Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11154/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 16 September 2022	**On the 14 November 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

RK
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Jegarajah of Counsel, instructed by Tann Law Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Anonymity Order:
Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We make this order because the Appellant seeks international protection and so is entitled to privacy. Further, it is her case that she is HIV+ as a consequence of her being

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attacked and we see no legitimate public interest in her identity rather than her circumstances.

DECISION AND REASONS

Introduction

1. This is the remaking of the decision in the Appellant's protection and human rights appeal, following the decision at the error of law hearing that the First-tier Tribunal had erred in law and that its decision should be set aside with no findings of fact preserved. A copy of the decision that the First-tier Tribunal erred in law is appended hereto.

2. The Appellant is 52 years old, being born in 1970. She is a national of Zimbabwe. Her claim arises out of the making of a deportation order, following her conviction, on 21 February 2014, at the Harrow Crown Court, on two counts of theft, for which she was sentenced to concurrent terms of 18 months' imprisonment.

3. The Appellant has a lengthy immigration history. Some of that history needs to be set out, partly for the avoidance of confusion and partly because some findings of fact from a previous decision of an Immigration Judge have been retained.

Date	Event
24 December 2000	The Appellant entered the UK as a visitor, with leave expiring on 24 June 2001.
17 February 2003	She made an application for leave to remain outside of the Immigration Rules, on the basis of her HIV positive condition. The application was refused on 20 November 2003.
16 February 2006	She made a protection claim (based on her political affiliation) and human rights claim (her medical condition), both of which were refused on 3 August 2007.
25 March 2008	An Immigration Judge dismissed her appeal but this decision was set aside by a Senior Immigration Judge. The appeal was remitted with a number of findings of fact retained.
8 October 2008	The remitted appeal was dismissed.
22 September 2010	The Appellant was granted Indefinite Leave to Remain.
17 November 2014	A deportation order was signed and the Appellant's associated protection and human rights claims were refused and certified.
30 October 2019	The decision under appeal was issued.
4 March 2020	Her appeal was dismissed by the First-tier Tribunal. On appeal, the Upper Tribunal set aside the decision and remitted the case to the First-tier Tribunal.

6 January 2021	The First-tier Tribunal dismissed her appeal.

The matters in issue

4. The retained findings of fact (from the decision of the Immigration Judge on 25 March 2008) are as follows:

> "20. On the evidence I find these facts:-
>
> (a) I accept that the [Appellant] was raped on 30 June 2000 by a group of Zanu-PF supporters. It would seem that three men actually raped her and an additional two men held her down. She was kept at a police station for two days before being released, having been taken thereby her attackers.
>
> (b) I accept that it is likely that this incident caused her to become HIV-positive.
>
> (c) I accept that she spent a further day in custody at the same police station on 1 December 2000.
>
> (d) She left Zimbabwe on her own passport through Harare airport with a valid visitor's visa to enter the United Kingdom and did so on 24 December 2000. She did not claim asylum in this country until 16 February 2006 (over five years after her initial arrival here and after other attempts to remain here had failed)".

5. At the hearing before us, Ms Jegarajah and Mr Melvin clarified that the issues in dispute are whether:

(1) the Appellant is at real risk of persecution by reason of her returning as a lone woman who has previously suffered sexual violence at the hands of Zanu-PF and having no family support;

(2) by reason of the absence of, or her inability to access, the treatment required to manage her HIV positive condition, the Appellant faces a significant reduction in her life expectancy, contrary to Article 3 of the European Convention on Human Rights ("ECHR").

6. Ms Jegarajah confirmed that the Appellant was not relying upon any argument based on political affiliation/imputed political opinion and nor was she relying upon Article 8.

Hearing

7. The hearing was conducted with all parties present at Field House.

8. We heard oral evidence from the Appellant, who gave evidence with the assistance of a Shona interpreter.

9. In closing, Mr Melvin relied upon his skeleton argument and both advocates made oral submissions. During the course of this decision, we address the points they made.

