



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03843/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 5 February 2021

Decision & Reasons Promulgated
On 23 February 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

CS
(ANONYMITY DIRECTION CONFIRMED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A Chowdhury, Legal Representative, Londonium Solicitors

For the Respondent: Mr. I Jarvis, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Malawi and presently aged 42.
2. Her appeal on international protection and human rights (articles 3 and 8) grounds was initially heard by the First-tier Tribunal sitting at Bradford and refused by a decision dated 27 November 2019.

3. The appellant appealed to the Upper Tribunal on human rights grounds alone. She was granted permission to appeal, and by a decision dated 4 November 2020 I set aside the decision of the First-tier Tribunal. In doing so I observed, *inter alia*, at §16 of my decision:

‘16. With his usual candour, Mr. Tufan conceded on behalf of the respondent that in light of the recent judgment of the Supreme Court in AM (Zimbabwe) the Judge’s consideration of the appellant’s article 3 and 8 rights at para. 42 was insufficient in terms of consideration. He confirmed that the respondent did not oppose the setting aside of the decision of the First-tier Tribunal, though he observed that the respondent did not accept that the objective evidence relied upon by the appellant came close to meeting the burden placed upon her.’

4. I directed that the decision be remade by this Tribunal and confirmed that the findings of fact made by the First-tier Tribunal in relation to the international protection claim, at §§25-41, were preserved and the findings of fact made in respect of the article 8 claim, at §§42-45, were set aside.
5. In not proceeding with the remaking of the decision at the last hearing, I acceded to the appellant’s request to be given time to secure and file further evidence.

Hearing

6. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.
7. The appellant attended the hearing remotely.

Anonymity

8. By means of my decision dated 4 November 2020, I made an anonymity direction and detailed my reasons. Neither party sought for the direction to be set aside, and so I confirm it at the conclusion of this decision. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of her human rights claim becoming publicly known, in particular the nature of her illness.

Facts

9. The appellant first arrived in this country on 7 July 2002 with valid entry clearance as a student and was granted leave to enter until 31 August 2003. She made subsequent applications to vary her leave as a student and enjoyed leave to remain until 31 August 2005. At an unknown date in 2005 she returned to Malawi and subsequently secured entry clearance as a student. She returned to this country in September 2005 and was granted leave to enter until 31 August 2007.
10. In 2006 the appellant was hospitalised and subsequently diagnosed as HIV+. She has since regularly received antiretroviral treatment for her condition.
11. She completed treatment for a Stage 4B diffuse large B cell lymphoma in 2013 which required intensive care treatment. She underwent a surgical operation where a tumour was removed from her spinal-cord.
12. The appellant still has her 'Ommaya reservoir shunt' - a soft, plastic, dome-shaped device that is placed under the scalp - *in situ* as advised by neurosurgeons for use in case of any future relapses. She initially had significant neurological disability due to spinal involvement but has made considerable recovery. Whilst receiving treatment for this condition she developed further complications of CMV retinitis, where the retina of an eye is inflamed, and peripheral neuropathy which is still ongoing. Though she is independently mobile she confirmed to me that she requires the use of a walking stick.
13. She continues to attend follow-up consultations in the ophthalmology, haematology and HIV departments of her local hospital for appropriate health management.
14. In October 2013 she claimed asylum. The claim was refused by the respondent consequent a decision dated 30 January 2015 and certified as clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002.
15. She served further representations on asylum and human rights grounds dated 3 June 2016. Subsequent representations were served under cover of a letter dated 19 June 2018. By a decision dated 23 March 2019 the respondent accepted the representations as constituting a fresh claim under paragraph 353 of the Immigration Rules.
16. In 2018 the appellant was diagnosed with saddle pulmonary embolism, a form of large pulmonary thrombo-embolism that straddles the main pulmonary arterial trunk at its bifurcation, and she is presently prescribed anticoagulant medication.
17. By a decision dated 27 November 2019, Judge of the First-tier Tribunal Kelly dismissed the appellant's appeal. For the purpose of my consideration of the human

rights appeal before me, the following findings of fact made by Judge Kelly are preserved:

