Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03766/2017
HU/03768/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 September 2019	**On 12 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) MA (ALBANIA)
(2) DA (ALBANIA)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants:	Mr A Metzer QC and Mr P Slatter, Counsel instructed by Gulbenkian Andonian Solicitors
For the Respondent:	Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal from the decision of the First-tier Tribunal (Judge O'Hagan sitting at Priory Court, Birmingham on 9 January 2019) dismissing their appeals against the refusal of their human rights claims under Article 8 ECHR, in which the principal argument was that the removal of mother and child to Albania would have unduly harsh consequences for the child in circumstances where, on the evidence

available, there could be no confidence that the treatment she required to manage her chronic condition would be accessible in Albania.

The Reasons for the Grant of Permission to Appeal

2. On 22 May 2019 Upper Tribunal Judge Smith granted permission to appeal for the following reasons: "*As is recognised in the grounds, the success or otherwise of the appellants' case turns on the medical condition of the minor appellant. In an otherwise very carefully reasoned decision, it is arguable that the Judge has erred in failing to take into account when considering the child's best interests, the importance to her of receiving treatment for her condition in the UK.*"

Relevant Background

3. The appellants are nationals of Albania. The first appellant was born on 28 March 1989, and she gave birth to the second appellant in Albania on 4 November 2011. The appellants entered the United Kingdom illegally on 5 December 2014, and have been here ever since. The first appellant claimed asylum, but her asylum claim was refused by the respondent on 27 March 2015. On 9 February 2016, the appellants applied for leave to remain outside the Rules on the basis of the child's health.

4. On 17 February 2017 the respondent gave his reasons for refusing the applications. The first appellant had provided evidence of her child's condition, along with documents from Albania detailing her treatment there. She stated that the doctors in Albania were unable to correctly diagnose her daughter's condition. However, the doctors in the UK had now done so. Her daughter successfully underwent an operation for her achalasia in January 2017 and as such she should now be able to return to Albania with her, as her condition had been diagnosed and there was no evidence to suggest that she was unfit to travel.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The appellants were represented by Mr Slatter of Counsel at the hearing before Judge O'Hagan. There was no representation on behalf of the respondent. The documents filed for the hearing included up-to-date evidence of the child's state of health and also evidence about the availability of medical treatment in Albania.

6. In his subsequent decision, Judge O'Hagan reviewed the child's medical history at paragraphs [6]-{10]. At about the age of one, the child displayed problems swallowing food and she had an associated propensity to vomit. She was treated in Albania where it was assumed that she had gastro-oesophageal reflux disease. As a result of her problems, she was notably failing to thrive, as she displayed delayed physical development compared to other children of the same age. She had been under the care of Birmingham Children's Hospital since she came to the UK. She was initially diagnosed with achalasia, a life-long oesophageal disorder. In January 2017, the child underwent surgery to the oesophagus. The purpose of that was to reduce the symptoms of achalasia that she was experiencing. Subsequently, she experienced on-going symptoms of acid reflux and difficulties in swallowing. She

had, nonetheless, regained her pre-surgery weight by January 2018. In March 2018, it was found that she had inflammation of the lining of her oesophagus around the scarring caused by the operation.

7. Writing on 8 February 2019, Doctor Whyte noted that the child's most recent endoscopy showed on-going ulceration, and inflammatory changes at the lower end of the oesophagus, despite medical therapy. She anticipated that the child would require regular endoscopies, and assessment of growth. She would also need to be monitored because of the risk of developing Addison's disease. She would require dietetic support. There was a possibility that she would need further surgical intervention.

8. On the topic of the global clinical picture and the child's prognosis, the Judge quoted Dr Whyte as follows at paragraph [9]: "*Despite her mother repeatedly seeking advice for recurrent vomiting in Albania, the diagnosis was missed and as a result she was unable to swallow any solids at the time when I first met her. She required a period of nutritional rehabilitation as her nutritional state was very poor and the risk of surgery was significantly high due to her malnutrition. With intensive input and nutritional support, [the child] gained weight and was then safe to proceed with surgery to manage her achalasia. It is well understood that children who have achalasia, particularly those who present late, have worsened outcomes and ongoing problems; vomiting, dysphagia (things getting stuck in the oesophagus); oesophageal dysmotility (abnormal contractions of the oesophagus) and oesophagitis (inflammation of the oesophagus). They often have problems with poor growth which has been displayed by [the child] as her growth has been slow.*"

9. At paragraph [10], the Judge expressly accepted Dr Whyte's summary of the child's clinical history and the ongoing problems that she was likely to face as an achalasia sufferer who had presented late with the condition.

