



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/13774/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 18 May 2018

Decision & Reasons Promulgated  
On 5 June 2018

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

SC  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Mustafa, Counsel instructed by Pillai & Jones Solicitors  
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant who is a citizen of Bangladesh was born in 1986. She appeals the decision of First-tier Tribunal Judge J Hamilton who for reasons given in his decision dated 11 February 2018 dismissed the appellant's appeal on grounds under the Refugee Convention, for humanitarian protection and with reference to Articles 2, 3 and 8 of the Human Rights Convention against the Secretary of State's decision refusing the asylum and humanitarian protection claim which had been made on 24 August 2016.
2. The First-tier Tribunal Judge made an anonymity direction which I continue in the Upper Tribunal in the following terms:

“Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 there is a prohibition on the disclosure or publication of any material likely to lead members of the public to identify the appellant and her child as AA. Failure to comply with this order may result in contempt proceedings.”

The First-tier Tribunal Judge (the judge) used the following initials which I shall continue in my decision:

H1 First husband  
H2 Second husband  
H3 Third husband  
AA The appellant’s daughter

3. The background to this case is that the appellant came to the United Kingdom as a student in March 2013. In 2006 she had married H1 and a son was born. They separated and H1 kept their child denying her contact. They divorced in April 2010. In March 2014 the appellant underwent an Islamic marriage in the UK to H2. No civil marriage took place. On 19 June 2014 the appellant’s leave was curtailed with effect from 23 August 2014. On 22 August 2014 the appellant applied for leave to remain under the Immigration Rules and on Article 8 grounds on the basis that she had been a victim of domestic violence during her second marriage. This was refused on 5 November 2014 on the basis that she had failed to provide sufficient evidence to establish her claim.
4. The appellant appealed and on 30 July 2015 First-tier Tribunal Judge Fox dismissed her appeal against that decision. The appellant had originally requested an oral hearing. However, on 8 June 2015 her solicitors asked the Tribunal to consider the appeal on the papers only in the light of instructions that they had received from the appellant. Judge Fox dismissed the appeal and gave his reasons for doing so in a detailed decision which was sent out to the parties on 30 July 2015. The appellant did not appeal that decision.
5. On 10 August 2015 the appellant undertook a further Islamic marriage to H3 and on 7 April 2016 a daughter was born. AA suffers from health problems summarised by Judge Fox at [13]:

“I consider Article 8 ECHR and the 5 stage test as set out in Razgar v SSHD [2004] UKHL 39 (“Razgar”). I remind myself that the starting point is that the respondent is entitled to control the entry of foreign nationals into the UK and she is afforded a margin of appreciation in the administration of this. A fair balance must be struck between the competing interests of the individual and the needs of wider society.”
6. The appellant thereafter claimed asylum on which she was substantively interviewed on 31 January 2017. This was refused as I have noted above in August and led to the appeal before Judge Hamilton.
7. The appellant relies on numerous grounds of challenge to Judge Hamilton’s decision. These related to certain credibility findings by the judge and the judge’s findings on Article 3 grounds in respect of AA’s medical difficulties. Specifically as to the latter, reference is made to the judge’s conclusions at [95] which were:

“Looking at the evidence as a whole, I find that AA is a little girl living with serious medical difficulties. The majority if not all of these problems do not appear, in themselves, to be life threatening. However in order to address them and ensure AA has the best possible quality of life, she is very likely to require a high level of care for the rest of her life. The seizures she experiences currently can be severe enough to require medical intervention. The record of her hospital admission in January 2018, strongly suggests they can also potentially be life threatening.”