Evidence

10. We have taken into account the:

    (1) documents within the resumed hearing bundle (insofar as they are relevant to the matters in issue);

    (2) documents within the Appellant's bundle (pages A1-D2); and

    (3) oral evidence of the Appellant.

Legal framework

Asylum

11. The burden of proof is on the Appellant and the standard of proof is that of a reasonable degree of likelihood or a real risk.

12. A refugee is defined by Regulation 2 of the 2006 Qualification Regulations ["the Qualification Regulations"] by reference to Article 1A of the Refugee Convention, which in turn provides that a refugee is someone who:

> … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence … is unable, or owing to such fear, is unwilling to return to it.

13. The fact that a person has already been subject to persecution or serious harm will be regarded as a serious indication of the person's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated (paragraph 339K of the Immigration Rules).

Article 3

14. In AM (Art 3; health cases) Zimbabwe [2002] UKUT 00131 (IAC), the Upper Tribunal considered the authorities of AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 and Savran v Denmark (application no. 57467/15) and concluded:

> 1. In Article 3 health cases two questions in relation to the initial threshold test emerge from the recent authorities of AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 and Savran v Denmark (application no. 57467/15):

(1) Has the person (P) discharged the burden of establishing that he or she is "a seriously ill person"?

(2) Has P adduced evidence "capable of demonstrating" that "substantial grounds have been shown for believing" that as "a seriously ill person", he or she "would face a real risk":

[i] "on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,

[ii] of being exposed

[a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or

[b] to a significant reduction in life expectancy"?

2. The first question is relatively straightforward issue and will generally require clear and cogent medical evidence from treating physicians in the UK.

3. The second question is multi-layered. In relation to (2)[ii][a] above, it is insufficient for P to merely establish that his or her condition will worsen upon removal or that there would be serious and detrimental effects. What is required is "intense suffering". The nature and extent of the evidence that is necessary will depend on the particular facts of the case. Generally speaking, whilst medical experts based in the UK may be able to assist in this assessment, many cases are likely to turn on the availability of and access to treatment in the receiving state. Such evidence is more likely to be found in reports by reputable organisations and/or clinicians and/or country experts with contemporary knowledge of or expertise in medical treatment and related country conditions in the receiving state. Clinicians directly involved in providing relevant treatment and services in the country of return and with knowledge of treatment options in the public and private sectors, are likely to be particularly helpful.

4. It is only after the threshold test has been met and thus Article 3 is applicable, that the returning state's obligations summarised at [130] of Savran become of relevance – see [135] of Savran.

Findings

Risk on return

15. Ms Jegarajah submitted that sexual violence against women is widespread in Zimbabwe. She, quite properly, did not submit that gender is a

characteristic that, of itself, gives rise to a real risk of persecution/serious harm. However, Ms Jegarajah identified three factors said to make this Appellant particularly vulnerable, namely her (i) being a single female (ii) being a past victim of such violence and (iii) lacking the support of friends or family in Zimbabwe. In the Appellant's witness statement (Appellant's bundle page C1, paragraph 4) two further factors were identified: "the heavy presence of the ruling party's supporters [in her home area], coupled with my status as a lone woman and serious health conditions, mean I would be at huge risk of being a victim of physical and sexual violence."

16. Mr Melvin submitted that the factors identified do not demonstrate a real risk and further, that the Appellant's account that she has no friends or family in Zimbabwe is not credible.

17. We find that the Appellant has not demonstrated that she faces a real risk on return as a result of gender-based violence. We reach this conclusion for the following reasons.

18. We have reviewed the documents with care to identify evidence relevant to the issue of gender-based violence. In the Country Policy and Information Note ("CPIN") entitled 'Zimbabwe: women fearing gender-based harm or violence" (October 2018) we note, in particular, the following evidence.

19. The United Nations Fund for Population Activities reported that, "about 1 in 3 women aged 15 to 49 have experienced physical violence and about 1 in 4 women have experienced sexual violence since the age of 15."