10. The Judge recorded Mr Slatter's closing submissions at paragraph [17] of his decision. Mr Slatter asked him to allow the appeal outside the Rules on the basis that a refusal would have unjustifiably harsh consequences for the child. He asked the Judge to find that the child had a private life in the UK, independent of her medical condition. He asked the Judge to find that the necessary treatment would not be available in Albania. She had tried to organise a conference call with the hospital in Tirana, but they would not cooperate. The lack of treatment in Albania was a factor in the proportionality assessment. It pushed it "*over the line*" as there would be unjustifiably harsh consequences. He reminded the Judge of the need not to visit the sins of the parents on the child.

11. The Judge set out his analysis, findings and conclusions at paragraphs [18] onwards. At paragraph [19], he observed that it was established law that in cases where someone might suffer harm as a result of cessation of medical treatment in this country, that could potentially give rise to a finding that such cessation breached Article 3 ECHR. The threshold was, however, set very high. It had not been argued before him that the child's circumstances had reached the very high threshold required for a breach of Article 3 EHCR.

12. At paragraph [21], he directed himself that, before moving on to carry out his substantive Article 8 assessment, he should explore in general terms the issue of whether a case which did not succeed under Article 3 on medical grounds could succeed instead under Article 8. The Judge went on to consider the guidance given by the Court of Appeal in **MM (Zimbabwe) -v- SSHD [2012] EW Civ 279** and in **GS (India) & Others -v- SSHD [2015] EWCA Civ 40**.

13. The Judge began to address the substantive Article 8 claim at paragraph [25]. In his discussion about proportionality, the Judge adopted a balance sheet approach. He considered the public interest factors at paragraphs [31]-[33], and at paragraph [34] he turned to consider the other side of the balance sheet, "*the factors which favour the appellants.*" With regard to the first appellant, he held that realistically the only interests that she could advance was the position of her daughter. If he accepted that the interests of the child were sufficient to outweigh the public interest, it would follow that he would grant the first appellant leave to remain alongside her daughter.

14. At paragraph [35], he turned to consider the position of the child. He reminded himself that no adverse inference should be drawn against the child for the fact that her time in the UK was accrued while she had been here unlawfully or with a precarious status.

15. At paragraph [38], the Judge reminded himself that the welfare of the child was a primary consideration, but not the paramount consideration.

16. At paragraph [39], the Judge observed that the child was aged 7, and she was aged 3 when she arrived. He did not doubt that the child had formed friendships, and that she had achieved that level of social integration which most children of her age would have achieved. Nonetheless, she was still of an age at which the primary focus of her life would be within her family. He was satisfied that the child's best interests lay with her mother. In his view, with the love and support of her mother, the child would be able to adjust to life in Albania.

17. At paragraph [42], the Judge reminded himself of the guidance given in **Zoumbas -v- SSHD [2013] UKSE 74** at paragraph [24]: "*There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision-maker recognised might be of a high standard that would not be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and healthcare in this country.*"

18. At paragraph [44], the Judge said that while the child had sufficient private life in the UK to engage Article 8, the factors weighing on her side of the balance in the assessment of proportionality, excluding her health problems, fell far short of those weighing in favour of the public interest. At paragraph 45 the Judge said:

> I have considered whether the impact of the child's health condition, and the ongoing need for treatment, is sufficient to tip the balance the other way. I have real sympathy for the fact that the child has a difficult and life-long condition. Nonetheless, I must and do conclude that it not only falls short of the Article 3 threshold, but it is insufficient, in the context of an otherwise weak Article 8 claim, to tip the balance away from the public interest and to the child's private interests. I readily acknowledge that the child may well struggle in Albania to access healthcare of the quality that she has had in this country. I note Dr Whyte's forcefully expressed concerns in that regard. Whilst that may be right, it is not my place to engage in such a comparative exercise. In the language of **MM (Zimbabwe)**, to do so would offend against the principle that "… the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported …"

19. The Judge held at paragraph [46] that the public interest outweighed the private interests of both appellants. While he regretted the impact of this decision on the child, "*the weight of case law is such that I find myself unable sustainably to reach any other conclusion.*"

The Hearing in the Upper Tribunal

20. At the hearing before me to determine whether an error of law was made out, Mr Metzer QC developed the case pleaded in the permission application. He had no quarrel with the Judge's analysis up to and including paragraph [44]. However, he submitted, paragraph [45] contained two errors. Firstly, the Judge had misdirected himself in law in declining to engage in a comparative exercise between the treatment and medical expertise that the child was accessing in the UK to manage her condition as against what was likely to be available to her in Albania on the grounds that this would offend against the "*no obligation to treat*" principle. Alternatively, insofar as the Judge could be taken to have accepted Dr Whyte's concerns regarding the absence of adequate medical treatment for the child in Albania, the Judge had materially erred in law by failing to provide adequate reasons as to why it was not therefore overwhelmingly in the child's best interests to remain in the UK such as to outweigh the public interest in the maintenance of effective immigration controls. Ms Jones submitted that the Judge had directed himself appropriately, and that no error of law was made out.

