Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03085/2017

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 20th August 2018	**On 9th October 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr S Clark, instructed by Migrant Legal Project (Cardiff)

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (AB) or her children. A failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State to the Upper Tribunal I will for convenience refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Afghanistan who was born on 28 December 1986. She is a Sikh. She left Afghanistan, together with her husband and daughter ("K") and her mother-in-law in July 2014. En route to the UK, she and her daughter were separated from her husband and mother-in-law. Eventually, the appellant and her daughter entered the UK clandestinely by lorry on 16 August 2014. She claimed asylum on 16 August 2014. The basis of her claim was that she and her family were subject to persecutory treatment as Sikhs in Afghanistan and would be at risk on return.

4. On 28 June 2015, the appellant's second daughter ("M") was born in the UK.

5. On 9 March 2017, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and under Art 8 of the ECHR. The appellant's husband had previously made an asylum claim, as I understand it essentially on the same basis, which had been refused and his appeal had been dismissed in 2014.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. Judge Real, who heard the appeal, dismissed the appellant's appeal on asylum grounds.

7. In addition, the appellant relied upon the impact upon her two children, K and M, of returning to Afghanistan. In particular, she relied upon the impact upon K's education if returned to Afghanistan, and also the impact upon M's health, who suffers from hypothyroidism and who has developmental issues which were subject to ongoing investigation.

8. Judge Real dismissed the appellant's claim under Art 3 of the ECHR on the basis that neither the appellant's circumstances nor those of her daughter, M (in particular the impact upon her health), in Afghanistan reached the high threshold to establish a breach of Art 3. However, the judge went on to allow the appellant's appeal under Art 8.

The Appeal to the Upper Tribunal

9. The Secretary of State appealed to the Upper Tribunal against Judge Real's decision to allow the appellant's appeal under Art 8. No cross-appeal was brought against the judge's decision to dismiss the appeal on asylum grounds and under Art 3.

10. The appeal first came before me on 23 January 2018. In a decision promulgated on 15 February 2018 I concluded that Judge Real had materially erred in law in allowing the appeal under Art 8 and I set her decision aside. At that time, given that no challenge was brought to the judge's decision to dismiss the appeal on asylum grounds and under Art 3, I directed that her findings and decision in that regard should stand.

11. The appeal was adjourned in order that it could be re-listed for a resumed hearing in the Upper Tribunal in order to re-make the decision in respect of Art 8 only.

12. That resumed hearing was initially listed before me on 27 March 2018. However, that hearing was adjourned at the invitation of the appellant (without objection by the Secretary of State) because M's health condition had deteriorated and she had been hospitalised the previous day. Further information was to be sought on her condition and prognosis.

13. The resumed hearing was again listed before me on 20 August 2018.

The Resumed Hearing

14. At the resumed hearing on 28 August 2018, Mr Howells, who represented the Secretary of State, accepted on behalf of the respondent that the appellant's appeal should be allowed under Art 8. This was, he indicated, on the basis of new evidence concerning the health of the appellant's other child, K, since the previous hearings. I will return to the evidence shortly but, in summary, in July K was diagnosed with T-Cell Acute Lymphoblastic Leukaemia. She was undergoing combination chemotherapy and, if that was successful, she would require a bone marrow transplant together with 18–24 months post-transplant intensive follow-up. Even with that "very intensive therapy", she is said to have "at the very best a 50/50 chance of long term survival".

15. In the result, therefore, it is accepted that the appellant's appeal should, at least, be allowed under Art 8 of the ECHR.

16. However, Mr Clark, having taken instructions from the appellant, indicated that the appellant wished to pursue the appeal under Art 3 of the ECHR based upon K's medical condition.

17. Mr Howells did not object to the appellant pursuing her claim under Art 3, despite the fact that Judge Real's decision dismissing the appeal on that ground had not previously been challenged, based upon the new matter and evidence relating to K.

18. No objection was made to the admission of a bundle of new evidence dealing, in particular, with K's medical condition and the availability of treatment and care for her in Afghanistan. Consequently, I admitted that evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

The Appellant's Submissions

19. Mr Clark relied exclusively upon Art 3 of the ECHR and K's medical condition.

20. First, Mr Clark accepted that the UK case law, binding upon the Upper Tribunal, only recognised a claim under Art 3 in a health case (at least concerned with an adult) in so-called "deathbed" cases. He submitted that, even if the House of Lords had not restricted Art 3 claims in health cases to such narrow circumstances in N v SSHD [2005] 2 AC 296, the Court of Appeal's interpretation of N in GS (India) and Others v SSHD [2015] EWCA Civ 40, that Art 3 claims (applying N) are confined to deathbed cases is binding upon the Upper Tribunal.

