Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08035/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On Monday 10 February 2020	**On Monday 2 March 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

W P
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Howorth, Legal Representative, Westkin Associates
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal Judge. The appeal involves a protection claim. Accordingly, it is appropriate to make an anonymity direction. 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.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-Tier Tribunal Judge D Ross promulgated on 22 October 2019 ("the Decision") dismissing her appeal against the Respondent's decision dated 2 August 2019 refusing her protection and human rights claims.

2. The Appellant is a national of Namibia. She was born in April 2001 and is therefore now aged nearly nineteen years. She came to the UK in December 2016 and was granted leave to enter as a visitor until 29 June 2017. She overstayed and claimed asylum in April 2018. Her asylum claim was predicated on a sexual assault which she is accepted to have suffered as a child at the hands of her cousin. She says that the abuse occurred while she lived with her aunt, the mother of the cousin in question. The Appellant's father died when she was aged two. Her mother died in 2010 after contracting HIV. It was just before her mother's death, when the Appellant was aged eight or nine, that she was sent to live with the aunt in question.

3. Since coming to the UK, the Appellant has resided with one of her other aunts, [E]. The Appellant's human rights claim is based on the situation which would face her on return to Namibia and the family life which she has formed with [E] and [E]'s family.

4. As a result of her past experiences, the Judge accepted that the Appellant should be treated as a vulnerable witness and that questions about her time in Namibia should be avoided ([8] of the Decision).

5. The Judge concluded that there was no Refugee Convention reason for the protection claim ([19]). He did not accept that the Appellant would face Article 3 mistreatment on return to Namibia ([20]). He accepted that the Appellant could not be expected to return to live with the aunt whose son had abused her but found that there were other family members with whom she could live in Namibia ([23]).

6. Although the Appellant by her ground four challenges the Judge's failure formally to dismiss the protection claim, Ms Howorth sensibly did not pursue that ground. It is evident when the Decision is read as a whole that the Judge intended to and did reject the protection claim for the reasons given. The fact that it is not included in the Notice of Decision appears to be a typographical error as the human rights appeal is dismissed twice. Since ground four is the only ground of challenge in relation to the protection claim, I need say no more about it.

7. Turning then to the human rights claim and the Article 8 issue, the Judge, for the same reasons as in relation to the Article 3 claim rejected

the suggestion that there would be very significant obstacles to the Appellant's return to Namibia. In terms of the Article 8 claim based on the Appellant's life in the UK, the Judge did not accept that the Appellant enjoyed family life with [E] and [E]'s family. He did however accept that the Appellant enjoyed a "strong private life" in terms of her relationship with [E] ([25]). The Judge carried out an assessment of the Article 8 claim at [29] and [30] of the Decision but concluded that the decision to refuse the claim was proportionate.

8. The Appellant challenges the Decision in relation to the Article 8 claim on three grounds as follows:

   Ground 1: The Judge failed to consider all the evidence when reaching the conclusion that there were not very significant obstacles to integration in Namibia.
   Ground 2: The Judge misdirected himself in law when considering whether family life exists between the Appellant and [E]/[E]'s family in the UK.
   Ground 3: The Judge failed to take account of material considerations when carrying out the proportionality assessment and had taken account of irrelevant factors.

9. Permission to appeal was granted by Resident First-tier Tribunal Judge R C Campbell on 24 December 2019 in the following terms so far as relevant:

> "... 2. In the grounds it is contended that the judge failed to assess the appellant's private life case against the requirements of paragraph 276ADE(1)(vi) of the rules in the light of the evidence showing the extent of her mental ill-health and concluded, against the weight of the evidence and guidance given in Singh [2015] EWCA Civ 630, that the appellant, an orphan, does not enjoy family life with her aunt in the United Kingdom.
> 3. It is arguable that in comparing the appellant's circumstances (which include a recent attempt at suicide) with what many 18-year-olds do, as at paragraph 29 of the decision, the judge may have erred in law in failing to conduct a proportionality assessment focussed on the particular evidence before the Tribunal.
> 4. It is also contended that the judge failed to properly decide the asylum ground of appeal, as it is not mentioned at the end of the decision. This ground has little merit in view of the clear adverse findings at paragraphs 19 and 20.
> 5. Permission to appeal is granted."

