**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/04302/2016**

**THE IMMIGRATION ACTS**

| **Heard at Rolls Building, London** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9th February 2018** | **On 14th March 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MR A. K. M. MAJHARUL HASAN**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr J Plowright (Counsel)
For the Respondent: Mr I Jarvis (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Hawden-Beal, promulgated on 21st March 2017, following a hearing at Birmingham on 7th March 2017. In the determination, the judge dismissed the appeal of the Appellant, therefore the appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

**The Appellant**

2. The Appellant is a male, a citizen of Bangladesh, who was born on 5th March 1971. He appealed against the decision of the Respondent Secretary of State dated 3rd February 2016 refusing his application for further leave to remain on the basis of his

private life. The Appellant has acute kidney problems. There is expert evidence that he is at a critical stage. Without a transplant he could die from kidney failure. An absence of dialysis could lead to death within one to two weeks. The appellant needs dialysis three times a week. If he were to be returned to Bangladesh this would cost him around £125 to £375 per week. He has a sister and her husband in Bangladesh. However, they could not pay for this treatment. His family home is about 180 kilometres away from Dhaka, the capital city, where kidney dialysis treatment would be available to him. He could not move there. He could not travel there every other day of the week to have this treatment three days a week. His kidneys have failed completely. He is not passing urine. Anything he drinks has to be removed by dialysis. He also has arthritis which is treated by weekly injections. He is not married. He has no children. He was designated suitable for kidney transplant two and a half years ago. However, he was taken off the list because of his lack of permanent immigration status. He was told that once his status is regularised a kidney transplant would then become an option once again. He maintains that if he got permission to remain in the UK he could possibly get a job and pay for the treatment in that way. However, he has never paid for any treatment whilst he has been in the UK. He claims that no-one has ever asked him to pay for such treatment. However, the Respondent Secretary of State, in refusing his application to remain here, has stated that he has outstanding debts for his national health service treatment from Epson and St Helier's NHS Trust, which on 16th August 2012, raised a debt against him of £6,928.11. On 24th October 2012, it raised a further debt against him of £4,272.63. The Appellant had not lived in the UK for at least twenty years. He was over the age of 18. He was not under 25 years of age. He could not point to "very significant obstacles" to his integration back into Bangladeshi society because he was born there. He had spent the first 26 years of his life there. He was familiar with the language and customs of Bangladesh. He had two brothers and three sisters living there. They could support him on his return there.

**The Judge's Findings**

3. In a comprehensive and well-structured determination, IJ Hawden-Beal recounted the evidence from the Appellant and his sister Mrs Roushanara Shilu, before noting the contents of the refusal letter that it was not credible that the Appellant would have received at his home address the appointment letters for hospital treatment but no Invoices, all of which were sent to his London address, and yet he had not paid for his treatment. The judge went through the "**Razgar** steps" before concluding that this was a case which was on all fours with the Court of Appeal judgment in **GS (India) [2015] EWCA Civ 40**. The judge observed that, "There is nothing within his claim which brings him within the very exceptional circumstances" which cases of this kind require to be shown (at paragraph 25). Careful consideration was given to the European Court case of **Paposhvili v Belgium [2017] Imm AR 867**, which the judge recounted,

> "Should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment, or being exposed to a serious

and rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (which is what was stated at paragraph 183 of **Paposhvili**, and confirmed at paragraph 38 of the recent case of **AM (Zimbabwe) [2018] EWCA Civ 64)**.

4. The judge went on to thereafter consider "Whether there is care available for the Appellant the Respondent and Appellant have both confirmed that such facilities as it requires are available in Bangladesh, albeit that it will not be of the same standard as that in the UK" (paragraph 26). The judge, accordingly, concluded that the Appellant could not bring himself within the exception set out in **Paposhvili**. She concluded that, "There are facilities available to him, he has family there who I am satisfied could support him, and I am satisfied that his family here could also support him, as they have done since 2011" (paragraph 27).

5. The final paragraph of the judge's determination, which considered the application of Article 8 ECHR, saw the judge state that the Appellant could not succeed, "on the basis of the above illegal entry and state, the cost of his treatment and the non-payment of his bills" (paragraph 28).

