Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10390/2018

THE IMMIGRATION ACTS

Heard at Bradford
on 1 August 2019

Decision & Reasons Promulgated
on 20 August 2019

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NGGM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ell instructed by Bankfield Heath solicitors
For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer.

DECISION AND REASONS

1. On 1 May 2019 the Upper Tribunal found a judge of the First-tier Tribunal had erred in law when allowing the appellant's appeal on Humanitarian Protection and human rights grounds. That decision was set aside, and the appeal listed for a further hearing to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

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Background

2. The appellant is a citizen of Venezuela born on 23 July 1945 who is therefore now 74 years of age. The appellant entered the United Kingdom on 7 February 2018 lawfully as a family visitor but claimed asylum on 14 March 2018 due to country conditions in Venezuela.
3. The findings of the First-tier Tribunal Judge relating to the dismissal of the asylum and/or any other form of protection claim, the appellant's immigration history, and the finding that family life pursuant to article 8 will not be breached if the appellant is removed, are preserved findings.
4. The First-tier Tribunal found at [21] of that decision that the appellant's name was published in Frontera newspaper, a daily local newspaper, in 1983, in support of an opposition political candidate, but that there was no evidence produced of any recently held posts in any opposition political party or to show the appellant had been politically active other than by voting in the country's elections. At [27] the First-Tier Tribunal Judge found:

> 27. However, given that no interest has been shown in the Appellant to date on account of her political beliefs; that she has been for the most part politically inactive for 13 years; that she does not hold any party position and that she has travelled freely in and out of Venezuela in 2014 in 2017, I find that she has failed to substantiate her claim that she will be at real risk of persecution on account of her imputed political opinion if she is returned to Venezuela.

5. Directions were given by the Upper Tribunal for the filing of additional evidence. A further bundle has been received from the appellant including a country expert report written by a Dr Michael McCarthy dated 3 July 2019.
6. At the outset an issue was raised with Mr Ell in that the report has endorsed upon it the specific wording "Attorney Work Product <u>Privileged and Confidential</u>". Mr Ell was asked whether that endorsement created problems in either the admissibility of the report or the ability of the Upper Tribunal to refer to the same in its decision to which he responded that Dr McCarthy was aware of the purpose for which the report had been commissioned. Mr Ell was asked whether he waived any privilege attached to the document, which he confirmed he did. The report was accordingly admitted and shall be referred to in detail below, where required.
7. A further issue arose in relation to documents provided by the appellant including what appear to be supermarket/shop receipts and copies of bank statement in Venezuela which had not been translated. No explanation for why this had not occurred was provided especially when other evidence, including a medical report from Venezuela, has been translated.
8. In addition to the appellants pension there appears on the bank statements to be a further credit noted as 'Pago De Nomina' of 12.322,00 Venezuelan Bolivar although as the documents has not been translated it is not clear what this is. Rule 13(6) of the Upper Tribunal Procedure Rules providing: '(6) Subject to paragraph (7), if a document submitted to the Upper Tribunal is not written in English, it must be accompanied by an English translation'. Paragraph 7 relates

to documents in the Welsh language and is not applicable on the facts of this appeal.

9. The other observation raised by Mrs Pettersen is that the applicant's own updated witness statement dated 3 July 2019 appears more of a critique and comment upon the reasons it was found the First-tier Tribunal had erred in law rather than establishing the appellant's current situation. It is however possible to extract from that statement that the appellant's position is as it always has been claimed, that if returned to Venezuela she is an elderly lady with no funds of her own, in a dangerous situation, with the collapse of the medical care system, concerned about her mental health, claiming that she will die from lack of food and lack of medication and be a victim of indiscriminate violence from groups recognised by the government, face destitution as a result of the direct activities of the Venezuelan government, that her pension does not provide her with sufficient money to live on as a result of the government's failure to manage the economy, and that she would like to remain in the United Kingdom with her daughter and her family who live here.

10. All the admissible evidence has been considered including a petition signed by a number of people although it was not established they have direct knowledge of the appellants position in Venezuela and did not attend to give oral evidence and have not provided witness statements.

