



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/12936/2017

THE IMMIGRATION ACTS

Heard at Bradford  
On 16 August 2019

Decision & Reasons promulgated  
On 17 September 2019

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

N  
(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Greer (Counsel)

For the Respondent: Mr A McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. On 11 March 2008 the claimant entered the United Kingdom (UK) as a domestic worker. She was granted leave to do so but that leave expired on 10 March 2009. Successive applications for further leave were refused. On 06 June 2017 she claimed asylum. That claim was refused on 22 November 2017. She appealed but on 22 October 2018 the First-tier Tribunal (the tribunal) dismissed her appeal. In so doing, it rejected her contention to be a refugee. It rejected arguments under Article 3 of the European Convention on Human Rights (ECHR) and under Article 8. It also decided she could

not successfully rely upon paragraph 276 (ADE) (vi) of the Immigration Rules. Permission to appeal the tribunal's decision was granted and on 01 May 2019 I set aside the tribunal's decision on the basis it had applied the wrong legal test when deciding matters under paragraph 276 (ADE) (vi). But I preserved its findings and conclusions concerning asylum and Article 3 of the ECHR. I directed that there be a further hearing before the Upper Tribunal so that I could remake the decision. I indicated that the issues would be whether she was able to succeed under paragraph 276 (ADE) (vi) and, if not, whether she might succeed under Article 8 of the ECHR outside the Immigration Rules. That hearing took place on 16 August 2019 and representation was as stated above. I am grateful to each representative for the helpful submissions which I received.

2. The claimant had been granted anonymity by the tribunal. I had continued that grant when setting aside its decision. I have decided, once again, to continue the grant of anonymity. That is because the claimant has a particular medical condition (see below) which, as I understand it, she would not wish to become public knowledge.
3. In fact, Mr Greer did not seek to argue the case under Article 8 of the ECHR outside the rules. So, the issue for me is a narrow one. Paragraph 276 (ADE) relevantly provides as follows:

**Requirements to be met by an applicant for leave to remain on the grounds of private life**

**276 ADE (1).** The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant: ...

(vi) subject to sub-paragraph 2, is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

4. Paragraph 276 ADE (2) relates to persons whom it is proposed to return to a third country and has no application in this case.
5. It is for a claimant to demonstrate that he/she meets the requirements of the above Immigration Rule. That is to be done to a balance of probabilities.
6. By way of background, the claimant is a national of Malawi and she was born on 06 October 1962. When she claimed asylum she said that all of her close family members had passed away, that she had been sexually abused by an uncle, that that uncle had threatened her, that the family members of the person who had brought her to the UK as a domestic worker had also threatened her, and that she had then been abandoned in the UK. She was disbelieved about all of that by the Secretary of State and then by the tribunal.
7. As to difficulties she may have in seeking to integrate into Malawi if returned there, the claimant points out that she is HIV positive and is taking anti-retroviral therapy provided to her in the UK; that she has no family remaining in Malawi or at least no

close family; that she is otherwise in ill health; that she would be stigmatised as a person who is HIV positive in Malawi; and that she has been in the UK for an extensive period.

