Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16632/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2018	**On 15 February 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

M T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Aslam, instructed by Solomon Shepherd Solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of the respondent made on 20 June 2016 to refuse her application for leave to remain on a human rights basis and thus to refuse her human rights claim.

2. The appeal against was dismissed by First-tier Tribunal Judge Robertson sitting in Birmingham for the reasons given in my decision promulgated on 12 October 2018 (a copy of which is annexed). I found an error of law in that decision and set it aside to be remade.

3. The appellant is a citizen of Ghana who entered the United Kingdom in 2001 with leave as a visitor for six months. She has remained here since without leave.

4. The appellant was 33 when she entered the United Kingdom and states that all the living members of her family are in the United Kingdom including her mother, all four of her sisters, their husbands and children.

5. After entry into the United Kingdom, she entered into a relationship with a man for about a year and a half. In 2003 she was diagnosed as having contracted HIV, a complication of which has left her blind in her right eye. She feels stigmatised as a result and has only been able to tell two of her sisters of her condition.

6. The appellant is supported by her family and also by the church that she attends. She says that she has nothing and no-one to go back to in Ghana where she has no accommodation and no prospect of employment.

7. In addition, the appellant's case is that she would not receive proper treatment for her condition and that accordingly, her removal would be in breach of Article 3 Human Rights Convention as well as Article 8 of the Human Rights Convention.

8. The respondent's case is that the appellant's removal would not be in breach of Article 3, in respect of whether this is a case to which it is not in any event falling within the terms of **Paposhvili v Belgium [2017] Imm AR 867**, there being adequate treatment available for the appellant in Ghana. It is also submitted that there were not in this case very significant obstacles to the appellant integrating again to life in Ghana and so she did not meet the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules. The respondent considered also there were not in this case exceptional circumstances such that removal would be disproportionate.

9. I heard evidence from the appellant and two of her sisters. I also had before me the following:-

   (i) Respondent's bundle.

   (ii) Bundle prepared for the First-tier Tribunal hearing.

   (iii) Bundle prepared for earlier judicial review proceedings.

   (iv) Supplementary bundle containing updated medical evidence.

   (v) Response to information request produced by the respondent re availability of healthcare and medications for HIV in Ghana.

10. In addition, I heard submissions from both representatives.

11. The appellant adopted her witness statement adding in cross-examination that she had only worked briefly in the United Kingdom and she had not kept in contact with anybody in Ghana. She said that she would be homeless. She said that she did not think that the pastor of her church, who knew people in Ghana, would be able to help her. Asked if she had tried to find out what treatment would be available for her she said she did not known anybody in Ghana and she was not very good at using the internet.

12. I then heard evidence from the appellant's sister, H, who adopted her witness statement, who in cross-examination said that she goes back to Ghana every two to three years not more frequently and while she has friends there they would not be able to help the appellant. She said she had not made any enquiries about this. She said that her sister lives with her and she is able to support her however it is very small amounts of money and she eats with the family. She said it would be too difficult for the appellant to go back to Ghana and she would not be able to afford things.

13. Ms Holmes submitted that even on the broader interpretation of Article 3 set out in **Paposhvili**, as referred to at paragraphs 40 and 41 of **AM (Zimbabwe)** this case simply came nowhere near the Article 3 threshold as medical treatment would be available for the appellant. She submitted further that little weight should be attached to the appellant's private life in the United Kingdom. She submitted that there were in this case no exceptional circumstances and that having had due regard to Section 117B of the 2002 Act, the conditions that the appellant would face in Ghana were not sufficiently serious to engage Article 8. It was accepted that she would have difficulties on return but equally she had lived in the United Kingdom illegally for seventeen years and had established no family life in the United Kingdom.

14. Mr Aslam submitted that on the basis of the evidence from Ghana about the availability of treatment and below the non-availability of Raltegravir removal would on the facts of this case engage Article 3.

15. Mr Aslam submitted further that on the facts of this case viewed cumulatively, the difficulties that the appellant would face are such that she would not be able to reintegrate again into life in Ghana given the length of time she had been away, her health problems, the lack of employment and the lack of accommodation. He submitted that she had established family life here and that she was dependent on her sisters and had been an integral part of the family for some seventeen years.

The Law

16. I am bound with regards to Article 3 by **N v SSHD [2005] UKHL 31**. I have considered whether, that case notwithstanding, I should consider the position has changed. In the light of **AM (Zimbabwe) v SSHD [2018] EWCA Civ 64** I have nonetheless considered it is, I accept, arguable that

the Grand Chamber has in **Paposhvili** relaxed the test of violation of Article 3 in the case of removal of a foreign national with a medical condition but I consider that, insofar as it does so, it is to a modest extent as noted by Sales LJ in **AM (Zimbabwe)** at 40 to 41:

