IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003243

First-tier Tribunal Nos: PA/55898/2022
LP/00376/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

AN
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Dr. S. Conlan, Hope Projects Ltd.
For the Respondent: Mrs. R. Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 3 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. In a decision issued on 4 June 2024 I set aside the decision of the First-tier Tribunal to be remade.

The hearing

2. At the outset of the hearing Mrs. Arif indicated that she had not received the appellant's bundle prepared for the remaking hearing. It had been received by the respondent, but for reasons which were not clear, had not been passed onto her. The new material for the remaking is contained in Part B. Mrs. Arif had seen the material contained in Parts A, C and D. However it was not possible to forward her an electronic copy of Part B. She was provided with copies of witness statements in Part B, the skeleton argument, and the care assessment, which it was agreed were the documents of most relevance, and given time to consider them. I gave Mrs. Arif a further seven days in which to provide any further written submissions once she had had the opportunity to consider the rest of Part B. As at the date of writing this decision, no further submissions have been received.

3. Mrs. Arif indicated that she had no cross-examination for the appellant, or for HW who had also attended the hearing. The hearing proceeded by way of submissions only which were translated for the appellant by the interpreter, Ms. R. Narula. She confirmed before proceeding that she and the appellant both fully understood each other. The language used was French.

4. The agreed issues were whether the refusal was contrary to the Refugee Convention, whether it was a breach of Article 3 or Article 8 on medical grounds, and/or whether it was a breach of Article 8 on private life grounds. In relation to private life, it was submitted that the appellant met the requirements of paragraph 276ADE(1)(vi).

5. The documents before me consist of the appellant's Upper Tribunal bundle (338 pages in four parts), an Adult Social Care Assessment dated 23 August 2024, and the skeleton argument dated 27 August 2024.

Decision and reasons

6. In relation to the previous decision of the First-tier Tribunal dated 30 November 2015, it was submitted in the skeleton that there was a factual error in the decision insofar as the video made by the appellant on women's rights in the DRC was made when the appellant was in the United Kingdom, not when she was in the DRC. Further, in relation to her health, it was submitted that there had been a significant deterioration in her spine, and that was now incurable.

7. I find that it is almost nine years since the previous decision of the Tribunal. The appellant's health has declined significantly since then, which is not disputed by the respondent. In relation to her political activity, in the respondent's review, the respondent did not accept that the new evidence provided to the respondent in August 2020 amounted to a fresh claim. This new evidence included "a copy of your APARECO membership card, a copy of your APARECO membership form, a letter of support from the Territorial Representative of APARECO England-UK and a bundle of sur place activity photographs". The respondent stated that "little weight had was attached to this evidence in furthering the Appellant's claim for the reasons clearly outlined in the previous RFRL", and it was concluded that the further submissions did not amount to a fresh claim.

8. In addition to this evidence which was not before the previous Tribunal in 2015, the appellant provided a country expert report for the hearing before the First-tier Tribunal in 2023. The respondent considered the appellant's asylum claim on the basis of her political opinion in her decision. I find that both due to the

passage of time, and the evidence before me which was not before the Tribunal in 2015, that I can depart from the decision of the First-tier Tribunal in 2015.

Asylum

9. Mrs. Arif submitted that there was no new evidence to show that the appellant continued to play an active role in APARECO, and that she was not at risk on account of her membership of APARECO. With reference to the country guidance caselaw she submitted that the new case of PO (DRC – Post 2018 elections) DRC CG [2023] UKUT 00117 (IAC) endorsed the previous country guidance in the case of BM and Others (returnees – criminal and non-criminal) (CG) [2015] UKUT 293. A low-level supporter of APARECO was not at risk. In relation to the appellant's country expert report, she submitted that the weight to be attached to that was a matter for me.

10. Dr. Conlan submitted that PO did not change BM. The appellant could still be at risk depending on her role, profile and activities, with reference to [148] of PO. The respondent did not dispute the appellant's membership of APARECO, as shown by her acceptance of the documents provided by the appellant set out in the respondent's review. She submitted that the authorities would know of the appellant's past connections with APARECO given the photographic evidence of her sur place activities. I was referred to the expert report at page 272. The appellant had a well-founded fear of persecution on the basis of her imputed political opinion.

11. I have considered the expert report from John Birchall. I have considered his expertise and qualifications (pages 258-259). He is aware of his duties to the court. It is correct that some of his authorities are his own lecture notes, but this is not true of all parts of the report. He has cited the relevant country guidance caselaw, as well as the respondent's own guidance in the form of the CPIN DRC: Opposition to the government, November 2019 (the "2019 CPIN"). This has now been replaced by a version from 2023, but his report is dated April 2022. I find that his reference to the CPIN as well as other external sources indicates that he has taken into account relevant evidence. I find that I can rely on his report.