20. The 2015 Zimbabwe Demographic and Health Survey, which surveyed 9,955 women aged 15-49 from across Zimbabwe, published its findings in 2016. These findings include:

    (1) More than one-third (35%) of women in this age group have experienced physical violence since the age of 15. 15% of women have experienced physical violence in the previous 12 months. Women with more than a secondary education and those from the wealthiest households are least likely to report having recently experienced physical violence. Among women who have been married (whether married at the time of the survey or previously married) the most common perpetrators of physical violence are current or former husbands/partners. Among those who have never been married, the most common perpetrators are family members (including mothers, fathers, siblings and other relatives) as well as teachers.

    (2) 14% reported of women in this age group have experienced sexual violence and 8% had experienced sexual violence in the previous 12 months. Current and former husbands/partners are the most common

perpetrators of sexual violence, followed by other relatives and strangers.

(3) Of those women in this age group who have at some point be married, more than one in three (35%) had experienced violence, whether physical or sexual, committed by the husband/partner. 20% of these women had experienced such violence by their partner in the previous year.

(4) Almost 40% of those women who had experienced physical or sexual violence had sought help to stop the violence. More than half sought help from their own families, while 37% went to their husband's/partner's family. 21% sought help from the police.

21. In a report by Freedom House, entitled 'Freedom in the World 2018 – Zimbabwe', it was noted that "sexual abuse is widespread, especially against girls."

22. The United States State Department report (2017) reported:

> "While the law criminalises sexual offences, including rape and spousal rape, these crimes remained widespread problems. Spousal rape received less attention than physical violence against women. Almost a quarter of married women who had experienced domestic violence reported sexual violence, while 8% reported both sexual physical and sexual violence.
>
> Although conviction of sexual offences is punishable by lengthy prison sentences, women's organisations stated that sentences were inconsistent. Rape victims were not consistently afforded protection in court.
>
> Social stigma and societal perceptions that rape was a "fact of life" continued to inhibit reporting of rape. In the case of spousal rape, reporting was even lower due to women's fear of losing economic support or of reprisal, lack of awareness that spousal rape is a crime, police reluctance to be involved in domestic disputes, and bureaucratic hurdles. Most rural citizens were unfamiliar with laws against domestic violence and sexual offences. A lack of adequate and widespread services for rape victims also discouraged reporting."

23. The report from the UN Resident Coordinator for Zimbabwe, published 23 November 2017, noted:

> "Addressing the media in the capital Harare, UN Resident Coordinator, Mr Bishow Parajuli, said, "some say cases of abuse and violence, especially against women are going up in Zimbabwe, others say that is only because reporting is getting better. It does not matter. There are still many thousands of gender based violence cases reported across country …"

24. A Sunday News article, dated 30 April 2017, stated:

> "Gender activists and women's organisations are on record stating that more than 60% of rape cases recorded in the country yearly involved children below the age of 16. They contend that majority of perpetrators are relatives."

25. In our view, the evidence demonstrates that gender-based violence is widespread but it does not demonstrate that the nature and extent of such violence is of a level that all women are at real risk of persecution. The evidence does demonstrate some factors make women more vulnerable. Whether this evidence is sufficiently cogent to establish a real risk of persecution is a moot point because none of these factors are present in the Appellant's case. The factors disclosed by the evidence are:

    (1) Women between the ages of 15-49 are most risk of physical violence from husbands/partners, family members and teachers.

    (2) Women between the ages of 15-49 are most at risk of sexual violence from current or former husbands/partners, followed by other relatives and strangers.

    (3) In more than 60% of rape cases, the victim is a child below the age of 16 with the majority of perpetrators being family members.

26. There is an absence of evidence about the risks for a woman in the Appellant's age-group but, at 52 years old, she is sufficiently proximate to the upper end of the researched age-group that the evidence is of assistance. By reason of her age, she does not fall into the group most likely to be a victim of rape (girls under 16 years). It is the Appellant's case that she is returning as a single woman without family and therefore she does not fall into the category of women most likely to suffer gender-based violence because perpetrators are predominantly partners/husbands or family members.

27. The evidence does not demonstrate that, as a past victim of serious sexual violence, the Appellant is at greater risk of suffering gender-based violence in the future.

