Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12100/2019**

THE IMMIGRATION ACTS

Heard at Field House (remotely)	**Decision & Reasons Promulgated**
On the 01st July 2021	**On the 12th July 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

S E (MOROCCO)
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: and Mr Chengatai Mupara of Counsel, instructed by UK Lawyers Advocates London, a firm registered with the Office of the Immigration Service Commissioner

For the respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of S E who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of her or of any member of her family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

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Decision and reasons

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision on 21 November 2019 to refuse her refugee status under the 1951 Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds.

2. The appellant is a citizen of Morocco, of Bedouin origin, born in November 1953, and is presently 67 years old. She has an adult daughter, who is married with a young child, who lives in the United Kingdom and who was 13 years old when they arrived in 2002. She also has a sister living nearby.

3. **Mode of hearing.** A Skype hearing was listed in January 2021, but the appellant failed to attend and it was adjourned. The hearing today took place face to face at Field House. The appellant was present and was represented by Mr Mupara, who had helpfully accepted a brief on 30 June 2021, at the last minute.

4. The appellant's representatives, UK Lawyers and Advocates London, settled the grounds of appeal in this appeal but were not instructed again until the day before the 1 July 2021 hearing. At 10:52 am on 30 June 2021, they asked for the hearing to be moved from 2.30 p.m. on 1 July 2021 to 10 am on the same day, because of a conflict in Counsel Mr Mupara's diary. In the event, the hearing went ahead at 2.30 p.m. as originally listed and Mr Mupara was able to represent the appellant.

Background

5. The appellant entered the United Kingdom on 18 April 2002 on a visit visa which expired on 18 October 2002. She has not had valid leave to enter or remain since then.

6. When her visit visa expired, the appellant did not embark for Morocco. She made six further applications on non-protection grounds (mainly Article 8 ECHR) for leave to remain in the United Kingdom: on 7 October 2002, 26 October 2010, 22 February 2011, 25 June 2014, 3 February 2015 and 7 February 2016. All of those applications were unsuccessful.

7. On 21 January 2016, the appellant was served with form RED.0001(c) as an overstayer. She made an asylum claim on 5 August 2016, which the respondent refused, and was appeal rights exhausted on that claim on 27 March 2017. The decision of the First-tier Judge in the 2017 appeal is the *Devaseelan* starting point for the present appeal.

8. Also on 5 August 2016, the appellant claimed to be a victim of trafficking. On 9 September 2016, the respondent as Competent Authority made a

negative Reasonable Grounds decision, finding that she was not a former victim of trafficking.

9. The present claim arises out of further international protection and human rights submissions made on the appellant's behalf on 23 September 2019. The appellant asserted that she is at risk on return to Morocco because she is a lone woman, that she would face destitution there, and that she has certain medical conditions, which would not be treated on return, such that she would be subject to inhuman and degrading treatment contrary to Article 3 ECHR and unlawful breach of her private and family life contrary to Article 8 ECHR.

Refusal letter

10. In her refusal letter dated 21 November 2019, the respondent refused the international protection and human rights claims and also refused to grant discretionary leave to remain. She considered that the lone female ground had been considered and determined in the 2017 appeal and that there was no new evidence to enable the respondent to depart from that decision as her *Devaseelan* starting point.

11. The respondent noted that the appellant's fears as expressed related only to return to Casablanca, not all of Morocco, suggesting that she could avail herself of an internal relocation option and that surrogate international protection was not necessary. She did not consider that the asserted fear of destitution was proven: there was no more than a bare assertion by the appellant that she would be destitute and on the streets if returned.

12. The appellant had shown considerable personal fortitude in relocating to the United Kingdom, and if she returned voluntarily, could benefit from the Voluntary Assisted Return and Reintegration Programme, which could include a relocation grant, assistance in starting a small business, short term accommodation and vocational training.

13. The respondent was not satisfied that the appellant had demonstrated that she had a well-founded fear of persecution, to the lower standard appropriate in international protection claims, nor that humanitarian protection was appropriate on those facts. Her claims under Articles 2 and 3 ECHR fell with the international protection claim.

14. As regards private and family life, the respondent considered that the appellant could not bring herself within the Immigration Rules HC 395 (as amended). She had lived in Morocco for about 48 years before coming to the United Kingdom and there were no very significant obstacles to her reintegration there on return.

15. The respondent then considered whether there were exceptional circumstances for which leave to remain outside the Rules should be given. The appellant had heart problems (mixed mitral valve disease and aortic regurgitation), and asserted that she had severe depression and

anxiety, and painful joints, including chronic back and shoulder pain. A list of medication was provided. Healthcare in Morocco was not as sophisticated as in the United Kingdom but nevertheless, there was treatment available there. The 2018 CPIN on Morocco set out MedCOI information about treatments available there. The appellant's health conditions did not amount to exceptional circumstances. The Article 3 ECHR medical element of the claim fell with the exceptional circumstances claim, being based on the same evidence.