6. The appeal was dismissed.

**Grounds of Application**

7. The grounds of application state that the judge erred in law because the Appellant's serious condition was acknowledged, but that the judge then wrongly concluded that treatment was available in Bangladesh, even though such treatment was not local to the Appellant. The judge had not disputed that the Appellant suffered from end-stage kidney disease and that his life was dependent upon dialysis treatment, without which he would die within one or two weeks. In concluding as the judge had done, there had been a failure to consider the cases applicable which deal with the severity of the medical condition, together with a failure to be able to access such treatment in the country of origin, on account of being unable to afford such treatment. At first instance, in a decision made by the First-tier Tribunal on 2nd October 2017, permission to appeal was refused. It was noted that the Appellant simply did not fall under the exceptions set out in **Paposhvili** given that he claimed, on the one hand to be saying that he was no longer in contact with his relatives in Bangladesh, but on the other hand to be saying that he knew his family members were struggling, which could not have been true if he was not in touch with them.

8. Upon reconsideration by the Upper Tribunal on 27th November 2017, however, permission to appeal was granted on the basis that the Appellant was suffering from end-stage kidney disease and would die within two weeks if medical treatment was withdrawn. That being so the judge at the First-tier Tribunal had failed to properly reconcile **Paposhvili** with **GS (India) [2015] EWCA Civ 40**. Although the judge's decision was carefully written, there was no obvious consideration of the Appellant's Article 3 ECHR rights.

9. On 21st December 2017, a Rule 24 response was entered by the Respondent Secretary of State of State on the basis that, as far as **Paposhvili** was concerned, the Tribunal

had held in **EA and Others (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 00445** that it was not open to the Tribunal to apply that case by reason of the judicial precedent that arose by way of the Supreme Court judgment in **N v SSHD [2005] 2 AC 296**.

**Submissions**

10. At the hearing before me on 9th February 2018, Mr Plowright, appearing on behalf of the Appellant as Counsel, made the following submissions. First, as the grant of permission stated, there was no obvious consideration by the judge below of Article 3 ECHR. Instead, the judge appears to have looked at Article 3 in the context of Article 8, and to have treated the exercise as one of proportionality before the Tribunal. This was the reason why the judge states at paragraph 25 that "the final question" was "whether the decision is proportionate and I am satisfied that it is". In fact, even at the end of the determination, at paragraph 28, the judge approaches the matter as one of proportionality, observing that what militated against the Appellant was his "illegal entry and stay, the cost of his treatment and the non-payment of his bills". The conclusion is that, "I am therefore satisfied that his physical and moral integrity will not be undermined by his removal" with the observation that "the decision to remove him is proportionate" (paragraph 28). This, submitted Mr Plowright, was the wrong approach if the judge was required to consider Article 3 as a separate matter.

11. Second, insofar as the Rule 24 response relies on the fact that **EA and Others [2017]** now establishes that domestic law must take precedence over the European Court ruling in **Paposhvili**, the position has now changed again because in **AM (Zimbabwe) [2018] EWCA Civ 64**, the Court of Appeal re-emphasised the importance of **Paposhvili** in a domestic jurisprudence. In the instant case, two doctors have drawn attention to the end-stage kidney disease that the Appellant is suffering from. One states that he has two to three weeks to live and the other states he has three to four weeks to live without drastic treatment.

12. For example, the letter from Epson and St Helier's NHS Trust (see page 24 of Taj Solicitors' bundle), which is dated 1st February 2017, from the consultant responsible for the Appellant's management, states that

> "The above patient has end-stage kidney disease and this means that his kidney has failed to the point that they are no longer performing enough to provide any useful function. He additionally has hepatitis (blood pressure) and has a diagnosis of ankylosing spondylitis … he receives haemodialysis for four hours three times a week …."

The letter goes on to say (at page 25) that, "Without this he will die within three to four weeks". This was the first report by Dr Rebecca Sukling MRCP PhD. The second report is by Dr Marie Condon and is dated 12th May 2015 and she states that, "If he did not receive his dialysis therapy he is likely to die within a short period (one to two weeks). He is never likely to regain kidney function …."

13. Third, these facts therefore, suggested, on the basis of the case law in **Paposhvili**, that there was a procedural obligation on the Respondent Secretary of State to examine the Appellant's case with care and by reference to all the available evidence. This was clear from the Court of Appeal judgment in **AM (Zimbabwe) [2018]**, which confirmed that all that the applicant had to do, on the basis of the Grand Chamber decision in **Paposhvili**, was that "He could have raised a sufficiently credible Article 3 case that it gave rise to a procedural obligation …" (paragraph 41). What the Grand Chamber had established was that, "The violation of Article 3 which the Grand Chamber held would have occurred if the applicant had been removed … was a violation of that procedural obligation" (paragraph 41). That, submitted Mr Plowright, was the position here as well.