28. It is the Appellant's case that her home area is the town of Rusape in Manicaland. The evidence demonstrates that this area is a Zanu-PF stronghold and that it is one of the areas with the highest incidence of politically motivated violence (see, for example, the CPIN entitled, 'Zimbabwe: opposition to the government' (February 2019). However, we have not been directed to any evidence that demonstrates that non-politically motivated violence, whether gender-based or otherwise, is higher in Zanu-PF stronghold areas.

29. We have considered whether, if on return the Appellant was without accommodation or employment, we can properly infer that she would be at greater risk of gender-based violence such that she faces a real risk of

persecution. Firstly, we find that any such conclusion would be speculation rather than a properly drawn inference based on evidence, given the absence of evidence on the point.

30. Secondly, we find that the Appellant has friends and family who live outside of Zimbabwe, who would be able and willing to provide her with financial support. We reach this conclusion, for the following reasons.

31. We find the Appellant has a large family. We accept her evidence that her parents are deceased because it is inherently plausible. However, in her witness statement (page A26, paragraph 8) she stated that she is the eldest of eight sisters, all of whom have migrated. In her oral evidence, the Appellant stated that two of her sisters live in the UK, one lives in Australia, one in New Zealand, one in America and three in South Africa. In her witness statement, she stated that she has two children, a son and daughter. Her son has indefinite leave to remain the UK and her daughter migrated to New Zealand where she lives with her husband and child.

32. We acknowledge the point made by Mr Melvin, namely that the Appellant did not adduce any evidence to corroborate the whereabouts of her family members. However, we accept her evidence for two reasons. Firstly, we consider it inherently plausible that her family members would wish to leave Zimbabwe and make a life for themselves in another country. Secondly, when she gave her oral evidence about the location of her family members, she did so in a manner which caused us to believe that she was being truthful: she did not hesitate and she was specific in relation to their respective locations.

33. We find the Appellant has maintained her relationship with family members and is currently in contact with them. We reach this conclusion because in oral evidence, when questioned as to the absence of evidence from her family overseas, she stated that she has their telephone numbers and could ask them to provide witness statements. In the absence of her stating that she has no contact with those family members who live in the UK, we infer that she does maintain relationships with them.

34. We find that the Appellant's family members would be able and willing to provide financial support to the Appellant. We reach this conclusion for the following reasons:

    (1) The availability of financial support is a matter directly relevant both to the question of the protection claim and the Article 3 claim. This is the Appellant's case and, if such support is not available, she could reasonably have been expected to adduce relevant evidence.

    (2) The Appellant has lived in the UK for approximately 18 years. For a number of those years, she has been unable to work, for example, she had no permission to be in the UK until she was granted Indefinite Leave to Remain in September 2010 and in her oral evidence, she stated that she is not currently working. We infer that during those

non-working years, she must have been reliant, either in whole or in part, on the financial support of family and friends. In the absence of any evidence to the contrary, we conclude that such support could continue if she returned to Zimbabwe.

35. Mr Melvin invited us to find that the Appellant has friends and family living in Zimbabwe. He pointed to her having returned to Zimbabwe in December 2011 and having remaining there for a period of approximately five weeks. Mr Melvin submitted that the Appellant's account about the purpose for which she returned to Zimbabwe, namely to rectify a typographical error on her passport, is implausible and that further, the Appellant herself referred to having been in communication with a friend living in Zimbabwe at this time.

36. We do not consider it necessary to determine whether, in 2011/12, the Appellant was still in touch with friends and family in Zimbabwe. The fact is, she left her home country almost 20 years ago and we consider it plausible that she has now lost touch with friends and that family members are either deceased or have migrated.

37. Given our conclusions about risk, we do not need to consider sufficiency of protection or internal relocation.

Article 3 (health)

Seriously ill person

38. In a letter, dated 30 January 2020, the Appellant's treating clinician, Dr Joseph Arumainayagam (Consultant in HIV/GU medicine), reported that the Appellant's HIV infection was diagnosed in 2002, that her condition has been managed with antiretroviral drugs and that if her treatment is withdrawn, "it is extremely likely that she will die in a period of 12-18 months". That evidence was not the subject of challenge and, given Dr Arumainayagam's expertise and his knowledge of the Appellant's medical history, we accept his evidence. Given the nature of the Appellant's illness, we find that she has demonstrated that she is a seriously ill person.