21. Mr Clark accepted, therefore, that the more recent decision of the Grand Chamber in Paposhvili v Belgium (Application No 41738/10) [2017] Imm AR 4 which recognised a lower threshold for a health case to succeed under Art 3, could not be applied by the Upper Tribunal unless and until the Supreme Court adopted that lower threshold by departing from the case of N. Mr Clark accepted that that was the effect of the Court of Appeal's recent decision in AM (Zimbabwe) v SSHD [2018] EWCA Civ 64.

22. Mr Clark accepted that K's circumstances did not fall within the "deathbed" category.

23. Secondly, however, Mr Clark submitted that the case law, including N, was concerned with a claim under Art 3 by an adult. He submitted that, in assessing whether a breach of Art 3 had been established, the circumstances, including the age of the claimant, had to be taken into account. He submitted that the category of "exceptional" cases recognised as being required in order to succeed under Art 3 in a health case, was not limited to "deathbed" cases where the individual was a child and, having regard to her age, the level and intensity of suffering reached the Art 3 threshold.

24. Thirdly, Mr Clark invited me to make findings on the basis of the lower threshold recognised in Paposhvili to cover the eventuality that the Supreme Court subsequently departs from N and adopts the Paposhvili test and the appellant brings a further appeal which would, if Paposhvili were followed, require a consideration of K's circumstances in the light of that test.

25. Mr Clark relied upon the evidence concerning K's health and prognosis set out in two letters from a Consultant Paediatric Haematologist, Dr J P Moppet, dated 26 July 2008 and 9 August 2008, at pages H12–H13 and H14–H15 respectively of the appellant's new bundle. He also relied upon an internet publication dated 2 July 2018 entitled "Afghanistan: Few Options for Leukaemia Patients" (at pages H5–H8 of the appellant's new bundle). Mr Clark submitted that, although K was not currently terminally ill, if she returned to Afghanistan there would be no treatment available for her leukaemia. Intensive chemotherapy was "not feasible" and the additional "novel agent" with which she was being treated, namely "Nelarabine" was not available. Further, if she were returned after her chemotherapy, the required bone marrow transplant would not be available in Afghanistan. The medical evidence was that without this treatment and indeed, if she were removed within the "first two years following bone marrow transplant", K would die. Finally, Dr Moppet stated in his letter that: "There would not be adequate services available to provide her with a good palliation and she would likely have an unduly painful and difficult palliative phase". Mr Clark pointed out that the background document, to which I have referred, indicated that within the health system in Afghanistan, including hospitals in Kabul, the only treatment available for leukaemia patients, including children, was blood transfusions.

26. Taking all those circumstances into account, Mr Clark submitted that K met the lower threshold recognised by the Grand Chamber in Paposhvili at [183].

The Respondent's Submissions

27. Mr Howells submitted that on the basis of the authorities binding upon the Upper Tribunal, in particular GS (India) and Others, K's medical condition did not reach the high threshold required to establish a breach of Art 3 of the ECHR. He submitted that that category of case was limited to "deathbed" cases, namely where the individual is terminally ill and his or her return to their home country would be to circumstances where they would suffer "inhuman or degrading treatment" as in D v UK (1997) 24 EHRR 423 because there would be an absence of any family or other support during the dying process.

28. Mr Howells submitted that there was no authority that children should be treated differently in respect of the Art 3 threshold in health cases.

29. Mr Howells did not make any submissions in relation to whether the new medical evidence would establish that K met the lower threshold in Paposhvili.

Discussion

30. The only claim now made by the appellant in this appeal is that based upon K's medical condition and that her return to Afghanistan would breach Art 3 of the ECHR.

31. As I have already indicated, it is accepted that the appellant's appeal should be allowed under Art 8 of the ECHR.

32. Further, it was common ground between the parties, that if a breach of Art 3 in respect of K is established, then the appellant's appeal should be allowed on the basis that her return to Afghanistan would breach Art 3.

Article 3 and 'health' cases

33. As is well-known, Art 3 of the ECHR provides that:

> "No-one shall be subject to torture or to inhuman or degrading treatment or punishment".