8. The ground then refers to [182] of *Paposhvili v Belgium* (Application No. 41738/10) and argues:

- “12. ...it cannot reasonably be suggested that, in presence of the established significant medical problems (“life threatening”) of AA coupled with the unchallenged fact that the Appellant is pregnant again, AA would have an appropriate treatment and care in Bangladesh. The convention must always be interpreted and applied in a matter which renders rights practical and effective and not theoretical and illusory. The IJ has speculated that the adequate treatment is available in Bangladesh and alternatively affordable by the Appellant. This amount to material error of law rendering the decision to be flawed and warrants to be reviewed by the Upper Tribunal (IAC).
13. In paragraph 103-104, the IJ relied upon EA & Ors (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 445, and GS (India), and did not apply the more flexible test provided in paragraph 183 of ECtHR judgement of Paposhvili as compared to the test of D v UK and N v UK. Although the relaxed test has not been encapsulated into domestic law yet but AM (Zimbabwe) has sought from the Supreme Court to do so. Until than the similar matter may be stayed as per guidance by COA in AM (Zimbabwe).
14. However, the IJ has failed to give any regard to recent determination of AM (Zimbabwe) & Anor v The Secretary of State for the Home Department [2018] EWCA Civ 04 (30 January 2018), which concluded in paragraph 37 that Paposhvili has relaxed the test for violation of Article 3 with medical condition of foreign immigrants.
15. In paragraph 33-34 of the AM (Zimbabwe) above, it was concluded that the similar cases would be stayed until the Supreme Court modify domestic law according to the ECtHR determination of Paposhvili. It is respectfully submitted that the IJ has filed to apply the binding guidance given by the Court of Appeal in following paragraph 36 of AM (Zimbabwe) in light of Paposhvili case. This is a material error of law particularly in light of finding of the IJ as to significant medical problems amounting to life threatening in this matter coupled with the fact that AA is a child. Since the recent guidance AM (Zimbabwe) has not been applied as such it amounts to material error of law and thus permission to appeal to the Upper Tribunal (IAC) is being respectfully sought.
16. The IJ also has failed to give appropriate consideration to AA medical case in context of Article 8 ECHR having found that it is in the best interest of her remaining in the UK. That was a weighty factor and a primary consideration as such due weight should have been attached to the same.”

9. After providing a summary of the grounds of challenge, in granting permission First-tier Tribunal Judge Grant-Hutchinson observed:

“3. The judge has carefully considered all the evidence in relation to the Appellant’s application for protection under the Refugee Convention and has made appropriate findings which were open to him to make. It was open to the Judge to consider what weight he felt it appropriate to place on all the evidence before him. Even if the Appellant had contact with one friend through the phone not Facebook this is immaterial when considering all the evidence in the round and the fact that the Judge has given adequate reasons for his decision.

4. However it is arguable that the Judge has misdirected himself when considering the Appellant’s daughter’s health conditions by failing to take into account the recent case of AM (Zimbabwe) & Another v SSHD [2018] EWCA Civ 64 which was handed down on 30 January, 2018, a day after the hearing. Notwithstanding this, the case was in the public domain before promulgation of the decision. It is arguable that in applying said case it may have made a material difference to the outcome or to the fairness of the proceedings.”

10. Mr Mustafa confined his argument to the ground identified as arguable and did not advance any case on those that were not. The judge’s observations regarding AA’s medical difficulties are set out in detail in his decision from [89] of his decision. In respect of the claim that AA was medically unfit to travel the judge observed at [94]:

“The Appellant claimed that AA was medically unfit to travel to Pakistan. There was no medical evidence about this. The Appellant said she had not in fact asked AA’s doctor if AA could make the journey. She based her belief on her own experience of caring for AA. I take into account the medical evidence when considering this issue. However, in the absence of medical evidence showing AA cannot travel, I do not find this to be the case.”

And in respect of medical treatment for AA in Bangladesh found at [96] to [99]:

“96. The Appellant claimed that adequate medical treatment was not available in Bangladesh and even if it were she and H3 would be unable to afford it.

97. In the RL, the Respondent asserted that medical treatment was available in Bangladesh. The RL contained information about medical services available in Bangladesh that it was said could address AA’s needs and gave details of where this information had been sourced. The Respondent concluded that in the light of this information AA’s condition was not at such a critical stage that requiring her to relocate to Bangladesh would deprive her of the care she was currently receiving and result in her early death without care available to let her die in dignity. Accordingly her circumstances did not meet the high threshold required for her Article 3 rights to be engaged.