8. When setting aside the tribunal's decision I indicated that I was preserving what I characterised as being 'pure factual findings' (as opposed to conclusions drawn from findings) as contained within paragraphs 39-52 of its written reasons. I explained that I was doing so on the basis that those findings were correct at the time they were made on the basis of the material then available. But I made it plain I would not shut out the possibility of reaching different findings on the basis of further evidence I might subsequently receive. So, in effect, those findings, I had decided, would represent my starting point but not necessarily my end point. But as to those findings, it had been decided that the claimant suffers from depression, has bladder dysfunction, has osteoarthritis of the right knee, has a recent history of spinal surgery, and is HIV positive. It was accepted that discrimination against people who are HIV positive is common in Malawi but that, whilst there are difficulties with respect to medical treatment for such persons, anti-retroviral therapy is available and, if necessary, the appropriate drugs could be supplied free of charge. The tribunal also concluded that the claimant would, once she had recovered from recent spinal surgery, be able to gain some employment in Malawi and would, in any event, 'have some support from family and friends were she to have to return to Malawi'.
9. The claimant's solicitors provided a supplementary bundle of documents for the purposes of what I shall call the re-making hearing. Included in that bundle is a letter of 18 July 2019 from the claimant's consultant spinal and orthopaedic surgeon to her solicitors. It is noted in that letter that the claimant had originally presented in October 2016 with acute onset symptoms related to her lumbar spine. It is explained that she had surgery in October 2016 but continued to experience difficulties and consequent physical restrictions such that she had to have further surgery in August 2018. Nevertheless, it was said that she continued to experience significant back pain which restricted her mobility though she was able to walk with a stick. As to her current prognosis, it was said that she would continue to experience back pain but that such would 'hopefully gradually improve as time passes'. In a letter of 24 July 2019 written by a social worker, it was explained that the claimant receives a morning visit from a person employed by a homecare agency to assist her 'with having a wash and changing her clothing, preparing breakfast and drink for her, preparing food to be left for her to access later in the day'. It is said that a recent assessment had confirmed the ongoing need for such assistance. The supplementary bundle also contained an expert report by one Dr E Venables regarding or primarily regarding country conditions in Malawi, and some background country material. It also contained a witness statement made by the claimant in which she said she had not, in fact, been a business woman in the past but had said she had been because of a need to put something on her passport application. She said she is not currently in contact with anyone in Malawi and that her family members in Malawi are all deceased (I think that is intended to be a reference to close family). She said her sister had two children who are now both adults and who are in Malawi though she has not had contact with them. She said there is a woman she

attends church with in the UK called Emily who has family in Malawi and that she might, if desperate, contact them.

10. The claimant gave oral evidence but what was said did not seem to take matters very much further in terms of the factual background.
11. So, I must now decide whether the claimant's appeal should succeed under paragraph 276 (ADE) (vi) or not. I agree with Mr Greer that what is required of me, with respect to an assessment as to whether the requirements are satisfied, is a broad evaluation of the circumstances. But my focus, of course, given the wording of the rule is upon the extent of any obstacles to the claimant's integration, and whether they would be very significant obstacles, if she were returned to Malawi.
12. The claimant has been in the UK for a period of approximately 10 years. There is nothing to suggest that she has been back to Malawi for any visits during that period and no preserved finding that she has. I find that she has not undertaken any return visits to Malawi. The fact that she has not lived as part of Malawian society for something a little in excess of 10 years, on any view a lengthy period, does suggest there would be some difficulties with respect to readjustment. But she has experienced life there as an adult and has spent the majority of her life there so this matter, of itself, is not overly significant. But the passage of time and the length of time she has not been part of Malawian society is a factor which I will consider amongst other factors and is not, in my view, to be characterised as lacking in significance.
13. The claimant is HIV positive. The tribunal found, in findings which I have preserved, that discrimination with respect to such persons is common (see paragraph 41 of its written reasons). In any event, a Refugee Documentation Centre (Legal Aid Board Ireland) report on Malawi of 15 February 2016, contained within the supplementary bundle, confirms that such societal discrimination remains a problem. References are made therein, to a report from a Malawi based radio station called Capitol FM which had indicated that young people who are HIV positive have faced discrimination from their peers which has been 'negatively impacting on their day to day life'. There is no reason to suppose that the position will be any different with respect to older persons. Reference is also made therein to a report published by an organisation called the Malawi Network of People Living with HIV and AIDS which indicates that relatively large percentages of HIV positive persons questioned had reported being 'gossiped about', 'insulted/harassed/threatened' and that lower proportions of persons had been physically harassed or assaulted. A number had reported being excluded from social gatherings and family or religious activities. Mr McVeety did not seek to argue, before me, that the claimant would not face some societal discrimination. I find that she would and that it is likely that, to some extent, that will impair her ability to seek to integrate or become an insider within Malawian society. I also accept Mr Greer's submission that since the claimant has been residing in the UK for some time where such stigma and discrimination is, relatively speaking, less of a problem, she would have difficulty in adjusting to having to face such treatment upon return.