34. In order to establish a breach of Art 3 it is, again, well-known that any ill-treatment must attain a "minimum level of severity".

35. The application of Art 3 in so-called 'health' cases has been considered in a number of leading decisions, in particular by the House of Lords in N v SSHD and the Strasbourg Court in D v UK and N v UK [2008] Imm AR 657. Those cases, and their effect, were helpfully summarised by the Court of Appeal in AM (Zimbabwe) in the judgment of Sales LJ (with whom Patten and Hickinbottom LJJ agreed) at [17]–[19] as follows:

> "17. The test to determine when art.3 may prevent removal of a foreign national from the UK, where he is suffering from a medical condition which may get worse if he is removed, was authoritatively laid down in domestic law by

the House of Lords in *N v Secretary of State for the Home Department*. That case concerned a Ugandan woman suffering from advanced HIV, or full-blown AIDS as it was called, who was receiving effective treatment in the UK which would not be available to her if she was returned to Uganda. If returned to Uganda, the claimant would die within a matter of months, whereas if she stayed in the UK she could live for decades. Despite this, her claim under art.3 failed.

18. Lord Hope of Craighead gave the principal speech. He referred to what was then the leading judgment of the ECtHR, in *D v United Kingdom* (1997) 24 E.H.R.R. 423, which also concerned expulsion of a foreign national suffering from AIDS, and a range of other authorities. The claimant in *D v United Kingdom* was in an advanced stage of AIDS and close to death; he would receive no comfort or moral support while dying if returned to his country of origin. The case was treated as an exceptional one, in which the ECtHR held that art.3 would prevent removal. In *Amegnigan v The Netherlands*, [2004] ECHR 741, judgment of 25 November 2004, the ECtHR characterised the circumstances in *D v United Kingdom* as 'very exceptional'. Lord Hope set out the test to be derived from the Strasbourg authorities in [50], as follows:

> '…. For the circumstances to be … 'very exceptional' it would need to be shown that the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he is dying. …'

To similar effect, see also [69]–[70] per Baroness Hale of Richmond and [94] per Lord Brown of Eaton-under-Heywood. As Laws LJ pithily summarised the effect of these opinions in *GS (India)* at [66], according to the House of Lords the *D v United Kingdom* exceptional situation in which art.3 will prevent removal to another country with lesser standards of care "is confined to deathbed cases'.

19. The claimant in *N v Secretary of State for the Home Department* applied to the ECtHR, relying on art.3. In its judgment in *N v United Kingdom*, the Grand Chamber dismissed her application, holding that her case 'does not disclose very exceptional circumstances, such as in *D v United Kingdom*' and that her removal to Uganda would not give rise to a violation of art.3. The ECtHR referred to the speeches in the House of Lords without adverse comment. Its summary of the principles to be drawn from its own case law included this:

> "42. In summary, the Court observes that since *D v United Kingdom* it has consistently applied the following principles.
>
> Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy,

> would be significantly reduced if he were to be removed from the contracting state is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the D case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.
>
> 43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v United Kingdom* and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country".

36. In AM (Zimbabwe) itself, the Court of Appeal recognised that these authorities limited the application of Art 3 in 'health' cases to so-called "deathbed" cases, namely where death was already imminent when the individual was to be removed and the circumstances on his return would amount to "inhuman or degrading treatment" (see e.g. at [38]).

37. That was the conclusion of the Court of Appeal in GS (India) and Others. In that case, Laws LJ at [65]-[66], set out the law following N:

> "65….the *ratio decidendi* of *N* in the House of Lords is entirely plain. I give the following citations:
>
> > '15. Is there, then, some other rationale [sc. other than the pressing nature of the humanitarian claim] underlying the decisions in the many immigration cases where the Strasbourg court has distinguished *D's* case? I believe there is. 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. In the case of *D* and in later cases 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. This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. But in the case of *D*, unlike the later cases, there was no question of imposing any such obligation on the United Kingdom. *D* was dying, and beyond the reach of medical treatment then available.' (*per* Lord Nicholls)
>
> '36. What was it then that made the case exceptional? It is to be found, I think, in the references to D's 'present medical condition' (para 50) and to that fact that he was terminally ill (paras 51: 'the advanced stages of a terminal and incurable illness'; para 52: 'a terminally ill man'; para 53: 'the critical stage now reached in the applicant's fatal illness'; Judge Pettiti: 'the final stages of an incurable illness'). 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)
>
> '69. In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (ie he is dying) that it would 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)
>
> See also *per* Lord Brown at paragraphs 89 – 94.
>
> 66. These citations demonstrate that in the view of the House of Lords the *D* exception is confined to deathbed cases…."