> 40. 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 para. [183] out of context, it might be taken to indicate a very wide extension of the protection of Article 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 para. [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 para. [178]), in which no violation of Article 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 para. [183] of *Paposhvili* the ECtHR intended to reverse the effect of *N v United Kingdom*. Moreover, the Grand Chamber's formulation in para. [183] requires there to be a "serious" and "rapid" decline in health resulting in intense suffering to the Article 3 standard where death is not expected, and it makes no sense to say in the context of analysis under Article 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 para. [183], read in context, is the one given above.
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> 41. In that regard, it is also significant that even on the extreme and exceptional facts of the *Paposhvili* case, where the applicant faced a likelihood of death within 6 months if removed to Georgia, the Grand Chamber did not feel able to say that it was clear that a violation of Article 3 would have occurred for that reason had he been removed. Instead, all that the Grand Chamber held was that the applicant had raised a sufficiently credible Article 3 case that it gave rise to a procedural obligation for the relevant Belgian authorities to examine that case with care and with reference to all the available evidence. The violation of Article 3 which the Grand Chamber held would have occurred if the applicant had been removed to Georgia was a violation of that procedural obligation.

17. I have therefore gone on to consider whether on the facts of this case it is established that there would be a serious and rapid decline of the appellant's health resulting in intense suffering to the Article 3 standard.

18. It is not in doubt that the appellant is HIV positive or that she has been on antiretroviral therapy since 2003. She is currently on Truvada and

Raltegravir. The most recent letter from her treating physician is that she will require lifelong antiretroviral therapy in the absence of which she would experience, within in a matter of a few months, opportunistic infections or cancers which may become life threatening or end up in permanent sequalae such as loss of her sight. The doctor added that it is not within her remit to state whether the present treatment is available in Ghana although she did doubt whether she would be able to afford it.

19. The letter from the Ghana Canada Medical Centre gives no indication of where that centre is based but I assume that it is based in Ghana. It is also undated although it clearly postdates the letter from the Royal Free Hospital of 25 October 2018. The letter confirms that Raltegravir is not available in Ghana, as is confirmed by the Home Office's report, and the letter opines that if treatment is interrupted for any reason it is very likely that a life-threatening HIV drug resistance will develop and this will adversely affect her health. It is also said that on the basis of her medical history the appellant will need laboratory investigations including HIV drug residence monitoring in the future but that there was no accredited laboratory where genotypic and phenotypic HIV testing can be conducted in Ghana to optimally monitor her treatment. The letter concludes:

> "Against this background, should the appellant be compelled to return to Ghana, my assessment is that she will not be able to access the full regimen of her life-saving cocktail of drugs that she is currently taking and her health condition and access to HIV treatment is likely to be very precarious."

20. It is of note that neither the Home Office's response nor the letter from the Ghana Canada Medical Centre make any comments about the cost of HIV treatment or whether it is available free at point of treatment in Ghana. It is, however, recorded in the May 2012 country information form produced by the respondent that the government announced that money would be made available to ensure the reduction of infections and that funds had been made available for antiretroviral treatment for up to 20,000 new HIV/AIDS cases in 2012.

21. I accept that one of the drugs currently prescribed for the appellant, Raltegravir, is not available in Ghana. What there is not is any indication of whether the other drugs which are available would be of assistance or what the effect would be of any change in treatment regime. There is insufficient evidence to show that the appellant would not be able to access antiretroviral treatment in Ghana and certainly, there is insufficient evidence to show with a lack of treatment that she would suffer a serious and rapid decline in health resulting in intense suffering. Whilst I can accept that, in the case of withdrawal of kidney dialysis, such a result may flow, there is simply insufficient evidence to show that would occur on the facts of this case.

22. I found the evidence of the claimed lack of support for the appellant in Ghana to be unsatisfactory. It was clear from the evidence of both the

appellant and her sister that at best they had simply not made any enquiries as to what support would be available for the appellant in Ghana. While I can accept that, as the sister said, she could not expect her friends in Ghana to support the appellant or offer actual help, she did not even ask how to go about arranging, for example, assistance moving back to Ghana. I found the evidence that the appellant gave for not asking her pastor for help, was equally unsatisfactory. Again, I accept it would not have been reasonable to expect him to have provided help for her directly but it is difficult to see how he is not the kind of person who might be able to point her in the right direction of how she could resettle back into Ghana. One might have thought that a church pastor was precisely the sort of person who would be able to provide such assistance.

23. That is not to say that the appellant will not have difficulties on return to Ghana. She has been out of the country for over seventeen years, has no relatives to whom to turn, no friends, no accommodation and she has few if any transferrable skills.

24. The picture the appellant has given is that she has, to all intents and purposes, been entirely dependent on her family even as an adult. Asked about whether she had worked in Ghana, she said that she had done a little selling of goods for friends on a commission basis but otherwise, it would appear she was entirely dependent on family.

25. I accept that the appellant is financially dependent on her family in the United Kingdom. She lives with her sister who provides her with accommodation and food; she also provides her with small amounts of money so that she can travel. I accept that the relationship between the appellant and her sister and other relatives in the United Kingdom is close but I am not satisfied that, viewing the evidence as a whole, the degree of emotional dependency and the financial dependency is such that, unusually, a family life exists between the appellant and any of her sisters or their children. I am not satisfied either that the appellant has shown that there would be no accommodation or support available for her in Ghana. The reality is the family has simply not tried to find out any information and, it would appear, have consciously avoided making the sort of enquiries one might have thought were necessary.