- The appellant provided a truthful account of the core events that occurred prior to her departure from Malawi but exaggerated the extent to which those events genuinely caused her to fear her return: [32] of decision.
- She spent her formative years in Malawi: [38]
- She retains significant social, family and cultural connections to Malawi: [39]
- It would be reasonable for her to relocate to an area away from her husband in order to avoid the small risk to her personal safety: [41]

Decision

Article 3

18. In respect of ‘medical health cases’ concerning article 3 ECHR and the removal of a foreign national from a Member State, the Grand Chamber of the Strasbourg Court held in *Paposhvili v. Belgium* (App. No. 41738/10) [2017] Imm AR 867 that the inferiority of health facilities in the receiving state is not of itself an exceptional circumstance, and nor is the fact that an individual's life expectancy would be significantly reduced by removal. Very exceptional cases are those which involve the removal of seriously ill persons where there are substantial grounds for believing that, although death is not imminent, they would face a real risk of a serious, rapid and irreversible decline in their health resulting in intense suffering or to a significant reduction in life expectancy due to a lack of access to appropriate treatment in the receiving country.
19. The Supreme Court confirmed in *AM (Zimbabwe) v. Secretary of State for the Home Department* [2020] UKSC 17, [2020] 2 WLR 1152 that in respect of article 3 it remains the basic principle that it is for the person alleging a breach of rights to establish it. However, in expulsion cases concerned with the provision of health care the general principle has been modified. The threshold now is that an appellant is to adduce evidence ‘capable of demonstrating that there are substantial grounds for believing’ that their article 3 rights would be violated. As confirmed by the Supreme Court this is a demanding threshold for an appellant to cross. The evidence adduced by the appellant must demonstrate substantial grounds for believing that they would be exposed to a real risk of being subjected to inhuman treatment if removed.
20. It therefore follows that there is an obligation upon the appellant in this matter to raise a *prima facie* case of potential infringement of her article 3 rights before

evidential obligations are placed upon the respondent. As to a *prima facie* case, the Court in Paposhvili confirmed at [186]

‘186. In the context of these procedures, it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see Saadi, cited above, § 129, and F.G. v. Sweden, cited above, § 120). In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment (see, in particular, Trabelsi v. Belgium, no. 140/10, § 130, ECHR 2014 (extracts)).’

21. Upon the appellant presenting evidence to the required standard, the respondent can seek to counter it in the manner outlined by the Strasbourg court in Paposhvili, at [187] - [191]. I observe {187}:

187. Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (see Saadi, cited above, § 129, and F.G. v. Sweden, cited above, § 120). The risk alleged must be subjected to close scrutiny (see Saadi, cited above, § 128; Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07, § 214, 28 June 2011; Hirsi Jamaa and Others, cited above, § 116; and Tarakhel, cited above, § 104) in the course of which the authorities in the returning State must consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual’s personal circumstances (see Vilvarajah and Others, cited above, § 108; El-Masri, cited above, § 213; and Tarakhel, cited above, § 105). The assessment of the risk as defined above (see paragraphs 183-84) must therefore take into consideration general sources such as reports of the World Health Organisation or of reputable non-governmental organisations and the medical certificates concerning the person in question.

22. The premise for such approach being that while it is for the appellant to adduce evidence about their medical condition and treatment, the State is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state.
23. Lord Wilson, with whom Lady Hale, Lady Black, Lady Arden and Lord Kitchin agreed, held in AM (Zimbabwe), at [33]:

‘33. In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the Paposhvili case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to

access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state. What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel "any" doubts raised by the applicant's evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to "serious doubts", he will realise that "any" doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond all doubt is a concept rightly unknown to the Convention.'

