IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003895
First-tier Tribunal Nos:
HU/54681/2021
IA/11745/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 March 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

PMP
(anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms Solanki, Counsel instructed by DMA Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Heard at Field House on 14 December 2022

Order for Anonymity:

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant or any member of her family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

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1. The Appellant is a national of Brazil born in 1983. She appeals with permission against the decision of the First-tier Tribunal (Judge Peer) to dismiss her human rights appeal.

2. Before the First-tier Tribunal the Appellant argued two grounds. First it was submitted on her behalf that she would, upon return to Brazil, suffer a serious, irreversible and rapid decline in her mental health such that would place the United Kingdom in violation of its obligations under Article 3 ECHR. Second, and in the alternative, the Appellant advanced the case that there were very significant obstacles to her integration in Brazil such that her removal would amount to a disproportionate interference with her Article 8 right to a private life. The Tribunal rejected both submissions, and on the 31st August 2022 Ms Solanki obtained permission to argue in respect of each of these conclusions that the Tribunal erred in law. It is convenient therefore that I address the various grounds of appeal under these two heads. Before I do so I think it appropriate to set out the background facts about the Appellant.

The Appellant's Life

3. It is the unchallenged evidence in this case that PMP endured a peculiarly brutal and abusive childhood. Her witness statement details regular and frequent ill-treatment at the hands of her parents, and later brother, which in many instances reached a threshold of severity such that it would properly be classed as torture, inhuman or degrading treatment. Her father, for instance, fashioned a tool specifically to be used to beat her: it was a large stick to which he nailed a length of hose piping. She would be beaten with this until she was bleeding. On many occasions during or after such a beating she would be chained up in the family laundry room, and in a particularly cruel twist for a young child, the lightbulb would be removed so she had to stay in there all night on her own in the dark. The Appellant recounts how years later her father expressed sorrow for his treatment of her, stating that he believed it to be "for her own good". It seems to me that he almost certainly had some demons of his own, for it is hard to understand how a father whom the Appellant describes to be otherwise loving and hardworking could have inflicted such horrific pain on a child. For reasons that I am not entirely clear about, the Appellant now places the blame for much of this violence on her mother, whom she describes as a "psychopath". The Appellant's mother was also physically abusive, regularly hitting her. Her mother was a Jehovah's Witness and at least some of the ill-treatment arose from her religious beliefs about the proper upbringing of children, but in other instances it, like that inflicted by the father, appears to have been nothing more than sadistic cruelty. It is not now in issue, nor at all surprising, that the Appellant is estranged from her family.

4. Nor is it in issue, nor at all surprising, that the Appellant has struggled with the consequences of her childhood trauma through her entire life. She began to self-medicate with large quantities of alcohol in her late teens, and seemingly made it her business to get as far away from Brazil, and her family, as she could. In her early 20s she travelled to Europe and North Africa, working, travelling and partying: "I drank and drank and drank...". The Appellant was in her early 20s, in a nightclub in Barcelona, when she experienced her first panic attack. She thought she was dying, and the following day sought medical help. She was prescribed diazepam and advised to seek psychiatric help, which she did, first in Spain and then later back in Brazil. The doctors she saw told her that her mental

health problems, which included auditory hallucinations of her parents talking to her, stemmed from her childhood. She did see a therapist in Brazil for a while but her continued desire to get away from Brazil interrupted that treatment when the Appellant came back to Europe.

5. There is some dispute about when she first entered the United Kingdom, but the Home Office records show her to be here from at least 2009. She entered first as a student, and then later married and varied her leave to remain as a spouse. By October 2013 her relationship with her husband had broken down and she was classed as an overstayer. At some point in 2014 she became homeless. There followed a period in which she was intermittently street homeless, living in shelters and squats or sleeping on people's sofas. The Appellant's evidence about this period, set out in her written statement of 5th February 2022, is difficult to follow, perhaps mirroring the kind of chaotic lifestyle that she was leading at this point in her life. What is clear is that in April 2017 she came to live in a shelter run by Emmaus, a Christian charity, who continue to support her today. Evidence from Emmaus keyworkers formed a central plank of the evidence before the First-tier Tribunal, and I return to this below.

