Upper Tribunal
(Immigration and Asylum Chamber) Appeal
Nos.: UI-2023-004757

First Tier No's: HU/60215/2022

LH/04108/2023

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 6th December 2023	**On: 16th January 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE R THOMAS KC

Between

BIBI SAMIMA EMAMBOCUS
[NO ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Swain of counsel, instructed by Synthesis Chambers Solicitors.
For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. This is an appeal by the Bibi Samima Emambocus ('the Appellant') against a decision of First-tier Tribunal Judge Ripley, dated 10th October

2023. Permission to appeal was granted by the First-tier Tribunal on 1st November 2023.

Anonymity

2. No anonymity direction was made by the First-tier Tribunal and no application for such a direction was made before me. I make no direction.

Background

3. The Appellant is a Mauritian national. She had travelled to the UK on a number of occasions in 2012, again in 2014 and finally in 2015 when she was admitted as a visitor for six months but overstayed and did not return to Mauritius.

4. In September 2021, she made an application for leave to remain "*on the basis of her well-established private and family life in the UK and on compassionate/exceptional circumstances. It is submitted that [her] case clearly engages paragraph 276ADE(1) of the Immigration Rules and Articles 3 & 8 of the ECHR*". It was said she had been married in 2002 and separated soon after and divorced in 2003. She then suffered domestic violence at the hands of her former husband and her own family for a number of years. As a result, she now suffers from "*severe PTSD, depression, suicidal ideations and a previous attempted suicide*". She had been advised to take anti-depressant medication. She was receiving support from friends and family (she lived with a 'family friend' in the UK on whom she was dependent) and "*has considerably lost her ties to Mauritius since she has been living in the UK continuously for a period of 6 years*". She was in a relationship with her partner since 2019. She spoke English and had engaged in voluntary work.

5. Her application was refused on 15th December 2022 on the grounds that it was not accepted she would face very significant obstacles to her re-integration in Mauritius, and that treatment was available and there was nothing about the Appellant's health that rendered removal disproportionate or risked of a breach of rights protected by Article 3 ECHR.

6. The Appellant lodged an appeal in the First-tier Tribunal and, as part of evidence submitted in support of that appeal, provided two expert reports: a Psychological Report dated 2nd April 2023 from Miriam Charalambous and an "Expert Report" dated 1st February 2023 which purported to address the Appellant's personal circumstances in the context of Mauritius, covering, inter alia, insufficiency of access to protection for victims of domestic violence, state healthcare and welfare, and relocation and vulnerability as a single woman.

7. In a further Review by the Respondent, it was not accepted there were very significant obstacles to the Appellant's re-integration into Mauritius: she had lived there until she was 38 and "*she will have retained knowledge of the life, language and culture, and would not face significant obstacles to re-integrating into life in Mauritius once more*". In the review, it was said that "*the appellant appears to be attempting to run a backdoor asylum claim for reasons of why she cannot return. If the appellant has a genuine fear as she claims then the correct approach is for the appellant to submit a claim and allow the respondent the opportunity to respond by making a decision*". Any private life "*established was done so whilst illegally in the UK*" and removal was proportionate. The circumstances were not exceptional. As to treatment, it was noted the psychological and expert reports relied heavily on an unchallenged narrative provided by the Appellant. There was no evidence treatment was not obtainable on return to a country with a "*functioning healthcare system*" and the high threshold for Article 3 ECHR had not been met. The review asserted "I*n the respondent's opinion what was an application for leave in the UK on the basis of private/family life has now evolved into a cynical attempt at a backdoor asylum claim. If the appellant has genuine fears of risk on return it is only proper that she submits an asylum application here in the UK which can be fully considered, and a decision issued in respect of that claim. For that reason, little weight should be attached to [the expert] report as the information accepted by the author has not been assessed in line with asylum policy*" [my emphasis].

The hearing in the First-tier Tribunal

8. FtTJ Ripley heard evidence from the Appellant and the witness, Miriam Shaw. The FtTJ recorded that the appellant's oral evidence "*included giving further information regarding her circumstances in Mauritius, her reasons for not claiming asylum, her contact with her family and prior visits to the UK with them and alone, her health conditions and treatment, her support in the UK and her activities in the UK*".

9. The FtTJ accepted the Appellant had been subjected to domestic violence from her husband before and during the marriage and that she was ill-treated and subjected to controlling behaviour by her family before, during and after her marriage. It was not accepted that this continued up until 2015 or that she had been detained by her family in her home until that date. The FtTJ noted that she had made this assertion in previous accounts to mental health services and the psychologist, but did not mention she had travelled to the UK with her family in 2012 and alone in 2014.

