Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/05982/2020**
HU/05983/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 November 2021	**On 06 December 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

GW
DM
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D Riok, Rehoboth Law
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

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

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

DECISION AND REASONS

The Appellants are citizens of Uganda. GW (date of birth 3 May 1976) is the father of DM (date of birth 30 September 2010).

The Appellants were granted permission to appeal against the decision of the First-tier Tribunal (Judge Aldridge) to dismiss their appeals against the decisions of the Respondent on 18 May 2020 to refuse their applications on human rights grounds. The Appellants appealed under Articles 3 (health grounds) and 8 ECHR.

DM has learning difficulties and ADHD. She was given in 2016 a "provisional" diagnosis of premature thelarche and raised thyroid hormone.

The judge directed himself in relation to Paposhvili v Belgium 41738-10, AXB (Art 3 health: obligations; suicide) Jamaica [2019] UKUT 00397 and AM (Zimbabwe) [2020] UKSC 17 at [9] – [15]. The judge heard evidence from GW. He referred to GW as the First Appellant (FA) and DM as the second Appellant (SA). The judge identified the issues at [22] of his decision, namely as follows:-

> "a) Does the SA qualify for a grant of leave under Article 3 ECHR on the basis of her severe medical conditions?
>
> b) Does SA (sic) qualify for a grant of leave under paragraph 276(1)(iv) of the Immigration Rules?
>
> c) Will the appellants face significant obstacles in Uganda in the context of paragraph 276ADE(1)(vi) of the rules?
>
> d) Are the appellants (sic) circumstances truly exceptional to warrant a grant of leave under Article 8 ECHR, outside the Rules?
>
> e) Should the best interest (sic) of SA be given any consideration as a child?"

The judge at [23] accepted that GW came to the UK in September 2014 in order to study at Nottingham University. He completed a PhD in economics in December 2019 and therefore has lived here continuously for around six and a half years. The judge said that DM arrived in February 2016 and that she has not lived continuously in the UK for at least seven years and therefore does not qualify under paragraph 276ADE(1)(iv) of the Immigration Rules.

He then considered Article 3. He directed himself as to the relevant test citing [183] of Paposhvili v Belgium 41738/10 and [23], [32] and [33] of AM.

At [26] the judge stated as follows:-

> "In order to determine whether Article 3 is engaged, I must determine whether [DM] has established a prima facie case for believing that she would face a real risk, on account of the absence of appropriate treatment in Uganda or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in her state of

> health resulting in intense suffering or to a significant reduction in life."

The judge at [27] said that he had carefully considered the expert reports that are contained within the Appellants' bundles. In respect of the report of Dr Sussens the judge noted that the report was dated over four years ago and it refers to the problems faced by DM in respect of "isolated thelarche". The judge said:

> "I find that the prognosis is very positive and cannot conclude that she is suffering an ailment that demonstrates the substantial grounds required for Article 3. Nor do I accept, having considered country evidence, that such appropriate treatment is unavailable in Uganda."

The judge stated as follows:-

> "28. In a similar vein, I must draw the same conclusion in respect of the psychiatric report of 2019 by Dr Jones which does not demonstrate that [DM] enters the arena of a realistic prospect of successfully arguing that Article 3 applies. I further note the report of Dr Wariyar concluding a likelihood of ADHD, which I do not accept could amount to an Article 3 positive decision when considering the relevant case law. In any event I find that [DM] will have the support of her father, grandfather and other close relatives who will be able to provide care for her."

The judge at [29] said that he was not satisfied that there is sufficient evidence before him to indicate that Uganda has anything other than a functioning health and education system. The judge said at [29]:

> "I do note the numerous reports regarding the issues surrounding individuals with disability in Uganda and I have considered them. I have also considered the letters that have been sent from Ugandan NGOs and considered the educational plans that have been submitted. However I cannot conclude that [DM] has established a case for believing that she would face a real risk, on account of the absence of appropriate treatment in Uganda or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in her state of health resulting in intense suffering or to a significant reduction in life expectancy. I have considered the age of [DM], I do not accept that the condition in respect of [DM] is so exceptional as to allow this appeal in respect of Article 3 ECHR."