10. The matter comes before me to decide whether there is a material error of law in the Decision and, if I so find, to either remit the appeal to the First-tier Tribunal or re-make the Decision in this Tribunal. For the reasons which follow, I indicated at the end of the hearing that I proposed to find an error of law in particular on ground three. Following discussion, it was agreed that I should re-make the decision based on the written evidence and Judge Ross' record of the evidence. The facts are not in dispute.

ERROR OF LAW

11. I would not have found an error of law in relation to ground one. I will need to consider the medical evidence when I come to re-make the decision and so I say little about it now. However, I accept Mr Tufan's submission that the evidence is of poor quality. Although there is reference in the papers, as Judge Campbell noted, to a suicide attempt by taking an overdose of paracetamol and there are also references in the medical records to referrals to mental health services, the only reports in that regard are one from a Mental Health Liaison Nurse following the overdose ([AB/48]) and one from a Ms Karen Staff of Norfolk and Suffolk NHS Foundation Trust who does not give her qualifications ([AB/64-65]). Ms Staff provides no formal diagnosis, other than to refer in the management plan to the Appellant's depression and anxiety following her past traumatic experiences and abuse. Read in that light, there is no error in the Judge's conclusion following analysis of the evidence at [14] of the Decision that "[t]here was no evidence of acute mental illness".

12. It is appropriate thereafter to consider grounds two and three together. In essence, the Appellant's complaint is that the Judge has erred in his overall assessment. Whether her relationship with [E] and [E]'s family is categorised as family life or private life, there can be no suggestion that it would meet the requirements of the Immigration Rules ("the Rules").

13. Ms Howorth's only complaint in relation to the finding that there is no family life but only strong private life based on the relationship in the UK is that family life could be given more weight in the overall assessment of proportionality having regard to Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") whereas private life can be given only little weight if formed whilst a person is in the UK unlawfully or with precarious status as here.

14. However, that submission in my view misses the point. Although the Judge was required to and did have regard to Section 117B, the weight to be given to the interference with an appellant's rights whether those are categorised as family life or private life has to be based on the strength as shown by the evidence albeit balanced by the public interest inherent in the appellant's status at the relevant time.

15. Turning then to the way in which the Judge assessed proportionality, that is to be found at [29] and [30] of the Decision as follows:

> "29. I must apply the balance sheet approach setting out the factors which I consider relevant on both sides of the argument. So far as the appellant is concerned, she has established a close relationship with her aunt in the UK, and she has been traumatised by her experiences in

> Namibia, in particular the sexual assaults she experienced. If she returns to Namibia she will face considerably more difficulties than she would face if she was allowed to remain in the UK she is now 18 years old, and therefore is no longer a child, and I do not have to consider therefore her best interests as a primary consideration as set out in the well-known case of **ZH Tanzania 2011 UKSC 4.** This case determined that in relation to children I must first consider the child's best interests which means whether it is reasonable to expect the child to leave the UK. However, in this case the appellant turned 18 in April, and it is not unreasonable to expect a young person of that age to establish a degree of independence. Many 18-year-olds leave the UK and study abroad or engage in gap years, which illustrates the fact that it is normal and expected that 18-year-olds should start to leave the family home. I therefore consider that the fact that she is still young is a factor which I have to take into account but is not a primary consideration. The fact that the appellant will have more opportunities if she remains in the UK is also not a factor to which I can give much weight, bearing in mind that she is not a British national, and is not entitled to remain in the UK or to receive education and health care in the UK.
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> 30. On the other side of the balance sheet, I must take into account that the appellant came to the UK for temporary reasons, and she had no right to remain in the UK after the end of her visit. Although I bear in mind that the appellant has given an explanation for why she remained in the UK, which has been accepted by the respondent as true and correct. I must apply Section 117B of the Nationality, Immigration and Asylum Act 2002 which states that the maintenance of effective immigration controls is in the public interest. It is in the public interest and in particular the economic well-being of the UK that persons who seek to enter or remain in the UK are able to speak English and are financially independent. In this case the appellant can speak English, but she is not financially independent. In addition little weight should be given to a private life which is established by a person at a time when the person is in the UK unlawfully or her immigration status is precarious. Clearly in this case the appellant has remained in the UK unlawfully and at a time when her immigration status was precarious, and I therefore can give little weight to private life established in this period of time."

