Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06530/2017**

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 30 January 2018	**On 01 February 2018**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

A T OLUWOLE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter, Advocate, instructed by Ethnic Minorities Law Centre, Glasgow
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against a decision by FtT Judge Mozolowski, promulgated on 9 October 2017.

2. The appellant's grounds of appeal are stated in the application for permission to appeal filed on 23 October 2017 as follows:

> Ground 1: Failure to have regard to *Paposhvili v Belgium*, application no 41738/10, [ECtHR, Grand Chamber, judgement dated 13 December 2016], which is material because:
>
> (i) The relevant test 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 a lack of access to

such treatment, of being exposed to a serious, rapid and irreversible decline in his and her state of health resulting in intense suffering or to a significant reduction in life expectancy (see paragraphs 132, 136 to 137, 175 to 183 of *Paposhvili*). The findings made by the FtT do not reflect the correct approach as outlined in *Paposhvili* as the decision refers to the appellant's illness not having reached a critical stage (i.e. that he is dying) or not being in the final stages of a terminal illness.

(ii) The findings in relation to the child's medical condition are undermined by failure to take into account the letter at page 138 of the appellant's bundle from Mrs Koya who was the child's nurse. She states that she was unaware of the child's condition and does not think the family had enough money to fund a diagnosis. Such evidence undermines the findings that the appellant and her husband would be able to afford such treatment. This is material as *Paposhvili* (paragraph 190) refers to the need by the respondent to consider the cost of medication and treatment and the distance to be travelled to access to the required care.

(iii) The findings in relation to availability and affordability of treatment are not supported, or not adequately supported, by the evidence … Reference is made to letters at pages 191 to 192 and 195 of the appellant's bundle. In light of this information there was no or insufficient evidence to support the findings … or the FtT failed to exercise anxious scrutiny. Even if the appellant and her husband could afford such treatment, there was no, or insufficient, evidence to show such treatment was available or could be accessed.

(iv) Such errors are material as serious doubts and the FtT has erred in law by failing to find a breach where there was no evidence that the respondent had obtained individual and sufficient assurances from the receiving state, as a precondition for removal, that appropriate treatment will be available and accessible to the appellant's child so that he does not find himself in a situation contrary to article 3 [or article 8].

Ground 2 – further errors in relation to article 8.

(i) Although the FtT states that the best interests of the child are a primary consideration at paragraph 17 it has failed to ask the right questions in an orderly manner in order to avoid the risk that the best interests of the child might be undervalued when other important considerations were in play: *Zoumbas v SSHD* 2014 SC (UKSC) 75 at paragraph 10 per Lord Hodge.

(ii) The FtT misapplied the law at paragraph 44. It is wrong to look for compelling reasons before looking at the case outside the rules. The tribunal requires to look at the case outside the rules in any event and the correct question is whether there is a sufficiently strong case to outweigh immigration control: *Agyarko v SSHD* [2017] 1 WLR 823 at paragraph 57 per Lord Reed.

Ground 3 – reaching findings not supported, or not sufficiently supported, by the evidence.

The FTT erred in law at paragraphs 21 and 22 by reaching findings not supported, or not sufficiently supported, by the evidence.

3. FtT Judge Alis granted permission on 29 November 2017, on the view of arguable error by applying the test in *N v SSHD* rather than the test in *Paposhvili (*ground 1 (i), in effect, although other grounds were not excluded).

4. In *EA and others* [2017] UKUT 00445 the UT held that the test in *Paposhvili* was not one it was open to the tribunal to apply, for reasons of judicial precedent.

5. Although the decision in *EA* is dated prior to the decisions of Judge Mozolowski and Judge Alis, it does not appear to have been reported until afterwards.

6. There is nothing in the grounds of appeal to the FtT about *Paposhvili*, and it does not appear to have been cited to the judge. If she did adopt the wrong approach, that would be largely due to parties not drawing the case to her attention. However, it is an error not to apply relevant jurisprudence, even when parties fail to make the submissions they should.

7. Mr Winter observed that *EA* is not binding on the UT; but he accepted that for practical purposes he would have to show that it is wrongly decided, which he undertook to do. He advanced an interesting and erudite argument, based mainly on *Hicks v Commissioner of Police of the Metropolis* [2014] 1 WLR 2152, to which the UT in *EA* was not referred.

8. It is convenient firstly to resolve the other grounds.

9. Ground 1 (ii) is based on a letter from a nurse in Nigeria who knew the appellant and her family, including her child A until the age of 5, but did not know he had sickle cell anaemia. In her last sentence she says she does not think the family "had the money to take him to the hospital for proper diagnosis".

10. The appellant's main bundle in the FtT ran to 195 pages. A judge does not have to mention specifically every line of every item of evidence before her. There does not appear to have been a submission that the nurse's letter was a principal item bearing on the financial circumstances.

11. As Mrs O'Brien submitted, the judge at paragraphs 19 – 30 carried out a thorough analysis of the evidence from the appellant and her husband, much of which related to their financial circumstances, and found it unsatisfactory for multiple reasons, in which no errors are alleged. At paragraph 32 she found their evidence "riddled with inconsistencies" and their "general credibility to be poor".

12. Ground 1 (ii) is an afterthought, based on combing through the evidence after receiving the decision. There is nothing in the absence of specific mention of the letter from the nurse which shakes the judge's general findings.

13. This also removes any real foundation for grounds 1 (iii) and (iv). Sickle cell anaemia is a common disease in Nigeria, but treatment is available. Although, sadly, it is not affordable to the poorer classes, on the findings of the FtT, soundly reached, about the true state of family finances, it is accessible for the appellant's child.

14. The judge commented at paragraphs 40 – 41 on the shortcomings of medical information at pages 87 – 94 of the bundle but did not specifically mention the evidence towards the far end of the bundle. To that extent, there is some force in the point at ground 1 (iii) about evidence at the far

end of the bundle. Those reports are rather more substantial, and there may have been an oversight. However, the appellant failed to show a state of affairs, even on those reports, which might meet the tests in *Paposhvili*. As submitted for the respondent, the picture which emerges is of a child with a moderate, well-managed condition, and nothing to show that such management may not continue in Nigeria. The conclusions of the FtT at paragraphs 41 and 54 have not been undermined.

15. Grounds 2 and 3 are only generalised disagreements, framed in the language of case law, not showing any purchase on the present facts.

16. The various elements of the test in *Paposhvili* lower the bar from *N*, but they still set it high. The evidence and findings in this case would not justify conclusions of exposure to serious, rapid and irreversible decline in health, intense suffering, or significant reduction in life expectancy.

17. It is therefore unnecessary to decide whether *EA* is wrongly decided; I say no more than that there may be a respectable argument to that effect.

18. The decision of the First-tier Tribunal shall stand.

19. No anonymity direction has been requested or made.

31 January 2018
Upper Tribunal Judge Macleman