10. The FtTJ noted that in the Appellant's initial claim, it was argued the Appellant had lost ties in Mauritius and would not be able to avail herself of support from her family because they were not on speaking terms and her siblings had their own families to support. There was no reference to a fear of threats or retribution from them on return or being forcibly taken to

live with her family. Of significance to the grounds of appeal the FtTJ went on to note "*The appellant raises fears of her family seeking her out on return in her appeal witness statement for the first time*" and to find:

> "I do not accept that the appellant expressed her fears of ill treatment from her family to legal advisors and was advised that she need to provide documentary evidence for a protection claim, but she was able to make a successful human rights claim without such evidence … As held in JA Nigeria [2021] UKUT 0097 (IAC), the appellant's claim that she is at risk from adverse treatment from her family on return may be undermined by her failure to make a protection claim. I do not accept Mr Swain's argument that paragraph 626B of the immigration rules absolves the appellant from needing to make a protection claim when claiming that she fears adverse treatment on return. That paragraph of the rules merely requires the respondent to consider whether an appellant's protection claim may engage Article 8. Considering the evidence overall, I am not satisfied that the appellant does hold a genuine subjective fear of being sought out by her family if she returns elsewhere in Mauritius, and threatened or abused in those circumstances or forced by them to move back home with them.

11. The FtTJ did accept that "*the appellant genuinely fears return to Mauritius as a long woman without family support*".

12. As to the Article 3 ECHR claim on health grounds, the FtTJ considered J v SSHD [2005] EWCA Civ 629 and concluded: "*I am not satisfied that the appellant has established to the lower standard that, without her support network but with the provision of the appropriate reception package and psychiatric support, there is a real risk that the appellant's mental health will deteriorate to such an extent that she will take her own life or suffer a serious, rapid, and irreversible decline in her state of health following her return*".

13. It was submitted on the Appellant's behalf that her mental health was an important contributory factor as to why there were significant obstacles to her reintegration (paragraph 276ADE.1(iv)). One of the issues to be considered was "*the degree to which she is likely to face social ostracization because of her poor mental health*". The FtTJ concluded that she could access mental health treatment in Mauritius and:

> It is accepted that the RIR reports that those with mental health conditions are often labelled 'mad'. However, as set out above, the appellant has been able to manage her own care needs and make a contribution to the community. There is a lack of evidence to indicate that she has ever presented publicly with psychotic symptoms. I am not satisfied on the balance of probabilities that the appellant has established that her poor mental health would comprise a significant obstacle to her integration.

14. The FtTJ then considered the proportionality of the interference in the appellant's private life that would result from removal. That the appellant will find a return to Mauritius difficult was acknowledged but removal was not found to be disproportionate.

15. The appeal on Article 3 and 8 ECHR grounds was dismissed.

The grounds of appeal to the Upper Tribunal

16. No appeal was pursued in respect of the dismissal of the Article 3 ECHR claim. Four grounds of appeal were pursued in respect of the dismissal of the Article 8 ECHR claim:

17. *Ground 1: "Inadequate analysis of domestic abuse":* This amounted to an assertion that the FtTJ had reached "*contradictory findings*" about the domestic abuse, in particular in rejecting the evidence that the behaviour from the appellant's family continued until 2015.

18. *Ground 2: "Unreasonable/erroneous assessment of the failure to make a protection claim".* This amounted to a complaint the FtTJ had misapplied JA (Nigeria) [2021] UKUT 0097 and impermissibly held the Appellant's failure to make a protection claim again the Appellant, and this resulted in the appellant's evidence on risk on return being rejected. It was said that a JA (Nigeria) 'adverse inference' applied only where the Home Office has given an applicant the express direction to make a protection claim and no such direction had been given. It was submitted the FtTJ erred in stating (in paragraph 21): "*The appellant raises fears of her family seeking her out on return in her appeal witness statement for the first time*".

19. *Ground 3: Failure to adequately assess medical evidence:* The written grounds focused on a complaint that the judge erred in focusing on a lack of evidence of the Appellant displaying psychotic behaviour in public and that "*if it is accepted that a patient's degree of depression and anxiety has reached such a level as to hallucinate that is a significant reason not to remove under Article 8 or 276ADE vi regardless of whether this condition has manifested itself in public*". In oral submissions, Mr Swain however focused on the inference that it is only a matter of time until they are displayed publicly and that will have a significant negative impact on her re-integration.