98. I accept that on the whole, the standard of general and specialist medical care available in Bangladesh generally is unlikely to be of a comparable quality to that available in the UK. However the background evidence provided by the Appellant to support her contention that appropriate medical treatment would not be available to AA in Bangladesh was weak. It consisted of what appeared to be an academic research paper on patient satisfaction (AB page 175) and 3 short news

reports about children who had died after not receiving proper medical treatment in Bangladesh (AB 199-201). This evidence came nowhere near rebutting the evidence in the RL and showing that appropriate medical treatment for AA was not available in Bangladesh.

99. Looking at the evidence as a whole, I find that adequate medical treatment to address AA's medical issues is available in Bangladesh."

Finally, in respect of the ability of the appellant to fund treatment, the judge found at [101]:

"101. Looking at the evidence as a whole, I do not find the Appellant has shown that her circumstances in Bangladesh would be such that she would be unable to afford medical adequate treatment and care for AA. I accept that the level of treatment and care they can afford may be well below that available in the UK for free but I do not find that she has shown it would be inadequate."

11. In the course of his submissions, Mr Mustafa explained that the decision of the Court of Appeal in *AM (Zimbabwe) & Anor v SSHD* [2018] EWCA Civ 64 was handed down on 30 January 2018 prior to promulgation of Judge Hamilton's decision on 16 February 2018. In the light of the detailed consideration by the judge of the principles established in *GS (India) and Others v SSHD* [2015] EWCA Civ 40, *EA and Ors (Article 3 medical cases – Paposhvili not applicable)* [2017] UKUT 445, *SQ (Pakistan) v the Upper Tribunal* [2013] EWCA Civ 1251 and *AE (Algeria) v SSHD* [2014] EWCA Civ 653, *ZH (Tanzania) v SSHD* [2011] UKSC 4, had the judge identified the proposition in *AM (Zimbabwe)*, it would have made a material difference.
12. In his view Mr Mustafa contended that although the appellant was unable to meet the threshold in *N*, it was arguable that AA came within [183] of *Paposhvili* and the case should be stayed until guidance was issued by the Supreme Court. I reminded him this was not the ground of challenge. He refocused his argument on *AM (Zimbabwe)* and argued in essence that the interpretation by Court of Appeal of *Paposhvili* indicated that the judge had taken the wrong approach. Mr Mustafa referred to the medical evidence before the judge as to AA's condition between pages 30 and 56 of the bundle.
13. After a detailed analysis of that evidence it emerged that the most recent report of any materiality was dated 1 October 2017 by Dr Mundada, a locum paediatric consultant at Barts Health. A follow-up was arranged and according to a report by Dr Enuganti, a consultant community paediatrician dated 29 December 2017 AA's parents had arrived late for the appointment and the doctor had only half an hour to spend with her and the family. Page 2 from the report is missing. A treatment plan is set out on the third and final page indicating a follow-up six months hence. Only one page from a report dated 10 January 2018 has been provided which refers to a clinic on-line January 2018 was provided to the judge which appears to be a letter addressed to Dr J P Lin, a consultant paediatric neurologist which begins "I would appreciate your expertise in the management of this lovely girl with severe dystonia that had failed to conventional medical treatment, I think she might benefit from deep brain stimulation". Thus, the only report with full detail before the judge was that dated 1 October from Dr Mundada.