Discussion

11. Initial discussion at the outset with the advocates regarding the correct test to be applied in relation to this appeal established that the correct approach for the Tribunal to take is not that of establishing whether the appellant met the high threshold in *N* (which it is unlikely she will have been able to prove on the facts) but that in *MSS v Belgium and Greece* which requires the Tribunal to have regard to the appellant's ability to cater for her most basic needs, such as food, hygiene and shelter, her vulnerability to ill-treatment and the prospect of her situation improving within a reasonable timeframe.

12. Specific reference is made in the error of law finding at [13] to the decision of the Court of Appeal in *MI (Palestine) [2018] EWCA Civ 1782* in the following terms:

> 13. There is a helpful discussion of the principles applicable when assessing an article 3 issues and destitution in *MI (Palestine) v Secretary of State for the Home Department [2018] EWCA Civ 1782* where it is written:
>
> The Article 3 jurisprudence
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> 16. Before considering the parties' submissions in a little more detail, I propose to summarise the law on Article 3 which is well-settled by two decisions of this Court: *GS (India) v SSHD* [2015] EWCA Civ 40; [2015] 1 WLR 3312 and *SSHD v Said* [2016] EWCA Civ 442; [2016] Imm AR 5. At [38] of *GS (India)* Laws LJ considered how the Court should address the issue of the ECHR being a "living instrument" whilst being loyal to the founders' agreement. He said:

"The notion that the modern scope of ECHR rights may be resolved by asking whether the States parties might have consented to this or that outcome suggested by circumstances which were or might have been beyond contemplation when the text was agreed is surely problematic. I think the best one can do is to confine any implication or enlargement to situations which have some affinity with the paradigm case; situations which are, so to speak, within the spirit of the paradigm case, whose identification therefore assumes a considerable importance."

17. At [39] he identified the paradigm case of a violation of Article 3 as an intentional act which constitutes torture or inhuman or degrading treatment or punishment. As Laws LJ noted later in his judgment at [46], the case of someone whose life will be drastically shortened by the progress of natural disease if he is removed to his home state does not fall within the paradigm. Accordingly in such cases, the Strasbourg Court had set a very high threshold as to when such a case would constitute a violation of Article 3, effectively limited to "deathbed" cases: *D v United Kingdom* (1997) 24 EHRR 423 and *N v United Kingdom* (2008) 47 EHRR 39. He cited at [50] of his judgment [42] and [43] of the judgment of the Strasbourg Court in *N*:

"42. In summary, the Court observes that since *D v the United Kingdom* it has consistently applied the following principles. Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."

18. Laws LJ then reviewed the decisions of the Strasbourg Court in *MSS v Belgium and Greece* and *Sufi & Elmi v United Kingdom* (2012) 54 EHRR 9. The latter is of particular relevance in the present context. The case concerned Somalian nationals who had committed criminal offences in this country. The Secretary of State was proposing to deport them to Somalia, which was resisted on the grounds that the dire humanitarian conditions in Somalia were such that their return would be a breach of Article 3. The Government contended that the appropriate test for assessing whether the dire humanitarian conditions reached the Article 3 threshold was that set out in *N v United Kingdom* so that humanitarian conditions would only reach the threshold in very exceptional cases where the grounds against removal were compelling.

19. The Strasbourg Court rejected that contention in the particular circumstances of that case because the humanitarian crisis in Somalia was predominantly due to the direct and indirect actions of the parties to the conflict there, so that the "very exceptional circumstances" test in *N* was not applicable. At [282]-[283], the Court said:

    282. If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N v the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population… This fact alone has resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control, despite the fact that between a third and a half of all Somalis are living in a situation of serious deprivation…
    283. Consequently, the Court does not consider the approach adopted in *N v the United Kingdom* to be appropriate in the circumstances of the present case. Rather, it prefers the approach adopted in *MSS v Belgium and Greece*, which requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame (see *MSS v Belgium and Greece*, cited above, paragraph 254)."

