Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/05222/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd January 2018	**On 5th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR BAT ERDENE GANBOLD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr F O'Dair (Counsel)
For the Respondent: Mr E Tufan (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Onofriou, promulgated on 17th July 2017, following a hearing at Hatton Cross on 4th July 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, 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 Mongolia, who was born on 16th November 1975. He appealed against a decision of the Respondent dated 11th May 2017 refusing him asylum and humanitarian protection under

paragraph 339F of HC 395. The basis of his claim was that if returned to Mongolia he would be mistreated on account of his developed hepatitis B and hepatitis D viruses as a result of his previous sexual activity, for which there is no treatment in Mongolia. He also claimed that there is no treatment for all his medical conditions in Mongolia given that he had extensive fibrosis and liver inflammatory lesions.

The Judge's Findings

3. The judge had regard to the fact that the Appellant had a wife and a daughter born on 13th September 2013, who was at nursery school, and some 3 years old. The judge held that, "there is no dispute about the Appellant's condition, the Respondent having accepted the diagnosis of Dr Lemoine as set out in the letters of 3rd February 2017 and 6th April 2017" (paragraph 38). This diagnosis entailed co-infection of hepatitis B and D and cirrhosis, and Dr Lemoine had stated that "he requires regular care by a specialist team in hepatology and antiviral therapy and potentially a liver transplantation in the future" (paragraph 38). The judge had gone on to say "that his condition is clearly very severe and the question is, is it so severe that returning him to Mongolia would breach even the high threshold of medical cases laid down in the case of **N**" (paragraph 38). The judge went on to observe that even though the Appellant had "a very serious condition, [c] is no worse off than the Appellant in **N**" (paragraph 48). It was concluded that the Appellant "satisfies the criteria that his lack of access to medical treatment in Mongolia would expose him 'to a serious, rapid and irreversible decline in his ...state of health resulting in intense suffering or to a significant reduction in life expectancy'" (see paragraph 44). The judge applied the well-known decision in **Paposhvili**.

4. The appeal is allowed.

Grounds of Application

5. The grounds of application state that the judge had incorrectly assessed the Appellant's claim in the light of the availability of a liver transplant, medical facilities in Mongolia. The judge had also looked at the fact that the Appellant had a very poor immigration history, having overstayed, worked illegally, and produced a false residency document. The judge had regard to the child's best interests but had used this as a "trump" card.

6. On 9th October 2017, permission to appeal was granted on the basis that the Appellant's daughter was not a qualifying child and the judge was wrong to allow the appeal largely on the basis of the Appellant's health conditions and the effect that this would have on the best interests of his daughter, were he to pass away upon return to Mongolia, because he could not afford medical health treatment there.

The Hearing

7. At the hearing before me on 2nd January 2018, the Appellant was represented by Dr F O'Dair of Counsel and the Respondent was represented by Mr E Tufan, a Senior Home Office Presenting Officer.

8. Since it was the appeal of the Respondent Secretary of State, Mr Tufan opened by stating that the judge had curiously dismissed the appeal under Article 3 but had then gone on to allow it under Article 8 on the basis of the help of the Appellant and the impact that this would have on his daughter, who was not a qualifying child. Second, the judge had plainly confused himself because at paragraph 51, in ending the determination, he had stated that "the appeal is allowed under the Immigration Rules", whereas earlier at paragraph 45, he had stated that the Appellant could not satisfy the requirements of paragraph 276ADE. Third, the judge erroneously referred to the comments of Moses LJ in **MM (Zimbabwe) [2012]** even though there was no such case (paragraph 46). Mr Tufan submitted that what the judge evidently intended to do was to refer to the judgment of Moses LJ in **MM (Zimbabwe) [2012] EWCA Civ 279**, which had been referred to by the Court of Appeal in a case called **GS (India) [2015] EWCA Civ 40**. Mr Tufan submitted that the case of **GS (India)** was also a case of kidney liver disease because the six Appellants there were suffering from terminal renal failure or end stage kidney disease (see paragraph 4) and were likely to die in two or three weeks. Nevertheless, the court held (paragraph 86) that for Article 8 to operate in a way as to assist them, they would need to refer to an additional factor. This is because, "Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm" (paragraph 86). The Appellant, however, was only referring to his ill-health. Insofar as there was a reference to the interest of the Appellant's daughter, these would be concomitant with the interests of the parents because the child was so young. This meant that if the parents were moved the child be also. In any event, the child was not a qualifying child.