24. In this matter I have considered all the documentary evidence placed before me including that filed by means of a 'rule 15(2A)' application which is addressed below.
25. The appellant has several adverse health conditions. In respect of her HIV+ infection the medical evidence relied on confirms that her HIV viral load has been consistently suppressed for several years and by 2019 at the latest she has been considered to have normal immune function. She continues to receive antiretroviral treatment for her condition.
26. Recent medical evidence provided to this Tribunal confirms that the appellant is not presently subject to lymphadenopathy or hepatosplenomegaly. As to her previous lymphoma, she is quite stable.
27. Mr. Moyo, a coordinator at a local project, confirmed by letter dated 25 January 2021 that the appellant has been supported by the project since May 2014. It is said that the appellant has shown some improvement over the years but has other challenges such as mental health concerns due to stress and anxiety. The appellant exhibits mobility problems.
28. Before me Mr. Chowdhury primarily relied upon two documents in seeking to establish the appellant's *prima facie* article 3 case. The first being an undated expert report authored by Dr Alan Msosa, who at the time of writing the report was a postdoctoral research associate at the University of York.
29. The Supreme Court observed in *Kennedy v. Cordia (Services) LLP* [2016] UKSC 6, [2016] 1 W.L.R. 597, at [41], that an expert in the social and political conditions existing in a foreign country who gives evidence to an immigration judge is giving expert evidence of fact. In considering whether the witness is an 'expert', the Supreme Court, at [43], approved the approach adopted in the South Australian case of *R. v. Bonython* (1984) 38 SASR 45, per King CJ at pp 46-47:

'Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of

witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.'

30. I am satisfied as to the first question that the Tribunal would properly be aided by expert evidence as to health care provision in Malawi.
31. Consideration is therefore to be given as to whether Mr. Msosa has the necessary knowledge and experience so as to aid the Tribunal on the issue of health care provision in Malawi, in particular with regard to HIV treatment. The Supreme Court held, at [50], that an expert witness must demonstrate to the Tribunal that they have relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence. Where the expert witness establishes such knowledge and experience, they can draw on the general body of knowledge and understanding of the relevant expertise.
32. The parties discussed Mr. Msosa's report before me. Upon considering Dr Msosa's curriculum vitae, I am satisfied that he is an expert as to governance, gender, sexual rights and Malawi's justice system. Having read his report it is clear to me that it is primarily directed towards the appellant's claim for international protection based upon allegations of domestic violence. I draw such conclusion from the introduction to the report which details, *inter alia*:

'The facts provided related to this asylum claim state that the appellant fled to the UK because she was always subjected to torture and oppression from her husband in her marriage entered in 1995. It also stated that she was diagnosed with HIV in 2006, which led to her husband and parents irrationally blaming her for the disease and withdrawal of support. It further states that she is under medical consideration in the UK and that her husband has threatened to kill her. As a result, the claim states, her deportation [sic] will have grave consequences. The aim of this report therefore is to provide the court with the situation of women in Malawi in terms of gender-based violence, HIV and AIDS, economic warfare in order to explore whether available protection mechanisms are sufficient to protect her situation as presented in the facts cited above.'

33. Mr. Chowdhury sought to rely upon the report as establishing a *prima facie* case of potential infringement of the appellant's article 3 rights in respect of health care. I note that there is limited discussion of this issue in Dr Msosa's report:

'Young women (and similarly older women) are disproportionately affected by HIV and AIDS not only because of the lack of access to support services, but also by poverty, harmful gender norms and socio-economic inequalities. 72% of

women have access to anti-retroviral treatment, which is below the UNAIDS target of 90%.’

‘Although approximately two-thirds of the women living with HIV are able to access treatment, intersecting poverty and violence may impede the most vulnerable women from accessing treatment, for example, a victim of sexual or physical violence may fail to go to access treatment.’

‘Deportation may mean that she loses her source of income in the UK ... It may also mean that she interrupts her anti-retroviral treatment as access to treatment is not guaranteed 100% in Malawi. Interruption of the treatment has serious consequences, including treatment failure.’