The judge found that DM would enjoy the protective factor of having her family around her and that she had come to the UK "speaking the native tongue of Uganda" and whilst it was not her first language, she and her father would be able to successfully integrate into Ugandan society and culture. The judge found that GW's improved educational qualifications will serve him well. The judge said at [33] the following:-

> "… In respect of s.55 of the Borders, Citizenship and Immigration Act 2019, I have considered the best interests of the child. I am conscious of the numerous documents that have been included with this appeal which define the concerns regarding the levels of state assistance for those with learning difficulties in Uganda and I also note the significant information regarding the educational plan for [DM] and her needs. I also note her acceptance, in 2022, to a special needs educational establishment. I have considered all the expert reports. However, I do find that it remains in the best interests of the welfare of the child, at her young age, who would have access in Uganda to more close relatives such as grandparents, aunts and cousins to remain with her parent, the first Appellant."

The judge went on to find that there would not be very significant obstacles to the Appellants' integration. The judge set out s.117B of the 2002 Act. At [44] he found that Article 8 is engaged for the following reasons:-

> "because there would be sufficient interference with the second Appellant's private life ties to require justification. On the facts of this case, I consider that any deterioration in the Appellant's health as a consequence of removal is not likely to be disproportionately severe for the reasons already identified. Healthcare and education is available in Uganda, albeit it is likely to be inferior to that currently available here, and close family support is also available which would minimise the risk of harm and which would assist the second Appellant in her development once she had come to terms with the disappointment of being removed. I reject the argument that the second Appellant cannot function as a person without her current care arrangements being continued in precisely the same form. They can be replicated and, in some ways, improved upon in Uganda".

The judge said that removing the Appellants would disrupt the current private life ties which they enjoy with friends in the UK. However, they could stay in contact via modern means of communication and social media. While GW's future study and employment plans in the UK would be "dashed" and DM would "lose the relationships she will have established with healthcare and educational professionals since her diagnosis." And that "[s]he would lose access to the NHS". However, the judge found that those matters are outweighed by the public interest. The judge concluded as follows at [47]:

> "Balancing these competing factors, I find that the considerable public interest in maintaining effective immigration control where the Appellant does not meet the requirement of the Rules outweighs the Appellant's limited private life established in the UK. The evidence of the Appellant's private life in the United Kingdom is limited and there are no features which could outweigh a public interest which remains considerable …"

The Grounds of Appeal

I will attempt to summarise the grounds. The judge materially erred at [24] – [29] because he failed to or refused to attach appropriate and adequate weight to the expert evidence in relation to DM. In particular, Dr Wariyar, a consultant in Paediatric Neurodisablity) and Dr Bistamam whose evidence is that DM is a vulnerable young person with attainment levels of approximately four years behind her expected level (AB/p72 – 74).

The judge's findings at [29] are "materially erroneous" and "amount to misrepresentation of facts." The findings and conclusions are the opposite of the "objective evidence before him."

In the Respondent's Review the SSHD relied on "objective evidence" by a Ugandan NGO – "Special Children, Special People" (http://specialchildrenuganda.org/uganda-and-disability). According to the grounds the evidence ".. unequivocally supports [DM's] claim that if returned to Uganda she would be vulnerable, have inadequate access to services, resources, and education due to a scarcity or lack of scholastic and institutional materials and poorly trained staff. The report supports that she would be unable to access basic help and assistive device or lead an independent and productive life in Uganda."

GW wrote to various NGOs in Uganda including the above-mentioned NGO and a letter from the director supported that DM would be a victim of abuse, rape and stigma in Uganda due to her disability. The same report confirmed that there will be a lack of facilities, resources and staff to support her which is exacerbated by the inclusive approach adopted by the schools and that only 6% of children with disability complete their primary education in Uganda (AB/51 - 52).