Significant reduction in life expectancy

39. In reliance on the evidence in the preceding paragraph, we further find that the Appellant has discharged the burden of establishing that she would face a real risk of a significant reduction in life expectancy if she were unable to obtain appropriate treatment for her condition.

The absence of appropriate treatment or the lack of access to such treatment

40. We find the Appellant has not adduced evidence capable of demonstrating that substantial grounds have been shown for believing she would face a real risk of a breach of Article 3 on account of the absence of appropriate

treatment or lack of access to such treatment. We reach this conclusion for the following reasons.

41. In assessing the evidence relevant to the question of the accessibility and availability of appropriate treatment, we remind ourselves of the observation in AM (Zimbabwe) that such evidence is more likely to be found in reports by reputable organisations and/or clinicians and/or country experts with contemporary knowledge of, or expertise in, medical treatment and related country conditions in the receiving state, as opposed to medical experts based in the UK.

42. We consider first the treatment the Appellant currently receives to manage her condition. We find, based on the evidence of Dr Arumainayagam, that she is currently taking an antiretroviral drug named Genvoya, which contains Tenofovir Alafenamide, Emtricitabine, Elvitegravir and Cobicistat as a fixed dose combination in the form of a single tablet. We find, based on the unchallenged oral evidence of the Appellant, that she takes this medication three times a day.

43. We turn to consider the evidence relating to the availability and accessibility of Genvoya or any other form of appropriate treatment.

44. The most up-to-date evidence is from Dr Arumainayagam, who states, in his letter dated 10 January 2022, the Genvoya is not available in Zimbabwe. We can place no weight on this aspect of Dr Arumainayagam's evidence, for two reasons:

    (1) He does not purport to be an expert in the availability of antiretroviral treatment in Zimbabwe and nor can we conclude, from his evidence, that he has such expertise.

    (2) He cites no source material for this statement.

45. The CPIN entitled 'Zimbabwe: medical treatment and healthcare" (April 2021) contains a list of available antiretroviral drugs as reported by MedCOI. We find that evidence gathered by this respected organisation to be reliable but, in relation to Genvoya, the observations about availability date from November 2019, approximately three years ago. In our view, this is too great a period for us to draw any reliable conclusions about the availability of Genvoya at the present time.

46. Indeed, Ms Jegarajah did not seek to rely upon this evidence in support of the Appellant's case. She submitted (we paraphrase) that events such as the Covid pandemic mean that evidence as to the availability of Genvoya in November 2019 is not a reliable indicator of the current position. Ms Jegarajah's submitted that it was for the Secretary of State to carry out the necessary enquiries as to the current availability of Genvoya. However, Ms Jegarajah's submission reverses the burden. The obligations of the Respondent only arise once the Appellant has adduced evidence capable of demonstrating that there are substantial grounds for believing that she

would face a real risk of a breach of Article 3 on account of the absence/accessibility of appropriate treatment. We have found that that the Appellant has not adduced such evidence.

47. Even if that three-year gap did, contrary to our view, permit a reliable conclusion to be drawn about the current availability of Genvoya, it does not assist the Appellant, for the following reasons.

48. Firstly, the information from MedCOI is that, as of November 2019, Genvoya was available from the Avenues Clinic (privately paying) in Harare and the Harare Central Hospital (publicly available) but "subject to supply problems". That there are supply problems is not, in our view, capable of demonstrating that there is a real risk that Genvoya will not be available to the Appellant.

49. Further, it is for the Appellant to adduce evidence capable of demonstrating that if supplies are intermittent, she will face a real risk of being exposed to a significant reduction in life expectancy or a serious, rapid and the reversible decline in her state of health resulting in intense suffering.

