Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39078/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 December 2018	**On 17th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MRS I S
(ANONYMITY DIRECTION MADE)

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Representation:
For the Appellant: Mr I Jarvis, Home Office Presenting Officer.
For the Respondent: Mr N Paramjorthy, Counsel.

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-Tier Tribunal with the Secretary of State referred to as "the Respondent" and Mrs I S "the Appellant".

2. The Appellant is a citizen of Sri Lanka who sought international protection. It was refused and she appealed. In a decision promulgated on 2 October 2018 Judge of the First-tier Tribunal Timothy Thorne dismissed the Appellant's appeal on refugee and humanitarian protection grounds but

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allowed it under Articles 3 and 8 of the European Convention on Human Rights.

3. The Respondent sought permission to appeal. That application was considered by Judge of the First-tier Tribunal Povey, who granted it. The Judge's reasons were: -

> "1. The Respondent seeks permission to appeal against a Decision of First-tier Tribunal Judge Thorne who, in a Decision and Reasons promulgated on 2 October 2018, dismissed the Appellant's appeal against the Secretary of State's decision to refuse her application for asylum and humanitarian protection but allowed her appeal under Articles 3 and 8 of the ECHR.
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> 2. The grounds allege that the Judge failed to give adequate reasons for his conclusion under Article 3, failed to properly weigh the medical evidence and erred in law in his assessment under Article 8.
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> 3. The Judge refused the Appellant's asylum and humanitarian protection appeals, making findings regarding her circumstances which are not challenged. At [78], he found that the Appellant's mental health and her circumstances on return to Sri Lanka were such that she would not be able to reasonably access any treatment which may be available to her. That finding was reasoned and clear. However, the Judge arguably erred in failing to explain how and why he afforded weight to the Appellant's expert medical report, given the criticisms raised by the Respondent as to its age and the lack of up to date medical evidence. The medical report was material to his assessment under Article 3 and the conclusions reached.
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> 4. It was also arguable that the Judge failed to undertake a lawful assessment under Article 8. It was not clear what separate or additional factual element (over and above the Appellant's mental health) brought the case within the Article 8 paradigm nor was it clear how the Judge had weighed the competing factors within that assessment.
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> 5. As such, the application for permission disclosed arguable errors of law and permission to appeal is granted. All grounds may be argued."

4. Thus, the appeal came before me today.

5. At the outset Mr Jarvis handed up the Authorities of **AM (Zimbabwe) v SSHD [2018] EWCA Civ 64** and **SL (St Lucia) v SSHD [2018] ECWA Civ 1894**.

6. Mr Jarvis submitted that this is a case which centres on the mental health issues that the Appellant presents and that the Judge has failed to engage with the potential risk of the suicide issue when analysing the expert medical evidence of Dr Raj Persaud at paragraphs 77 and 78 of his decision. He submitted that as the law currently stands there can only be a breach of Appellant's Article 3 rights in "deathbed" situations.

7. He referred me to the authority of **Paposhvili v Belgium [2017] Imm AR 867** and asserted that at paragraph 37 onward The Court of Appeal is

effectively dealing with cases of procedural argument for stay of removal where the only outcome might be for a stay or adjournment. The authority of **N v SSHD [2005] UKHL 31** remains binding. In this appeal the way forward may have been for the Judge to adjourn it pending the Supreme Court giving consideration to **Paposhvili**. Hence, the Judge has erred at paragraph 78 of his decision in concluding that there is a real risk of the Appellant being exposed to a serious, rapid and irreversible decline in her state of health resulting in intense suffering and that she would be in no fit state to access suitable treatment constituting a breach of Article 3 of the ECHR. Given that **N** is binding this is a conclusion that the Judge was not entitled to make. In applying **Paposhvili** the Judge has ignored precedent and should have dismissed the appeal under Article 3.

