Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08012/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 January 2019	**On 31 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVID [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr S Unigwe, Counsel instructed by Melvyn Everson & Co

DECISION AND REASONS

1. In a decision on error of law and directions issued on 23 November 2018 I found an error of law capable of affecting the outcome of the appeal and set aside the decision of the First-tier Tribunal, promulgated on 18 June 2018, to allow the appellant's appeal. That decision as an appendix to this decision and reasons.

Preliminary Matters

2. Mr Unigwe also confirmed that he would be relying on Articles 3 and 8 as well as paragraph 276ADE. Although Mr Melvin submitted that Article 3 had been refused by the Judge of the First-tier Tribunal, that decision had been set aside including due to the lack of adequate reasoning/conflation of reasons on Article 3.

Hearing

3. The appellant gave oral evidence in English and was cross-examined on that evidence. The appellant's evidence and the submissions of both parties are set out further in the Record of Proceedings. At the end of the hearing I reserved my decision which I now give.

The Respondent's Case

4. It is the respondent's case, in a decision dated 7 July 2017 refusing the appellant's application for indefinite leave to remain, that the appellant had failed to demonstrate that he met the requirements of either Appendix FM in relation to family life as he had not indicated either a partner or dependent children, and his application was refused under paragraph 276ADE. Specifically, when considering 276ADE(1)(vi), although it was not argued that the appellant fell foul of any of the suitability requirements, namely S-LTR.1.2 to 2.3 and S-LTR.3.1, the respondent did not accept that 276ADE(vi) was met. Although the refusal letter erroneously considered a previous version of 276ADE it was not disputed that the correct wording at the time of decision was:

> "(vi) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".

5. The respondent further considered whether there were any exceptional circumstances and considered Article 3 including the appellant's medical conditions; these included essential thrombocytosis, a bone marrow disease where the bone marrow creates too many abnormal platelets leading to high platelet counts in the blood with a risk of clotting and stroke. The respondent noted that the appellant received injections three times a week to lower his platelet count as well as blood thinning medication, aspirin, to reduce the risk of a stroke. The appellant has also been diagnosed with Type 2 diabetes and is seen every one to two months in the haematology clinic as well as follow-up appointments with vascular surgeons as a result of the amputation of his right big toe in September 2016. It was noted that the appellant's consultant haematologist stated that the appellant had a heart attack on 7 February 2015 and also received treatment for pericarditis in March 2015. The respondent

considered that the very high threshold considered in **N v SSHD [2005] UKHL 31** and **D v United Kingdom [1997] 24 EHRR 423**in Article 3 medical cases was not met.

Burden and Standard of Proof

6. In relation to Article 3 it is for the appellant to demonstrate that the appellant's removal would result in a breach of Article 3. In respect of Article 8 it is for the appellant to demonstrate, on a balance of probabilities that private or family life exists and for the respondent to demonstrate that any interference would be proportionate.

Immigration Rules

7. Although there is no ground of appeal in respect of the Immigration Rules, I have considered the appellant's appeal through the prism of the Immigration Rules. Appendix FM was not pursued by the appellant. In respect of paragraph 276ADE(1)(vi), although Mr Melvin conceded that in considering whether there were very significant obstacles to the appellant's integration I had to consider all the factors including the appellant's health, it was his submission that all the factors, including the appellant's extended family in Tanzania and his contacts there together with the evidence that there was treatment available in Tanzania did not suggest that there would be very significant obstacles.

8. The appellant confirmed in oral evidence that he is from a polygamous family and that his father had five wives and that the appellant's siblings as well as his parents reside in Tanzania. He also confirmed, as was confirmed before the First-tier Tribunal that his children are in Tanzania. Although the appellant gave oral evidence in relation to the difficulty in obtaining a job in Tanzania and referred, anecdotally, to his alleged inability to live outside of his village without employment, there was nothing before me, for example any attempts by the appellant to apply for jobs or any information that might suggest any such difficulty in obtaining accommodation or obtaining employment.

9. Equally, although the appellant stated that a number of his relatives were teachers and were poorly paid, there was nothing before me that might support this including from his relatives who might have been in a position to provide written confirmation of their employment and/or of their salary. Although I do not require corroboration, the appellant has not produced information/evidence where such ought to have reasonably been available to him.

