



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04108/2017

THE IMMIGRATION ACTS

Heard at Field House
On 22nd March 2018

Decision & Reasons Promulgated
On 24th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE RENTON

Between

C M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss M Harris, Counsel instructed by Solomon Solicitors

For the Respondent: Mr A Kotas, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a female citizen of Malawi born on 7th July 1981. She first arrived in the UK on 16th October 2005 when she was given leave to enter for a period of six months. The Appellant did not embark, and on 20th October 2016 she applied for asylum. That application was refused for the reasons given in the Respondent's letter of 19th April 2017. The Appellant appealed and her appeal was heard by Judge of the First-tier Tribunal Rastogi (the Judge) sitting at Hatton Cross on 26th May 2017. He decided to allow the appeal on humanitarian protection and Article 3 ECHR

grounds for the reasons given in his Decision dated 5th June 2017. The Respondent sought leave to appeal that decision, and eventually at a hearing in the Upper Tribunal before me on 1st December 2017 I found a material error of law in the decision of the Judge and set that decision aside.

2. This hearing is for the purpose of re-making the decision in the appeal.

The Hearing

3. At the hearing before me, I heard evidence from the Appellant. She referred to her Statement dated 25th May 2017 appearing at page 135B of her Bundle and confirmed that its contents were true. Referring to paragraph 18 of that Statement, the Appellant said it was M who had died and that her partner's grandmother was still alive. The Appellant added that she had three children, neither of whom had ever held a passport. They had never left the UK.
4. When cross-examined by Mr Kotas, the Appellant said that it was her partner's grandmother whom she feared. However, her partner had not attended the hearing today despite its importance as he had remained at home to look after the children. The Appellant went on to say that she had come to the UK in 2005. She had an aunt and an uncle still resident in Malawi. However, she had not been in contact with them for about ten years although her partner had been in contact when her last child had been born about eight years ago. The Appellant knew that her partner's grandmother was still alive although her partner had not spoken to her since 2010.
5. The Appellant added that her sister had been subjected to FGM as her father had insisted upon it. The Appellant's mother had prevented the Appellant from suffering the same. The Appellant added that she did not know the age of her partner's grandmother. Her partner's mother had died, and the Appellant did not know at what age she had given birth to her partner.
6. The Appellant then said that her family had been supported in the UK by her partner's employment when he had worked as a cleaner. He had not worked since 2016. The family was now maintained by NAS support. Prior to coming to the UK the Appellant had worked as a hairdresser and her partner had worked as a farmer.
7. Finally, the Appellant said that she could not safely relocate to another part of Malawi. Her partner's grandmother would know that she had returned and would be able to locate her anywhere in that country.
8. I then heard submissions. Mr Kotas addressed me first when to begin with he argued that the Appellant's claim for asylum was not well-founded. The Appellant herself had not been subjected to FGM, and the Appellant had not given a credible explanation why her sister had been subjected to FGM and not her. The Appellant claimed to fear a non-State actor, namely her partner's grandmother. However, there was no evidence that this person was still alive bearing in mind that the Appellant's partner had been born in 1968. There had been no contact between the Appellant's family and her partner's grandmother for eight years.

9. Mr Kotas went on to argue that in any event, it would not be unreasonable by way of being unduly harsh to expect the Appellant to safely relocate within Malawi. Referring to the Report of the Malawi Human Rights Commission at page 364B of the Appellant's Bundle, FGM was not widespread in Malawi and only 5% of its respondents stated that FGM was practised in their area. Mr Kotas noted that the Appellant had stated in her interview at page C15 of the Respondent's Bundle that that there had been no contact between her family and her partner's grandmother since that family had come to the UK. It was therefore reasonable for the Appellant and her family to relocate to an area of Malawi where FGM was not practised.
10. As regards Article 3 ECHR and the fact that the Appellant and her partner were HIV positive, Mr Kotas referred to the Malawi COI Report at page 68B of the Appellant's Bundle which showed that HIV treatment was readily available in Malawi even in rural areas. The information at paragraph 24.10 of that Report showed that nearly a million people in Malawi were HIV positive and no stigma therefore attached.
11. As regards Article 8 ECHR, Mr Kotas referred to paragraph 276ADE and submitted that the Appellant failed to satisfy this provision. There were no very significant obstacles to the Appellant's return to Malawi with her partner and children. The Appellant still had considerable ties to Malawi and although her twins had resided in the UK for more than seven years, they were still very young and their focus was on their immediate family and therefore it would not be unreasonable for them to be excluded from the UK in accordance with paragraph 276ADE(iv) of HC 395. Although it might be in their best interests to remain in the UK, the public interest was a weightier consideration. The family had a poor immigration history and was reliant upon NAS support. The family had received a considerable degree of medical treatment at public expense.
12. In response, Miss Harris submitted that the Appellant was credible and had given credible explanations for all of her actions. It may be the case that the Appellant's partner had been in contact with his family in Malawi. Miss Harris then conceded that the Appellant did not have a strong case under Article 3 ECHR as regards the health of herself and her partner following the decision in **EA and Others (Article 3 medical cases - Paposhvili not applicable) [2017] UKUT 445 (IAC)**. However, she argued that the appeal ought to succeed under paragraph 276ADE. The First-tier Tribunal Judge had found that it was in the best interests of the children to remain in the UK, and it would be unreasonable for them to be obliged to leave, particularly as the sins of the parents should not be visited on their children. The children had few cultural ties with Malawi. The COI Report showed the difficult circumstances for females in Malawi, particularly at paragraph 24.11.
13. At the end of the hearing I reserved my decision which I now give.