38. In his concurring judgment in GS (India) and Others, Underhill LJ agreed. At [104] he said this:

> "… it is established by *N v Secretary of State for the Home Department [2005] 2 AC 296* in the House of Lords that the essential reasoning in *D* must be taken to be, not that the applicant's removal to St Kitts would cause or accelerate his death, but that it would lead to him dying in inhuman and degrading conditions, without access to any adequate care to alleviate his suffering in the final stages of his illness: see in particular the passage from the opinion of Baroness Hale of Richmond quoted by Laws LJ at para 65 above. The reasoning of the majority in *N v United Kingdom 47 EHRR 885* in the Strasbourg Court is to the same effect: see the final sentence of para 42 of its judgment quoted by Laws LJ at para 50 above. That is in accordance with principle. The subject matter of article 3 is not the right to life as such, which is the subject of article 2, but the prevention of inhuman or degrading treatment".

39. Sullivan LJ (at [116]) also agreed with Laws LJ in relation to his treatment of Art 3 of the ECHR.

40. In AM (Zimbabwe) the Court of Appeal recognised (following GS (India) and others) that the test for establishing a breach of Art 3 in 'health' cases as set out by the House of Lords in N was binding upon the Court of Appeal and, by necessary implication,

the Upper Tribunal and First-tier Tribunal (see also, EA and Others (Article 3 medical cases – *Paposhvili* not applicable) [2017] UKUT 445 (IAC)).

41. Consequently, as Mr Clark candidly accepted before me, any dilution in the applicable test under Art 3 in 'health' cases recognised by the Grand Chamber in Paposhvili could not be relied upon by the appellant in this appeal. That concession was, of course, subject to Mr Clark's submission that the position was otherwise where the individual was a 'child'.

42. Mr Clark identified no principled basis upon which the decision of the House of Lords in N could be said not to be applicable in the case of a child. Certainly, none of the decisions recognised, or carved out, such an exception to the application of the "deathbed" category. Whilst the application of Art 3, as a generality, requires consideration of an individual's specific circumstances, including their age, in determining whether the 'high threshold' of the "minimum level of severity" has been reached to establish a breach of Art 3 (see, e.g. Ireland v UK (1978) 2 EHRR 25 at [162]), the "exceptional" or "compelling humanitarian" criteria applied by the House of Lords in N are principle based (see, GS (India) and Others). In my judgment, Art 3 is confined to "deathbed" cases even where the individual is a child.

43. The Court of Appeal in two cases endorsed that approach (see, R (SQ) (Pakistan) and Anor) v UTIAC [2013] EWCA Civ 1251 and AE (Algeria) v SSHD [2014] EWCA Civ 653). In AE (Algeria), the Court of Appeal rejected an argument that the "high threshold" in health cases recognised in N did not apply that because the individual was a child and so the test in N was inapplicable. At [6], Maurice Kay LJ (with whom Black and Lewison LJJ agreed) said this:

> "[Counsel for the appellant] seeks to derive support from Mayeka and Mitunga v Belgium [2008] 46 EHRR 23. Whilst that decision of the Grand Chamber does illustrate how the age of the child can inform the content of the duty under Article 3, it is not a health case and its facts bear no resemblance to those of the present case. … It is true that in Mwanje v Belgium (2013) 56 EHRR 35, six of the seven judges expressed the hope that the Grand Chamber would one day revisit the high threshold in health cases set in N. However, that has not yet happened and, whilst the fact of childhood is relevant, on the existing authorities the reality is that the present appeal must fail in relation to the two alternative bases upon which it is put. It would require a significant extension of the Article 3 jurisprudence for this appeal to succeed and, in the light of the authorities, I do not consider that it would be appropriate for us to be so innovative".

44. Of course, the Grand Chamber have now "revisited" the high threshold set in N in Paposhvili. But, as regards the application of that "high threshold" (absent any review), the Court of Appeal clearly did not envisage that the test in N, which is now succinctly encapsulated in the phrase "deathbed" cases, was inapplicable to a child. In both SQ and AE, the Court of Appeal considered, rather, that the child's circumstances were more appropriately dealt with under Art 8 of the ECHR.