10. In any event, even if I accept that earnings in Tanzania may well be lower than what might be earned in the UK, there was no adequate information or evidence to support the appellant's claim that his family would be unable to assist him in reintegrating including in assisting him, if such was necessary, in accessing treatment and/or medication. The appellant lived the majority of his life in Tanzania and has a large extended family there,

as well as friends, and the appellant gave oral evidence of his continued contact with friends and family. I am satisfied, and it was not argued to the contrary, that he continues to have social, cultural and family ties there. I am not satisfied that it has been demonstrated that the appellant meets the requirements of paragraph 276ADE of the Immigration Rules. The fact that the appellant does not, in my findings, meet the requirements of the Immigration Rules is relevant to my consideration of the appellant's human rights appeal.

Article 3

11. In **N [2005] UKHL 31** the court considered the issue of Article 3 specifically in relation to a sufferer of HIV and AIDS. The House of Lords established that the threshold in Article 3 cases is high. In **GS (India) [2015] EWCA Civ 40** the court held that a person whose life will be drastically shortened by the progress of natural disease if removed to his home state did not fall within the paradigm of Article 3. As discussed in the error of law decision the case of **Paposhvili v Belgium [2017] Imm AR 867** was considered by the First-tier Tribunal. Mr Paposhvili's claim was dismissed by the European Court of Human Rights by a majority by reference to the test in **N v United Kingdom [2008] 47 EHRR 39** under which the category of exceptional situations in which Article 3 would prevent removal to another country with lesser standards of healthcare was confined to "deathbed cases". On the evidence at the time Mr Paposhvili was stable and was not at imminent risk of dying and the court considered that although there were limits on treatment available in the country to which he would be returned the appellant was not without resources which might help.

12. The Court of Appeal in **SL (St Lucia) v Secretary of State for the Home Department [2018] EWCA Civ 1894** considered the subsequent progression of the jurisprudence as follows:

> "21. The application was referred to the Grand Chamber. The effect of its judgment was considered by this court in AM (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 64. First, of course, the court emphasised that the position in domestic law was authoritatively settled in favour of the criteria in N. In N v Secretary of State for the Home Department [2005] UKHL 31; 2005 2 AC 296, the House of Lords case which was endorsed by the European Court. But, in any event, in AM (Zimbabwe) Sales LJ (with whom Patten LJ and I agreed) considered that, in substantive terms, Paposhvili 'only intended to make a very modest extension of the protection under Article 3 in medical cases'" (see [39]). He said (at [28]);
>
> > 'So far as the ECtHR and the [ECHR] 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, 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 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 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 Article 3 protection has been shifted from being defined by imminence of death in the remaining 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 stage of the treatment which had previously been available in the removing state".

13. There has therefore been only a 'modest extension' to the test, from imminence of death in the removing state even with treatment to the imminence of intense suffering or death in the receiving state occurring because of the lack of treatment previously available in the removing state. I am not satisfied that the appellant has demonstrated that he falls within either tests.

14. Mr Unigwe referred me to the evidence that had been before the First-tier Tribunal and before the Upper Tribunal in respect of the error of law hearing. Mr Unigwe confirmed that there was no further updated medical evidence in respect of the appellant's medical condition, although I accept that the appellant's medical conditions were not specifically disputed. I have considered all of the evidence and this included, but was not limited to, a letter dated 17 May 2018 from the appellant's GP confirming the appellant's complicated medical history and confirming that he has three Interferon injections a week and is under regular review by the haematologist, and that he has a history of heart attacks with ischaemic heart disease and has been reviewed by the cardiology team, and is also under review by the diabetic team. It was the GP's view that if this treatment was withdrawn it would have a negative impact on the appellant's health and that "he will be more at risk of developing blood clots, heart attacks – due to history of essential thrombocythemia". I was referred to page 46 of the appellant's original bundle, a letter from Bedford Hospital NHS in relation to a clinic of 24 May 2017 which listed the appellant's conditions. I note that this letter indicated that the appellant "feels generally fine in himself at the moment".

15. At page 44 of the original bundle, I was referred to a letter from the consultant haematologist in relation to a clinic dated 25 April 2018; again this refers to the appellant feeling generally fine and that he has started

insulin because of his diabetes and that he is known to have ischaemic heart disease with previous heart attacks: "otherwise he feels generally fine in himself". At this stage the appellant was given a prescription for Interferon injections three times a week which it was stated would be reviewed in three months' time; his platelet count was slightly raised but stable. I note that there was no further up-to-date evidence produced for the resumed hearing including in relation to any review of the appellant's condition in the interim.