14. The tribunal found, in effect, that she would recover from her back surgery relatively quickly (paragraph 47 of the written reasons) and that once she had fully recovered it was possible she would be able to obtain some form of employment in Malawi (paragraph 49 of the written reasons). I preserved the findings on the basis that they were correct at the time in light of the evidence then available. The current evidence, though, suggests the situation is somewhat less promising. As I have already mentioned, the letter from the consultant spinal and orthopaedic surgeon indicated that she will probably continue to experience back pain though after two years “she should be able to mobilise with less pain, perhaps just with one stick in her hand and undertake normal activities without requiring medication”. But that does not paint a rosy prospect of the claimant being able to obtain employment if she were to be returned to Malawi now or, perhaps, for some considerable time afterwards. There is no evidence of her having any particular skills or education which will aid her in the job market in Malawi and against that background and in light of the current evidence, I would find that her prospects of obtaining work upon return would now be very limited indeed. Of course, the ability to take and hold down a job is not, of itself, a necessary requirement for re-integration into a society but it is, nevertheless, a factor to consider.
15. The evidence I have set out above from the social worker makes it clear that the claimant requires physical assistance regarding her self-care. Certain of that appears to be quite intimate care involving washing and changing her clothing. Broadly speaking it seems to me that a person who requires such care from another is less likely to be readily able to integrate into society, due to consequent dependency on others, than would a person without such a need.
16. The tribunal found, Mr McVeety appropriately stresses, that the claimant would not be entirely friendless or without contacts and that she ‘would have family and friends to provide her with support’. I have preserved those findings but I accept as Mr Greer in effect submitted, that they are vague though I recognise that vague findings are sometimes inevitable. But those findings do not, as I see it, preclude me from concluding that the claimant does not have what might be characterised as close family in Malawi. In fact, what she now says in effect acknowledges that she does have some family in Malawi being her sister’s adult children. I would accept that there is some prospect that, if called upon, they would afford her some assistance. But I suppose it is all a question of degree. As matters stand the claimant requires considerable assistance including assistance of a personal nature to enable her to do the basics such as washing and dressing. That is the evidence. I accept her evidence that she does not have close family in Malawi and so I would conclude it is most unlikely she would find someone in that country who is prepared to do all of that for her.
17. There is also the matter of the claimant suffering from depression. The tribunal did accept that she suffers from that condition which, again, is a finding I have preserved. I do note that there is no up to date medical evidence before me regarding the nature and extent of that. I do not, therefore, attach a significant amount of weight to this but the point that she has some degree of mental health difficulty as well as her other significant physical difficulties is not something I would completely disregard.

18. Mr McVeety sought to persuade me that the claimant's argument under paragraph 276 ADE was, essentially, no more than a health claim which did not reach the thresholds for her to succeed under Article 3 or Article 8 of the European Convention on Human Rights (ECHR). As he put it, with respect to health based arguments, there is not a three-stage process under which one might succeed under Article 3 if the situation is extremely severe, or under Article 8 if a little less severe, and then under 276 ADE if not so severe. I agree that there is not that sort of hierarchical potential basis for success where health arguments are made. But that does not mean health issues are irrelevant to the ability or otherwise to reintegrate such that they are not to be taken into account. There are, here, health concerns of some significance which I do take into account whilst acknowledging the preserved findings that anti-retroviral drugs are available, free of charge if needed, in Malawi.
19. Clearly Paragraph 276ADE(vi) sets a high threshold. It does seem to me that claimants will not often succeed on this ground. But, ultimately, I accept Mr Greer's submission that in the particular circumstances of this case there is a constellation of factors which come together to demonstrate that the requisite test is met. That constellation of factors, as set out above, includes but is not limited to health issues. Accordingly, in remaking the decision, I allow the claimant's appeal against the Secretary of State's decision of 22 November 2017. I do so on Article 8 ECHR human rights grounds within the Immigration Rules.

### **Decision**

The tribunal's decision has already been set aside.

In re-making the decision I allow, on Human Rights grounds, the claimant's appeal against the Secretary of State's decision of 22 November 2017.

### **Anonymity**

The First-tier Tribunal granted the claimant anonymity. I continue that grant pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall identify the claimant or any member of her family. This applies to all parties to the proceedings. Any breach may lead to contempt of court proceedings.

**Signed**

**M R Hemingway  
Judge of the Upper Tribunal**

**Dated**

**10 September 2019**

**To the respondent**

**Fee award**

Since no fee has been paid and no fee is payable, there can be no fee award.

**Signed**

**M R Hemingway  
Judge of the Upper Tribunal**

**Dated**

**10 September 2019**