14. For his part, Mr Jarvis submitted that reliance on **AM (Zimbabwe) [2018]** was misconceived, as that was a very different case. Mr Jarvis submitted that paragraph 30 of that case bears closer scrutiny because in that case neither of the Appellants, it was said by the Court of Appeal,

> "Can satisfy the test for breach of Article 3 set out in **N v Secretary of State for the Home Department** and **N v United Kingdom**. The parties are also in agreement that the decision of the House of Lords in **N v Secretary of State for the Home Department** is binding so far as this quote is concerned regarding the test to be applied in domestic law in this type of case, with the consequence that both appeals to this court have to be dismissed. It is common ground that this is so even though it appears that the ECtHR has more recently, in **Paposhvili**, decided to clarify or qualify to some degree the test previously laid down in **N v United Kingdom**, which corresponds with that set out by the House of Lords in **N v Secretary of State for the Home Department**" (paragraph 30).

15. Second, submitted Mr Jarvis, if one now has regard to the earlier Court of Appeal case of **GS (India) [2015]**, it is clear from paragraph 65 that, the court felt itself bound by the ratio decidendi of **N** in the House of Lords, where it was said (at paragraph 15) that,

> "The essential distinction is not to be found in humanitarian differences. Rather it lies in recognising that Article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries."

It was recognised that,

> "The Strasbourg Court has constantly reiterated that in principle aliens subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state. Article 3 imposes no such 'medical care' obligation on contracting states" (at paragraph 15).

16. In **GS (India)** the Court of Appeal at paragraph 65 also endorsed the principle in **N** (at paragraph 36) that the case had to be "exceptional", such as was the case in **D v**

**UK**, where the Appellant was "terminally ill" and in the "advanced stages of a terminal and incurable illness". The Strasbourg Court had then made a reference in the words of Judge Pettiti, to "the final stages of an incurable illness". In **N v SSHD**, the House of Lords said that, "It was the fact that he was already terminally ill while still present in the territory of the expelling state that made his case exceptional" (per Lord Hope at paragraph 36).

17. On the basis of this jurisprudence, Mr Jarvis submitted that what this suggested was that one had to be looking at a deathbed case of a man going to his death. This is clear from paragraph 69 of **N v SSHD**, where the House of Lords stated that,

> "The test in this sort of case is whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it will be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity" (per Lady Hale).

18. Mr Jarvis then proceeded to deal with the more recent case of **AM (Zimbabwe) [2018]**. In this case, the Court of Appeal, as is submitted, actually gave guidance on how **Paposhvili** was to be applied. Its guidance was important, because as the Court of Appeal pointed out (at paragraph 32), there were presently

> "A significant number of other cases involving claims by foreign nationals to resist removal from the UK by invoking Article 3 on medical grounds which are already in the system, in which reliance is sought to be placed on **Paposhvili** even though the claims had been dismissed by the application of **N v Secretary of State for the Home Department** and **N v United Kingdom**".

19. As the Court of Appeal explained,

> "In those cases, orders have been made in a similar way to prevent the removal of the Appellants from the United Kingdom until the final determination of their cases, which are on hold until the position in relation to the adoption of the guidance in **Paposhvili** into domestic law has been clarified" (paragraph 32).

20. In fact, as Mr Jarvis explained, the Court of Appeal was aware, that the cases were not simply confined to those that had already been lodged on the basis of the application of **Paposhvili**.
21. As the Court of Appeal explained, "In addition, similar new claims based on application of Article 3 on medical grounds may be brought forward at any time." However, the guidance given by the Court of Appeal in **AM (Zimbabwe)** was that,

> "In relation to those claims, all courts below the Supreme Court will be bound by the decision in **N v Secretary of State for the Home Department**, but claimants may contend that they have grounds for saying that their cases are covered by the new guidance in **Paposhvili** (in particular at paragraph 183) and that any question of their removal from the UK should be stayed until the

> Supreme Court has decided to modify domestic law (potentially decisive in their favour) by reference to that guidance" (paragraph 33).