16. Mr Unigwe also referred me to page 19 and 20 of the original bundle, the letter dated 17 May 2018 in respect of the appellant's conditions. Page 27 of the original bundle contained a medical report from the cardiology department dated 13 June 2018. This noted the appellant's history of heart disease that "he needs very good risk factor management and continuing medical therapy to minimise chances of further heart attacks". At page 17 of the supplementary bundle a report typed on 31 October 2018 from Watford General Hospital again sets out the review of the appellant's conditions and notes the appellant felt tired with symptoms of poor glycaemic control.

17. It was the appellant's oral evidence that he lives two days' travel by public transport from Dar es Salaam which the appellant stated was the only place where he felt he could access the necessary treatment. However, despite the fact that the respondent refused the appellant's case, on 7 July 2017, including because the respondent was of the view that the background country information indicated that treatment for the appellant's conditions is available in Tanzania; and that the error of law decision contained specific directions including that the Tribunal would benefit from up-to-date medical evidence, there was no information or evidence which might support the appellant's claims, in relation to the limitations in respect of accessing both medical treatment and medication in Tanzania, where such ought to have been available.

18. The appellant, in oral evidence, made a number of unsupported assertions including vague claims about speaking to doctor friends in Tanzania who told him treatment/medication would be only available in one central hospital in Dar es Salaam. He also made a number of vague claims in relation to fake medication and citizens of Tanzania having to go to India for treatment. None of these allegations were supported by background country information or otherwise which, it is reasonable to expect, ought to have been available, and which might have supported such a claim. Although I take into account that the respondent in the refusal letter indicated that the World Health Organisation reports that facilities are more readily available in the large urban conurbations than rural areas the appellant's claim that it was only in Dar es Salaam that treatment could be accessed was unsupported, as was his claim that he had no access to any transport and that none of the members of his family had any access to any transport other than public transport.

19. The only background information produced by the appellant was a 3 page 2008 report setting out 10 year strategies for non-communicable diseases in Tanzania. The appellant's representative highlighted from that report, at page 51, of the supplementary bundle that:

> 'Tanzania faces the challenge of lack of human, financial and infrastructure resources as well as a high burden of CDs, especially malaria and HIV/AIDS. Training programmes for specific NCD and implementation of this strategy will need to take into consideration and adopt measures accordingly.'

Although Mr Unigwe did not refer to this report in his oral submissions the tenor of the reports suggests a much more developed healthcare system than the appellant reported in his oral evidence, to the extent that long term strategies for dealing with diseases were clearly being developed over ten years ago. Whilst there was no specific dispute from the respondent in relation to the fact that the medical system in Tanzania might not provide the level of care provided by the NHS and that poverty is a factor, which is noted in the report, at page 52 of the appellant's supplementary bundle, it is evident that (and the report refers to) the health system in Tanzania is functioning and I note that non-communicable diseases listed in the report include cardiovascular disease and cardiac issues together with diabetes, both of which are issues the appellant suffers from.

20. I am satisfied that the appellant's evidence, such as it was, falls a very long way short of the test confirmed in **SL (St Lucia)**. Although I accept that the appellant has ongoing health issues, as described above, it cannot be said that it has been demonstrated that the appellant is at imminent risk of dying. Such was not argued. It was further not demonstrated that the appellant would face a real risk on account of absence of appropriate treatment or access of such treatment of being exposed to a "serious, rapid and irreversible decline" in his state of health. Indeed, in my findings the appellant has failed to demonstrate that he will not be able to access treatment.

21. I found the appellant's oral evidence to be generally vague and in my findings evasive. I did not find the appellant to be a credible witness with regards to his claimed situation on return. If the treatment that the appellant needs is not available or indeed only available in one central hospital in Dar es Salaam (which I am not satisfied has been established) I do not find it credible that the appellant would not have been able to produce some information from Tanzania which might have supported such a claim. Even if the appellant is right (which has not been established) the appellant could access treatment in Dar es Salaam. He was unable to adequately explain why he could not relocate there. I do not accept his claim that he would not be able to relocate without employment and he was further unable to adequately explain why he could not, even with his health conditions (and as noted above he is described in the most recent medical evidence as tired but also 'generally

fine') either obtain employment and/or receive assistance from his many extended family members (and it was the appellant's own evidence that at least two members of his family are teachers). Again, although he claimed that they received low salaries, there was no adequate explanation to support his claim that his family were unable to assist him should relocation to Dar es Salaam be required (which was not shown). Additionally, the appellant has provided information that he is currently supported, including financially, by his church in the UK, Vision Gospel Ministries Int. There was no adequate information or evidence to suggest that such financial support could not continue on return to Tanzania, if such were required

