



IAC-AH- -V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/11602/2019

**THE IMMIGRATION ACTS**

**Decision on Papers (P)  
On: 23 November 2020**

**Decision & Reasons Promulgated  
On: 01 December 2020**

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**ZPS**  
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**DECISION AND REASONS**

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Buckwell, promulgated on 7 January 2020. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 15 May 2020.

Anonymity

2. No anonymity direction was made previously, nonetheless such a direction is now made on account of the appellant's health issues.

Background

3. The appellant entered the UK on 11 August 2011 as a Tier 5 (Creative-Sport) migrant, with leave to enter until 10 August 2012. Her attempt to extend her leave to that of a Tier 5 (Charity) migrant was unsuccessful and her appeal against this decision was rejected as being out of time. Her appeal rights were exhausted on 31 July 2015. The appellant's partner BMM entered the UK as a working holidaymaker on 15 August 2006 and overstayed when his leave expired in 2008. The appellant made a human rights' claim on 11 March 2019 with BMM as her dependent. The basis of that claim was that the appellant suffers from HIV, left Upper Lobe Aspergilloma and was undergoing investigations into other ailments and would face destitution on return to South Africa. The Secretary of State refused that claim in a decision dated 25 June 2019 primarily because it was not accepted that the appellant met the requirements of the Immigration Rules or had demonstrated that there were exceptional or compassionate circumstances.

#### The decision of the First-tier Tribunal

4. The appellant gave evidence before the First-tier Tribunal and much of her testimony concerned her fears that she would not be able to obtain life-saving medication, treatment or employment in South Africa. She also mentioned an operation that she was due to have on one of her lungs. The judge found that the appellant's claim did not meet the threshold to establish a potential breach of Article 3, that paragraph 276ADE of the Rules was not met and that no unduly harsh consequences would arise from her return to South Africa.

#### The grounds of appeal

5. The grounds of appeal mainly concern the failure by the judge to consider the medical evidence regarding the appellant's lung condition in reaching his findings.
6. Permission to appeal was granted on the basis sought.

#### Procedure

7. Directions were served on the parties by email on 24 July 2020, which stated that a provisional view had been taken that the matter could be decided without a hearing and invited written submissions regarding whether the First-tier Tribunal made an error of law and whether that decision should be set aside. The parties were further invited to submit reasons if it was considered that a hearing was necessary.
8. Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 states that the Upper Tribunal may make any decision with or without a hearing but must have regard to any view expressed by a party when deciding whether to do. The respondent provided submissions attached to an email on 29 July 2020 which expressed agreement that the issue of whether there was a material error of law could be justly determined without an oral hearing. The appellant forwarded written submissions by email on 4

August 2020 and agreed that “*this matter could be appropriately determined without an oral hearing.*”

9. I have considered the judgment in *JCWI v The President of the Upper Tribunal* [2020] EWHC 3103 (Admin) and conclude that given my ultimate decision, the appellant has not been disadvantaged by the error of law issue being decided without a hearing in this instance.

#### Decision on error of law

10. I have taken into consideration all the documents before me in reaching my decision. The respondent’s submissions noted that the First-tier Tribunal did not have the benefit of *AM* [2020] UKSC 17 which was promulgated 3 months after the decision and reasons in the appellant’s case. Furthermore, the respondent noted that at [72] the Judge found that the caselaw subsequent to *N* did not lessen the threshold, failed to particularise what he meant and relied on the *N* threshold at [73]. Consequently, the respondent agreed that this amounted to a material misdirection of law.
11. The appellant’s submissions concurred with those of the respondent and further, argued that the respondent had failed to rebut the medical evidence that the appellant required a life-saving lung operation which would not be accessible in South Africa. The Upper Tribunal was urged to substitute a decision allowing the appeal.
12. The respondent is correct to concede that the First-tier Tribunal’s reliance on the threshold in *N* amounts to a material error of law both owing to the recent decision in *AM* as well as the judge’s lack of discussion regarding his finding that *Paposhvili* did not lessen the *N* threshold. There was also no reference in the reasons to *Savran*, which was additionally relied upon by the appellant at the hearing.
13. There is also the matter of the medical evidence. The most recent medical report of Professor Macallan, a professor of infectious diseases and medicine at St George’s University Hospitals includes his opinion that the medication used to treat the appellant’s lung condition, namely Aspergilloma, was toxic and infrequently used and may not be available in South Africa; that the appellant required cardio thoracic surgery which he did not think would be available in her country or origin and that the possibility of the appellant changing her HIV medication on return to South Africa could make it impossible to treat her Aspergilloma owing to drug interactions. Professor Macallan explained that if the appellant was unable to proceed with surgical treatment this would be potentially life-threatening leading to the development of serious bleeding from the lungs or leaving her profoundly disabled. While the judge briefly refers to this evidence at [70], there was no assessment of the serious consequences referred to by Professor Macallan nor clear findings made as to the weight to be attached to it. No evidence was put forward on behalf of the respondent to show that the infrequently used drug the appellant used for Aspergilloma was available in South Africa. At [73] the judge states “*In general terms such medication is available in South Africa and I do not*

*find that the Appellant can establish reliance upon the judgment in N with respect to her HIV condition.* " This finding was less than adequate in the circumstances and amounts to a further material error of law. I accordingly find that the decision of the First-tier Tribunal is unsafe and set it aside in its entirety.

14. The appellant requested, in the first instance, that the Upper Tribunal remake the decision on the papers, by allowing her appeal. I have decided not to do so for the following reasons. Firstly, the medical evidence is now somewhat dated and the most recent letter of 5 July 2019 from Professor Macallan is incomplete, in any event. Secondly, the respondent may wish to explore whether the drug in question, Voricanazole is available in South Africa as well as whether cardiothoracic surgery is available. The respondent, depending on the outcome of that exploration, may wish to review this case in the light of the judgment in *AM*.
15. In the alternative, the appellant is of the view that the appeal should be remitted for a de novo hearing before the First-tier Tribunal. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is the case that the appellant has yet to have an adequate consideration of the medical aspects of her human rights appeal at the First-tier Tribunal and it would be unfair to deprive her of such consideration.

## **Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.**

**The decision of the First-tier Tribunal is set aside.**

**The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House IAC, with a time estimate of 3 hours, by any judge except First-tier Tribunal Judge Buckwell.**

Signed:

Date 23 November 2020

Upper Tribunal Judge Kamara