There was another report by a Ugandan NGO (Society for Disabled Children) which echoed the high prevalence of discrimination, exploitation, neglect and stigma against children with disability in Uganda because of traditional beliefs and weak government Regulations (AB/53 - 54). The grounds state that "it is not clear why the judge attached little or no weight to these (sic) overwhelming evidence." The judge "fundamentally erred in law by misconstruing the principles set out in [183] and [188] of Paposhvili v Belgium [2017] Imm AR 8."

The judge made adverse findings at [32] concerning fear of return to Uganda, but the Appellant was not relying on protection grounds and did not have an opportunity to advance a case on protection grounds.

The evidence supported that there would be very significant obstacles in Uganda and that a change in environment would negatively impact on DM (AB/48, 81-84.

The Appellant's education advisor warned about consequences of moving DM and that this would completely destroy the Final Education, Health and Care Plan (EHCP) (AB/26-47).

The assessment of proportionality is flawed.

Error of law

The grounds of appeal are insufficiently particularised and diffuse. They make unsupported claims and in the main are an attempt to reargue the case. Properly construed and having considered Mr Riok's oral submitted, I interpret the grounds on as the judge failing to take into account the evidence in respect of the consequences of removal on DM.

There is a Rule 24 response, but as conceded by Mr Lindsay the author had not seen material documents. Mr Lindsay conceded on behalf of the SSHD that there was a material error of law identified in the assessment of DM's best interests (see [33]) with reference to [18] of KO (Nigeria) v SSHD [2018] UKSC 53.

Paras. 18 and 19 of KO read as follows:-

> 18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT
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> > "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made ..."
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> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874, para 58:
>
> > "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is

> it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

Mr Lindsay conceded that the judge's approach to the question of DM's best interests was erroneous with reference to [33]. He conceded an error in the Article 8 proportionality assessment. He accepted that the Appellant, DM, has a strong Article 8 claim, but stated that he was not conceding the appeal. However, Mr Lindsay drew my attention to the grounds, which is his view challenge the decision on Article 3 grounds. He said that the case could not succeed under Article 3.

I heard oral submissions from Mr Riok. I hoped that he would be able to clarify the grounds for me. However, he sought to re-argue the Appellants' case rather than properly identify an error of law in the decision.

The judge materially erred in respect of Article 8 for the reason conceded by Mr Lindsay. It would have assisted the First-tier Tribunal had the Appellants' solicitors not mischaracterised the case as an Article 3 (health) case. Mr Riok argued before me that DM would be at risk on return (Article 3) as a disabled child. I am not sure whether he argued this before the First-tier Tribunal. However, the evidence does not come close to the high Article 3 threshold (and neither could it meet the AM test as a health case). The findings of the judge in respect of Article 3 stand. However, I set aside the decision oof the judge to dismiss the appeal on Article 8 grounds.

Re-making of the appeal

The parties agreed to me remaking the appeal on the evidence before the First-tier Tribunal. I heard submissions. Mr Lindsay said that he relied on the decision letter.

There were three bundles before the First-tier Tribunal. The Appellant's bundle (AB) containing 125 pages and an Appellant's supplementary bundle (ASB) containing 104 pages. There was no coherent challenge to the findings of the First-tier Tribunal. Similarly there was no challenge to the evidence produced by the Appellant from various professionals. From the evidence before the First-tier Tribunal, I make the following findings:-

i. DM has learning difficulties, developmental delay and ADHD

ii. There has been a CAMHS referral as a result of problems raised by the school and GW which resulted in an ADHD assessment

iii. The Appellant is under the care of consultant paediatrician, Dr Chloe Johnstone

iv. The Appellant was seen by Dr Sussens, a consultant paediatrician in 2016 who suspected that she would need on going thyroid treatment and referred her to an endocrinologist.

v. In a letter from Dr Wariyar, consultant in Paediatric Neuro-disability to GW of 3 January 2019 (AB/91-92), she states that

DM has immense difficulties at school with concentration, impulsivity, rudimentary communication and that her academic performance is way behind peers.

