Upper Tribunal
(Immigration and Asylum Chamber)

HU/01782/2019 (P)
HU/01786/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34

Decision & Reason Promulgated
On 22 July 2020

Before

UT JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J N & G N

Respondents

DETERMINATION AND REASONS (P)

1. The parties are as above, but the rest of this determination refers to them as they were in the FtT.

2. The appellants are mother and son, both citizens of Nigeria. Their human rights case was based on the health condition of the second appellant, 5 years old. FtT Judge Rose allowed their human rights appeals by a decision promulgated on 19 August 2019.

3. The SSHD has permission to appeal to the UT on one ground, headed as "material misdirection in law", set out in three sub-paragraphs, in summary as follows:

[1] misunderstanding of *AM (Zimbabwe)* [2018] EWC A Civ 64; the FtT was bound by *N v SSHD* [2005] 2 AC 296 unless and until overruled by the Supreme Court; the criteria in *N* were not satisfied because the second appellant did not face a risk of imminent death upon return to Nigeria;

[2] alternatively, article 3 test in *Paposhvili* [2017] Imm AR 867 not met; health facilities in Nigeria may not generally be as good as in the UK but that does not make removal to Nigeria of someone who suffers from biliary atresia a breach of article 3; no evidence that the second appellant will suffer anything like the serious, rapid and irreversible decline in his health resulting in intense suffering … required by *Paposhvili* … whatever the outcome of *AM* in the Supreme Court may be … as serious as the second appellant's condition clearly is, his case falls far short of the article 3 threshold;

[3] error in the alternative findings on article 8, which required some separate element to engage article 8, and was not engaged by inadequacy of medical treatment alone.

4. The UT granted permission on 27 January 2020, and directed the hearing to be listed after decision of *AM* in the Supreme Court.

5. The appellants filed a response, dated 26 February 2020, to the grant of permission. Along with that, they applied for admission of updated medical reports, yet to be obtained. Such material might be admissible if the decision were to be remade, but the application does not suggest that it is relevant to whether the FtT erred on a point of law.

6. On 29 April 2020, the Supreme Court decided *AM* [2020] UKSC 17.

7. The UT issued directions on 5 May 2020, with a view to deciding without a hearing whether the FtT erred in law and, if so, whether its decision should be set aside. Parties were also given the opportunity to submit on whether there should be a hearing.

8. The time limits for complying with directions have expired. Any time extensions necessary for considering parties' responses are granted.

9. The SSHD's response, dated 18 May 2020, relies upon the grounds, and runs thus (in summary, and following the numbering of the submission):

[4] error in applying *Paposhvili* when it had no force in domestic law; not clear that had *AM* been applied, as clarified by the Supreme Court, that the FtT would have decided as it did;

[5] substantive article 3 test in *Paposhvili* "not in fact applied at all by the judge";

[6] misdirection at [11] of the decision on the standard of proof; conflation at [25] of the approaches to articles 3 and 8;

[7] repeats [4], and adds - no identification and application of the relevant test; no reasons for key findings at [21-25]; unclear, other

than erroneous reference to proportionality, what standard of assessment was used.

10. Finally, the SHD asks for the decision "to be set aside with no findings preserved".

11. The SSHD does not submit on any need for an oral hearing, and so presumably considers the case to be suitable for decision "on the papers".

12. The appellants' response, dated 26 May 2020, says that there should be an oral hearing (unless the UT considers there to be no error of law). On the substance of the case, the response runs (again in summary, and following the numbering of the submission):

    [10-12] on (sub) ground [1], the question is whether if the Supreme Court's decision had been available at the time, that would have made any material difference;

    [14-15] the SSHD's submissions on standard of proof and absence of reasons seek to introduce new grounds, on which permission has not been granted;

    [17-18] no error by FtT on the (very modest) extent to which *Paposhvili* relaxed the article 3 test; Supreme Court *less* restrictive on that relaxation than the Court of Appeal, so any error cannot be material;

    [19] on seriousness of condition of the second appellant, grounds are disagreement, not error of law;

    [20-25] factors identified by FtT sufficient to meet the article 3 test;

    [26] misrepresentation of decision to suggest it is based simply on inferior health facilities in Nigeria;

    [27] in line with *Paposhvili* and *AM* approach, evidence of inadequacy of Nigerian healthcare was produced, and not countered by the SSHD;

    [29] if no error on article 3, article 8 ground irrelevant;

    [30] in any event, best interests of second appellant were engaged, and therefore private life.

13. Having considered all the above, I prefer the submissions for the appellants, for the following reasons. It is therefore possible, in terms of rules 2 and 34, to resolve the case without an oral hearing.

14. The nub of *AM* is at [34], where the Supreme Court found no question of refusing to follow *Paposhvili*, and decided to depart from *N*. The FtT directed itself at [10] to apply *N* subject to the "very modest relaxation" established by *Paposhvili*. That relaxation is now seen to be slightly less modest that the FtT thought.

15. The SSHD's grounds and submissions show no material error by the FtT in identifying the legal threshold for article 3. I see no lack of clarity in the standard of assessment applied to the evidence.

16. The SSHD's submissions on "standard of proof" are not covered by the grant of permission or by any application to advance further grounds. In any event, the complaint is vague, and leads nowhere.

17. The grounds directed against the FtT's findings on the facts are confused, vague, and do not fairly represent the decision. The submissions for the appellant are correct in pointing out that the decision is not based on health facilities being "not generally as good in Nigeria … as in the UK". The grounds accept that the appellant's condition is serious, but not that it comes "anywhere near" the *Paposhvili* threshold. Without any reference to the underlying evidence, that is nebulous disagreement, not identification of anything which might amount to an error on a point of law.

18. The decision at [1] records apparent agreement that the second appellant is "extremely sick". He had a liver transplant, in India, when aged 9 months. At [23 a – c] the Judge specifies, briefly but clearly, the medical evidence and history which underpins his conclusion at [23 d], *"Consequently, there is no prospect of the second appellant's condition being managed successfully in Nigeria and, if returned there, his condition will swiftly deteriorate, his liver transplant will fail and he will die. The worsening of his condition will be hugely distressing and painful for a child of [his] age".*

19. The Supreme Court in *AM* at [31] made observations on the relative significance of reduction in life expectancy of persons aged, in the examples they gave, 74 and 24. The relatively high significance of reduction in life expectancy in this case is a factor on which the FtT was entitled to found, and which is reflected at [23 d] of its decision.

20. The SSHD has failed to develop any argument that the evidence cited did not amount to a legally adequate basis for its conclusion on the facts. It is a conclusion which justifies the outcome of the appeal.

21. I doubt whether there is any substance in the appellants' response on the article 8 alternative; but, as they say, given the outcome on article 3, that need be taken no further.

22. The SSHD has not disputed that if the second appellant succeeded, so did the first.

23. The grounds and submissions for the SSHD do not show any material error in the FtT's self-directions on the law; in its conclusions on the facts; or in applying the law to the facts found, and allowing the appeal. The decision of the FtT shall stand.

24. The anonymity direction made on 5 May 2020 is maintained.

25. The date of this determination is to be taken as the date it is issued to parties.

Hugh Macleman

UT Judge Macleman
9th July 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.