



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/08697/2017

THE IMMIGRATION ACTS

**Heard at Manchester
On 18 September 2018**

**Decision & Reasons Promulgated
On 05 October 2018**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**MS SCHOLASTICA SHARIF
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Tapfumaneyi, PT Law & Associates
For the Respondent: Mr A Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Malawi, has permission to challenge the decision of Judge Durance of the First-tier Tribunal (FtT) sent on 26 July 2018 dismissing her appeal against the decision made by the respondent on 24 August 2017 to refuse her protection claim.

2. The permission granted in respect of the appellant's grounds was limited to two points: that it was arguable that the judge materially erred in law by speculating without evidence that the appellant's daughter returned to the UK and that this error infected the assessment under para EX.1; and that it was arguable the judge had erred in failing to consider humanitarian protection.
3. It is convenient to deal with the second ground first, as it was (sensibly) not pursued by Mr Tapfumaneyi. The judge gave sound reasons for rejecting the appellant's asylum claim (which was based mainly on being at risk as a lesbian) and the appellant's grounds contain nothing to cast doubt on those reasons. Based on those reasons the appellant could not succeed on humanitarian protection grounds save possibly in respect of her health circumstances. However, her health circumstances were dealt with by the judge both as regards Articles 3 and 8 of the ECHR and again the grounds raise no objections to these findings. The CJEU has confirmed that Article 15(b) of the Qualification Directive broadly corresponds to Article 3 ECHR save that it does not extend to cases in which lack of health treatment is predominantly caused by state actions (see e.g. Case C-353/16. **MP**, 24 April 2018. Hence in substance the judge's treatment of the appellant's Article 3 health circumstances entails that she cannot succeed under Article 15(b). This ground is devoid of arguable merit.
4. Turning to the first ground, I find it wholly fails to identify an error of law. Contrary to what is asserted, the judge's finding that both the appellant and her youngest daughter had failed to show that they had been continuously resident in the UK since 2004 and 2007 respectively, was not based on speculation but on documentary evidence in the form of: IABS search results; entry clearance applications from 2007 and 2014;; a screenshot of an embarkation from 2010; fingerprint matches showing that a person using a different name (that of Parce Melissa Clara) from the youngest daughter but with the same fingerprints was refused an entry clearance visa from the Entry Clearance Officers in Pretoria in 2014; and a letter from Chapel Street Primary School confirming that the youngest daughter left school on 19 March 2010 for the reason that she was emigrating to Malawi. This body of evidence also included a witness statement from a Higher Scientific Officer of the Office Fingerprint Bureau (IFB) dated 19 February 2018 confirming that the prints of the appellant's youngest daughter matched those used by someone using the name Parce Melissa Clara.
5. At the hearing before the judge the appellant gave evidence that she and her youngest daughter had not left the UK as alleged and her eldest daughter corroborated her evidence.
6. In my judgment the judge was clearly entitled to reject their evidence since not only did it conflict with the documentary evidence produced by the respondent (as identified above) but the appellant wholly failed,

despite ample opportunity to do so, to produce counter- evidence of her and/or her youngest daughter's presence in the UK between 2010 and 2015. The judge's observations regarding this lack at para 31 were wholly apposite. The burden of proof rested ultimately on the appellant and she had manifestly failed to discharge that burden.

7. Mr Tapfumaneyi sought to submit that the judge was wrong to find that the appellant was a dishonest witness because in relation to the alleged deception practised by the youngest daughter in her entry clearance application, the burden of proof rested on the respondent. He is certainly right to state that in relation to an allegation of deception, the burden rests on the respondent, but that burden was more than adequately discharged by the documentary evidence produced to support it. In response to this documentary evidence, the evidential burden shifted to the appellant and she wholly failed to discharge it.
8. Mr Tapfumaneyi submitted that the judge should have regarded it as inherently unlikely that the appellant did not leave the UK in 2010 since the Home Office had possession of her passport throughout this period. Even assuming the Home Office did have her passport for that entire period, it does not assist the appellant in rebutting the documentary evidence that she had left the UK without being in possession of her own passport.
9. Given the lack of legal error in the judge's findings and the significant interruption in the appellant's and her daughter's periods of residence in the UK, it was clearly open to the judge to conclude that their Article 8 claim was based upon less than 3 years' residency in the immediate past. The judge properly weighed in the balance against the appellant that the best intentions of the youngest daughter lay with continuing to live with the appellant and that there were no significant obstacles to both of them being returned together to Malawi. The judge properly concluded that the appellant's Article 8 grounds of appeal were not made out. In turn, I find that the appellant's grounds of appeal to the Upper Tribunal are not made out.
10. For the above reasons I conclude that the FtT Judge did not materially err in law and that the decision of the FtT Judge shall stand.
11. No anonymity direction is made.

Signed:

Date: 28 September 2018



Dr H H Storey
Judge of the Upper Tribunal