34. During his submissions, Mr. Chowdhury candidly accepted that upon considering Dr Msosa’s curriculum vitae he is not for the purposes of these proceedings an expert in the healthcare system of Malawi. I observe that Dr Msosa references only two documents when making his observations detailed above: UNAIDS ‘*Miles to go: Closing gaps, breaking barriers, righting injustices*’ (2018) and Nyalapa, M and Conn, C ‘*HIV/AIDs among young women in Malawi: A review of risk factors and interventions*’ (2019). I note that no reference is provided by Dr Msosa for his assertion that 72% of women have access to anti-retroviral treatment, nor as to his assertion that two-thirds of women living with HIV are able to access treatment.
35. I note at this juncture that the respondent’s ‘Avert’ document (2019) refers to UNAIDS ‘AIDSinfo’, detailing:

‘In 2018, 90% of people living with HIV in Malawi were aware of their status, of whom 87% were on treatment. Of these people, 89% were virally suppressed, meaning the country is very close to reaching the UNAIDS 90-90-90 targets. This equates to 78% of all people living with HIV in Malawi on antiretroviral treatment (ART) and 69% of all people living with HIV virally suppressed.’
36. In circumstances where time was given by the Tribunal to the appellant to collate objective country information as to the provision of health care to persons suffering with HIV/AIDS in Malawi, it is surprising that significant reliance was placed upon Dr Msosa’s report in seeking to meet the demanding threshold of establishing a *prima facie* case. The report is primarily focused upon a separate aspect of the appellant’s appeal which is no longer pursued.
37. Being mindful of Mr. Chowdhury’s acceptance as to Dr Msosa not having expertise as to the health care system in Malawi, I place limited weight upon his general opinion on the issue.
38. The second document relied upon is a letter from Dr Dzanjalimodzi, dated 5 May 2019, which is primarily concerned with the availability of identified medication concerned with long-term anticoagulation treatment for saddle pulmonary embolism, namely Endoxaban. Dr Dzanjalimodzi is a general practitioner in Malawi and asserts that the appellant is his patient. His letter runs to three paragraphs, in

which it is stated that Endoxaban is not readily available in Malawi because of the high cost associated with its importation. Further, it is stated that there are an insufficient number of doctors in the country, and this would lead to the appellant being at high risk in respect of healthcare services. No further detail is provided for either assertion.

39. I take judicial note that Endoxaban is an anticoagulant, or blood thinner, that is used in several treatments including strokes, heart attacks, deep vein thrombosis as well treating a blood clot in the lungs, a pulmonary embolism. Judicial note is also taken as to the general use of other well-known anticoagulants such as Warfarin and Enoxaparin. The appellant provides no evidence as to an inability to be prescribed related forms of medication in place of Endoxaban upon return to Malawi.
40. Mr. Chowdhury accepted on his own initiative before me that the First-tier Tribunal raised cogent concerns as to Dr Dzanjalimodzi's letter, at [42] of its decision.

'42. ... I have noted the contents of the letter from Dr Edward Placid Dzanjalmodzi. Given that he is a doctor who practices in Malawi (in which the appellant has not resided for some 14 years) I find it strange that he should refer to her as, 'my patient'. I have thus attached less weight than otherwise to his claimed awareness of the drug she is receiving in the UK to reduce the risk of recurrence of the pulmonary embolism she suffered in October 2018, namely 'Endoxaban'. Indeed, this appears to be contradicted by the letter from Mary Oresi (Clinical Nurse Specialist at the [hospital]) wherein she states that the appellant was treated with 'subcutaneous injections of Tinzazaparin ...'