12. However, I am obliged to follow the country guidance case of PO (DRC – Post 2018 elections) DRC CG [2023] UKUT 00117 (IAC) which postdates the expert report. This case does not change BM insofar as it is still possible for someone with a profile in APARECO to be at risk. The headnote states at (3)(v):

> "Persons who have a significant and visible profile within APARECO (leaders, office bearers and spokespersons) may be at risk upon return to the DRC. Rank-and-file members are unlikely to fall within this category."

13. At (4) and (5) of the headnote it states:

> "Failed asylum seekers are not at risk on return simply because they are failed asylum seekers and there is no basis in the evidence before us to depart from the guidance set out in BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293.
>
> There is no credible evidence that the current authorities in the DRC are interested in monitoring the diaspora community in the UK; nor is there is any credible evidence that the intelligence capability exists, even if there were the appetite."

14. I have considered the appellant's involvement with APARECO. It was accepted in the reasons for refusal letter, albeit by reference to the 2020 reasons for

refusal letter, that the appellant had been a member of APARECO. Her participation in demonstrations in the United Kingdom was also accepted. However, it was not accepted that she had a significantly high profile to alert the authorities.

15. I find that the appellant is no longer a member of APARECO. Further her ill health has prevented her from attending any demonstrations in the United Kingdom in the last few years. In her most recent statement she says [30] to [32]:

> "With regards to my case and the political elements, I have been unable to engage much in politics in recent months. The last time I attended an event was when I was living in Manchester and the event was in London. These were demonstrations where we would stand for long periods. This was impossible for me as the pain was too much.
>
> I was unable to stay until the end at the last event and struggled with the pain of attending. The police were quite forceful at this event and were forcing movement in the crowd.
>
> With the more recent severe pain, it is just too difficult for me to travel and be involved in politics. The pain takes over everything."

16. In her witness statement before the First-tier Tribunal she stated that she had left Manchester in February 2020. I find that she has not been politically active in the United Kingdom for over four years. She does not a have a "significant and visible profile within APARECO". She is no longer a member. I also take into account that PO held that there was no credible evidence that the authorities were interested in monitoring the diaspora community in the United Kingdom. I find, following the most recent Country Guidance of PO, that the appellant has not demonstrated that she would be at risk on account of any involvement with APARECO.

Article 3 medical grounds

17. Mrs. Arif submitted that there was limited evidence of whether the appellant could access the required treatment in the DRC. It was a matter for me to place weight on the evidence as to whether the appellant reached the high threshold of AM (Zimbabwe) [2020] UKSC 17. The respondent accepted that the appellant suffered from various medical conditions but the onus was on the appellant to demonstrate the lack of available treatment.

18. Dr. Conlan submitted that the respondent had not fully considered the appellant's medical conditions and the availability of treatment in the reasons for refusal letter. In particular there was no consideration of the availability of pain relief for the appellant's back pain and osteoporosis (pages 239 to 241). She referred to the EASO Medical Country of Origin Information Report August 2021. This states (page 180):

> "In addition, pain relief in DRC, including in emergency care is very limited. The International Narcotics Control Board (INCB) defines less than 200 daily doses per million, per day as inadequate for a population's pain management. According to the latest data from INCB, in 2013 DRC had 2 daily doses per million, per day."

19. It further states (page 186):

> "For complex care, those with necessary financial resources almost exclusively choose to travel to neighbouring countries for treatment. Key medical destinations include Rwanda, South Africa and India."

20. Although I have preserved no findings from the First-tier Tribunal decision, as set out in my error of law decision the Judge had stated "I accept that no mention is made of treatment for back pain in the refusal letter so treatment for back pain may not be available". He had also accepted the finding in the expert report that there would be "considerable costs to access medicine", and that there might be supply chain issues. While the burden lies on the appellant, I note that the respondent has not challenged this, nor provided any further evidence for this hearing to show that pain relief or treatment for back pain is available or affordable.

21. The appellant's diagnoses and her medical condition is not in dispute. I find that she has chronic back pain and finds it very difficult to walk. She uses morphine patches, without which she is hardly able to walk. Her medical records provided for this appeal confirm that she has a "compression fracture of the spine" (page 31). A letter from the advanced physiotherapist dated 16 February 2024 states that the appellant has received a "graded programme of exercises, and provision of a walking stick, in addition to activity and mobility advice" (page 154). However, this did not help.