26. Accordingly, taking all of these factors into account, I am not satisfied that the appellant has shown that she meets the requirement of paragraph 276ADE(1)(vi) of the Immigration Rules as although she will face difficulties, she has not shown that they meet the very high threshold necessary. She has not shown that accommodation or support could not be found for her.

27. In assessing whether, nonetheless, despite not meeting the requirements of the Immigration Rules, her removal would be disproportionate. In doing so I apply section 117B of the 2002 Act.

28. For the reasons set out above, I am not satisfied that the appellant has developed a family life in the United Kingdom with her siblings or her other relatives.

29. I bear in mind that there is a strong public interest in the maintenance of immigration control which includes the removal from the United Kingdom of those with no right to be here. The appellant has overstayed for some seventeen years and has relied for her health on extensive treatment provided by the National Health Service. She does, I accept, speak English but she could in no way be seen to be financially dependent.

30. The appellant's private life which includes her relationships with her family here, which I accept are close, has been established here when her position here was at best precarious. I conclude that accordingly, little weight should be attached to that although on the particular facts of this case, given the length of time spent here and the fact that she has lived with siblings the whole of that time some weight must be attached to this.

31. Bearing in mind that the appellant would be sent back to Ghana with a serious condition and a country where she has not lived for some seventeen years, it is clear that her circumstances will be difficult. I am not, however, persuaded that any interference with her right to private and family life is such that removal would not be proportionate given the considerable public weight to be attached to the enforcement of immigration control and accordingly I dismiss the appeal on all grounds.

Summary of Conclusions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by dismissing the appeal on all grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 22 January 2019

Upper Tribunal Judge Rintoul

IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16632/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October 2018	.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

M T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Aslam instructed by Soloman Shepherd solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Robertson in which she dismissed the appeal against a decision made to refuse her human rights claim and to remove her, that decision being made on 20 June 2016.

2. In short there are two aspects to the claim. First, that removal of the appellant would be a breach of her rights pursuant to Article 3 of the Human Rights Convention given the HIV diagnosis, that she has the circumstances of which that is said to have occurred and whether she would be able to obtain treatment for that on return to Ghana. She says

that she could not. Second, the appellant also says that there would be a breach of her rights pursuant to Article 8 of the Human Rights Convention as she has nobody to turn to in Ghana, her family all live in the United Kingdom including siblings and their children. On that basis and given the length of time that she has now spent outside Ghana it is said that she meets the requirements of paragraph 276ADE of the Immigration Rules and/or her removal would, the fact she does not meet the requirements of the Rules notwithstanding, be disproportionate.

3. The judge concluded that the removal of the appellant would not be in breach of Article 3 finding that treatment is available in Ghana and thus Article 3 was not engaged. The judge noted also it was not established that the appellant cannot be returned to Ghana because there will be no care for her and where she says she has no-one at the end stage of her life.

4. The judge considered the **Razgar** approach and found in particular paragraph 12(iii) that even taking into account the fact the medication is available to her and there was limited contact with the family this did not amount to very significant difficulties and that applying Section 117B of the 2002 Act given that the stay in the United Kingdom has been unlawful for the whole of the period bar the first six months that removal would be proportionate.

5. Permission to appeal was refused by the First-tier Tribunal and by the Upper Tribunal resulting in a "Cart JR" in respect of which permission is granted on both issues. The matter then came back to the First-tier Tribunal, permission being granted by the Vice-President.

6. The current position with regard to Paposhvili is somewhat in flux. The recent decision of AM (Zimbabwe) [2018] EWCA Civ 64 is of assistance.

7. I have considered that it would given what is said in **AM (Zimbabwe)** [38] to [40] to consider in this case whether there was a possibility that the test identified in **Paposhvili** by Sales LJ would apply on the facts of this case. I consider that it may do so but that perhaps for understandable reasons the findings of fact reached by Judge Robertson do not extend to the findings on the issues identified. In particular there was no clear finding as to what treatment would or would not be available to the appellant on return.

8. On that basis I consider the findings of fact with respect to Article 3 cannot stand and must be set aside. It follows also that a consideration of what treatment is or is not available would be relevant to an Article 8 issue and I consider that on that basis the findings with respect to Article 8 do not stand. I am therefore of the view that the decision involved the making of an error of law and must be remade in the Upper Tribunal.

9. The question then arises to how and when the appeal should be remade.

10. In my view the appeal should be relisted it after four weeks. That should allow time to obtain relevant information with respect to treatment in Ghana

11. The appellant is directed to obtain evidence:

    (i) Of what treatment would be available to her in Ghana;

    (ii) Evidence (preferably from her treating physicians) the consequences of not taking the drugs currently prescribed; what the likely pattern of deterioration is likely to be both in terms of the drop of CD4 count and its consequences; how that is likely to affect the appellant in terms of suffering;, and, the likely timescale;

12. Any new evidence is to be served at least 10 working days before the next hearing.

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Signed Date 12 October 2018

Upper Tribunal Judge Rintoul