41. The finding as to Dr Dzanjalimodzi's letter was not preserved, though I note that Mr. Chowdhury did not seek to explain how appropriate reference could be made to the appellant being a patient of the doctor.
42. I observe the recently filed letter from a Specialist Registrar in Haematology, dated 29 January 2020, which confirms that the appellant was prescribed Edoxaban as at September 2019. There is little information provided as to the appellant's prescription at the present time, but I am content for the purpose of this decision to accept that the appellant continues to be prescribed Endoxaban.
43. I note that Dr Dzanjalimodzi provides no detail within his short letter as to what anticoagulants are used for the treatment of a pulmonary embolism in Malawi, and their availability. I find that no weight can be placed upon his evidence as to the accessibility or otherwise of suitable treatment in Malawi.
44. I observe the evidence of clinical nurse specialists provided by their letter of 6 November 2020 as to concerns that the appellant would be unable to access timely and appropriate monitoring of her chronic health conditions in Malawi. They also express concern as to whether she could secure access to her current medication. I find that the authors of the letter are not specialists in the Malawian health system

and provide no clear corroborated reasoning as to their concerns. Rather, such concerns can properly be considered to be genuine in nature but speculative in basis. On the question as to the availability of appropriate treatment for the appellant in Malawi, no weight can be given to the evidence of the clinical nurse specialists.

45. In addition to relying upon the evidence detailed above, the appellant relied upon her witness statement dated 29 January 2021. She details psychological problems she experiences consequent to her HIV+ status and explains that following 'personal research' she is aware that HIV treatment and medication is available to a 'limited extent' in Malawi. Further, she details at §10 that she has no family or friends in Malawi: '... all of my friends are either dead or moved out of Malawi for greener pastures.'
46. When remaking a decision, the Upper Tribunal may hear such evidence and argument as it considers necessary, but it is not bound to do so and can, indeed often does, decide the disputed questions of law on the basis of the findings of fact made by the First-tier Tribunal: *Sarkar v. Secretary of State for the Home Department* [2014] EWCA Civ 195, [2014] Imm. A.R. 911. In this matter, the preserved findings of fact included a finding that the appellant retains significant social, family and cultural connections to Malawi. No objection to the preservation of such finding was made by counsel for the appellant at the hearing in October 2020.
47. During his submissions Mr. Chowdhury was unable to provide a rational explanation as to why the Tribunal should reopen the preserved findings in this matter. At one point he sought to withdraw the evidence, though ultimately accepted that such step was not possible in circumstances where the appellant had adopted her witness statement and been both examined and cross-examined.
48. Ultimately, I find the appellant's recent evidence unhelpful. She candidly accepted before me that her son continues to reside in Malawi, contrary to an assertion made in her witness statement. Further, her assertion that her friend Irene left Malawi soon after the First-tier Tribunal hearing was very vague in detail, and I find to the appropriate standard to be incredible. It is simply an unsophisticated attempt to undermine the preserved finding that she retains significant social connections to Malawi.
49. Therefore, the evidence before me as to the appellant's *prima facie* case amounts to the brief observations of Mr. Msosa, upon which limited weight can be placed, and the appellant's vague observation that HIV treatment and medication is available in Malawi only to a limited extent, which is inconsistent with the information provided by means of the respondent's Avert document which relies upon figures provided by UNAIDS in respect of the situation in Malawi. I observe that The Joint United Nations Programme on HIV and AIDS (UNAIDS) is a joint venture established by the United Nations to bring together the efforts and resources of 11 UN system organizations in respect of achieving universal access to HIV prevention, treatment, care and support. Its statistics can therefore be properly relied upon by this Tribunal.