> "Unfortunately, despite this input, [the appellant] continues to struggle with pain, and has been referred on to Pain Management. As there is nothing further for Physiotherapy to offer, she has now been discharged, to await input from the Pain Team."

22. The letter from the musculoskeletal physiotherapist from January 2022 indicates that the appellant has "persistent pain degenerative changes" indicating that her condition is not going to improve (page 60). Osteoporosis and low bone density is confirmed on page 64. A letter from the musculoskeletal specialist dated 19 May 2023 states that the appellant has "chronic mechanical lower back pain" (page 73). I find that the medical evidence corroborates the appellant's claimed level of disability and pain.

23. I have considered the Social Care Assessment Report. There was no challenge to this report by Mrs. Arif. I find that it is a report carried out for the purpose of assessing the appellant's social care needs, and I place reliance on it. The outcome of the assessment is set out from pages 6 to 9. It concludes that the appellant "faces difficulties managing her nutrition" as her "back pain prevents her from standing for extended periods to prepare meals". In relation to maintaining her personal hygiene it states that she "does her best to handle it independently despite the pain. She struggles to reach certain body areas due to her limited mobility and often finds it challenging to walk to the bathroom because of her restricted movement and use of a walking stick". In relation to toilet use it states that she can "usually manage going to the toilet independently; however, there are times when she can't and relies on friends for help. Her restricted mobility makes getting to the toilet challenging, and she struggles to sit and stand once there." It states that dressing appropriately is tricky due to her physical limitations.

24. The report states that the appellant "rarely goes out unless absolutely necessary, as it is no longer enjoyable for her due to her physical limitations. She expressed that she finds more comfort lying on her back in bed or sitting on her settee."

25. In the rationale for the decision that the appellant meets the eligibility criteria it states:

> "[The appellant's] fluctuating care and support needs arise from her underlying physical health impairment, specifically recurrent severe back pain and osteoporosis. As a result of these conditions, her ability to achieve her desired outcomes without assistance varies depending on the severity of her pain. When experiencing significant pain and distress, she relies on others to provide the help she needs. On good days, [the appellant] can manage most of her needs, but it takes her an extended period, with breaks, to do so. Consequently, she feels exhausted, which negatively impacts the rest of her day. She frequently takes breaks to regain her strength and energy to overcome exhaustion and manage her routines."

26. While the report states that the appellant has a strong desire to remain independent, it is clear from the assessment that she is barely able to manage her own personal care and everyday needs, and needs assistance from others for the most basic of needs. The report states on page 2:

> "Regarding her strengths and resources, [the appellant] expressed a strong desire to maintain her independence in carrying out her daily tasks. However, the persistent and severe pain resulting from her backache and osteoporosis significantly hinders her ability to take care of herself. There are times when the pain is so intense that she's unable to get out of bed and has to rely on friends for help with basic activities like getting food and getting dressed. [The appellant] emphasised that dealing with pain is no laughing matter, and the prescribed painkillers offer little relief."

27. In her most recent witness statement the appellant said (page 22):

> "The pain is always present. There is no point in time when I am not in pain but normally I can still manage to move. It is when I hit a crisis that I cannot move. It does not happen every day but when I am crisis, the pain is so bad that it completely prevents me from moving.
>
> When the pain is too bad, I cannot get out of bed, I cannot sit down. I cannot walk, I cannot turn left or right. Even with a cane, I cannot move."

28. The appellant described the crisis situation in February 2024 which led to her being prescribed morphine patches (page 23). She states at [24] of her statement:

> "The morphine patches help with the pain but they do not last long. Since February, they have increased the dose 3 times. The last time I went in July, they reduced my dose and gave me some other painkillers. It didn't have much effect then and I had to inform my GP of this.
>
> The most recent incident of having this severe pain was in April 2024. This time it lasted for around one week. It was the same as the other times, I hobbled to the GP and got a higher dose of morphine to help but it did not get rid of the pain completely."

29. I find that the appellant suffers from severe and chronic pain as a result of a deteriorating spine. I find that her pain is partially, but not completely, controlled by the use of morphine patches. I find that other less strong pain relief medication has not managed her pain. I find that her condition is too severe, and her pain levels too high, to be able to benefit from physiotherapy. Pain management is the only treatment left for her. I find that she is significantly

physically restricted due to her pain to the extent that she is unable properly to care for herself. At times of extreme pain, she is unable even to get out of bed.