6. The evidence about the Appellant's mental health is voluminous, and again not particularly easy to follow. I can see that in 2018 she was referred for treatment following a diagnosis of Post-Traumatic Stress Disorder. During 2019 she was under the care of 'Time to Talk' in Greenwich and underwent 20 sessions of Cognitive Behavioural Therapy to help her cope with symptoms which included severe low mood, nightmares, insomnia, panic attacks, scratching (and wounding) herself in her sleep, anxiety, intrusive memories and talking to herself. She was at various points prescribed anti-depressants including Mirtazapine and Sertraline, as well as anti-psychotics Lorazepam and Quetiapine. She started a course of Eye Movement Desensitization and Reprocessing in January 2020 but, to her subsequent regret, discontinued it. As the lockdown of medical services spread during March 2020 the Appellant's various therapies went online, and she slowly disengaged. Her anxiety worsened, particularly after she lost a close friend to Covid, and by April 2021 she was suffering such a severe mental health crisis that she was admitted to hospital.

7. She was discharged from hospital back into the care of Emmaus. Emmaus keyworkers report that upon receipt of the Respondent's refusal letter in August 2021 the Appellant then "fell apart". She has subsequently been diagnosed with agoraphobia. It was their evidence that she has, in effect had a complete personality change. When she first arrived at the service, she was manic, chaotic and even disruptive: she was outgoing and perhaps overly sociable. Now she is completely withdrawn and reliant on others. Giving evidence at the hearing before the First-tier Tribunal Emmaus community leader Clare Waghorn told Judge Peer that "at the moment she cannot open the door to her room". Other residents and support workers do her shopping, and meals are prepared for her and left at her door. It has got so bad that someone has to fill her water bottle up for her and leave that there too. Sometimes at night, with the support of someone she trusts, she will venture out of her room to the shared areas of the building. She is supported by an in-house counsellor and the mental health team visit and treat her in her room. It was the view of Ms Waghorn that asking the Appellant to leave that environment, in her present mental state, would "destroy her".

The First-tier Tribunal Decision

8. The Tribunal heard oral evidence from the Appellant, and from Clare Waghorn (described in the decision as the 'community leader' at Emmaus). The Tribunal expressed no credibility concerns about the Appellant and found Ms Waghorn to be an "honest and credible" witness who gave "compelling" and "balanced" evidence. It accepted the account given of the Appellant's childhood, her estrangement from her family, her poor mental health and her current reliance on the support of Emmaus.

9. The crux of the Tribunal's reasoning is found in paragraphs 59 to 60, where it concludes that the Appellant has not discharged the burden of proof in showing that there would be "no relevant support available" to her in Brazil. It goes on:

> 60. I accept the evidence about the appellant's current agoraphobic state, however the evidence on this is mixed as she goes out sometimes and it presents as a temporary rather than permanent state. The community leader confirmed her mental state was up and down. There is no evidence available to me to demonstrate to the necessary standard that she is unable to take basic care of herself or that she will never return to being a person with social skills and ability to interact with others.

10. Having already expressed that conclusion the decision then follows a somewhat odd structure in that it then turns to a lengthy examination of the evidence relating to the Appellant's mental health and the availability of care in Brazil, before reiterating its conclusions again at paragraph 72:

> 72. The evidence available to me does not demonstrate that there is an absence of appropriate treatment in Brazil even if the health system is currently under strain. The appellant's position is not of a person with a particular condition dependent on particular medication which is unavailable. The appellant has had various changes of anti-depressant medication over time and in October 2021 she was being moved off an anti-psychotic drug back on to citalopram which she had taken in Brazil. There was no evidence that adequate medication for her depression would not be available to her in Brazil. There is a level of mental health provision even if this is not equivalent to that in the UK and the appellant's own evidence refers to community based support services for mental health.

11. On that basis the appeal under Article 3 ECHR is dismissed, since the Tribunal could not be satisfied that the Appellant faced a real risk of being exposed in Brazil to either a serious, rapid and irreversible decline in health resulting in intense suffering or any significant reduction in life expectancy.

12. The Tribunal then turns to Article 8, directing itself to the appropriate test in paragraph 276ADE(1)(vi) of the Immigration Rules, the judgment in <u>SSHD v Kamara</u> [2016] EWCA Civ 813 and Mr Justice McCloskey's formulation in <u>Treebhawon and Others</u> (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 13 (IAC):

> "The other limb of the test, 'very significant obstacles', erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this

> context. The philosophy and reasoning, with appropriate adjustments, of this Tribunal in its exposition of the sister test "unduly harsh" in MK (Sierra Leone) [2015] UKUT 223 at [46] apply".