22. I am not satisfied that it has been demonstrated that the appellant will not be able to access the treatment/medication he requires on return to Tanzania. Considering all the factors in the round the appellant's evidence falls a long way short of establishing that he faces a real risk of being exposed to a serious, rapid and irreversible decline in his state of health on account of the absence of appropriate treatment in the receiving country. The appellant's appeal under Article 3 cannot succeed.

Article 8

23. Although Mr Unigwe also sought support from **Paposhvili** and **SL (St Lucia) v Secretary of State for the Home Department** in aid of the appellant's Article 8 case, at [27] the Court of Appeal in **SL (St Lucia)** were entirely unpersuaded that **Paposhvili** had any impact on the approach to Article 8 claims.

24. I have considered and applied the five stage test set out in **Razgar**. I remind myself as the First-tier Tribunal did, of what was said in **GS (India) [2015] EWCA Civ 40** that a person whose life will be drastically shortened by the progress of natural diseases if removed to his home did not fall within the paradigm of Article 3. The court went on to hold that if the Article 3 claim failed, Article 8 could not prosper without some separate or additional factual element which brought the case within the Article 8 paradigm. The core value protected by Article 8 is quality of life and not its continuance. That meant that a specific case must be considered under Article 8.

25. I must identify whether Article 8 is engaged in respect of private life, it not being contended that it was engaged in respect of family life. It was Mr Unigwe's submission that the appellant's long stay in the UK was sufficient to engage Article 8 and Mr Unigwe referred to the appellant's "productive life". Rather surprisingly Mr Unigwe at paragraph 17 of his skeleton referred to the appellant's "established family and private life". However, there was no evidence and nothing relied on in relation to family life. In respect of private life, Mr Unigwe stated that the appellant had put down roots in the UK. However, there was no adequate information or evidence

to support those roots. The appellant in his updated witness statement indicated that he had come to study but stopped studying in 2010 and did not obtain any qualifications.

26. The appellant's witness statement relies largely on his medical conditions, although he also referred to his active involvement in the UK in charity organisations including his church community (and he refers to the letter enclosed with his original application) which is now supporting him financially. Although the appellant claimed that he has 'almost lost ties' with Tanzania, I rely on my findings above that this is not accepted. Mr Unigwe also relied on a supporting letter from Vision Gospel Ministries which was at page 137 of the original bundle. This letter is dated 4 May 2018 and refers to the appellant being an active member of the church since 2007 and that the church is supporting him financially.

27. It is significant that the appellant provided no further adequate information evidence in relation to his private life and there was no witness statement or oral evidence from anyone who might support the quality or otherwise of that private life.

28. However, given the low threshold I am prepared to accept that Article 8 is engaged to the extent that the length of the appellant's stay in the UK would indicate that he has established some private life. I am further satisfied, given that low threshold, that the respondent's decision may interfere with that private life. Such decision is in accordance with the law as the appellant cannot meet the requirements of the Immigration Rules and is for the legitimate purpose of the maintenance of immigration control.

29. Turning to the final proportionality question I have considered all aspects of the appellant's private life. This includes his medical conditions and the adequate treatment that he clearly is obtaining in the UK. I further accept the appellant's claim that he wishes to remain in the UK, although as already noted he has provided limited evidence of his private life, other than his involvement in the church and their assistance to him. There was no adequate information to suggest that he could not maintain those links when he returns to Tanzania including the continuance of financial support if that were required.