vi. The Appellant was seen by an educational psychologist, Dr Bistamam on 5 March 2020 (AB/72-74). He diagnosed ADHD – inattentive type. His evidence can be summarised as follows. The Appellant experiences particular difficulties with language. There are concerns around emotional literacy, motor skills and coordination. She has limited awareness of danger. She is vulnerable and needs a high level of adult support. She is approximately 4 years behind peers.

vii. Merton Special Schools Panel has agreed that DM's needs cannot be met in mainstream school and she has been offered a place at Cricket Green Special School to start in 2022. There is in place a final EHCP (AB/30)– an arrangement between DM's education provider and the local authority.

viii. DM requires significant support which mainstream school was unable to provide

ix. There is a report entitled "Assessment of Problem of Primary School Children with Disabilities in Uganda" by authors Dastan Bamwesigye and Petra Hlavockova. The report is about school dropout rates of children with disabilities in rural Uganda. I am not sure of the date of the report (AB/114) but it supports that there is poor teacher attitude towards disability, that there is a lack of special equipment and discrimination.

x. There is a report from "Special Children Special People" on Uganda and disability (ABS/44) which supports that there is a scarcity of appropriate educational, scholastic and instructional materials, inadequate training staff handling concerns of person with disabilities.

xi. There is evidence from NGOs (AB/51-54) which support a lack of training for teachers of children with disabilities and stigma and abuse towards them. The Uganda Society for Disable Children in a letter of 7 November 2020 to GW (AB/53) states that discrimination and stigma against children with disabilities continues in Uganda. They are vulnerable to abuse. The burden of costs for support lays with the family. There is neglect in the schools. There are few teachers trained to handle children with learning disabilities.

None of the above was the subject of challenge. A chronology from the Appellant's solicitors setting out treatment/interventions and decisions made in respect of DM would have been very helpful, but unfortunately this was not forthcoming.

From the above it is clear that DM is a vulnerable child with learning difficulties and ADHD. What is significant about her problems is that they are sufficiently serious to warrant her being taken out of mainstream education where she is not thriving. She now has a place at a special school to commence in 2022.

She has been in the United Kingdom for five years. She has benefited from significant input from education experts and the medical profession since she arrived. Five years is a significant period of time in the life of a child, albeit she is not a qualified child. There has been a lot of disruption in the her early life. She came here when she was only six years of age and is a child with problems.

I am in no doubt that it is in DM's best interests to remain in the United Kingdom with her father and to continue with what she has become accustomed to and to adopt the arrangements that have been made for her. Notwithstanding that GW has no independent right to be in the United Kingdom, it is not in her best interests to return with him to Uganda. A lot of work has been done by professionals looking after DM to put together a plan to help her culminating in her having a place at a special school to commence in 2022. The best interests of DM is a primary consideration although not the paramount consideration to be out into the balancing exercise.

It was accepted that the Appellants cannot meet the requirement of the IR. However, DM has a significant private life here. She is now aged 11. She attends school where she has friends and has the regular input of specialist teachers and other professionals who assist her. She is soon to move into a special school. I am satisfied that there is stigma and discrimination towards disabled children in Uganda and it is unlikely that she would receive the help that she received in the United Kingdom. This will not be overcome by the family support that she may have there, as found by the First-tier Tribunal.

The Appellants are not overstayers. GW is financially independence and language is not an issue. Obviously the maintenance of immigration of control is in the public interest. In this case neither Appellant is able to meet the IR. This is a factor that weighs against them in the proportionality balance. However, in this case, Mr Lindsay conceded that DM has a strong Article 8 claim. I agree with him. Taking into account all of the matters in favour of the Appellant, I accept that in this case there are compelling circumstances relating to DM and her needs that tip the balance in favour of the Appellants. I allow the appeal on Article 8 grounds.

Notice of Decision

The appeal is allowed on Article 8 grounds.

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Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 29 November 2021

Upper Tribunal Judge McWilliam