20. Laws LJ commented on that case and *MSS* in [57]-[59] of his judgment:

    "57. There appears to be a fork in the road, on the court's own reckoning, between the approach in *N v UK* on the one hand and *MSS* on the other. It is on the face of it difficult to find any governing principle, applied across the learning, which provides a *rationale* for departures from the Article 3 paradigm. There are, however, certain strands of reasoning. In *MSS* it is to be noted that Greece (unlike Belgium) was not impugned for breach of Article 3 on account of anything that would happen to the applicant in a third country to which Greece proposed to remove him, but by reason of his plight in Greece itself. One may compare the case of *Limbuela* [2006] 1 AC 396, in which the House of Lords was concerned with the dire straits to which certain asylum-seekers in this country were reduced for want of access to public funds, and held that there was a violation of Article 3. In *MSS* a critical factor was the existence of legal duties owed by Greece under its own law implementing EU obligations: paragraphs 250 and 263 which I have cited; and it is clear that the court attached particular importance to the fact that the applicant was an asylum-seeker.
    58. In *Sufi & Elmi* the court avowedly followed *MSS* (paragraph 283). In this case the critical factor was that the "crisis is predominantly due to the direct and indirect actions of the parties to the conflict": paragraph 282. This is closer to the paradigm than the ill-treatment in question in *MSS*, for it must have involved deliberate acts.
    59. Thus in *MSS* and *Sufi & Elmi* the court looked for particular features which might bring the case within Article 3, and found them – in Greece's legal duties and the applicant's status as an asylum-seeker, and in the nature of the crisis in Somalia."

21. *Said* concerned a Somalian national who had received a sentence of 5 years imprisonment for rape in 2009 and was thus subject to the automatic deportation provisions under the UK Borders Act 2007. He resisted deportation relying inter alia on Article 3. The Upper Tribunal upheld his appeal from the First-tier Tribunal,

holding that following the Country Guidance case *MOJ and others (Return to Mogadishu) Somalia CG* [2014] UKUT 442 (IAC) he would be at risk of being destitute and finding himself in a camp for internally displaced persons (IDP) where conditions were poor. The Upper Tribunal Judge found that he suffered from depression and PTSD and was thus a vulnerable individual who would be unable to cope with the stress of living in an unstable environment and had little prospect of a livelihood on return.

22. In the main judgment, given by Burnett LJ, as he then was, the Article 3 jurisprudence summarised above was set out and the conclusion reached at [18]:

"These cases demonstrate that to succeed in resisting removal on article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others in the sense described in para 282 of *Sufi and Elmi*, whether or not the feared deprivation is contributed to by a medical condition, the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the *D* and *N cases*."

This Court evidently considered that the Country Guidance case showed that the conditions in Somalia, although harsh, could no longer be attributed to the direct and indirect actions of the parties to the former conflict so that the *N* test applied to the applicant's case and he could not satisfy that test, hence the Secretary of State's appeal succeeded.

13. The reason for adopting this approach is the evidence in the appellants appeal bundle which clearly shows the crisis within the economy in Venezuela, giving rise to hyperinflation, the collapse of health service and other resources including food imports and shortages, are not as a result of indiscriminate violence or conflict within Venezuela but rather the activities of the previous and current Venezuelan government and their mismanagement of the Venezuelan economy.

14. In his report Dr McCarthy refers to the humanitarian crisis in Venezuela together with specifically considering the needs of this appellant. In relation to the humanitarian crisis Dr McCarthy writes:

71. The Venezuelan humanitarian crisis is manifest at both the domestic and international levels.

72. Domestically, the humanitarian crisis involves more than poverty, which measures at 87% for total poverty and 61% for extreme poverty, according to the Venezuelan National Household Conditions Survey for 2018 (ENCOVI, 2018). In terms of its most severe impacts, the humanitarian crisis entails the severe shortage of basic food goods and medicines, ranging from a lack of vaccines and treatments to more sophisticated medical services such as dialysis or chemotherapy.

73. According to a report jointly published by the Venezuelan Health Observatory - a University research group - and the Bengoa Foundation - an NGO dedicated to nutrition issues - the levels of both malnutrition and death from malnutrition increased considerably in 2017. The report indicates that around 80% of homes suffer from a situation of food insecurity, nine out of ten surveyed for the ENCOVI report not having a high enough income to cover food expenses, and over half the population reports going to bed hungry.