13. In applying that test to the present appeal the Tribunal's conclusions are in essence a reiteration of those already expressed at its paragraphs 60 and 72:

> 89. If the crux is that psychological integrity and ability to function socially is said to be affected by return due to the lack of support and the types of support she currently accesses here in voluntary/charitable organisations, the difficulty for the appellant is that there is no real evidence to show that support networks from services or charities are not available in Brazil. The evidence the appellant has produced refers to community mental health services. I have also found above that the appellant has not demonstrated that she is permanently lacking in any ability to build relationships with others so as to establish or find a support network in time.

Article 3

14. Ms Solanki's detailed grounds make several criticisms of the Judge's approach to the evidence, (which I return to under the heading Article 8) but her primary submission on Article 3 was that the Judge misdirected himself when apparently requiring the deterioration in the Appellant's health occasioned by her return to Brazil to be "permanent": see for instance at paragraph 60.

15. It is correct to say that the word "permanent" does not feature in the operative test, but the word "irreversible" does: see AM (Zimbabwe) v SSHD [2020] UKSC 17. The Judge had to consider whether there are substantial grounds for believing that if the Appellant is removed, she faces a real risk of dying or otherwise facing a "serious, rapid and *irreversible* decline in health resulting in intense suffering or a significant reduction in life expectancy" (emphasis added). There may be a case in which the difference between these two adjectives is meaningful, but I am not persuaded that this is it. As Ms Solanki accepts, there *was* no medical evidence to say that the Appellant's current state of agoraphobia was permanent, or irreversible. It was clear from the evidence that she had not always suffered from this condition: in fact in the relatively recent past she had been described by Emmaus staff as sociable and "manic". In the absence of evidence as to her future prognosis I do not accept that the Tribunal could properly have allowed this appeal with reference to the Article 3 test as set out in AM (Zimbabwe).

Article 8

16. The test under Article 8 is obviously less exacting, but it is nevertheless a high threshold. Paragraph 276ADE(1)(vi) of the Rules provides that limited leave to remain will be granted where the claimant can show that there are "very significant obstacles to her integration" in Brazil.

17. Ms Solanki's first challenge under this head is that in its self-direction about what that test requires the Tribunal erred in referring itself to Treebhawon (the passage cited above at my paragraph 12). That is because in Parveen v Secretary of State for the Home Department [2018] EWCA Civ 932 Underhill LJ appeared to disapprove that decision's emphasis on how hard the test might be to surmount [at paragraph 9]:

> "I have to say that I do not find that a very useful gloss on the words of the rule. It is fair enough to observe that the words 'very significant' connote an 'elevated' threshold, and I have no difficulty with the observation that the test will not be met by 'mere inconvenience or upheaval'. But I am not sure that saying that 'mere' hardship or difficulty or hurdles, even if multiplied, will not 'generally' suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as 'very significant'".

18. Second, the Judge has again imported a requirement of permanence into the equation. Ms Solanki maintains that there is no cause, in an Article 8 assessment, to look for a permanent state of affairs. In particular there is nothing in paragraph 276ADE(1)(vi) which requires the obstacles to be indefinite. The test in the rule in ultimately concerned with integration and this suggests an assessment of the period immediately following arrival.

19. The final limb of Ms Solanki's challenge relates to the way in which the Tribunal recorded, and interpreted the evidence before it. Variously, she submits, the Tribunal failed to have regard to material evidence, omitted to consider pertinent matters and cherry-picked the evidence so as to reach perverse conclusions: ultimately, she submits, it is "not clear that the Judge has grasped the seriousness of the Appellant's condition".

20. I have considered these three grounds in light of the evidence and the submissions made by both Ms Solanki and Mr Melvin, and having done so I find that they are all made out.

21. I return to the global conclusion expressed at the Tribunal's paragraph 60:

> 60. I accept the evidence about the appellant's current agoraphobic state, however the evidence on this is mixed as she goes out sometimes and it presents as a temporary rather than permanent state. The community leader confirmed her mental state was up and down. There is no evidence available to me to demonstrate to the necessary standard that she is unable to take basic care of herself or that she will never return to being a person with social skills and ability to interact with others.

22. That passage reveals each of the errors identified by Ms Solanki.

23. The evidence is described as "mixed", showing that the Appellant's mental state is "up and down". It is said that there is "no evidence" to demonstrate that she is unable to care for herself. Those conclusions are, with respect to the Tribunal, difficult to square with the passages in the evidence that I have been taken to. The "honest and credible" evidence of Clare Waghorn is that the

Appellant is heavily reliant on others. Her anxiety leaves her unable to leave her room for long periods, so that all her shopping, cooking and washing must be undertaken by friends and workers within the Emmaus community. Her medicines are delivered to her bedroom door, as are water, food and other necessities such as sanitary products. Behind that closed door the Appellant is described as being “frozen”, or “locked”. Ms Waghorn emphasised the extent of the Appellant’s extreme dependence on others by stating that in her view she would be “destroyed” if she were required to leave the community.