16. I attach little weight to what the Judge says about financial independence. As Mr Tufan accepted, the fact that the Appellant is supported independently of State support means that she is financially independent but that is in any event a neutral factor. There are however three reasons why I conclude that the assessment conducted contains errors of law.

17. First, the Judge's reference to what "many 18-year-olds" may be capable of entirely leaves out of account this Appellant's past experiences. In that regard, the Appellant's mental health, however poorly evidenced was relevant. Similarly, this analysis sits uneasily with the Judge's finding at [8] of the Decision that the Appellant is vulnerable to the extent that she should not be asked questions about her experiences in Namibia.

18. Second, and leading on from this, the assessment contains no reference to the impact on the Appellant of returning to Namibia. The Judge accepted that she had been abused in the past. The Judge went so far as to find that there would be very significant obstacles to her returning to that country if she was forced to go to live with the same aunt as previously. I do not accept that the Judge's finding at [23] of the Decision that there are no very significant obstacles is flawed as asserted by the Appellant in her ground one – as I have already explained, the medical evidence is thin and the Judge was entitled to take into account that she would have other family members with whom she could live. That does not mean however that the impact on the Appellant of return should not form part of the overall assessment. Other than reference to the traumatic experiences as being accepted at [29] of the Decision, that factor does not figure in the balance thereafter.

19. Third, and similarly, although the Judge does refer to the Appellant's close relationship with [E] at [29] of the Decision, the Judge had found at [25] of the Decision that this amounted to a "strong private life". Even if Mr Tufan is right that, in that paragraph, the Judge was addressing his mind to whether Article 8 was engaged at all, the Judge still needed to factor in that strong relationship, whether as part of the Appellant's private life or family life in the assessment which follows.

20. For those reasons, I accept that the Decision contains errors of law. I preserve the Judge's findings in relation to the protection claim. For the reasons given, the protection claim is formally dismissed. I also see no reason to interfere with the Judge's recitation of the evidence or other findings at [9] to [17] and [19] to [24] of the Decision. I set aside only paragraphs [25] to [31] of the Decision.

RE-MAKING OF DECISION

21. I turn then to the only issue which remains for me to decide, namely whether the decision to refuse the Appellant's claim is unlawful under the Human Rights Act 1998 as contrary to Article 8 ECHR.

22. The Appellant does not argue that she can meet the Rules in relation to family life. She has no relationship with a partner or child in the UK. I will come below to whether the relationship with [E] and [E]'s husband can give rise to family life.

23. The Appellant previously submitted that she could satisfy the Rules in relation to her private life as she faces very significant obstacles to integration in Namibia. The Judge's findings in this regard were as follows:

> "23. The appellant has not lived in the UK for seven years. As I have already indicated, I accept that there would be very significant obstacles

> to her returning to Namibia, if she was to go back to live with the aunt that she had previously lived with, but there are other members of the family, and it has not been established that she cannot return to Namibia and live with one of them, bearing in mind the social norms in Namibia, which are that the family is expected to look after family orphans. I therefore consider that the appellant faces difficulties on return to Namibia, but these do not amount to very serious obstacles."

I have already indicated that I did not find any error of law in this finding. I therefore adopt what is there said. I also take into account the evidence set out at [30] below taken from an assessment conducted by Social Services.

24. It must be remembered that paragraph 276ADE(1)(vi) of the Rules is directed at obstacles to integration and not necessarily impacts such as fear of return, except where such fear would prevent integration. The Court of Appeal in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813 explained the test as follows:

> "14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

Adopting Judge Ross's reasoning as set out above, the evidence of the Appellant's continued association with her language and culture and applying that test, I conclude that the evidence does not show that there are such very significant obstacles. Again, though, that does not mean that I leave out of account the impact of the Appellant's past experiences when I come to assess whether removal is disproportionate.

25. I turn then to the evidence about the impact of the Appellant's past experiences on her mental state. The Appellant was referred to children's mental health services in February 2017. She was assessed by telephone and placed on a waiting list for therapeutic support. She was seen by Ms Staff to whose report I have already referred in March 2017. She denied any thoughts of suicide or self-harm. The Appellant was referred to "Point 1" to help her to manage her "Depression and Anxiety". I have already noted that there is no formal diagnosis of mental illness. It was also said that the Appellant would be referred to

the Sue Lambert Trust to access support in relation to her past traumatic experiences. It appears that efforts were made by Point 1 to contact the Appellant to offer counselling in June 2017, but her case was closed in January 2018 after she failed to respond.