30. I have also considered Section 117 of the Nationality, Immigration and Asylum Act 200. I take into account that the appellant cannot in my findings meet the requirements of the Immigration Rules. The maintenance of Immigration control is in the public interest. I further take into account that although there was a letter confirming that the church provide him with financial assistance, there was no adequate evidence that the appellant is financially independent. Even if I am wrong this is no more than a neutral factor for the appellant. Although the appellant speaks English that is also no more than a neutral factor. I also must take into consideration that little weight must be accorded to private life established at a time when the appellant's immigration status was

precarious and little weight must be attached to private life when the appellant had no leave to remain. The appellant's immigration status has been at most precarious, his initial leave to remain was as a student, the appellant arriving on 28 January 2007, and for the majority of his time in the UK he has been here unlawfully (since December 2009)**.**

31. In considering Article 8 and the public interest consideration applicable in all cases I have I have applied the 'balance sheet' approach. The Supreme Court in **Hesham Ali (Iraq) v Secretary of state for the Home Department [2016] UKSC 60 SC** and **R (Agyarko); R (Ikuga) [2017] UKSC 11** confirmed that the question to be determined is whether a fair balance has been struck using the structured approach to proportionality. I have reminded myself that there are situations where private life might be accorded more than little weight. I have taken into account as an additional factor, to be weighed in the balance with other factors, that the appellant is receiving medical treatment here in the UK and wishes to continue to do so. However, I rely on my findings that there is no adequate evidence that he will not be able to continue receive any necessary treatment in Tanzania. I am not satisfied therefore that the appellant's evidence has established that this is such a case.

32. Although the appellant indicated in evidence before me that he was from a small country village rather than Mwanza which was a larger town and as cited above he stated he would have a long way to go for treatment, for the reasons already given, although I accept he may well come from a rural village, I am satisfied that he could still continue to receive treatment, including in moving to an urban area if required. I do not accept his evidence in relation to claimed difficulties in accessing treatment, which I find to be overstated, vague and unsupported, where such documentary support ought reasonably to have been available.

33. I am satisfied that any interference with the appellant's private life is proportionate, taking into account as I do my findings that the appellant's claims in relation to the difficulties he would experience are not established. Although treatment may not be of a level he is receiving in the UK I am not satisfied it has been established that he will not be able to access treatment. I am further satisfied that the appellant has a network of family and friends who can assist him if necessary in Tanzania and I accept Mr Melvin's submission that the appellant had some education in Tanzania which enabled him to come to the UK to study. This will assist him on integrating into Tanzania on return. The appellant's appeal cannot succeed under Article 8.

34. Taking into account all the evidence, including having fully considered the medical evidence, I am further not satisfied in the round, that this amounts to exceptional or compelling circumstances or that the refusal of leave would result in unjustifiably harsh circumstances.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law such that it is set aside. I substitute my decision re-making the decision dismissing the appellant's appeal on all grounds.

No anonymity direction was sought or is made.

Signed Date: 24 January 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed no fee award is made.

Signed Date: 24 January 2019

Deputy Upper Tribunal Judge Hutchinson

APPENDIX

IAC-AH-SC/DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08012/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 November 2018	.....

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVID [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr S Unigwe, Counsel instructed by Melvyn Everson & Co

DECISION ON ERROR OF LAW AND DIRECTIONS

1. The appellant is the Secretary of State and the respondent is Mr [M]. However, for the purposes of this decision I refer to the parties as they were before the First-tier Tribunal where Mr [M] was the appellant.

2. Mr [M] is a citizen of Tanzania born on 1 April 1982. He appealed to the First-tier Tribunal against the decision of the Secretary of State dated 7 July 2017 refusing him leave to remain in the UK on the basis of private and family life. In a decision promulgated on 18 June 2018, Judge of the First-tier Tribunal Beg allowed the appellant's appeal on human rights grounds.

3. The Secretary of State appeals on the following grounds:

(1) Failure to resolve a material conflict of fact in relation to where the appellant lives, relevant to his access to medical treatment.

(2) Material misdirection of law:

(a) in respect of alleged reversal of the burden of proof;

(b) there is little evidence to suggest that the removal of the appellant would result in intense suffering or significant reduction in life expectancy and the judge appears to conflate the Article 3 threshold with Article 8;

(3) The judge failed to adequately consider the public interest given the appellant's overstaying in the UK since 2009 and his treatment on the NHS.