24. In his defence of the decision Mr Melvin points out that Ms Waghorn is not medically qualified to make such an assessment and this is true, but the Tribunal did not reject her opinion on that basis. It appeared to proceed, quite reasonably, on the basis that the evidence of the Emmaus support workers was all consistent with the actual medical evidence that this is a woman who has suffered long term mental health difficulties which have now reached a crescendo. Nor do I accept Mr Melvin’s suggestion that the Tribunal’s conclusions in paragraph 60 are simply a matter of weight. To say there was “no evidence” was simply an error of fact. To say that the Appellant “goes out sometimes” is a misunderstanding of the evidence, which was that on occasion, the Appellant is mentally – and physically – supported by a friend or keyworker to venture out of her room to other areas in the building, late at night when there is no one else around, and for short periods. If one were to take a long view of the Appellant’s mental health over the past twenty years it is no doubt correct to say that it is “up and down” but that finding rather obscures the uncontested evidence that she has barely left her bedroom in the past two years (notable exceptions being when she was admitted to a residential psychiatric unit, and to attend the hearing in her appeal).

25. At paragraph 60 the Tribunal also considers as relevant that the Appellant’s agoraphobia “presents as a temporary rather than permanent state”. The same point is made again at paragraph 73: “there are no indications that her current agoraphobia is permanent rather than temporary and a response to the uncertainty of her immigration status”; and at paragraph 89: “I have also found above that the appellant has not demonstrated that she is permanently lacking in any ability to build relationships with others so as to establish or find a support network in time”. I am satisfied that the Tribunal here materially misdirected itself in respect of what the Appellant needed to show. As Ms Solanki points out, paragraph 276ADE(1)(vi) is ultimately concerned with integration, but more broadly the question for the Tribunal was simply whether the Appellant will, as a result of the refusal to grant her leave, experience a disproportionate interference with her right to a private life. In assessing the extent of the breach, and whether that is proportionate, the decision maker might legitimately look to the length of time that the conditions in question might endure, but this is not the same thing as the approach the Tribunal took here, which is seemingly to treat the lack of permanence in a diagnosis of agoraphobia as determinative. That it applied the test erroneously is made clear in the final sentence of the passage where the Tribunal finds there is not the evidence to establish that “she will *never* return to being a person with social skills and ability to interact with others” (emphasis added).

26. That leads me to the point made in <u>Parveen</u>. The Court of Appeal there gives a clear steer that the terms introduced by Mr Justice McCloskey in <u>Treebhawon</u> are unhelpful gloss, which in effect set the bar too high. That being the case, the Tribunal should avoid that dicta for the more clear, and repeatedly approved,

formulation in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813 [at 14]:

> "In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported … is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up *within a reasonable time* a variety of human relationships to give substance to the individual's private or family life."

Had the Tribunal applied this guidance, it would not, as my emphasised words demonstrate, have made the errors that it did.

27. It follows that I do not need to address the numerous other criticisms of the Tribunal's reasoning, particularly in respect of its approach to the evidence, that Ms Solanki details in her grounds. The decision on Article 8 is flawed for legal misdirection and a failure to take relevant evidence into account and so it is set aside in its entirety. I would however note for the record that in its assessment of the situation facing the Appellant in Brazil the Tribunal, it seems to me, focused unduly on the best possible scenario (her accessing help of a similar nature to that currently provided by Emmaus) rather than the practical realities of how a severely traumatised woman with no family support might overcome profoundly debilitating mental illness in order to access the relevant care.

Decisions

28. The decision of the First-tier Tribunal is set aside to a limited extent. The appeal is dismissed on Article 3 grounds for the reasons I have articulated above, but the entirety of the Tribunal's reasoning on Article 8, and analysis of the evidence, is set aside to be remade.

29. At the hearing Ms Solanki indicated that her instructions were to seek a remittal. She indicated that further expert evidence relating to the Appellant's mental health was presently being sought, and that it should ready by the date of any resumed hearing. Mr Melvin had no objection. In view of the extent of the fact finding exercise required I agree to remittal. The First-tier Tribunal may wish to list this matter for a case management review prior to substantive listing, so that a timetable for service of any new evidence may be agreed.

30. There is an order for anonymity, imposed in this case because of the disclosure of medical issues personal to the Appellant.

Upper Tribunal Judge Bruce
25th January 2023