8. Beyond that the Judge has failed to engage with the Respondent's supplementary refusal letter.

9. I was then referred to paragraphs 27 and 28 of **SL** (see above). They state:-

> "27. However, I am entirely unpersuaded that Paposhvili has any impact on the approach to article 8 claims. As I have described, it concerns the threshold of severity for article 3 claims; and, at least to an extent, as accepted in AM (Zimbabwe), it appears to have altered the European test for such threshold. However, there is no reason in logic or practice why that should affect the threshold for, or otherwise the approach to, article 8 claims in which the relevant individual has a medical condition. As I have indicated and as GS (India) emphasises, article 8 claims have a different focus and are based upon entirely different criteria. In particular, article 8 is not article 3 with merely a lower threshold: it does not provide some sort of safety net where a medical case fails to satisfy the article 3 criteria. An absence of medical treatment in the country of return will not in itself engage article 8. The only relevance to article 8 of such an absence will be where that is an additional factor in the balance with other factors which themselves engage article 8 (see (MM (Zimbabwe) at [23] per Sales LJ). Where an individual has a medical condition for which he has the benefit of treatment in this country, but such treatment may not be available in the country to which he may be removed, where (as here) article 3 is not engaged, then the position is as it was before Paposhvili, i.e. the fact that a person is receiving treatment here which is not available in the country of return may be a factor in the proportionality balancing exercise but that factor cannot by itself give rise to a breach of article 8. Indeed, it has been said that, in striking that balance, only the most compelling humanitarian considerations are likely to prevail over legitimate aims of immigration control (see Razgar at [59] per Baroness Hale).
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> 28. Therefore, in my firm view, the approach set out in MM (Zimbabwe) and GS (India) is unaltered by Paposhvili; and is still appropriate. I do not consider the contrary is arguable."

10. Mr Jarvis submitted that consequently, the appeal should also have been dismissed under Article 8. The Judge has failed to lawfully engage with the significant obstacles assessment within the Immigration Rules.

11. Further, the Judge has given no adequate explanation as to why the same arguments which failed under Article 3 should succeed under Article 8. There is a lack of identification of factors outside of the alleged difficulty of accessing treatment to show why the Article 8 consideration is based on factors different to those under Article 3. Finally, there is a failure to conduct a proper balancing exercise having failed to show that Section 117B in all of its provisions has been properly applied with the appropriate weight given, as mandated by statute, including but not confined to the limits to weight to be given to private and family life established by those with a precarious status.

12. Mr Paramjorthy accepted that this was a complicated appeal with unusual features. He submitted that the Judge has considered detailed oral evidence in regard to the Appellant's mental health. A lack of funds prevented the Tribunal benefitting from up-to-date psychiatric evidence. However, the Judge has applied a holistic approach finding the Appellant plausible in aspects of her evidence including that her son returned to Sri Lanka and has not been heard of since. The Judge has found that the Appellant's children, and in all probability herself, were and remain on a watch list but not a stop list and it was open for the Judge to come to a conclusion that the Appellant would suffer a rapid deterioration in her health were she to be returned. Adequate reasons have been given and there is nothing within the decision to suggest the Judge failed to engage with the Respondent's supplementary refusal letter.

13. The Judge concludes at paragraph 78 of his decision that there is inadequate evidence to establish that suitable medical psychiatric treatment is not available in the Appellant's country of origin. He then goes on to find that given her vulnerability she would not be in a fit state to access such treatment. However, in coming to this conclusion the Judge has failed to engage with the issues raised within the Respondent's supplemental refusal letter and particularly in light of the adverse comment in relation to the age of the Appellant's medical evidence. Further the Judge has erred in not finding himself bound by the above-mentioned authority of **N**. Beyond that he has failed to adequately reason why the arguments which failed under Article 3 would be successful under Article 8 and no identified factors outside of the alleged difficulties to access available treatment to show why the Article 8 consideration is based on factors different to those under Article 3 can be gleaned from his decision. These factors have impacted upon the balancing exercise required with particular reference to the weight that should be given to private and family life established by an Appellant with precarious status.

14. For those reasons the Judge has materially erred. In these circumstances further fact finding is required.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Direction 7(b) before any Judge aside from Judge Thorne.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 8 January 2019

Deputy Upper Tribunal Judge Appleyard