20. *Ground 4: Inadequate/irrational assessment under Article 8*: It was submitted the FtTJ erred in finding the fact that the Appellant accessed NHS treatment in the UK was a matter that should be held against her when considering proportionality / public interest because she had done so only in a 'health emergency'.

21. The Respondent provided a Rule 24 Response arguing, in essence, the FtTJ's analysis was correct. The Appellant replied, re-emphasising the grounds of appeal.

Discussion and decision on error of law

Ground 1: Inadequate analysis of domestic abuse

22. The FtTJ found the Appellant's evidence was "*largely consistent*" (paragraph 16). Where the evidence was found to be inconsistent that is set out in the decision (paragraphs 18-19). The FtTJ accepted some aspects of the Appellant's evidence, but rejected other aspects, notably about the domestic violence and controlling behaviour (including being held at home) continuing to 2015. This is a permissible approach.

23. I am not persuaded the findings on domestic abuse are 'contradictory' as between paragraphs 16 and 20 – both paragraphs make plain what is and what is not accepted. Nor am I persuaded that there is any contradiction in paragraph 38: it is not inconsistent to find that the appellant may not want to live at home given a history of domestic violence / controlling behaviour whilst having also rejected the appellant's evidence this had continued up until 2015.

24. I do not find the FtTJ's approach amounted to an error of law.

Ground 2: "Unreasonable/erroneous assessment of the failure to make a protection claim"

25. The arguments on this ground were developed by both parties at the hearing. At the heart of the Appellant's complaint is an assertion the FtTJ erred in rejecting the Appellant's case that the abuse was continuing in 2015 and, in particular, that it would continue if returned. Mr Swain submitted this was an error on a key aspect of the consideration as to whether there would be very significant obstacles to the appellant's re-integration.

26. Mr Swain submitted that the FtTJ erred in the approach to JA Nigeria, and that this error infected the credibility findings on the continuing risk of harm, which in turn infected the overall assessment on Article 8. Mr Swain's arguments focused on an analysis of paragraphs 21-23. In paragraph 21 the FtTJ noted that in the original application there was no reference to fear of threats or retribution or being forcibly taken to live with her family. The FtTJ went on to find that "*The appellant raises fears of her family seeking her out on return in her appeal witness statement for the first time*". Mr Swain's argument was that this was an important error as, he sought to a submit, it had been raised before. In support of this assertion he pointed to the letters provided with the original application:

    (i) By Miriam Sharf, in which she makes reference to the appellant wanting to "escape".
    (ii) By Comfort Kyeremaa, in which she says the appellant referred to her life being "in danger back home".
    (iii) By Ally Etwaree, in which she says "*even after divorce, [the appellant] could not lead a good life with her relatives, she was*

> *tortured mentally that she has to run away from Mauritius to come to UK*".

27. The claim about risk on return is not made in the letter itself as might be expected of such an important aspect of the application. Further, the reference by Ms Sharf does not contain any reference to a fear that the Appellant's family would seek her out on her return. The reference to 'escape' is temporally ambiguous, as is the description of the appellant's account given by Ms Kyeremaa. Nor is such an assertion to be found in the account given by the appellant reported by Ms Etwaree.

28. Mr Swain does not seek to make a discrete submission on the FtTJ's rejection of the appellant's explanation that she did not make a protection claim on the advice of her lawyers (and there is no waiver of legal professional privilege). He does however submit that this finding was part of the FtTJ's overall flawed approach. The FtTJ held that the approach in JA Nigeria meant the appellant's account of being at risk from her family on return could "*be undermined by her failure to make a protection claim*". Whilst it is not made clear in the decision, Mr Swain submits the clear implication is that the FtTJ went on to find her account was so undermined and this was in error because a correct interpretation of JA Nigeria meant the appellant's account could only be undermined if there had been a clear direction by the Respondent to make a protection claim and then had been no such clear direction. Mr Lindsay sought to argue that in circumstances where the FtTJ had engaged with the failure to make a claim and rejected the Appellant's explanation, she was in any event entitled to draw an adverse inference from the failure.