50. In his letter, dated 30 January 2020, Dr Arumainayagam stated:

> "She currently receives Genvoya … She was changed to this new treatment because of serious side-effects from the above treatment which included jaundice and lipodystrophy …
>
> As she has developed a marked resistance virus, many of the treatment options available in her country of origin will not treat her condition. Genvoya is not available in her country of origin and if she were to return, she cannot afford to purchase this privately."

51. The previous treatments are not named in the letter but other evidence demonstrates that in February 2017 (Appellant's bundle page A72), the Appellant was prescribed Truvada, Evotaz and Pregabalin. It is not stated when her medication was switched to Genvoya.

52. In his letter, dated 10 January 2022, Dr Arumainayagam states:

> "In view of the nature of her virus which has become resistant to many drugs, any alternative drugs will not be effective. Also, she could not tolerate many of the other regimens which means that even if an alternative regimen can be found, she will not be able to tolerate them. Furthermore, antiretroviral drugs are not readily available in Zimbabwe and has been purchased for a price, which this patient may not be able to afford if she is returned …
>
> Therefore, in conclusion I can confirm that there is no alternative combination of antiretroviral drugs with Genvoya which is available in Zimbabwe. Discontinuing her current regimen and

> prescribing an alternative regimen which will not be effective against her virus, will be counter-productive and may lead to her demise."

53. The evidence of Dr Arumainayagam is not capable of demonstrating that anything other than a continuous supply of Genvoya would lead to a real risk of the Appellant facing a breach of Article 3. Firstly, the expert does not address the question at all. He proceeds solely on the basis that Genvoya is not available in Zimbabwe.

54. Secondly, whilst we accept his evidence that the Appellant has become resistant to many antiretroviral drugs, his evidence about the suitability of an alternative regimen, both in terms of its effectiveness and side-effects, is far from clear.

55. In 2020, he states that "many" of the treatment options available in Zimbabwe will not treat her condition. Not only is there no reference to the antiretroviral drugs that are currently available in Zimbabwe, the corollary of their being "many" unsuitable treatment options is that there are other suitable treatment options.

56. In 2022, he states that "any alternative drugs" will not be effective but then goes on to state that "even if an alternative regimen could be found she will not be to tolerate them". If Dr Arumainayagam had been provided with the list of antiretroviral drugs that are available in Zimbabwe, he has the expertise to express an opinion on their effectiveness at managing the Appellant's condition. He would also have expertise to express an opinion on the side-effects that would result from any such treatment. The evidence before us is not such that we could conclude that there is a real risk that the side-effects to alternative antiretroviral drugs would mean the Appellant face a real risk of a breach of Article 3. For example, one of the side-effects that led to a change in antiretroviral drugs was lactic acidosis.

57. For the reasons set out above, we conclude that the Appellant is not adduced evidence capable of demonstrating that she faces a real risk of a breach of Article 3.

NOTICE OF DECISION

The appeal is dismissed on protection and human rights grounds.

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed  Date 28 October 2022

Judge Welsh
Deputy Upper Tribunal Judge

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11154/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 February 2022	**On . . . . . .**

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

RK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Jegarajah of Counsel, instructed by Tann Law Solicitors
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant appeals against a decision of First-tier Tribunal Judge Juss ("the Judge"), promulgated on 6 January 2021, to dismiss her appeal against the decision of the Respondent to refuse her protection and human rights claim. Her claim arose out of the making of a deportation order following her conviction, on 21 February 2014, at the Harrow Crown Court on two counts of theft, for which she was sentenced to concurrent terms of 18 months' imprisonment.

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2. Permission to appeal was granted, on 25 March 2021, by Upper Tribunal Kamara. The grounds upon which permission was granted were not restricted.

3. At the conclusion of the hearing, we found that the decision of the Judge contained errors of law and we set it aside. We directed that the remaking hearing take place at the Upper Tribunal. Our reasons are set out below.