74. The crisis in the health sector includes increasing levels of infant and maternal mortality, the re-emergence of what was thought to be completely eradicated tropical diseases (e.g. malaria) in urban centres, and decreasing level of vaccines for diphtheria and measles.

75. This shortage of medicine and medical services has coincided with a significant increase in the uninsured. The percentage of uninsured reportedly rose from 50% to 68% between 2014 and 2017 while the costs of medical services have skyrocketed.

76. As an illustrative example of the access to case implications for the severe health crisis, consider the following case. Consultations with medical doctors revealed that in the public healthcare system, where care is free, doctors are currently able to treat about 70% of dialysis cases. Under improved economic conditions - those in existence prior to the Maduro-era economic crisis - would have been able to cover closer to 100% of all such cases. Due to the ongoing power grid crisis that regularly causes blackouts throughout the country, including in major cities, such as the capital Caracas where the best hospitals are located, as well as severe shortages of medication and equipment, it is possible that this treatment rate could decline even further. Before multiple power outages took place in March 2019, the likely scenario was that the health sector, hospitals included, would remain dangerously close to a situation of total collapse in which power would not be available at hospitals. Now after the power outages, total collapse appears to have begun, with the Maduro government finally agreeing to accept international humanitarian assistance at hospitals via the delivery networks and donations of the International Red Cross.

77. The international dimensions of the humanitarian crisis, driven by both Venezuela's increasingly dire economic situation and political repression, is taxing all of northern South America, with no remedy insight. In what UN High Commission for Refugees officials call "one of the largest mass population movements in Latin American history", an estimated 3.2 million Venezuelans - about 10% of the country's population - have left the country since 2014. According to UNHCR, more than half of these emigrants suffer from malnutrition, and a significant percentage suffer from diseases, such as diphtheria and measles, previously thought to be under control.

78. Venezuela's humanitarian crisis is roiling Latin America, and the crisis is posing economic and security challenges to neighbouring countries. As a result, tensions over the costs of hosting and integrating migrants are quickly rising. The fundamental drivers of the continued high level of migration are, on the one hand, the country's economic crisis and its various impacts on the country's state welfare institutions, and, on the other hand, regime driven persecution of the opposition.

79. UNHCR estimates that the population of displaced Venezuelans is at least 4 million and that, by the end of 2019, this population could grow to 5 million.

80. Currently, there is neither an end in sight for the migration crisis, nor for the multi dimensional in country crisis. The current status quo suggests the crisis may worsen on all fronts. Political persecution against regime opponents, both ordinary citizens and public figures, seems set to continue for the foreseeable future, with this practice potentially growing more arbitrary and erratic due to the overall unpredictability of the situation and the government's dysfunctional brand of authoritarian rule.