Discussion

21. In paragraph [23] of **MM (Zimbabwe)**, cited by the Judge O'Hagan at paragraph [21] of his decision, Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) said:

> The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with dependence on the family here for support, together establish "private

> life" under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above but that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported.

22. As stated by Judge O'Hagan at [22], the Court of Appeal in **GS (India)** affirmed the reasoning in **MM (Zimbabwe)**. Giving the leading judgment, at paragraph [86] Laws LJ cited the above passage with approval, adding: "*If the Article 3 claim fails (as I would hold it does here) Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm - the capacity to form and enjoy relationships - or a state of affairs having some affinity with the paradigm.*" At [87] he said that the rigour of the D exception applied *"with no less force"* when the claim is put under Article 8.

23. My attention was also drawn to paragraph [111] of **GS**, where, after quoting the passage from **MM (Zimbabwe)** I have set out at {21] above, Underhill LJ said:

> There are possibly some ambiguities in the details of the reasoning of that passage, but I think it is clear that two essential points are being made. First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8; if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise, but that factor cannot be treated as by itself giving rise to a breach, since that would contravene the "no obligation to treat" principle.

24. I do not consider that Ground 1 is made out. The passage from the judgment of Moses LJ at paragraph [23] of **MM (Zimbabwe)** contains an implicit prohibition against the decision-maker embarking on a comparison between medical facilities here and those in the country of return. This is borne out by the hypothetical example given in the same passage. The example does not involve a comparison between the quality of the medical treatment that the appellant has been receiving in the UK as against the absence of adequate medical treatment in Zimbabwe, but on the availability of continuing medical treatment in the UK coupled with his dependence on his family here for support, both of which factors combine to establish and enhance his private life in the UK.

25. Although the passage was not cited by Judge O'Hagan, his discussion in paragraph [45] is also consonant with the reasoning of Underhill LJ at paragraph [111] of **GS**. Judge O'Hagan accepted that Article 8 was engaged by other factors, and he expressly took into account as a factor in the proportionality exercise that the child was receiving medical treatment in the UK which might not be available in Albania. He acknowledged that the child might well struggle in Albania to access health care of the quality that she had in the UK, noting Dr Whyte's forcefully expressed concerns in that regard.

26. I do not consider that it was incumbent on the Judge to make a specific finding that adequate medical care would definitely not be available or to make a specific finding on how much worse the monitoring and treatment of the child's condition was likely to be in Albania, in circumstances where it was not the evidence that there was likely to be a complete absence of treatment; when the accepted prognosis did not disclose the need for life-saving treatment; and when the degree of medical expertise which would be required in the future to manage the child condition's appropriately was to a significant extent dependent on whether and in what respects child's symptoms worsened. Mr Metzer submitted that the Judge had "*downplayed*" the difficulties the child was likely to encounter in Albania. But I consider that his finding at [45] fairly reflected the thrust of the evidence. In the report of Dr Whyte quoted at [9], Dr Whyte explained how she had not been able to ascertain from the private hospital in Tirana that would be responsible for the child's care the treatment that would be available. She reasoned that as the child had a life-long condition that was poorly managed in her home country initially, she did not have confidence that Albania had the expertise to manage appropriately the child's gastrointestinal and endocrinology problems. She went on to identify potential problems that might emerge in the future and also the complex investigations which she would in any event like to carry out in the future, using highly specialised equipment which she suspected would not be available in Albania.

27. Turning to Ground 2, the Judge did not explicitly state that, other things being equal, it was in the best interests of the child to stay in the UK with her mother so that she could continue to receive monitoring and treatment for her chronic condition which was of a high standard and probably considerably superior to that which she was likely to be able to access in Albania, where the diagnosis of achalasia was missed with the consequence that she had presented late with achalasia to Dr Whyte. However, it is tolerably clear from the Judge's line of reasoning, including his citation from **Zoumbas**, that he took this into account when assessing proportionality.

28. It was open to the Judge to find that the child had a relatively weak private life claim, absent her health problems, for the reasons which he gave in paragraphs [35]-[44] and which are not the subject of an error of law challenge; and, having earlier accepted the global clinical picture and prognosis given by Dr Whyte, he gave adequate reasons for holding that the child's condition did not tip the balance the other way.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity

Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or

any member of their family. This direction applies both to the first appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Monson 6 September 2019