26. The Appellant took a deliberate overdose of paracetamol on 9 August 2019 and was taken to A&E by her aunt. This followed the Respondent's decision refusing her claim. The Appellant was assessed by a Mental Health Liaison Nurse. It is there said that the Appellant had received counselling at school but had not been able to engage with the Sue Lambert Trust due to school pressures but was willing to engage. The nurse concluded that there was "no evidence of acute mental illness … [n]o mental capacity concerns". The overdose was attributed to the removal threat. The Appellant was said to suffer from low mood, which might benefit from psychological intervention. She was referred to Wellbeing for psychotherapy and MIND for "brief support and interventions". The Appellant's GP was asked to follow up therapy with the Sue Lambert Trust. I can see no further evidence in that regard.

27. The evidence indicates that the Appellant is naturally concerned about return to Namibia but has not been diagnosed with any acute mental health issues. I take into account also Judge Ross' findings that the Appellant is vulnerable and in particular is reluctant to discuss her past experiences in Namibia.

28. Turning then to the Appellant's situation in the UK, Ms Howorth directed my attention to a Social Work Assessment which appears at [RB/F] ("the Report"). The Report was prepared it appears to deal with potential safeguarding issues. I do not repeat what is contained in the Report concerning the Appellant's interaction with mental health services nor her background.

29. The Appellant is said to be doing well at school. The school is providing extra support with the Appellant's English and although previously unaware of the Appellant's past experiences indicated that they would be willing to offer pastoral support. The Appellant is said to enjoy school.

30. The Report deals with the Appellant's relationship with her aunt in the UK. Some concern is expressed by [E] that the Appellant often displays no emotional reaction but then flares up when challenged. The social worker also expresses some concern that the "huge change in culture and environment could affect [W]'s developing identity". However, that could be overcome in the social worker's view with the assistance of [E] who grew up in Namibia and shares her religion, ethnicity and culture. The Appellant and [E] are said to speak in their native language and [E] has arranged for the Appellant to attend

church. [E] is also supporting the Appellant to adapt to the culture in the UK.

31. In terms of the family circumstances in the UK, [E] lives with her husband, [J] and [J]'s son from a previous relationship who was then aged 17 years. No concerns were expressed by Social Services concerning the living arrangements in the UK.

32. The Appellant's own statement is at [AB/6-9]. I do not need to deal with the Appellant's family background or past experiences as the facts of those are all accepted. As to her circumstances in the UK, she says this:

> "8. I am still at school, doing my 'A' levels. I have met lots of new friends, and I am enjoying school. My favourite subjects are science and history. I am studying health and social care at school. After that, I would like to go to University and study Nursing. I want to become a nurse, as I like to help people.
> 9. I found it hard to fit in in the UK at first. I could not cope with the weather to start with, as it is so different to Namibia. I also struggled with English language at the beginning, as I was not used to British accent, this made it hard to understand what other people are saying at times. The food is also different but I feel safe in the UK, and I feel that I am looked after. I am living with my auntie [E], who looks after me. I am happy living with her, as this is the closest that I could get to being with my mother."

33. Although I do not depart from Judge Ross' findings that the Appellant could go to live with other family members in Namibia (which findings were not challenged), I note what the Appellant says at [10] of her statement about her inability to cope on her own and her need to be looked after. That is reflected in the statement of [J]. He has a daughter aged 19 years and therefore much the same age as the Appellant. His son is also of a similar age. He says that although the Appellant is eighteen "she comes across like a 14-year-old to me. She is very immature for her age and still acts and thinks like a child". [E] confirms this and describes the Appellant as "very fragile".

34. [E] says that she treats the Appellant as her daughter. There is limited evidence otherwise about the relationship between the Appellant, [E] and [J]. However, the Appellant has, since coming to the UK, confided in them about the past abuse which demonstrates a trust and emotional attachment.

35. There can be no issue in this case concerning the engagement of Article 8 ECHR whether that be by way of a family life or a private life. Nor is there any issue that removal will interfere with the Appellant's right to respect for that life. The interference is however lawful and necessary subject only to proportionality. I therefore turn to assess the proportionality of the interference.

36. I begin by considering the interference with the Appellant's rights. The question whether the Appellant enjoys family life with [E] and [J] is a fact sensitive assessment based on the evidence. As the Appellant is not a child, the question is whether the relationship is one which involves more than normal, emotional ties between family members (Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31). It must be a relationship with entails "real" and "effective" support.