15. In relation to the situation appertaining to the appellant, Dr McCarthy writes:

> 81. [NGGM] account of the events surrounding her decision not to return to Venezuela and instead seek asylum in the United Kingdom, or in the alternative, humanitarian protection, is consistent with what high quality research on the country's political crisis - including my own - has documented.
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> 82. Given the inseparable nature of the political and humanitarian crisis in Venezuela, and the fact that [NGGM] has an antiregime political affiliation and has spent considerable time abroad in a country that has sanctioned the Maduro government, she is at risk of being subjected to practices of intolerance and discrimination such as verbal harassment and bullying, and, even worse, persecution via politically intentioned efforts to deny her access to public goods, including food supplies and healthcare. She faces the risk of political persecution for her constitutionally guaranteed political dissent while the denial of her constitutional access to public goods could well result in her being deliberately subjected to inhumane treatment.
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> 83. Some respected analysts have compared Venezuela's multi dimensional crisis to the internal armed conflict in the country of Syria. Despite the similarities at the levels of the refugee crisis and the overall humanitarian emergency, this comparison is not accurate, in my view. Still, the extent of lawlessness in the country of Venezuela has generated conditions that are ripe for rampant political violence from gorilla and other established groups, organised crime, and criminality more broadly and in fact the specific types of actors have been the perpetrators of both the common criminal and political violence that regularly takes place in the country.
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> 84. Due to her age, and perceived vulnerabilities stemming from her age and gender, [NGGM] would face a serious risk of physical harm upon return to Venezuela from unprovoked attacks or burglaries, crimes that are committed at an alarmingly high rate in all major urban centres of the country.
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> 85. [NGGM] would not be able to seek protection against such crime from the authorities. She would not be able to seek this protection due to two factors. One, the country has the worst ranking in the World Justice Projects Rule of Law Index (126 out of 126 ranked) and, moreover, authorities corruption is so severe that there is no plausible reason to believe that protection would in practice be granted. Two, due to [NGGM] political affiliation, she would be at great risk of not only being denied protection, but also facing the risk of verbal harassment and/or physical abuse.
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> 86. Venezuela's economic crisis has reached alarming proportions, with hyperinflation not only affecting the value of the local currency but also increasing the cost of living for those who have access to foreign currency. Ecoanalitica, a respected economic consultancy based in Caracas, estimates that from December 2018 to April 2019, the cost of living in dollars increased 555%. Though hyperinflation has tapered off a bit from the monthly rate of 190% in January 2019, it is apparent that the lag effects of this hyperinflationary cycle will result in continued speculation. The vicious hyperinflationary cycle of cost of living increases means that a person like [NGGM] who lacks strong financial support from her family, would face great difficulty being able to sustain herself financially. I am aware that [NGGM] does have a pension, however, due to hyperinflation, I feel it is crucial to note that a pension is equivalent to a trivial amount of income. I am very concerned she would end up destitute, increasing the likelihood of suffering.

> 87. If [NGGM] were forced to return to Venezuela, she would likely have to depend on foreign currency from family members currently living abroad. There are risks associated with depending on foreign transfers and remittances, some of which stem from problems associated with US sanctions imposed on the Central Bank of Venezuela. Though the sanctions do not bar humanitarian aid, they have created problems for counter-part banks. Moreover, the Maduro governments erratic nature has resulted in a high policy volatility when it comes to the relationship between the state and the banking industry. As a result, it can be expected that there will be future haphazard policy decisions that create hardships for citizens dependent on foreign currency, as would be the case for [NGGM]. Finally, the risk of an out right across the board nationalisation of the banking sector is nontrivial, the risk that throws into doubt the security of deposits and calls into question the ability to access private accounts.
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> 88. I am not able to confirm reports that the government of Nicholas Maduro would be willing to trace back to the source of remittances and follow this trace to carry out punishment against regime opponents, though I have no doubt that radical elements of the Maduro government will be willing to do this to carry out repression while less radical, but no less cynical, elements might use the information for purposes of extortion.

16. In her submissions Mrs Petterson referred to the fact the Upper Tribunal was considering a narrow issue namely conditions in Venezuela for the appellant if she was to be returned.
17. The appellant refers to availability of medical treatment. In her bundle at page 47 is an English translation of the document written in Spanish appearing at page 49. This states that the appellant, described as a 72-year-old female patient, is controlled as a cardiology outpatient as a result of a diagnosis of arterial hypertension. The report states the appellant requires continuous and permanent medical treatment with Valsartan and Concor, daily, to deal with her increased blood pressure. The report is said to be dated 15 February 2017 issued in the city of Maracay. There is no indication in the report of the actual readings taken to assess the appellant's blood pressure and her evidence is that since being in the UK there have been no concerns regarding her blood pressure or need to be prescribed or take any medication. If the stress of being returned and living in Venezuela causes the appellant's blood pressure to increase it was not made out the appellant would not have adequate resources to secure such medication as she required. It was not made out in relation to medical aspects that the appellant was able to meet the high threshold set out in *N* and had not demonstrated a breach of article 3 on medical grounds.
18. The appellant's assertion before the First-tier Tribunal that she would have no access to her funds in her bank in Venezuela is not made out. The finding by the First-tier Tribunal Judge that the appellant would have no access to her account has been shown to be incorrect as the appellant's evidence is that she was able, online, to authorise her son who still lives in Venezuela to access her account and withdraw funds from the same. The appellant claims these funds are being used by her son who has his wife, two children and two nephews to support, to meet his own living costs; but the evidence did not support the appellant's contention that she would not have access to her pension. There is also, as noted

above, a possible further source of income being paid into the appellant's account.