Decision

14. I can deal shortly with the Appellant's asylum and humanitarian protection claim. Her only fear is that the grandmother of her partner, and her alone, would subject the Appellant's female children to FGM if they return to Malawi. I find this fear to be

entirely not well-founded. I find no reasonable likelihood that the grandmother of the Appellant's partner is still alive. There is no evidence that anybody in the Appellant's family has been in contact with her since 2010 at the latest. The date of birth of the grandmother of the Appellant's partner is not known, but the Appellant's partner was born in 1968 and taking a conservative estimate of twenty years per generation, this means that his grandmother would have been born in the late 1920s and therefore if still alive is now at least 90 years of age. The life expectancy of a woman in Malawi is given as considerably less than that age and therefore I find that there is no reasonable likelihood that the grandmother of the Appellant's partner is still alive.

15. The Appellant and her partner both suffer from HIV/AIDS. The COI Report shows that HIV/AIDS is not uncommon in Malawi and that medical treatment is available. That being the case, the Appellant's situation is nowhere near satisfying the test confirmed in **EA and Others**.
16. As regards paragraph 276ADE(iv), the Appellant has three children, twins born on 28th September 2010 and a son born on 18th June 2015. They were all born in the United Kingdom and have never left that country. At the date of the hearing before me, the twins have been resident in the UK for more than seven years. However, I find it reasonable for them to leave the UK. They will be returning to Malawi with their parents and younger brother as part of the family. They have some cultural ties with Malawi. They have settled well into their junior school and have progressed. However, they are still only 7 years of age and the focus of their lives will be upon their parents and family. It is in their best interests to remain with that family. I have already found that they will not be at risk on return.
17. As regards Article 8 ECHR rights outside of the Immigration Rules, I follow the approach given in the decision in **Razgar v SSHD [2004] UKHL 27** and I take full account of the fact that the best interests of the Appellant's children are a primary consideration. I find that the Appellant has a family life with her partner and children in the UK, and also a private life there established during her time in the UK. The decision of the Respondent will interfere with that family and private life to such a degree of intensity as to engage the Appellant's Article 8 ECHR rights. However, I find that interference to be proportionate.

Taking account of the factors set out in Section 117B of the Nationality, Immigration and Asylum Act 2002, I find that a heavy weight must attach to the public interest for the reasons listed by Mr Kotas in his submission. I have already found that the Appellant and her children will be safe on return to Malawi, and that it is in the best interests of her children to remain with their family. The Appellant and her partner will have access to appropriate medical treatment in Malawi. There is no evidence before me by way of, for example, any sort of medical or social report of any particular hardship which the Appellant and her family will suffer by leaving the UK. I have considered the matters raised in the Statements of the Appellant and her partner but HIV/AIDS is so prevalent in Malawi that I am not satisfied that any

greater stigma will attach to the Appellant and her family on their return. There is no reference to such in the COI Report produced to me.

18. For these reasons I dismiss this appeal.

Notice of Decision

The appeal is dismissed on asylum, humanitarian protection, and human rights grounds.

Anonymity

The First-tier Tribunal made an order for anonymity which I am happy to continue for the reasons given by the First-tier Tribunal.

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.

Signed

Date 20th April 2018

Deputy Upper Tribunal Judge Renton

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed

Date 20th April 2018

Deputy Upper Tribunal Judge Renton