9. For his part, Dr O'Dair submitted that the application for permission was nothing more than a disagreement with the decision of Judge Onofriou. The question here was whether the judge had misdirected himself. He had not. The Grounds of Appeal by the Secretary of State referred to no proposition of law, and cited no particular legal argument as such, but simply argued that the judge had given the wrong weight to the factors that he was duty bound to consider. The heart of the matter here was the inter-relationship of Article 3 with Article 8 of the ECHR. The law was undisputed. I

10. Insofar as the judge allowed the appeal by reference to the case of **Akhalu**, this was a suggestion that had originated from submissions by the Secretary of State, who has cited the case. It was, of course, true that one could not reformulate a failed argument under Article 3, as a Article 8 ECHR submission, but this was not the case here. There were other factors here. The other factor was the position of the young child. The judge was not wrong to refer to this. It was a relevant factor. Given that the Appellant could not afford medical care in Mongolia, if he were to be returned there, the judge was right to say that, "I consider the fact that she would see her father's health rapidly deteriorate and most likely die within a short period which would be very traumatic for her and a clear

substantial adverse effect over family life" (see paragraph 46(c)), and there had been no challenge to this particular finding by the Respondent Secretary of State.

11. Finally, it was not the case that the judge had confused himself on the question of whether she was allowing the appeal on the basis of the Immigration Rules or not. This is because the judge had first considered the position of the Appellant divorced from his medical ill-health at paragraph 45 and had observed that, "clearly the Appellant and his family have established a private and family life, but this had been done during a time when his immigration status was precarious, and the judge here had found the essential argument to be that of whether the decision of the Secretary of State was proportionate or not. He and the judge had concluded that the Appellant could not succeed under the Immigration Rules.

12. However, once the judge had factored in the Appellant's medical condition as well, her conclusion was that the Appellant would succeed, and now the judge held that "the Appellant's removal, together with his family, would be disproportionate and therefore I allow this appeal under Article 8 of the ECHR and paragraph 276ADE(1)(vi) of the Immigration Rules". There was nothing inconsistent in this. The decision was impeccable in terms of the care and quality attained by the judge. As for the citation of **MM (Zimbabwe)** there was nothing in this point because it was plain that the judge intended to refer to **MM (Zimbabwe)** and a mistake as to citation of the decision did not constitute a material error of law.

13. In reply, Mr Tufan submitted that the judge had wrongly allowed the appeal under paragraph 276ADE on the basis that it would be "difficult to reintegrate" for the Appellant in Mongolia, when the requirement of the Rules was that there would be "very significant obstacles".

No Error of Law

14. I am satisfied that the making of the decision by the judge did not involve 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.

15. First, it is not correct that the judge has not applied the correct legal Rule when referring to the fact that it would be "difficult to reintegrate" for the Appellant in Mongolia, because he had already concluded (at paragraph 44), that in applying paragraph 183 of **Paposhvili**, the lack of access to medical treatment in Mongolia for the Appellant would expose him to a serious, rapid and irreversible decline in his state of health. The judge had expressly referred to "other very exceptional cases" as the criterion to be applied in such a situation.

16. Second, the judge did look at two alternative situations, first under the Appellant's private and family life (devoid of his medical ill-health); and second, by factoring in his ill-health, and then looking at three different scenarios in this context (see paragraph 46(a) to 46(c)). It was only with

respect to the latter that the judge had concluded that the Appellant would succeed both under paragraph 276ADE and a freestanding Article 8 ECHR jurisprudence.

17. Third, the judge was cognisant of the medical expert's report in the form of a letter of Dr Lemoine of 30th January 2017 (see paragraph 38 line 7) which makes it clear that the Appellant would be at severe risk of hepatitis complications and death. The judge had properly concluded that the medical expert referred to such medical treatment in Mongolia being unaffordable for the Appellant (see his paragraphs 35 and 42). These findings were open to the judge to make on the basis of what Dr Lemoine had found. The judge equally was not wrong to take into account the European Court decision in **Paposhvili**. Moreover **Akhalu** stood for the proposition that a decline in the health of a person precipitated by removal can be a factor to be taken into account in balancing the exercise in relation to Article 8 cases.

18. There was left the question of the best interests of a child who was not a qualifying child. However, the judge did not regard the best interests of the child as a trump card. She uses no such language. This was only one of the factors taken into account and the judge was entitled to do so. In this respect, the judge approached the matter consistently with the decision in **Akhalu**. On the facts of this case, it was open to the judge to conclude (at paragraph 46C) that it would not be in the best interests of the child to see her father, who would not have access to medical help in Mongolia given his impecuniosity, eventually die for his inability to access such health care. It is moreover, of course, the case that the judge was very much cognisant of Section 117B of the 2002 Act and recognised that little weight would be given to a private life acquired where the Appellant's immigration status was precarious (see paragraph 46). Accordingly, there is no error of law.

Decision

There is no material error of law in the original judge's decision. The determination shall stand.

The appeal of the Secretary of State is refused.

No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 26th February 2018