50. Consequently, whilst the appellant has adduced credible evidence as to her condition and sufficient, though limited, evidence as to her current treatment, she has provided no cogent evidence as to the likely suitability of any other treatment and the availability or otherwise of such treatment in Malawi. Consequently, she has not crossed the threshold of establishing a *prima facie* case demonstrating substantial grounds for believing that she would be exposed to a real risk of being subjected to inhuman treatment upon return to Malawi.
51. During submissions, possibly being aware that the appellant had provided no cogent evidence as to a lack of suitable alternative drugs in Malawi, Mr. Chowdhury sought to assert that a cumulative approach should be taken to all of the appellant's medical conditions and their impact upon her return to Malawi. However, as confirmed by the Supreme Court in *AM (Zimbabwe)* the question for this Tribunal is, ultimately, whether there are substantial grounds for believing that, although death is not imminent, the appellant would face a real risk of a serious, rapid and irreversible decline in her health resulting in intense suffering or to a significant reduction in life expectancy due to a lack of access to appropriate treatment in the receiving country. There is no cogent evidence before this Tribunal that at present her other health conditions come close to crossing the required threshold.
52. On the evidence before this Tribunal, the appellant comes nowhere close to establishing that she would enjoy a lack of access to appropriate treatment upon her return to Malawi.
53. Many people will have sympathy for the appellant, who has coped with several significant illnesses since at least 2006. However, the threshold for establishing a breach of protected article 3 rights is a demanding one, and due attention is to be given to relevant information required consequent to the Supreme Court's judgment in *AM (Zimbabwe)*. This is a matter where there has been a concentration by the appellant on establishing the nature and extent of her illness and treatment in this country, with much more limited focus upon the availability, or otherwise, of treatment available to her in Malawi. The Tribunal can only properly consider the evidence before it and in this matter, when considered in the round, such evidence as is relied upon is wholly insufficient to establish a *prima facie* case. Even if that hurdle were capable of being crossed, the evidence relied upon by the respondent as to the health care situation in Malawi is presently sufficient to establish the availability and accessibility of suitable treatment for the appellant upon her return. I observe that Mr. Chowdhury raised no meaningful challenge to the contents of the Avert document, save for noting Mr Msosa's observation as to a lower engagement by women with medical treatment. Such general observation was not accompanied with a reference to a study or official statistics and so for the reasons detailed above, I prefer the referenced statistic provided in the Avert document.
54. In the circumstances, the appellant's article 3 appeal is dismissed.

Article 8

55. The appellant relies upon article 8, though before me Mr. Chowdhury confirmed that such reliance was solely concerned with access to medical treatment. To all intents, article 8 in this matter is advanced as an alternative to the health care submission advanced under article 3.
56. In *SL (St. Lucia) v Secretary of State for the Home Department* [2018] EWCA Civ 1894 the Court of Appeal confirmed that the decision of the Grand Chamber in *Paposhvili* made a modest extension to the boundary of protection against immigration removal under article 3 in medical cases and had no effect on the threshold or approach to private life claims under article 8 where an individual's health and medical treatment was the only, or only material, issue. The proper approach remained that an absence of medical treatment in the country of return would not in itself engage article 8. Such approach is not disturbed by the Supreme Court's judgment in *AM (Zimbabwe)*.
57. Having been unsuccessful on her article 3 ground, the appellant cannot properly succeed on article 8 grounds in respect of absence of suitable medical treatment in Malawi.
58. The appellant does not rely upon private life rights established in this country or upon family life ties. In such circumstances, the article 8 appeal is dismissed.

Rule 15(2A)

59. I proceed to address procedural issues that arose before me. At the error of law hearing held before me on 26 October 2020, the parties agreed that it was appropriate to adjourn the remaking of the decision in this matter. The respondent put the appellant on notice that she considered the objective evidence relied upon by the appellant as coming nowhere near close to meeting the burden placed upon her. In securing an adjournment, the appellant's counsel confirmed that further evidence would be sought to address the requirement to establish a *prima facie* case as identified by the Supreme Court in *AM (Zimbabwe)*.
60. Prior to the hearing in October 2020, the appellant's legal representatives had adopted the erroneous approach of sending documents not previously relied upon to the Tribunal by email simply requesting that they be considered at the hearing. Such approach was wholly inconsistent with the requirement of explanation detailed by rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the Procedure Rules'):

(2A) In an asylum case or an immigration case –

- (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –

(i) indicating the nature of the evidence; and

(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.

61. I detailed at [17] of my decision:

17 ... Mr. Parkin sought time in which to file further evidence, acknowledging that documents filed by his instructing solicitors the afternoon before the hearing listed before me failed to comply with the requirements of rule 15(2A) ... ‘

62. I issued directions that the appellant file and serve additional evidence to be relied upon, accompanied by an appropriate rule 15(2A) application, no later than 14 days before the resumed hearing and that the appellant file and serve a skeleton argument no later than 7 days before the resumed hearing.