45. For these reasons, therefore, I conclude that the test in N applies to this appeal in assessing whether K's circumstances reach the "high threshold" required to establish

a breach of Art 3 in health cases. That "high threshold" is restricted to deathbed cases. It is accepted by Mr Clark, on the evidence, that K's circumstances do not fall within that category as her condition is not terminal in the UK and her death is not imminent regardless of any treatment she may receive.

46. I agree that the medical evidence which I have set out above does not demonstrate that K falls within the deathbed category upon which her Art 3 claim must depend following the House of Lords decision in N.

47. For those reasons, whilst the appellant's appeal is allowed under Art 8, she has not succeeded in establishing a breach of Art 3 and her appeal is dismissed on that ground.

Paposhvili v Belgium

48. The Grand Chamber's decision in Paposhvili re-visited the applicable test when applying Art 3 in health cases. Having recognised at [181], that the Strasbourg Court's previous case law limited claims under Art 8 in health cases to "where the person facing expulsion is close to death", the Grand Chamber extended the scope of Art 3 in [183] of its judgment as follows:

> "The court considers that the 'other very exceptional cases' within the meaning of the judgment in *N v the United Kingdom* ((§ 43) which may raise an issue under art.3 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 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. The Court points out that these situations correspond to a high threshold for the application of art.3 of the Convention in cases concerning the removal of aliens suffering from serious illness".

49. In AM (Zimbabwe), the Court of Appeal recognised that the Grand Chamber had relaxed the test for a violation of Art 3 in health cases but only to a "very modest extent" (see [37]). At [38], Sales LJ, having set out the Grand Chamber's words at [183] of its judgment, said this:

> "This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the art.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. In other words, the boundary of art.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. 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".

50. At [39], Sales LJ gave a number of reasons why he considered that the Grand Chamber only intended a "very modest extension of the protection under art.3 in medical cases".

51. At [40], Sales LJ dealt with an argument that the Grand Chamber [183] intended to extend the breach of Art 3 to any case where there was a "significant reduction of life expectancy" if the individual was removed. In rejecting that interpretation, Sales LJ said this:

> "It is true that if one read the phrase 'would face a real risk … of being exposed … to a significant reduction in life expectancy' in [183] out of context, it might be taken to indicate a very wide extension of the protection of art.3 in medical cases, since in very many such cases where a foreign national is receiving treatment at a higher level of effectiveness in the removing state than would be available in the receiving state (e.g. in the case of those suffering from AIDS) they would be able to say they would face a real risk of a significant reduction of life expectancy if they were removed. But this is not a tenable interpretation of [183] of *Paposhvili*, read in its proper context. *N v United Kingdom* was itself a case where removal resulted in a very significant reduction in life expectancy (as was also noted in *Paposhvili* at [178]), in which no violation of art.3 was found, and the Grand Chamber in *Paposhvili* plainly regarded that case as rightly decided. *N v United Kingdom* was itself a Grand Chamber judgment, decided by 14 votes to 3. It is impossible to infer that by the formula used in [183] of *Paposhvili* the ECtHR intended to reverse the effect of *N v United Kingdom*. Moreover, the Grand Chamber's formulation in [183] requires there to be a 'serious' and 'rapid' decline in health resulting in intense suffering to the art.3 standard where death is not expected, and it makes no sense to say in the context of analysis under art.3 that a serious and rapid decline in health is *not* a requirement where death rather than intense suffering is the harm expected. In my view, the only tenable interpretation of [183], read in context, is the one given above".

Paposhvili and the facts

52. Mr Clark invited me to make factual findings applying the new approach in Paposhvili so that, if a further appeal in this case is made at a time when the Supreme Court has had an opportunity to reconsider N in light of Paposhvili, on the assumption that they would adopt the modest change to the test effected by the Grand Chamber in Paposhvili, the outcome of the appellant's appeal would be known.

