs of Kenya, as is her husband. I accept that there will be a significant degree of isolation for the appellant on her return but she had integrative links before she left in 2015. Notwithstanding her disability and the isolation that that involves and would involve in the future, I am not satisfied that it is the case that the integrative links that she had

when she was there have been lost, or would be unable to be re-established on return, limited though those links may have been. I also bear in mind in this context the reasonable prospect that the appellant would be able, with her husband, to make contact with various disability rights organisations.

87. There are plainly compelling circumstances meriting consideration of Article 8 outside the confines of the Article 8 Rules. The Article 8 case on private life was not advanced in terms of personal integrity, autonomy or dignity; i.e. quality of life (*GS (India)* at [39]). It is in any event clear that absent some “separate or additional factual element” a case that fails on Article 3 grounds, cannot succeed on Article 8 grounds ([86] of *GS (India)*).
88. In terms of family life, I reject the contention that returning the appellant to Kenya would amount to a breach of her Article 8 rights in terms of family life because of her and her husband’s longstanding wish and efforts to have a child, and the risks that that would involve without expert treatment. I do not accept that the right to family life extends to the right to the fulfilment of a desire to have children or that interference with that right, if it exists, is disproportionate. As was said in *Akhalu*, a state is entitled to deploy its resources for the benefit of its citizens, (see likewise, *EV (Philippines) & Ors v Secretary of State for the Home Department* [2014] EWCA Civ 874).
89. Furthermore, I do not accept the proposition that the appellant and her husband are entitled to require the UK to assist in the fulfilment of their desire to have a family whatever the circumstances or risks to her health. Regrettably, the appellant’s and her husband’s wish to have children, notwithstanding the risks to her health, are matters of choice for them.
90. Otherwise, in terms of Article 8 outside the Rules, the s.117B factors are relevant. I note that the appellant was interviewed in English, although gave evidence before the FtT in English. I am satisfied that she does speak English and thus the issue of the ability to speak English is not a matter that weighs against her under s.117B(2), although she cannot gain any positive advantage from that fact in terms of proportionality (*AM (S 117B) Malawi* [2015] UKUT 0260 (IAC)).
91. The appellant is not financially independent (s.117B(3), and the private life that she has established in the relatively short time that she has been in the UK since 2015 when she arrived as a visitor has been established when her immigration status was precarious (s.117B(5)). I bear in mind that in relation to the latter, Mr Seddon referred to the appellant’s explanation for overstaying her visa, namely that she discovered that she was pregnant after she had arrived in the UK and she could not return to Kenya because of the seriousness of her condition, and that this was accepted by the FtJ. Nevertheless, her immigration status was precarious all the same.
92. The impact of removal on the appellant’s husband was not specifically argued on behalf of the appellant. However, it is a matter that I have taken into account. He has his own health problems which would have an impact on them both in terms of his need to care for the appellant in conditions that would be far from ideal. He will be

concerned for her and for them as a family unit as well as having to deal with his own ill health.

93. However, balancing all relevant factors, in the light of my analysis of the background evidence, the appellant and her husband's evidence, the accepted and established facts and the expert evidence, I am not satisfied that the appellant's case demonstrates that returning her to Kenya would amount to a disproportionate interference with her Article 8 rights in terms of family or private life.
94. For the reasons otherwise given, the appeal on all grounds must be dismissed.

Decision

95. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, the appeal is dismissed on all grounds.

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 her or any member of her 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.

Upper Tribunal Judge Kopieczek

25/07/18