



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17493/2016

THE IMMIGRATION ACTS

Heard at Field House
On 26 June 2018

Decision & Reasons Promulgated
On 24 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR ERNEKA OKOYE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Iengar counsel instructed by M&K Solicitors
For the Respondent: Mr C Avery, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Nigeria, date of birth 10 June 1961, appealed against the Respondent's decision, dated 6 July 2016, to refuse a human rights claim. The decision

of the Secretary of State on appeal was upheld and the matter returned to the First-tier Tribunal. First-tier Tribunal Judge I A Lewis decided [D] on 8 January 2018 that the appeal failed for reasons which he fully, properly and helpfully set out. Permission to appeal that decision was given on 24 April 2018.

2. Since the grounds were drafted the issue of Article 3 health claims has been considered by the Court of Appeal in *AM (Zimbabwe)* [2018] EWCA Civ 64 in which the Court of Appeal has analysed its interpretation of the applicability of the Grand Chamber's decision in *Paposhvili* (41738/10 GC) insofar as it bears upon the well-known application of the cases of *D* [1997] EHRR 453 and *N* [2005] UKHL 31.
3. In particular the position has moved on from that reflected in the grounds by reference to an Upper Tribunal decision in *EA and Others* [2017] UKUT 445 which in principle no longer has application in the light of the decision in *AM (Zimbabwe)*. In the Judge's decision he fully set out what was substantively unchallenged being the medical evidence which I do not need to repeat herein but is to be found at [D 23-26] and in the Judge's conclusions [D37 to 39]. What was accepted by the Judge was that the medical evidence supported the likely decline in the Appellant's health leading to death, given the circumstances faced, in a short period of time upon a return to Nigeria.
4. The decision of the Court of Appeal in *AM (Zimbabwe)* states, at paragraph 38, having referred to the Judge making reference to the effects of the judgment in *Paposhvili*:-

"So far as the ECHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to death bed 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 medical treatment in the receiving country or 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” (paragraph 183).

This covers 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 them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason.

5. In other words the boundary of Article 3 protection has been slightly 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. likely “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.
6. The Court of Appeal continued at paragraph 39:-

“There are powerful indications, including in the Grand Chambers’ judgment itself, which support this interpretation at paragraph (183) and the inference that the Grand Chamber only intended to make a very modest extension of the protection under Article 3 in medical cases.”

The court then helpfully set out an analysis of matters to be addressed. That decision, in respect of which leave to appeal has been given, is binding on me. It seemed to me that the Judge when he said in his decision at [D39]:-

“Further, for completeness I note that if I had found I was obliged to follow the reasoning in *Paposhvili* I would likely have concluded in the Appellant’s favour on the basis that the evidence establishes that he faces a real risk of his serious

rapid decline in his health and a significant reduction in life expectancy on return to Nigeria. ...”

7. Mr Avery submits that it may be that the Judge’s understanding and the findings that were made were not directly referable inevitably to those reflected in the judgment of the Court of Appeal in *AM (Zimbabwe)*. I should look at the extent of the evidence actually provided to see to what extent, within the thresholds of the way the Court of Appeal has expressed, it there may be in fact an error of law because of the extent of the proper interpretation to be given to *Paposhvili* in the context of *D* and *N* and the fact that *Paposhvili* is not an opening door, as many advocates might argue, to a much wider interpretation of the applicability of Article 3 ECHR in medical cases.
8. In this case it seemed to me that the approach the Judge took was entirely at one with the circumstance of *AM*, not least in the context of the case of *EA*. Helpfully, having expressed himself as he did, it seemed to me that the door was open to disclosing an error of law by the Judge: Simply because he was not aware at the time of the view the Court of Appeal would take in *AM (Zimbabwe)* on *Paposhvili* and its applicability to the facts of the present case. In the circumstances I find that the original Tribunal’s decision does disclose an error of law and the decision cannot stand .
9. The parties are agreed that the Judge has made sufficient findings of fact upon which I can apply the Court of Appeal’s interpretation in *AM (Zimbabwe)*. I do so given the circumstances of the Appellant in any event and it seemed to me that this is an appropriate case where the following decision should be substituted on the basis of the facts established concerning the Appellant’s health and its likely decline, which stand unchallenged, by the Respondent, in the decision of First-tier Tribunal Judge I A Lewis. I find the appeal should be allowed on Article 3 ECHR grounds.

DECISION

The Original Tribunal decision cannot stand and the following decision is substituted.

The appeal is allowed on Article 3 ECHR grounds.

ANONYMITY DIRECTION

No anonymity direction was sought nor is one made now.

TO THE RESPONDENT

FEE AWARD

The appeal has succeeded. In the circumstances of this case it has succeeded on the basis of the law as now understood on the same factual basis. I find a fee award is appropriate.

Signed

Date 4 July 2018

Deputy Upper Tribunal Judge Davey