Factual background

4. The Appellant is a national of Zimbabwe, born in 1970. She arrived in the UK as a visitor on 24 December 2000 and remained in the UK after the expiry of her leave. She first made a protection claim in 2006, the basis of which was that she was at real risk of persecution on political grounds as a result of her active support for the Movement for Democratic Change ("MDC"), both in Zimbabwe and in the UK. She was unsuccessful on appeal but the First-tier Tribunal made a number of findings of fact in her favour, including that she had been raped by Zanu-PF supporters in June 2000 and, as a consequence, is HIV positive. In 2010, she was granted indefinite leave to remain.

5. Following her criminal conviction, a deportation order was signed against the Appellant in 2014. Her resulting protection and human rights claim was refused by the Respondent on 30 October 2019. Her appeal against that refusal was dismissed by the First-tier Tribunal but on 3 November 2020, Upper Tribunal Judge Grubb set aside the decision and remitted the case to the First-tier Tribunal with no findings of fact preserved.

6. It is the decision resulting from the de novo hearing at the First-tier Tribunal with which we are concerned. The Appellant's case as argued before the Judge can be discerned from the skeleton argument of Counsel, Ms Imamovic, who represented the Appellant at that hearing. It reveals that there were four strands to the Appellant's case:

   (1) she faces a real risk of persecution by reason of her political opinion, relying both on past persecution and risk arising from sur place activity;

   (2) alternatively, she is at real risk of persecution/serious harm by reason of her returning as a lone woman who has previously suffered mistreatment at the hands of Zanu-PF and the police;

   (3) by reason of the absence of, or her inability to access, the treatment required to manage her HIV positive condition, she faces a significant reduction in her life expectancy, contrary to Article 3 of the European Convention on Human Rights ("ECHR"); and

   (4) her personal circumstances are such are such that the Respondent maintaining the decision to deport would breach Article 8 of the ECHR.

The grounds of appeal

7. The grounds of appeal, drafted by Ms Imamovic, raise a number of issues covering all aspects of the case that had been argued before the Judge. The grounds are particularised under headings '2a-2d', though we note that two headings are both described as '2a' and so there are in fact 5 different grounds pleaded. At the hearing before us, Ms Jegarajah withdrew the following grounds:

   (1) that the Judge had erred in refusing the Appellant's application to adjourn the substantive hearing (the first ground 2a); and

   (2) all grounds relating to the Appellant's political asylum claim (the second ground 2a and ground 2b).

8. The remaining grounds that fell to be considered by us were:

   (1) The Judge failed to make any findings or reach any conclusions in relation to the Appellant's protection claim arising out of her status on return as a lone woman who had been the victim of sexual violence in Zimbabwe (ground 2b). We identify this as Ground 1.

   (2) Article 3 (ground 2c). The Judge failed to take into account evidence relevant to the question of whether the Appellant would experience a significant reduction in life expectancy, failed to make any findings about the accessibility of treatment and erred in the application of the evidential burden of proof. We identify this as Ground 2; and

   (3) Article 8 (ground 2d). The Judge failed to take into account all the personal circumstances of the Appellant and the country evidence relevant to the assessment of her private life. We identify this as Ground 3.

9. In the rule 24 response, dated 23 April 2021, the Respondent submitted that the grounds amount to no more than a disagreement with the proper findings of the Judge.

Discussion and conclusions

Ground 1 – the protection case

10. Ms Jegarajah submitted that the Judge had failed to make any findings or reach a conclusion on this aspect of the Appellant's case. Mr Tufan accepted that the Judge ought to have made findings and that he ought to have reached a conclusion. However, he submitted that the failure to do so is not material because the Appellant's case, at least in part, is based on events that occurred over 20 years ago and no risk can arise given the lengthy passage of time.

11. We find that the Judge erred in law by failing to make findings or reach conclusions in relation to the protection claim. We cannot agree with Mr Tufan that such an error is not material. There is no dispute between the parties that the Appellant suffered serious sexual violence at the hands of

Zanu-PF. She adduced evidence in relation to the risk of gender-based harm, both generally and to her in particular, that cannot be dismissed as plainly irrelevant.

Ground 2 – the Article 3 case

12. Ms Jegarajah submitted that, though the Judge had cited AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17, he had failed to apply the relevant principles to the facts of the Appellant's case. Mr Tufan accepted that the evidence relevant to the question of life expectancy had not been considered by the Judge but submitted that none of the alleged errors were material because the evidence that had been adduced was insufficient to meet the high threshold for Article 3 cases.