22. Mr Jarvis submitted, however, that it was not necessary to await a final outcome in the Supreme Court, before cases such as the present one, could be disposed of. This is because the Court of Appeal in **AM (Zimbabwe)** did give clear guidance. It went on to say that,

> "We are providing authoritative guidance on the true interpretation of illegal criterion governing how courts and Tribunals in the domestic legal system should make judgments regarding the exercise of their powers to grant stays of removal. That guidance will be formally binding upon courts and Tribunals below the level of the Supreme Court, in the usual way" (paragraph 36).

23. As to what that guidance was to be, the Court of Appeal explained the matter as follows.

24. First, as far as **Paposhvili** was concerned, "It is clear both at paragraph 183 of **Paposhvili** relaxes the test for violation of Article 3 in cases of removal of a foreign national with a medical condition and also that it does so only to a very modest extent" (paragraph 37).

25. Second, that

> "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, or 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'(paragraph 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 him in the removing state or faces a real risk of death within a short time in the receiving state for the same reason" (paragraph 38).

26. What this meant according to the Court of Appeal in **AM (Zimbabwe)** was that,

> "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) for being defined by the imminence (i.e. likely as '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" (paragraph 38).

27. Finally, Mr Jarvis submitted that in any event, the judge in this case did apply **Paposhvili** and did conclude that the Appellant did not face the prospect of imminent death or suffering. This was clear from the judge's treatment of the facts at paragraphs 25, 27, and 28. For all of these reasons, the judge, submitted Mr Jarvis, did not err in law, and this appeal should not succeed.

28. In reply, Mr Plowright submitted that, he would have to accept that if the Appellant did not fall within the structures of **Paposhvili**, then his appeal would fail. However, there were two issues to contend with. First, whether there was treatment available in Bangladesh. Secondly, whether there was a potential risk of death arising from the Appellant's removal given his end-stage kidney problems. With respect to neither of these two questions, submitted Mr Plowright, could one confidently say that the judge had approached the matter correctly because this had been done through the prism of Article 3, which had tainted the eventual analysis to be undertaken with respect to Article 3. This was clear from the judge's approach at paragraphs 19, 25, and 28. It is this inadequate consideration of Article 3 that must lead to the conclusion that the judge had failed to consider the availability of treatment in a practical and effective way, so as to not violate the Appellant's Article 3 rights, were he to be returned to Bangladesh. He asked me to allow the appeal.

**Error of Law**

29. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

30. First, this is a case where the Appellant is suffering from end-stage renal disease and is currently on dialysis treatment (haemodialysis) and the prognosis is that without a transplant he would die from kidney failure. The evidence of a locum consultant nephrologist, Dr Marie Condon, is that without dialysis treatment the Appellant would die within one to two weeks. The prognosis of the second doctor is that he would not live beyond four weeks. Second, as against that, it is the case that the Appellant has family members in Bangladesh. Judge Hawden-Beal was rightly sceptical of the Appellant's contention that he was not in touch with them, when he was at the same time maintaining that they were struggling to make ends meet themselves, and would not be able to provide him with the necessary assistance that he would need, in order to travel from his own village at some great distance to the capital city Dhaka where there was availability of kidney dialysis machines. I also note that at paragraph 14 of the Appellant's witness statement (at page 18) does not state that there are not enough kidney dialysis machines in Dhaka. The issue is one of access to medical treatment.

31. Second, on the issue of whether, realistically speaking, the Appellant will be able to access his much needed treatment in Bangladesh, a number of issues are relevant here. The Appellant has not been working in the UK, and has kept a low profile such that, as Judge Hawden-Beal correctly stated, were it not for his illness he would

never have brought himself forward to the attention of the authorities (at paragraph 28). However, precisely because of his illness, he is not likely to be able to gain employment in Bangladesh either upon arrival.

32. It is also the case that the treatment that he requires has to be spread out over a week during three alternative days. If he cannot relocate to Dhaka, and there is no evidence that he has the means to be able to do so, then he has to travel from his village regularly every other day in order to undertake the kidney dialysis treatment without which he would die.

33. In **AM (Zimbabwe)** the Court of Appeal most recently considered the concept of "other very exceptional cases" (see paragraph 183) which was a term considered in the judgment of **N v United Kingdom** (at paragraph 43), with a view to analysing how an issue may be raised under Article 3, so as to cover the situation of those facing removal as seriously ill persons.