19. It is also the case that the letter from the appellant's son in Venezuela, dated 9 September 2018 at pages 140 – 141 of the appellant's appeal bundle, only refers to his son and his daughter living at home, his previous occupation within the army and subsequent qualification as a lawyer. He claims not to have a stable job and refers to hyperinflation but does not specifically claim that he cannot accommodate or is unwilling to assist the appellant as far as he is able, if she is returned. The appellant's son claims his mother was forced to leave Venezuela as it was impossible for him to help as his monthly salary by way of a military pension was spent when it arrived in light of the inflationary pressures within Venezuela.

20. The fact the appellant's evidence is that her son is able to access the content of her bank account in Venezuela clearly shows that she too will be able to access that account and the funds contained therein which have continued to be paid by the Venezuelan authorities. Although Dr McCarthy refers to risk to the appellant as a result of what is said to be an adverse political profile it is a preserved finding of the First-tier Tribunal that no such risk arises.

21. It is not made out that if returned to Venezuela the appellant will need ongoing medical assistance or that if same is required it will not be available to her.

22. The appellant confirmed in her evidence that her son, his wife and their two children and two nephews live in Venezuela supporting the respondent's contention the appellant will not be alone on return. There was insufficient evidence to establish it is not reasonable in all the circumstances for the appellant to be able to live with or near to such family members which undermines the claim that if returned she will be a lone single elderly female without family support. The son has no right to rely upon the appellant's pension which is her personal resource.

23. Notwithstanding this issue having been clearly canvassed in the earlier proceedings there was insufficient evidence to show that the buying power of the appellant's pension will not be sufficient to enable her to meet basic needs in Venezuela with the support of remittances from family in the United Kingdom. It was not made out that the family in the UK, who have clearly done all they can to support the appellant, will abandon her if she was returned to Venezuela. The appellant's son-in-law, Dr Stuart John Williams, in his witness statement dated 17 September 2018 confirms at [17] that he and his wife, the appellant's daughter Damaris who holds a PhD in Chemistry obtained in the UK, have always supported the appellant financially and that she will never be a drain on public funds. Both he and his wife are in stable well-paid jobs and can support the appellant in every aspect of life. That is taken as a reference to life in the United Kingdom where the cost of living is substantially higher than in Venezuela. If the family have sufficient resources to meet all of the appellant's needs in the UK they will clearly have resources available to meet her needs in Venezuela where the cost of living is considerably cheaper. It is not made out that any funds or remittances sent would not reach the appellant for use in

meeting her personal needs. The availability of resources from this source was not challenged or contested by Mr Ell in his submissions.

24. Dr McCarthy acknowledges that as a result of hyperinflation in Venezuela the appellant will be dependent upon remittances from abroad but at the date of the hearing it was not made out that such remittances would not be available from the UK, would not be sufficient, would not be credited to the appellant's bank account, or that the appellant will be targeted for adverse attention such as harassment if such remittances were made. The appellant was clearly able to access her bank account online from the UK and give instructions for her son to be able to withdraw funds from it without evidence of the account being closed or her pension being stopped. Whilst it may assist the family in Venezuela to have access to these additional funds it was not made out there was any legal obligation upon the appellant to allow her son to use such funds to her own detriment.

25. The cost of living in Venezuela is much cheaper being around 58% lower than in United Kingdom, excluding rent, with rent in Venezuela being 75% lower than in United Kingdom, on average.

26. Mr Ell in his submissions referred at length to the content of the expert evidence identifying the causes of the crisis within Venezuela and actions of the authorities and the use of a two-strand method by the authorities to create direct conflict and through the use of welfare services. It was not disputed that the country situation is poor, but it was not made out that this is as a result of indiscriminate violence in a situation of internal or international armed conflict but is rather as a result of economic mismanagement and the actions of the current regime.

27. It is accepted the US State Department, together with other information provided by the appellant, supports the submission that women and the elderly and those with health problems are the most vulnerable in Venezuela at this time. It is not disputed there are economic difficulties and that life for those within the country and those returning is likely to be difficult; but that is not the required test.