Background

4. The appellant entered the UK on 8 January 2007 as a student, his visa expiring on 31 December 2009 after which he became an overstayer. The appellant made an unsuccessful application for leave to remain in 2010. He applied for leave to remain on the basis of his private and family life on 29 July 2013. This application was also refused. He made a further application on 13 February 2017 which was the subject of the appeal to the First-tier Tribunal. The respondent refused the appellant's application noting that he did not meet the requirements of Appendix FM and did not have a partner or dependent children in the UK. In respect of private life, the respondent considered paragraph 276ADE and was satisfied the appellant had not been in the UK for twenty years. The respondent noted that the appellant had lived in Tanzania for most of his life and did not accept that he did not have social, cultural or family ties there because his parents and children live there. The respondent considered that there would not be very significant obstacles to the appellant's integration into Tanzania. The respondent also considered whether there were any exceptional circumstances including the appellant's health problems.

5. There was evidence before the respondent and the First-tier Tribunal that the appellant has been diagnosed with thrombocytosis, a bone marrow disease and that he is required to have three injections a week to lower his platelet count. The respondent also noted that the appellant had a heart attack on 7 February 2015 and received treatment for pericarditis. The respondent considered **N v SSHD [2005] UKHL 31** and was satisfied that the appellant's health had not reached a critical stage of his illness. The

respondent also took into consideration that the appellant in the entry clearance application was submitted on 21 November 2006 provided an address in Mwanza, the second largest city in Tanzania and the respondent noted that although the healthcare systems in the United Kingdom and in Tanzania were unlikely to be equivalent and although it was accepted the appellant may face significant difficulties upon return, this did not amount to exceptional or insurmountable circumstances. The respondent noted the appellant was sponsored by his brother and would have his support, as well as the support of his parents and children,

Submissions

6. In respect of ground 2 paragraph 2, Mr Whitwell submitted that it was appropriate to consider relied on what was said by the Court of Appeal in **SL (St Lucia) [2018] EWCA Civ 1894**. The approach to Article 8 health claims is the same as before **Paposhvili,** Lord Justice Hickinbottom at paragraph 27 stating as follows:

> "However, I am entirely unpersuaded that **Paposhvili** has any impact on the approach to Article 8 claims. As I have described, it concerns the threshold of severity for Article 3 claims; and, at least to an extent, as accepted in **AM (Zimbabwe)**, it appears to have altered the European test for such threshold. However, there is no reason in logic or practice why that should affect the threshold for, or otherwise the approach to, Article 8 claims in which the relevant individual has a medical condition. As I have indicated and as **GS (India)**emphasises, Article 8 claims have a different focus and are based upon entirely different criteria. In particular, Article 8 is not Article 3 with merely a lower threshold: it does not provide some sort of safety net where a medical case fails to satisfy the Article 3 criteria. An absence of medical treatment in the country of return will not in itself engage Article 8. The only relevance to Article 8 of such an absence will be whether this is an additional factor in the balance with other factors which themselves engage Article 8 (see **(MM (Zimbabwe)**at [23] per Sales LJ). Where an individual has a medical condition for which he has the benefit of treatment in this country, but such treatment may not be available in the country to which he may be removed, where (as here) Article 8 is not engaged, then the position is as it was before **Paposhvili**, i.e. the fact that a person is receiving treatment here which is not available in the country of return may be a factor in the proportionality balancing exercise but that factor cannot in itself give rise to a breach of Article 8. Indeed, it has been said that, in striking that balance, only the most compelling humanitarian considerations are likely to prevail over legitimate aims of immigration control (see **Razgar** at [59] per Baroness Hale)."

7. Mr Whitwell noted that the judge cited **Paposhvili** at [24] and submitted her conclusions at [26] were problematic as the judge appeared to conflate Article 3 and Article 8 finding as follows:

> "I find in taking the evidence as a whole, that the appellant is a seriously ill person and there are substantial grounds for believing that he, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in Tanzania or the

> lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health which is likely to result in a stroke or heart attack which could be fatal.
>
> …"

8. Mr Whitwell submitted that the judge found the appellant's health was a large part of his private life and although the judge directed herself to **GS (India) [2015] EWCA Civ 40** and reminded herself at [21] that an Article 8 appeal could not prosper without some separate additional factual element which brought the case within the Article 8 paradigm, the core of value protected being the quality of life not its continuance, Mr Whitwell submitted that it was difficult to see how the Article 8 case could prosper without the health issue. In addition, although the judge posed the **Razgar** questions at [12], it was Mr Whitwell's submission that the judge failed to even identify whether Article 8 is engaged.