34. What is required is that,

> "Substantial grounds have been shown for believing that he or she, although not at immediate risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the 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" (at paragraph 183).

35. On the evidence in this appeal, it is clear that "substantial grounds have been shown" that there is a "real risk", that in the specific circumstances of the Appellant's case, there would be a "lack of access to such treatment" which would expose him to "a serious, rapid and irreversible decline" in his health, the consequences of which would be to afflict with him with "intense suffering or to a significant reduction in life expectancy".

36. Dhaka has only 35 kidney dialysis machines. The Appellant's family lives eight hours away in a village. The treatment of kidney dialysis itself takes four hours. He would have to undertake a twenty hour expedition three times a week in order to go from his village to Dhaka. That is bound, if not to put him at "imminent risk of dying" certainly to expose him to a "real risk" of a "rapid and irreversible decline" in his health.

37. Third, Judge Hawden-Beal was perfectly alive to the legal principles established by **Paposhvili**. In fact, at paragraph 25, she expressly and *verbatim* draws upon paragraph 183 of **AM (Zimbabwe)** in distilling the jurisprudence arising from **Paposhvili** and **N v UK**. The difficulty, however, is that this particular paragraph is prefaced also with the remarks that the final question was "as to whether the decision is proportionate" so as to suggest that Article 3 was not considered separately in its own right unaffected by considerations of a proportionality that arise in Article 8 cases. It is true that thereafter the judge does make firm findings of fact, in the context of the application of **Paposhvili**, to say that the facilities are available to the Appellant, his family is there, they would be able to support him,

and they have done so since 2011 (see paragraph 27), but there is still no reference here to Article 3, and this still follows on after consideration of Article 8. Indeed, the concluding paragraph (at paragraph 28) returns back to considerations that are germane to Article 8, where attention is drawn to the cost of his treatment in the UK and the non-payment of his bills in this country. It is concluded that "his physical and moral integrity will not be undermined by his removal" (paragraph 28) which are categories of rights relevant to Article 8 but not relevant to Article 3 ECHR.

38. Finally, there is the jurisprudence itself. The guidance given by the Court of Appeal in **AM (Zimbabwe) [2018]** is that "**Paposhvili** relaxes the test for violation for Article 3" but that "it does so only to a very modest extent" (paragraph 37). That modification, to a very moderate extent, is what is the case here.

39. As the Court of Appeal made clear, the protection of Article 3 against removal in medical cases "is now not confined to deathbed cases where death is already imminent" but requires instead a consideration of whether, due to lack of treatment, the person in question is "being exposed to a serious, rapid and irreversible decline in his or her state of health", with the result that,

> "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. the likely 'rapid' experience) of intense suffering or death in the receiving state" (at paragraph 28).

40. The current jurisprudence accordingly fits the predicament of this Appellant. In so concluding, I am mindful of the fact that the Court of Appeal in **AM (Zimbabwe)** also pointed out that it was

> "Significant that even on the extreme and exceptional facts of the **Paposhvili** case, where the applicant faced a likelihood of death within six months if removed to Georgia, the Ground Chamber did not feel able to say that it was clear that a violation of Article 3 would have occurred for that reason had he been removed".

41. What the Grand Chamber had been able to say was that "The applicant had raised a sufficiently credible Article 3 case that it gave rise to a procedural obligation for the relevant domestic authorities to examine that case with care and with reference to all the available evidence" (paragraph 41).

42. In the instant case that "procedural obligation" has been fulfilled in this case in that both the Secretary of State and the Tribunal below has considered whether a "sufficiently credible Article 3 case" had been raised by the Appellant. Both have concluded that it has not. That conclusion, however, on the evidence, that I have recounted, is not sustainable. On the evidence, this case is "exceptional".

43. Even in **N v UK**, the Strasbourg Court used language to cover precisely this sort of case. Judge Pettiti referred to "the final stages of an incurable illness" Lord Hope in the House of Lords, in terms of our domestic law, referred to the fact that the Appellant was "already terminally ill while still present in the territory of the expelling state that made his case exceptional" (at paragraph 36).

**Remaking the Decision**

44. I remake the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

**Notice of Decision**

45. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

46. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 10th March 2018

**TO THE RESPONDENT**
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of the amount that has been paid or is payable

Signed Date

Deputy Upper Tribunal Judge Juss 10th March 2018