28. It is not made out the appellant's profile, actual or imputed, is such that she will be at risk of suffering serious harm as defined in paragraph 339CA of the Immigration Rules. The key question is whether the appellant has made out that if returned to Venezuela she will not receive or be able to access funds and services sufficient to cater for her most basic needs such as food, hygiene and shelter.

29. Mr Ells referred to the presence of hyperinflation within Venezuela being a strong balancing element in favour of the appellant and in his submissions accepted that the issue is not necessarily availability of finances but the lack of resources that drives hyperinflation making cash-based services too expensive; meaning the appellant will be unable to afford products that she requires. In light of the availability of resources from the United Kingdom it was not made out at the date of hearing that this is the case. The appellant refers in her earlier witness statement to shortages of food items in some retail outlets, the need to queue to purchase goods required, and having to return home when incidents

have occurred in areas where she has been queueing, on occasions. Whilst that is the reality according to country information and people have had to adapt to buying cheaper more staple items rather than those they may have purchased previously the appellant has not established that she would not be able to access items required to meet her basic needs, the denial of which could give rise to a claim pursuant to article 3 ECHR.

30. Both parties accept this is a somewhat unusual case in that the difficulties do not arise as a result of internal or external conflict but as a result of policies adopted by the government that has created difficulties and caused some ordinary people with few resources or an inability to fund medical care to have to leave the country to survive. It was submitted by Mr Ell that it is as a result of such an unusual combination of factors that the appellant is prevented from returning.

31. The difficulty for the appellant is that identified above which is that on the evidence made available it was not made out that food and shelter would not be available to her. It was not made out that her pension income together with resources provided from family members, such as those in the UK, will be insufficient even taking into account the current evidence regarding inflationary pressures within the Venezuelan economy, to enable the appellant to meet her basic needs. It was not made out the appellant will not have family support available to her in Venezuela or be at risk.

32. Although the country information refers to the use of an ID card as a means to access basic services it was not made out that the appellant will be denied the same or be targeted for persecution or face restrictions on access to the services available to the normal population in Venezuela as a result of her profile, especially in light of the preserved findings.

33. Even accepting that life for the appellant on return to Venezuela will be difficult, and that she prefers to remain in the United Kingdom with her family members, it is not made out that the appellant has established that lack of services and goods will lead to destitution or ill-treatment sufficient to engage article 3.

34. It is not made out the appellant is entitled to a grant of international protection.

35. Mr Ell submitted that if the appellant was unable to succeed on article 3 grounds it would still be possible for her to succeed pursuant to article 8 ECHR on the basis of an unlawful interference with her private life.

36. It was accepted that it may be difficult to succeed on article 8 if the appellant failed in relation to article 3 and the findings in relation to article 3 have equal application to the article 8 assessment, where it has been established that notwithstanding a degree of difficulty being experienced the appellant will not be destitute.

37. Article 8 does not give a person the right to choose where they wish to live. Whilst the appellant prefers to remain with her family in the UK, where life for her is much easier, that is not the determinative factor.

38. The appellant's private life has been developed during the time her presence in the United Kingdom has been precarious warranting little weight being attached to the same pursuant to section 117B of the 2002 Act. It is a preserved finding the appellant cannot succeed pursuant to article 8 on the basis of her family life.

39. It is not made out the appellant will be unable to maintain contact with family in the United Kingdom, as she was able to do previously, if she is returned.
40. Whilst it is accepted the private life she has as a member of the household of the UK based family cannot be replicated within Venezuela, in all other respects communication permitting points of discussion and matters passing between them can be continued albeit by different means.
41. Whilst the appellant's date of birth shows that she is an elderly woman being returned she is a citizen of Venezuela whose has lived there all her life with family support.
42. In *Botta v. Italy (Application No. 21439/93)*, 24 February 1998, the European Court established that private life encompasses the physical, moral and psychological integrity of a person. This was confirmed to be the case in *Bensaid v. The United Kingdom (Application No. 44599/98)*, (6 February 2001) where the applicant, undergoing treatment for schizophrenia, complained that his proposed expulsion to Algeria would leave him without adequate medical treatment, threatening his physical and moral integrity. The Court elaborated that ''private life' is a broad term not susceptible to exhaustive definition' and 'that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8'.
43. In addition it established that:

    A person's body is an intimate aspect of his or her private life (Y.F v Turkey) and a sound mental state is an important factor for the possibility to enjoy the right to private life (Bensaid v UK para 47). Measures which affect the physical integrity or mental health have to reach a certain degree of severity to qualify as an interference with the right to private life under Article 8 (Bensaid v UK, para 46). However, the Court has also held that even minor interferences with a person's physical integrity may fall within the scope of article 8 if they are against the person's will (Storck v Germany, para 143)

    As far as the physical integrity is concerned, the scope of article 8 overlaps with the ambit of article 3 ECHR. As pointed out above, the Court distinguishes the fields of application of these two provisions according to the gravity of the interference. While it considers article 3 lex specialis if grave interferences with a person's well-being are in question, the right to private life comes into play when the interference does not reach the threshold required to qualify it as torture or inhuman treatment.

44. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.
45. In relation to the appellant's concerns regarding her personal safety, there is no clear evidence the appellant could not live near her son preventing her becoming isolated. There is reference in the expert report to politically motivated violence, but it is not made out the appellant will be specifically

targeted for the same. There is the possibility the appellant may witness events and may have been caught up in the same in the past creating an understandable subjective fear, but it has not been objectively established that she will be specifically targeted. It is accepted the deteriorating situation in Venezuela has spurred violence and criminal activity disassociated from politics and that criminal gangs appear to be a problem within Venezuela. There is within the appellant's bundle a letter of 24 September 2018 written by Jane Taylor a private practitioner for psychotherapy, counselling and trauma specialist reporting upon counselling/psychotherapy sessions with Stuart John Williams in 2009 as a result of difficulties experienced whilst working in Venezuela and concern for family members in Venezuela left behind when he returned to the UK.

46. Dr McCarthy specifically considered the issue of risk to the appellant at [84 – 85] referred to above.

47. The appellant fails to establish an entitlement to leave to remain on the basis of any disproportionate breach of her moral integrity on the basis of that term as 'an innate moral conviction to stand against things that are not virtuous or morally right'.

48. In relation to the appellant's physical integrity, I find this applies to the physical and mental health problems caused by any illness arising from the situation in Venezuela, if any.

49. In *GS (India); EO (Ghana); GM (India); PL (Jamaica); BA (Ghana) and KK (DRC) v SSHD [2015] EWCA Civ 40* it was held 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 being the quality of life, not its continuance. That meant that a specific case must be made under Article 8. The rigour of the D exception for the purpose of Article 3 in such cases as these applied with no less force when the claim was put under Article 8. Although the UK courts have declined to state that Article 8 could never be engaged by the health consequences of removal from the UK, the circumstances would have to be truly exceptional before such a breach could be established (paras 45, 85 – 87 and 106 – 111). At paragraph 111, Underhill LJ said this "First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging Article 8: if that is all there is, the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle."

50. In *SL (St Lucia) v SSHD [2018] EWCA Civ 1894* the Court of Appeal commented that the focus and structure of Article 8 is different from Article 3. They were unpersuaded that Paposhvili had any impact on the approach to Article 8 claims. An absence of medical treatment in the country of return would not of itself engage Article 8. The only relevance would be where that was an additional factor with other factors which themselves engaged Article 8. *Razgar*

was referred to for the proposition that only the most compelling humanitarian considerations were likely to prevail over legitimate aims of immigration control. The approach set out in MM (Zimbabwe) and GS (India) was unaltered by Paposhvili.

51. Having given very careful consideration to the available evidence and the detailed submissions made by the advocates on the day, I conclude that the appellant has failed to establish on the facts that she is able to meet the high threshold of article 3 and that the respondent has established that the decision to return the appellant is proportionate pursuant to Article 8 ECHR. The appellant's desire to remain in the United Kingdom with her family, whilst understandable, is not enough in light of the relevant prevailing legal considerations.

52. No breach of article 3 is made out. It is not made out the appellant's physical or moral integrity will be adversely impacted, despite the difficulties she will face, sufficient to make any interference in such private life disproportionate.

Decision

53. **This appeal is dismissed.**

Anonymity.

54. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 2 August 2019