9. In respect of ground 1, the judge found that the appellant lived in Tanzania at [11] although she did not resolve the conflict identified in the refusal letter that the appellant had provided an address in Mwanza in his entry clearance application submitted in 2006. At [22] the judge recorded that the respondent referred to the World Health Organisation report that there is medical treatment available in large urban areas rather than rural areas. Mr Whitwell submitted, in that context, it was incumbent on the judge to resolve the conflict as to where the appellant lived, whereas the judge simply recorded that the appellant gave evidence that the nearest large town of Mwanza was 300 kilometres away from his home. He submitted that was a failure to make findings on material facts.

10. In respect of ground 2, the first paragraph argued that the judge had reversed the burden of proof stating that there was no credible evidence the appellant would be able to receive the three injections he required. However, the burden was on the appellant to demonstrate, on a balance of probabilities that the treatment would not be available.

11. In relation to ground 2, the third paragraph, on the issue of proportionality, Mr Whitwell submitted that the public interest had not been adequately factored in and that the final question in **Razgar**had not been properly addressed by the First-tier Tribunal. The judge was aware, in her findings, that the appellant had availed of health services in the UK at considerable cost and that he had been an overstayer since 2009 although he had been attempting to regularise his stay. The judge failed to identify what weight was being given to the public interest.

12. Mr Unigwe referred to the evidence before the First-tier Tribunal, set out at [15] and [16], of Dr Almusawy dated 25 May 2017 and 19 July 2017 and referred to the other reports. Mr Unigwe relied on the appellant's list of medications at pages 107 to 110 of the appellant's bundle (AB). The judge heard evidence from the appellant and had the opportunity to assess credibility; his medical conditions go to the core of his claim. He emphasised that the appellant was seriously ill and it was his submission

that this was what the judge had in mind. Although he conceded that he was not suggesting that **SL (St Lucia)** had been wrongly decided by the Court of Appeal, he continued to submit that the judge had not erred in her approach to Article 8.

13. In respect of ground 1, although he accepted that the judge had not made a specific finding he submitted that she did not need to resolve the conflict between the refusal letter, which the judge was aware of and cited in her findings, and the appellant's claim as to where he lived. In his submission this was implied in her subsequent findings about the medical treatment.

14. In relation to the alleged reversed burden of proof, Mr Unigwe relied again on the medical reports. Although he speculated that the appellant would have provided evidence of the unavailability of the treatment as I indicated at the hearing, the judge's Record of Proceedings indicates that the appellant stated that he had not made any such enquiries. This is specifically recorded at [8] of the decision and reasons: *'He said he has not made enquiries about what treatment is available in Tanzania'*.

15. However, Mr Unigwe submitted that the judge must have relied on the evidence before her and although he accepted that there was no evidence to show the treatment is not available he further submitted that the judge must have also taken into consideration the affordability of this medication.

16. In respect of the public interest Mr Unigwe submitted that the appellant had come as a student and that all his illnesses had been developed in the UK and therefore it was right that he received treatment in the UK. Although the judge may not have given reasons in respect of the public interest, he submitted that she was influenced by the medical reports and was right to allow the appeal under Article 8. In respect of 276ADE(vi) Mr Unigwe submitted that it would be difficult for the appellant to integrate although the judge did not specifically make findings on this. It was clear she had it in mind and therefore there was no error in law.

17. In reply Mr Whitwell submitted that any reliance by Mr Unigwe on the claim that the appellant's evidence as to difficulties in living in Tanzania with his illness went to quality of life and that this had been implicitly considered by the judge in her consideration of Article 8 did not salvage the decision. Although the judge may have been sympathetic this ignores that Article 8 is not a general dispensing power.

Discussion

18. I am satisfied that the grounds do disclose errors of law. As set out above, **SL (St Lucia)** reminds that **Paposhvili** does not have any impact on the approach to Article 8 claims. The judge however, at [24] cited **Paposhvili** including as follows:

> "The court considers that the 'other very exceptional cases' within the meaning of the judgment in **N** which may raise an issue under Article 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 a probate treatment in the receiving country or the lack of access to such treatment, of being exposed to serious, rapid, nervous and will 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 high threshold for the application of Article 3" [183].