13. We find that the Judge erred in law, for the following reasons:

    (1) The Judge failed to take into account unchallenged evidence relevant to the question of whether the Appellant would experience a significant reduction in life expectancy on return to Zimbabwe. At [33], the Judge stated, "The Appellant's position is not one such (sic) where she can point to a 'significant' reduction in life expectancy …". In fact, the Appellant had adduced evidence from an expert that if her treatment is withdrawn, it is extremely likely she will die within 12 to 18 months.

    (2) The Judge failed to make findings as to the affordability of appropriate treatment for the Appellant. Applying AM (Zimbabwe), this was a relevant issue in the case and findings ought to have been made.

14. If the Judge had taken into account the evidence in relation to both life expectancy and the affordability of treatment then, irrespective of the question of the evidential burden of proof, it cannot be stated that the Appellant's Article 3 claim would have necessarily failed.

Ground 3 – Article 8

15. In her oral submissions, Ms Jegarajah stated that the Judge had failed to take to account all of the relevant circumstances particular to the Appellant's private life. Mr Tufan pointed out, correctly, that the Judge had made a fundamental error in approach: he had assessed whether the Appellant met the requirements of paragraph 276ADE of the Immigration Rules rather than applying the provisions of section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). However, he submitted that the Judge had taken into account all relevant factual circumstances and the Appellant could not succeed on the facts as the Judge had found them to be.

16. We find that the Judge erred in law, for the following reasons. The Judge concluded,

> "as for the Appellants' (sic) Article 8 rights, the Appellants (sic) cannot succeed under Appendix FM (family life) and paragraphs 276DH (private life) for the reasons set out in the refusal letter" [40] …
>
> I am satisfied that there will not be 'unjustifiably harsh consequences' to the Appellant, for the reasons I already identified above, if she were returned to Zimbabwe now. She spent the majority of his (sic) life there. He (sic) would find no difficulty in being able to reintegrate into Zimbabwean society at the first available opportunity." [42]

17. Not only did the Judge not assess the weight to be attached to the Appellant's private life, or indeed the public interest, in the context of the provisions of section 117C of the 2002 Act, he also failed to make any independent assessment of the factual circumstances of the Appellant's private life. There are complex factual circumstances relating to the Appellant's private life - notably her health, her past trauma and the length of time she has been absent from Zimbabwe – all of which would need to be balanced against the public interest. The outcome of that balancing exercise is not one which is bound to result in the dismissal of the appellant's appeal.

Decision on error of law

18. The First-tier Tribunal's decision involves the making of errors of law such that it must be set aside.

19. In light of the nature and extent of the material errors of law we have identified, none of the findings can be preserved.

Remaking

20. In reaching our decision, we applied paragraph 7.2 of the Senior President's Practice Statement. Some factors pointed towards remitting the case to the First-tier Tribunal, namely the extent of the findings of fact that need to be made and the number of issues in dispute. However, given that this is the second occasion on which the Appellant's appeal has been considered by the Upper Tribunal, we concluded that the appropriate forum is the Upper Tribunal. This was also the Appellant's preference. Directions for the remaking are set out below.

Directions

21. The following directions shall apply to the future conduct of this appeal:

    a. The Resumed Hearing will be listed at Field House, reserved to Upper Tribunal Sheridan, with a time estimate of 5 hours.

    b. The Appellant requires the assistance of a Shona interpreter.

    c. The Appellant has permission to rely on evidence that was not before the First-tier Tribunal.

d. The Appellant shall, within 28 days of being sent the error of law decision, file and serve a paginated and indexed bundle including all evidence upon which she intends to rely at the resumed hearing.

e. The Appellant is to file and serve a skeleton argument at least 14 days before the resumed hearing.

f. The Respondent is to file and serve a reply at least 7 days before the resumed hearing.

Anonymity Order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

C Welsh

Signed Date 28 February 2022
Deputy Upper Tribunal Judge Welsh