30. I have considered the expert report of John Birchall in relation to the availability of treatment for the appellant in the DRC (pages 273 to 279). He states (page 275):

> "As will be clear from the above, [the appellant] will face many challenges in trying to acquire the expert assistance she needs and the drugs she will be prescribed. Supplies are irregular, many have to resort to buying drugs on the shadow market and these may contain copies and or out of date medicines."

31. He states that "most drugs are not consistently available", that private facilities "consistently have larger and more consistent supplies" of the drugs needed but she will not be able to afford it, that "approximately 70% of all medical costs have to be borne by the patient and/or relatives", and that she will "struggle to earn sufficient sums of money to buy all the drugs she requires".

32. Mr. Birchall considers the likelihood of the appellant being able to find employment to afford the drugs she needs, and concludes that she (a) "will struggle to obtain any form of employment in the informal economy and (b) she will not be 'invited' to join the formal, regulated and more secure sector of the economy" (page 278).

33. I have also taken into account the evidence from EASO set out above at [18] and [19] that pain relief is "very limited".

34. Taking all of the above into account, I find that the evidence shows that the appellant will not be able to access the required pain relief medication in the DRC as it is very limited and not generally available. I find, given the severity of her medical condition and her pain, that the appellant will not be able to obtain employment in the DRC to pay for pain relief medication from any private facility. I find that she does not have relatives who would be able or willing to afford to pay for her medication. The appellant's evidence in her most recent statement, which was unchallenged, was that she did not really have a relationship with her family in the DRC, and that she has little contact with them [33]. She said that they would not have the money to pay for her treatment in any event, and had nothing to spare once they had supported themselves [39]. I accept this evidence.

35. I find that the morphine patches which the appellant is currently prescribed do not deal adequately with her pain or enable her to care for herself all of the time. Without pain relief, I find that she will be unable to care for herself at all due to the extreme pain that she will be in. Her medical condition is chronic and degenerative, and will only deteriorate.

36. I am mindful of the high threshold set out in AM (Zimbabwe). However, I find that the evidence shows that there are substantial grounds for believing that the appellant "would face a real risk of being exposed to a serious, rapid and irreversible decline in their state of health resulting in intense suffering". I find that this "serious, rapid and irreversible decline in health" is as a result of "the absence of appropriate treatment in the receiving country". If I am wrong in this, and there is appropriate pain relief medication, albeit very limited, I find that the appellant will not be able to access it due to the cost of so doing, and her inability to meet these costs. I therefore find that the appellant has shown that the decision is a breach of Article 3 on medical grounds.

Article 8 – private life

37. I find, for all of the reasons set out above, that the appellant also meets the requirements of paragraph 276ADE(1)(vi) of the immigration rules. I find that the evidence shows that there are very significant obstacles to the appellant's reintegration into the DRC given the severity of her medical condition and her inability to care for herself. She would be unable to participate in society in any meaningful way given her physical restrictions, which would worsen given the lack of pain relief medication.

38. I find that the appellant has a private life in the United Kingdom such as to engage the operation of Article 8. She has been here since March 2014, a period of over ten years. I find that the respondent's decision would interfere with this private life, and that the interference would not be proportionate.

39. In assessing the public interest I have taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I have found above that the appellant meets the requirements of paragraph 276ADE(1)(vi) of the immigration rules so there will be no compromise to effective immigration control by allowing her appeal.

40. Following TZ (Pakistan) [2018] EWCA Civ 1109, I find that the appellant's appeal falls to be allowed. This case states at [34]:-

> "That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."

41. In line with this, the headnote to OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC) states:

> "(1) In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.

42. The appellant used an interpreter at the hearing (section 117B(2)). She is not financially independent (section 117B(3)). Sections 117B(4) and 117B(5) provide that little weight is to be given to a private life formed when a person has no leave, or their status is precarious. However, I have found that the appellant meets the requirements of paragraph 276ADE(1)(vi) which reflects the respondent's policy that a private life is to be given more weight in circumstances where the individual would not be able to reintegrate into their country of origin. For this reason, I attach weight to the appellant's private life. Section 117B(6) is not relevant.

43. Further, I find that the severity of the appellant's medical condition and the lack of treatment in the DRC is an exceptional circumstance which renders the respondent's decision disproportionate.

44. Taking all of the above into account, I find that the appellant has shown that the decision is a breach of her right to a private life under Article 8.

Notice of Decision

45. The appeal is allowed on human rights grounds - Article 3 medical and Article 8 private life.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
20 September 2024