19. The judge then went on at [26] (the decision containing no paragraph [25]) to find that although the appellant was not at imminent risk of dying there would be a real risk, on account of the absence of appropriate treatment, of being exposed to a serious and rapid irreversible decline. That conflates Article 3 and Article 8, whereas the judge purported to allow this case under Article 8, making no specific findings on Article 3. Although the judge reminded herself, at [20], of what was said in **GS (India)** that if an Article 3 claim failed Article 8 could not prosper without some separate or additional factual element and that although the courts have not said Article 8 can never be engaged by health consequences of removal, the circumstances would have to be truly exceptional before such a breach can be established, the judge failed to engage with these issues in her findings.

20. Equally, although the judge set out the five-stage test in **Razgar** at [12] of her decision and reasons, she failed to identify how Article 8 was engaged in respect of private life, if indeed that was the case, in terms of addressing the first and second questions in **Razgar** i.e. will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private and family life and (2) if so, will such interference have consequences of such gravity as to potentially engage the operation of Article 8.

21. The judge's error is further compounded by her finding at [27], that although she took into account the length of time the appellant had been in the UK and that he had support from his church and friends in the United Kingdom, his health was a "large part of his private life". The First-tier Tribunal failed to identify any separate or additional factual element which brought the case within the Article 8 paradigm. The judge materially erred in her approach and in erroneously applying **Paposhvili** as she did. As highlighted most recently by the Court of Appeal in **SL (St Lucia), Paposhvili** does not have any impact on the approach to Article 8 claims, which have an entirely different focus based upon different criteria, rather than 'Article 3 with merely a lower threshold' which is the error that the First-tier tribunal has fallen into in this case

22. In relation to the remaining grounds the judge also erred in failing to resolve the issue as to where the appellant lived, given that in 2006 he gave Mwanza as his contact address, as relied on by the respondent. In addition, including given what the judge recorded at [8] in setting out the appellant's evidence, that the appellant had "not made enquiries about

what treatment is available in Tanzania", the judge erred in reversing the burden of proof and finding that there was "no credible evidence before me that he will be able to continue to have three interferon injections every week". It was for the appellant to establish, on a balance of probabilities, that this was the case. It is difficult to see how he could have done so, given that he had made no enquiries. In any event the judge had acknowledged that there was medical treatment in Tanzania.

23. I am further satisfied that the judge further erred in failing to make adequate findings in respect of the public interest. Although the judge indicated that she had taken into account Section 117B, she failed to say what weight was given to the public interest including given the appellant's overstaying, that his stay in the UK had always been precarious at best and for the majority of the time unlawful and therefore little weight would be attached to that private life.

24. Although Mr Unigwe tried valiantly to defend the judge's decision, his submissions amounted to no more than a repetition of the appellant's case before the First-tier Tribunal as to the alleged strength of the medical evidence about the appellant's medical conditions in the UK, rather than addressing the errors in the judge's approach.

25. The decision of the First-tier Tribunal contains an error of law and is set aside. Although I was minded to re-make the hearing on the evidence before me, Mr Unigwe requested and Mr Whitwell did not object, that the case be re-listed on another day given that both Mr Unigwe and instructing solicitors had only been instructed in the days leading up to the Upper Tribunal hearing.

Notice of Decision on Error of Law

The First-tier Tribunal's determination contains an error of law capable of affecting the outcome of the appeal and is set aside. The decision on the appeal will be remade by the Upper Tribunal.

Directions

A. The appellant is to file and serve a consolidated bundle of evidence so that it is received no later than 10 December 2018. The bundle is to separately tabulate: (i) the evidence relied upon before the First-tier Tribunal; and, (ii) the additional evidence that it is now sought to rely upon before the Upper Tribunal. The bundle must include a skeleton argument on behalf of the appellant identifying the issues relied on. The Tribunal would be assisted by up-to-date medical evidence. It is also anticipated that the aforementioned bundle will include an updated witness statement for the appellant, to stand as his evidence-in-chief, which should address the issues in dispute including the appellant's address in Tanzania and the availability of treatment.

B. The Secretary of State is to file and serve, by no later than 17 December 2018, any evidence relied upon that is not contained within the bundle he relied upon before the First-tier Tribunal.

Failure to comply with any these directions may lead the Tribunal to exercise its powers to decide the appeal without a further oral hearing, or to conclude that the defaulting party has no relevant information, evidence or submissions to provide.

No anonymity direction was sought is made.

Signed Dated: 21 November 2018

Deputy Upper Tribunal Judge Hutchinson