14. Mr Mustafa clarified that he did not challenge the findings of fact by the judge on AA's medical condition but instead he challenged the analysis of the principles set out by the judge at [102] in his decision. These contain an analysis of the principles established in *GS (India)* and it is followed by reference to the approach by the Upper Tribunal in *EA and Others*.
15. On behalf of the Secretary of State Ms Isherwood argued that there had been no material error. She referred me to the information provided in the refusal letter (page 16 of 22) which sets out the Secretary of State's understanding of the treatment facilities available in Bangladesh. There was no other evidence before the Tribunal of this aspect. In summary the Secretary of State identified facilities that included the Centre for the Rehabilitation of the Paralysed which has several centres in Bangladesh, the Unique Gift Foundation which provides education and training to children and youths' special needs, the cerebral palsy association in Bangladesh and the availability of gastroenterological care and treatment such as tube feeding available at Dhaka Shishu Hospital. Paediatric care and treatment including speech therapy is reported to be available at the National Centre for Hearing and Speech for Children, Mohakhali, Dhaka. Ms Isherwood reminded me that the judge had understood the seriousness of AA's condition and even taking account of the consideration of *Paposhvili* by the Court of Appeal in *AM (Zimbabwe)* the judge had reached the right conclusion.
16. I am in no doubt that the judge should have referred to *AM (Zimbabwe)* particularly in the light of the hand down of that decision the day after he heard this appeal and in the light of his consideration of the Tribunal decision on *Paposhvili* in *EA and Others*. The question that remains whether *AM (Zimbabwe)* could have resulted in a different outcome having regard to the judge's evidential findings which are not disputed.
17. The effect of the judgment in *Paposhvili* was considered by Sales LJ at [37] to [41]. In particular at [37] and [38] he observed:
  - "37. I turn, therefore, to consider the extent of the change in the law applicable under the Convention which is produced by the judgment in *Paposhvili*, as compared with the judgments in *D v United Kingdom* and *N v United Kingdom*. In my view, it is clear both that para. [183] of *Paposhvili*, set out above, relaxes the test for violation of Article 3 in the case of removal of a foreign national with a medical condition and also that it does so only to a very modest extent.
  38. So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other

words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state."

18. Judge Hamilton found that there was no evidence that AA would not be fit for travel nor any evidence that there was an absence of appropriate treatment in Bangladesh or of her being exposed to a serious, rapid and irreversible decline in her state of health which would result in intense suffering or a significant reduction in life expectancy. I am not therefore persuaded that the error by the judge in not referring to *AM (Zimbabwe)* was material. The evidence of AA's condition although distressing and an understandable worry for her parents could not bring AA within the scope of the "relaxed test" noted by Sales LJ. There was no evidence of any materiality that indicated there are such shortcomings for treatment of AA's condition in Bangladesh of rapid intense suffering or death because of non-availability of treatment.
19. The extent of the evidence of medical facilities in Bangladesh comprised in the appellant's bundle includes a document entitled "Patient Health Services in Bangladesh". It opens with an expression of concern over the quality of healthcare services in Bangladesh which "... has led to loss of faith in public and private hospitals, low utilisation of public health facilities and increasing outflow of Bangladeshi persons to hospitals in neighbouring countries." Notes appearing at the foot of the document indicate that the research for the paper was initiated at a workshop during Dr Syed Saad Andaleeb's sabbatical in Bangladesh as a Senior Fulbright Scholar in 2003-04. The utility of this report is undermined by its age and the report does not indicate that facilities of the kind identified by the Secretary of State are not available. The author notes in the introduction that the underutilisation of available facilities is of significant concern. The government and its development parties have acknowledged their concerns about the quality of healthcare services. The report however is more an identification of the factors that influenced patient satisfaction with healthcare services and is of only limited assistance in identifying the adequacy of treatment available.
20. In addition, the appellant provided an extract from the US Department of State Country Report on Human Rights Practices for 2013. However this report does not identify deficiencies in the healthcare sector.
21. Finally, the appellant has provided three newspaper extracts. The first entitled "Child dies from 'wrong treatment' in Comilla" is dated 15 December 2017. The publication is not identified. It refers to a child dying of the wrong treatment at a private hospital in Kandirpar. The second is from a newspaper, possibly the Independent dated 12 July 2017 with the heading "Child killed due to wrong treatment". This article refers to the death of a child during treatment at Rangpur VIP General Hospital who had been allegedly killed by incorrect treatment and that the family had alleged the child's kidney was stolen "... in the name of surgery". The report refers to the police having detained five people over the allegations. Finally, a ground report dated 12 January 2014 refers to a claim at Narayanganj that a 19 month old child died for receiving the wrong treatment in a private hospital situated in Donchember. It records that a

complaint had been filed with the police. Although each of these incidents is unfortunate they do not even in their totality identify an inadequacy of a kind that would be reasonably likely to undermine the treatment and prospect for AA in Bangladesh.

22. Although the judge erred in failing to have regard to the Court of Appeal authority in *AM (Zimbabwe)* this was not a material error and as a consequence this appeal is dismissed.

#### NOTICE OF DECISION

The appeal is dismissed.

Signed

Dated: 25 May 2018

UTJ Dawson

Upper Tribunal Judge Dawson