16. The respondent refused the appellant any form of leave to remain and she appealed to the First-tier Tribunal.

First-tier Tribunal decision

17. First-tier Judge Russell considered the appeal (the 2019 decision), taking as his starting point the decision of First-tier Judge Taylor in 2017 (the 2017 decision), which was the correct approach. He noted that the grounds of appeal did not engage with the reasoning in the 2017 decision, which included what he described as 'various and specific negative credibility findings based on a comprehensive review of her evidence' and including a rejection of her claim to have been assaulted by a relative and to be at continuing risk from him on return. He also considered it 'an astonishing delay by any measure' that the appellant had waited until 14 years after her arrival in the United Kingdom before claiming international protection.

18. At [26], the First-tier Judge said this:

> "26. I have been given no reason nor evidence why I should go behind Judge Taylor's findings. In accordance with those findings, it follows that the appellant has not suffered persecution in Morocco, and that there is no continuing threat to her: it is extremely unfortunate that the representations made for the appellant fail to address those findings at all in making the fresh claim. The respondent has not explained why the representations in 2019 were treated as a fresh claim at all, in light of their very generic nature, and I find that this current claim can barely be differentiated from the claim already decided by Judge Taylor."

19. At [41], the First-tier Judge accepted that women in Morocco were capable of constituting a particular social group within Article 1A(2) of the Refugee Convention. At [42], he noted that there was no particularisation of the appellant's claim that there was a generic risk to her as a lone woman, from non-State actors, and that there were 'no submissions or representations to identify any actor of persecution or to identify what form the persecution may take'. A lack of equal treatment of women in Morocco was not enough to reach the persecution threshold, absent other factors and/or past persecution. The international protection element of the appeal could not succeed.

20. At [46], the judge considered the appellant's private and family life claim. He noted that there was no new evidence to show an Article 8 ECHR risk

on return to Morocco, over and above that already considered: her medical conditions had been considered in the 2017 decision:

> "46. …there is no new evidence concerning what obstacles there would be. The material purporting to be background evidence from page 82 of the appellant's bundle is simply woeful and falls far below the standards of evidence required to show relevant – by which I mean relevant to a finding that Article 3 is engaged – differences in treatment between Morocco and the United Kingdom.
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> 47. … I have no hesitation in adding to Judge Taylor's findings on the appellant's human rights claim by saying that the removal of the appellant is an entirely proportionate response to achieving the legitimate aim of maintaining confidence in our system of protection for refugees."

21. In conclusion, the First-tier Judge applied section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended): the appellant had not paid tax or National Insurance, having not worked since 2002 when she arrived in the United Kingdom. She had, however, made extensive use of the National Health Service, at considerable expense to the United Kingdom as her host country, and her human rights claim was based in part on being able to continue to do so, without having ever contributed to the NHS. Nor was she able to address the Tribunal in English, even after 18 years in the United Kingdom, which spoke to her lack of integration. There was little evidence of a private life or engagement with the wider community in the United Kingdom.

22. The appeal was dismissed. The appellant appealed to the Upper Tribunal.

Permission to appeal

23. The grounds of appeal did not challenge the protection element of the First-tier Tribunal's decision. The grounds of appeal asserted that exceptional and compassionate circumstances were not properly considered; removal of the appellant would separate her from her sister, who lives here, and from the life she had developed in the United Kingdom since her arrival.

24. The appellant contended that the First-tier Judge had applied his negative credibility finding to the medical evidence (the *Mibangi* error) rather than assessing all the evidence in the round before reaching a credibility conclusion. The appellant accepted that the First-tier Judge had considered her mental health and the medical care she receives; she had been dependent on NHS treatment and on her sister for 18 years and it would be a breach of Article 8 ECHR to separate her from either now. There was only limited psychiatric provision in Morocco and the appellant had established family ties with her sister in the United Kingdom to which insufficient weight had been given.

25. On 21 April 2020, Upper Tribunal Judge Owens granted permission to appeal. She considered that 'although the grounds are poorly worded, it is

just arguable that the Judge erred in failing to assess the appellant's Article 8 ECHR claim adequately under the Immigration Rules'.

26. Permission was granted on all grounds.

Rule 24 Reply

27. There was no Rule 24 Reply by the respondent. Triage directions were given on 22 October 2020, having regard to the Covid pandemic. The respondent provided a response on 9 June 2020.

28. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal proceedings

29. For the respondent, Mr Melvin prepared a skeleton argument. He continued to rely on the respondent's 9 June 2020 response. Mr Melvin noted that the grounds of appeal did not challenge the findings of First-tier Judge Taylor in 2017 and that the present grounds of appeal appeared to focus on private life between the appellant and her sister, the appellant's mental health, and the lack of available medical treatment in Morocco. The appellant did not claim to be able to meet the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules.

30. The grounds of appeal did not engage with the reasoning in either the 2017 or 2019 decisions, and were very general in nature. The respondent urged the Upper Tribunal to reject the challenge to the decision of the First-tier Tribunal.