37. There are some unusual facts in this case which lead me to the conclusion that family life does exist between the Appellant and [E] and [J] notwithstanding the lack of detailed evidence. First, [E] says that she treats the Appellant as if she were her daughter and the Appellant in turn says that [E] is "the closest that [she] could get to being with [her] mother". In other cases that might not be enough. However, in this case, the Appellant lost her mother when she was just a child. That is therefore a potent sentiment. Second, the Appellant has disclosed her past abuse to [E] and [J]. It is evident that she does not do so lightly as she was unwilling to discuss her experiences with the mental health professionals or with her school. That she did so to [E] and [J] shows a trust and strong, emotional attachment. Finally, there is evidence that the Appellant is immature and remains child-like. This is commented on in particular by [J] who has a daughter of similar age to the Appellant albeit she does not live with the family. [J] also has a son who is of a similar age and I therefore place weight on his evidence in this regard.

38. I give weight to the family life as set out above. I also give weight to the Appellant's private life. The Appellant very frankly accepts in her statement that she did not find it easy to settle into life in the UK at first. I accept that there is also evidence in the Report from the social worker which indicates that the impact of the Appellant remaining in the UK might not be wholly positive. However, the Appellant has now progressed, is doing well at school, is taking (or has taken) her A levels and wishes to go on to University and to pursue a career as a nurse.

39. That is a far cry from the life which the Appellant had in Namibia. Leaving aside the past abuse, the Appellant told the social worker who prepared the Report that she was treated like a slave. That is said to be common for children in Namibia although I note that the Appellant was still able to and allowed to go to school. I also accept that the Appellant's wish to have a better life in the UK is not reason to find the Respondent's decision disproportionate. However, her background and, in particular the trauma she suffered in Namibia is relevant to the degree of interference. Although I have accepted that the evidence does not make out a case that there are very significant obstacles to integration in Namibia, nonetheless, it is clear that removal to that country with all its memories would be traumatic for the Appellant.

That is demonstrated by the Appellant's taking of an overdose when her claims were refused by the Respondent.

40. I recognise that Section 117B permits me to give only little weight to the Appellant's private life due to her unlawful and/or precarious status. However, the degree of weight within the spectrum of what is little weight is higher in this case for the reasons I have given. Section 117B does not require me to give little weight to family life formed between the Appellant and [E] and [J] and I give that the weight it deserves based on the reasons why I have found family life to exist in this case.

41. I turn then to the public interest. That is in this case the maintenance of effective immigration control (Section 117B(1)). The Appellant came to the UK to visit [E]. She overstayed and did not claim asylum until nearly a year after her leave expired. [E] explains though that the Appellant told her and [J] about the abuse within a month of arrival and Social Services then became involved. Due to the Appellant's experiences, [E] and [J] understandably did not wish to send the Appellant back to Namibia. Their delay in seeking to regularise the Appellant's stay is unexplained, but I infer from their statements that the reason was that they did not know what to do and were then unable to pay a lawyer for advice. That does not excuse their conduct. The Appellant was herself a child at that time and would have relied on adults in what was a strange country to make decisions for her. Although the conduct of [E] and [J] is not to be condoned, I accept their reasons for not wishing to send the Appellant back and their explanation for the delay in taking action. Although I give weight to the public interest, I give it less weight for those reasons.

42. Balancing the interference with the Appellant's family and private life against the public interest, I therefore reach the conclusion that the Respondent's decision is disproportionate. It therefore breaches the Appellant's Article 8 rights and is for that reason unlawful under the Human Rights Act 1998.

DECISION

I am satisfied that the Decision contains a material error of law. I set aside paragraphs [25] to [31] of the decision of First-tier Tribunal Judge D Ross promulgated on 22 October 2019. I preserve the other findings and record of evidence. Those include the dismissal of the Appellant's protection claim.

I re-make the decision on human rights grounds (Article 8 ECHR). I allow the Appellant's appeal on the basis that removal of the Appellant would breach the Appellant's Article 8 rights. The Respondent's decision is for that reason unlawful under the Human Rights Act 1998.

The appeal is allowed on human rights grounds (Article 8 ECHR).

Signed  Dated: 12 February 2020

Upper Tribunal Judge Smith