63. Both directions were breached.

64. A rule 15(2A) application was made on behalf of the appellant on 29 January 2021, accompanied by a bundle running to 27 pages. The application was made 7 days out of time. In addition, an idiosyncratic approach was adopted of placing the written application at the back of the bundle, not at the front.

65. The bundle comprised of certain documents which should not form part of a rule 15(2A) request, notably the notice of resumed hearing and this Tribunal’s decision of 4 November 2020. In addition, a further witness statement was filed on behalf of the appellant, that addressed several issues, including certain preserved findings of fact.

66. Also included was a letter from clinical nurse specialists dated 6 November 2020 addressing the appellant’s health management, and a letter of support from Mr. Moyo, dated 25 January 2021. Two further documents which had formed part of the previously rejected rule 15(2A) application were again provided, namely a letter from a hospital clinical haematology department, dated 29 January 2020 and a printout of a medical patient summary, dated 28 October 2019.

67. On this occasion, there was an effort to comply with the explanation requirement of rule 15(2A)(a)(ii), but for the reasons explained to Mr. Chowdhury at the hearing such explanation was inadequate.

68. The core of the explanation provided is identifiable at §6 of the application:

‘6. The appellant accepts that this evidence should have been adduced along with the bundles submitted earlier, and she apologises unreservedly for the delay.

It is regretted that the importance of this evidence was not properly realised earlier. Also, the appellant as a financially disadvantaged and depressed person of poor health condition struggled to obtain the evidence from different sources, which contributed to the delay in submitting this evidence. An additional reason was that her appointments with the NHS consultants were cancelled due to the current pandemic and she was not able to contact various authorities involved in her treatment due to limited working patterns during the pandemic.'

69. The author of the application appears unaware of the requirement under this rule that an explanation be provided as to why the evidence was not before the First-tier Tribunal at the hearing held on 7 November 2019. Such lack of understanding is identifiable by reference to delay caused by the present Covid-19 pandemic which post-dates the First-tier Tribunal hearing. I am concerned that on two occasions in this matter the appellant's legal representatives have exhibited a lack of understanding as to the mechanism of rule 15(2A), which on its face is a simple procedural requirement that clearly sets out what steps are to be undertaken.
70. Further, it is unfortunate that the appellant is said to apologise for clear failings in circumstances where she was represented by her previous legal representatives before the First-tier Tribunal. No effort is made by the legal representatives to address their own failings.
71. The appellant's legal representatives further informed the Tribunal that a unilateral decision had been made to serve the appellant's skeleton argument on a later date than that directed by this Tribunal. No reasoning was provided as to why there was an inability to comply with the direction. In any event the skeleton argument was eventually filed 25 minutes before the listed hearing of this appeal. Whilst Mr. Chowdhury has given cogent reasons as to why the second, unilateral, deadline was breached, and I accept those reasons, no adequate reasons were given in respect of the initial breach of directions.
72. As detailed above, the evidence submitted by means of the rule 15(2A) application was accepted and consequently considered because I was satisfied that the appellant should not be hindered in the presentation of her human rights appeal by inadequate representation.
73. Londonium Solicitors are reminded as to the Tribunal's inherent jurisdiction to govern proceedings before it and to hold to account the behaviour of lawyers whose conduct of litigation falls below the minimum professional standards: *R. (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin). The Tribunal does not expect such failings in respect of directions and the filing of a rule 15(2A) application to arise again.

Notice of Decision

74. By means of a decision sent to the parties on 4 November 2020 this Tribunal set aside the decision of the First-tier Tribunal promulgated on 27 November 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
75. The decision is re-made, and the appellant's appeal on human rights (articles 3 and 8) grounds are dismissed.

Anonymity Direction

76. Pursuant to Rule 14 of the relevant Procedure Rules I make an anonymity order in respect of the appellant, CS:

'Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.'

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 8 February 2021

TO THE RESPONDENT
FEE AWARD

No fee was paid and so no consideration is given to a fee award.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 8 February 2021