29. At paragraphs 28-29 of JA Nigeria, the Upper Tribunal held:

> 28. We also agree with Mr Ndubuisi that what we have just said is not affected by the procedures the respondent has for assessing protection claims, including the need for a person making such a claim to be interviewed about it. Where, in the context of a human rights claim involving a "serious harm" element, the respondent considers it necessary to do so, she can make arrangements for the applicant to be interviewed about it. 29. This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is (as here) drawn to their attention by the respondent will never be relevant to the respondent's and, on appeal, the First-tier Tribunal's assessment of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by the refusal to subject oneself to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. The appellant may have to accept that the respondent and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the 2002 Act. On appeal, despite the potential overlap we have noted at paragraph 18 above, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1), but only on the ground specified in section 84(2).

30. Mr Swain submitted that the risk on return was pursued solely in the context of it being an obstacle to the Appellant's re-integration and he was right to argue that the Appellant was entitled to pursue only a human rights claim. However, I do not accept that the Respondent had not "brought to the attention" (the language used in (JA)Nigeria) of the Appellant the possibility of making a protection claim. In the Review – the first opportunity, given the way the application developed evidentially following the refusal letter – the Respondent made very robust comments (summarised at paragraph 7 above) about the failure to make a protection claim and making it clear that this is what was expected of the Appellant. In any event, given the FtTJ rejected the Appellant's explanation for not making a protection claim, the FtTJ would have been entitled to "*approach this element of the claim with some scepticism*".

31. The FtTJ did not err in her assessment of how the claim of risk on return had developed and did not err in finding that a failure to make a protection claim may have some negative impact on the assessment of the appellant's evidence. It would have been preferable if it had been made clear it had indeed been taken into account to the appellant's detriment, but it is plain (as Mr Swain himself submits) this was the approach taken. It follows the FtTJ was entitled to reach the factual conclusions in paragraph 23, rejecting the Appellant's fear of risk of reprisals on return but concluding that "*it is accepted that the appellant genuinely fears return to Mauritius as a lone woman without family support*".

Ground 3: Failure to adequately assess medical evidence

32. Mr Lindsay was correct to submit that I should be careful to note how this ground was pleaded. In the written grounds it is said that the FtTJ's "*analysis of the appellant's poor mental health and how this related to the appellant's ability to integrate in Mauritius (per 276ADE vi) was contorted to the point of being unreasoned*" [my emphasis]. The Grounds seek to argue that "*on any reasonable analysis*" despite the lack of evidence of psychotic behaviour in public (relevant to social stigma) if a person's mental health has "*reached such a level as to hallucinate that is a significant reason not to remove under Article 8 or 276ADE vi regardless of how this condition has manifested itself in public*". Taken together, the pleading appears to be an insufficiently particularised "unreasonableness / irrationality" argument which is unmeritorious.

33. Mr Swain sought – wisely – to reformulate this argument around the relevance of social stigma to the Appellant's reintegration. He focused on what he submitted was the failure of the FtTJ to focus on "*the appellant's increasingly poor mental health*". He submitted that on a proper analysis, there was a risk that a public display of psychosis was "*only a matter of time*" and this would have a significant negative impact on her re-integration. Even as reformulated, this ground of appeal does not identify an error of law and is in reality a complaint about the findings reached.

The FtTJ (see paragraphs 43-46) considered all the medical evidence and reached findings that were open to the FtTJ.

Ground 4: Inadequate/irrational assessment under Article 8

34. Mr Swain narrowed the approach in the written ground and focused on the single submission that the judge erred in paragraph 48 (not 45 as pleaded) when observing, in the context of considering a number of factors relevant to the public interest in the maintenance of effective immigration control (section 117B), that "*The appellant has benefited in the UK from treatment under the NHS. That is a factor that goes against her*". He submits that if the treatment was for a medical emergency (risk of suicide), then the approach should be different. Mr Lindsay's submission in response was that no such distinction exists and, in any event, there is no clear evidence the treatment was only in the context of a medical emergency. He further submitted this was only one of a number of considerations and was not materially determinative to the proportionality assessment.

35. I was not referred to any authority in support of Mr Swain's submission about a distinction for emergency treatment. I am not persuaded that there is such a clear distinction to be drawn and am not persuaded it was an error of law for the FtTJ to take this into account (along with a number of other facts in the appellant's favour) when conducting the required balancing exercise.

DECISION

The decision of First-tier Tribunal Judge Ripley dated 10th October 2023 did not involve the making of a material error of law.

The appeal is dismissed.

No anonymity direction is made.

Signed: Richard Thomas Date: 9th January 2024

Deputy Upper Tribunal Judge R Thomas KC