31. In oral argument, Mr Melvin relied on his skeleton argument and contended that the First-tier Tribunal had made an adequate assessment of Article 8 outside the Rules. The appellant had made numerous previous Article 8 ECHR claims which had all failed. The two asylum claims, made as a last resort, had been found to lack credibility and to be spurious. There was very little evidence of private life and no family life, nor any community engagement. The Upper Tribunal should find that there was no material error of law and dismiss the appeal.

32. Mr Mupara had not been able to prepare a skeleton argument, nor had he been provided with the First-tier Tribunal hearing bundle. His submissions were entirely oral. He contended that the 2019 decision showed a complete failure to consider Article 8 ECHR outside the Rules, relying on the decision of the Court of Appeal in *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630 (04 October 2019) at [34] in the judgment of Lord Justice Green, with whom Lady Justice Simler agreed.

33. The appellant was a long-time overstayer. Mr Mupara accepted that section 117B(4) and (5) were applicable to her and that the *Devaseelan* starting point was the 2017 decision of Judge Taylor. He further accepted, applying *AM (Zimbabwe) v Secretary of State for the Home Department*

[2020] UKSC 17 (29 April 2020) that the slight extension to the Article 3 test in *Paposhvili,* now applicable in the United Kingdom following *AM (Zimbabwe)* would not avail this appellant and that she could not meet the Article 3 ECHR standard.

34. The appeal could succeed, if at all, only by reason of Article 8 ECHR considerations which fell outside the Rules: *GM (Sri Lanka)* should be seen as modifying the Supreme Court's guidance in *R on the application of Agyarko and Ikuga v Secretary of State for the Home Department* [2017] UKSC 11 (22 February 2017) such that proportionality, rather than exceptionality, was the correct test. The appellant had asserted that she had no family support now in Morocco, and that her adult daughter provided assistance for her, although they are not living in the same household. Mr Mupara had no instructions as to whether the appellant had any family at all in Morocco, but his instructions were that there were none who would assist the appellant. She also had no home in Morocco.

35. Mr Mupara accepted that within the Rules, the appellant could not show 'very significant obstacles' to her reintegration in Morocco, but she had needed a heart operation, which she had in the United Kingdom, and had some ailments due to her age.

36. He asked me to allow the appeal.

Analysis

37. The appellant's argument hinges on the asserted change in the Supreme Court's approach to Article 8 ECHR outside the Rules in *GM (Sri Lanka),* which Mr Mupara contended overtook the exceptionality test in *Agyarko,* replacing it with a more general proportionality test. That submission seems to be at odds with what is said in the judgment:

> "3. The judgment under appeal was made in 2015. Since then the Supreme Court has clarified a series of issues relating to the test to be applied under Article 8 in relation to the IR and section 117B Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002" and "section 117B"). The main judgments are: *Agyarko v SSHD* [2017] UKSC 11 ("*Agyarko*"); *Ali v SSHD* [2016] UKSC 60 ("*Ali*"); *KO (Nigeria) v SSHD* [2018] UKSC 53 ("*KO*"); and, *Rhuppiah v SSHD* [2018] UKSC 58 ("*Rhuppiah*").
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> 4. These judgments clarify such matters as: the application of the applicable proportionality test and the relative weight to be attached to various factors in the balancing and weighing exercise; the relationship between the IR, the NIAA 2002 and Article 8; the meaning of "little weight" in sections 117B(4) and (5); the extent to which the "little weight" test applies to family rights; the relevance of a person's immigration status in a family life assessment; and the relevance of "insurmountable obstacles" to return in the family life context."

38. It is clear to me that the court in *GM (Sri Lanka)* was not purporting to depart from established caselaw. The passage relied upon by Mr Mupara at [34] appears under the sub-heading '*(ii) The nature of the rights that*

risk being relinquished if a person has to leave in order to retain a family life' and has no bearing on the factual matrix in this appeal. The court in *GM (Sri Lanka)* was concerned with a situation where a parent might be deported, and children might have to leave with them in order to retain family life.

39. That is not the situation here: there is no question of someone accompanying the appellant on her return to her country of origin in order to maintain family life. Applying section 117B(4)(a) and (5), little weight can be given to her private life. The appellant's sister and daughter are adults. The private life which developed between the appellant and her sister, with whom she does not live, developed while she was here precariously (but only for the 6 months of her visit visa) and thereafter while she was here unlawfully. Her private life with her daughter is not, apparently, extensive now.

40. Nor is there any merit in the suggestion that the First-tier Judge made the *Mibangi* error of applying his own credibility finding to the medical evidence. I asked Mr Mupara to identify where in the First-tier Tribunal decision that had occurred, but he was unable to identify any such place, and I can find none either.

41. In conclusion, the grounds of appeal do not identify any material error of law in the assessment of the appeal by the First-tier Judge. I decline to reopen the decision of First-tier Tribunal, which is upheld.

DECISION

42. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law
I do not set aside the decision but order that it shall stand.

Signed Judith AJC Gleeson Date: 4 July 2021
Upper Tribunal Judge Gleeson