53. There are a number of reasons why I should be cautious in accepting Mr Clark's invitation. First, there is no certainty that the Supreme Court will modify the House of Lords' decision in N to reflect the Strasbourg Court's decision in Paposhvili. Although, it does seem likely, since the decision in N was itself based upon the Strasbourg jurisprudence, that the Supreme Court will adopt the current approach of the Strasbourg Court in Paposhvili. Secondly, as the law currently stands, anything I say about the application of the Paposhvili test is unnecessary for the disposal of this appeal. Indeed, Mr Howells did not address me on the facts and the application of Paposhvili to K. Thirdly, if the Supreme Court does change the law to reflect the

approach in Paposhvili, whether K's removal would breach Art 3 would have to be determined on the evidence and facts at some future point when that issue directly arises. Necessarily, Mr Clark is seeking a conclusion on Art 3 somewhat prematurely. It is speculative as to what K's treatment and prognosis would be at that future point in time.

54. On the other hand, findings of fact made in these proceedings at this point in time may assist the future disposal of the appeal (without the need for a further hearing) if the Supreme Court changes the law in the UK and the appellant's appeal, if made, is pending in the Court of Appeal. It may also assist the respondent in how he treats the appellant's claim in the future. On balance, but with some hesitation, I propose to make relevant findings applying the test in Paposhvili.

55. My findings are based on the additional material submitted for the hearing before me, in particular the appellant's witness statement, the two letters from Dr Moppet and the background evidence at H5–H8 of the bundle.

56. K suffers from T-Cell Acute Lymphoblastic Leukaemia which was diagnosed in July of this year.

57. She is receiving treatment in the UK for that but she has a "poor prognosis, and additionally she has not responded very well to the treatment so far". That treatment consists of a combination chemotherapy with the addition of a novel agent called Nelarabine. If she responds adequately to that, K will require a bone marrow transplant. A donor will need to be found. That course of treatment will probably last around six months but, thereafter, she will require an intensive follow-up after the bone marrow transplant for at least eighteen to 24 months.

58. Even with that treatment, her prognosis is "at the very best a 50/50 chance of long term survival".

59. However, none of that treatment is available in Afghanistan. The only treatment available consist in blood transfusions. The background evidence indicates that initial treatment might last for around fifteen days together with six months' worth of medication thereafter. Bone marrow transplants are not available in Afghanistan.

60. I am satisfied that here will be a serious and rapid and irreversible decline in her health, leading to death. The medical evidence is that without these treatments K will die. Even if she is removed from the UK within the first two years following the bone marrow transplant, the medical evidence is that she would die also. She would be "significantly immune-suppressed" and she would require "regular specialist review and multiple medications" which are not available in Afghanistan. In addition, there would not be available "good palliation and she would likely have an unduly painful and difficult palliative phase". In other words, the process of dying, which would be inevitable in Afghanistan if she were removed either without completion of the treatment or within two years of the bone marrow transplant that she is yet to have in the UK, she is likely to die in circumstances of pain and distress involving the need for constant infusions of morphine, with the possibility of

significant bleeding, the consequences of which would be "unpleasant to catastrophic". In the absence of antibiotics, she would most likely suffer from "uncontrollable infection in the end". The intensity of her suffering in these circumstances is, self-evidently, severe, accentuated by her young age.

61. Adopting the test in Paposhvili as understood by the Court of Appeal in AM (Zimbabwe), I am satisfied that there are substantial grounds for believing that, although she is not at imminent risk of dying, there is a real risk that, due to the absence of appropriate treatment in Afghanistan, she would be exposed to a "serious, rapid and irreversible decline" in her health resulting in "intense suffering or to a significant reduction in [her] life expectancy". Consequently, on the evidence today, the facts establish that her removal would breach Art 3 if the Paposhvili test were applicable.

62. It is, of course, not yet the law in the UK, and I emphasise, again, that if the Supreme Court does change the law to embrace the Paposhvili test, whether the appellant can establish that K's removal would breach Art 3 will have to be decided upon the evidence as to her medical condition and prognosis, together with the availability of any appropriate treatment in Afghanistan, at the appropriate future date.

63. For the present, the evidence does not establish that K's removal would breach Art 3 on the basis of the law as it currently stands in England and Wales.

Decision

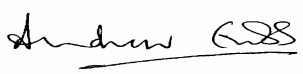
64. For the reasons set out in my earlier decision promulgated on 15 February 2018, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of an error of law. I set aside that decision.

65. I remake the decision as follows:

    (i) The appeal is allowed under Art 8 of the ECHR.

    (ii) The appeal is dismissed on asylum, humanitarian protection and Art 3 grounds.

Signed



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Judge of the Upper Tribunal

2 October 2018