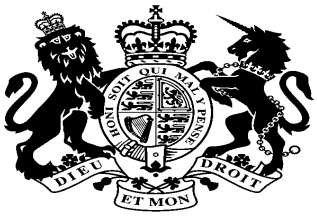

Upper Tribunal
(Immigration and Asylum Chamber) HU/17732/2019 (V)

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
by *Skype for Business*
on 16 December 2020

Decision & Reasons Promulgated

On 12 January 2021

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MATI ULLAH FAROOQI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: *Mr D Byrne, Advocate, instructed by Drummond Miller, Solicitors*
For the Respondent: *Mr A McVeety, Senior Home Office Presenting Officer*

DETERMINATION AND REASONS

1. This determination is to be read with:

   (i) The respondent's decision dated 14 October 2019.

   (ii) The appellant's grounds of appeal to the First-tier Tribunal.

   (iii) The decision of FtT Judge Lea, promulgated on 25 February 2020.

© CROWN COPYRIGHT 2021

(iv) The appellant's grounds of appeal to the UT, stated in the application for permission to appeal 10 March 2020.

(v) The grant of permission by FtT Judge Simpson, dated 28 April 2020.

(vi) Directions of the UT, issued on 2 July 2020, with a view to deciding without a hearing (a) whether the FtT erred in law and (b) if so, whether its decision should be set aside.

(vii) The appellant's submissions in response, filed on 20 July 2020.

(viii) Note by UTJ Smith, dated 25 September 2020, explaining that the UT would be assisted by more developed submissions, and directing a hearing by remote means.

2. I conducted the hearing from George House. Representatives attended remotely. The technology enabled an effective hearing.

3. The grounds as originally presented are, firstly, that the FtT failed to consider factors relevant to the appellant's ability to (re)integrate in Pakistan [in terms of paragraph 276ADE(vi) of the immigration rules] – an expert report; Home Office policy on taking account of national attitudes; dearth of mental health facilities; stigma attached by the community to the mentally ill; and, secondly, that the FtT failed to consider those factors in relation to exceptional circumstances and undue harshness.

4. The appellant subsequently crystallised his appeal into two grounds: failure to apply the law as stated in *AM (Zimbabwe)* [2020] UKSC 17; and speculation, or irrationality, about the appellant's mental health on return, and support in Pakistan.

5. The directions of UTJ Smith sought expansion and specification of those two grounds.

6. *AM* was not published until the day after the grant of permission; but as Mr Byrne said, the law is to be taken as always having been as stated by the Supreme Court. If the FtT's decision cannot stand by reference to the law as subsequently understood, it would fall to be set aside. This argument has to be considered, even without an application to amend the grounds.

7. *AM*, however, does not have the consequence that all cases on medical grounds must be reheard.

8. The second ground can be accommodated within the original application.

9. The first ground was well developed by Mr Byrne. The FtT's decision is underlaid by the previous test, which may be summarised as "imminent risk of dying". It did not anticipate the test as later approved by the Supreme Court.

10. The Court said at [22]:

Following a careful analysis of the decision in the *D* case and of its own decision in the *N* case, the Grand Chamber in the *Paposhvili* case expressed the view in para 182 that the approach hitherto adopted should be "clarified". The Convention is a living instrument and when, however appropriately, the ECtHR charts its growth, it may generate confusion for it to claim to be providing only clarification. The court proceeded as follows:

> "183. The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N v The United Kingdom* (para 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."

11. Mr Byrne said that *AM* not only changed the legal test, it placed the onus on the SSHD, a point which was also not considered by the FtT.

12. On onus, the Supreme Court said at [32 – 33]:

> The Grand Chamber's pronouncements in the *Paposhvili* case about the procedural requirements of article 3, summarised in para 23 above, can on no view be regarded as mere clarification of what the court had previously said; and we may expect that, when it gives judgment in the *Savran* case, the Grand Chamber will shed light on the extent of the requirements. Yet observations on them may even now be made with reasonable confidence. The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But "Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle …": *DH v Czech Republic* (2008) 47 EHRR 3, para 179. It is clear that, in application to claims under article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold, set out in para 23(a) above, is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish "substantial grounds" to have to proceed to consider whether nevertheless it is "capable of demonstrating" them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate "substantial" grounds for believing that it is a "very exceptional" case because of a "real" risk of subjection to "inhuman" treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a "prima facie case" of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement: see para 112 of a useful analysis in the Determination of the President of the Upper Tribunal and two of its senior judges in *AXB v Secretary of State for the Home Department* [2019] UKUT 397 (IAC). Indeed, as the tribunal proceeded to explain in para 123, the arrangements in the UK are such that the decisions whether the applicant has adduced evidence to the requisite standard and, if so, whether it has been successfully countered fall to be taken initially by the Secretary of State and, in the event of an appeal, again by the First-tier Tribunal.

> In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the *Paposhvili* case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state. What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel "any" doubts raised by the applicant's evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to "serious doubts", he will realise that "any" doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond *all* doubt is a concept rightly unknown to the Convention.

13. The FtT's decision was unavoidably based on case law which had since been superseded. The live issue is whether that (constructive) error is one which requires the decision to be set aside; a question which overlaps with the second ground.

14. Mr McVeety's submission was straightforward. The legal test remains a high one, and the appellant's case did not come near it. There was no evidence of any treatment he receives in the UK which would not be available in Pakistan. He declines to take any treatment here, other than a pill which costs a small amount (as he elects to be prescribed from England, not Scotland, where the medication would be free). The same medication is available at low cost in Pakistan, about 50 pence a day. There was no error in the FtT's conclusion that his return was not likely to lead to any deterioration in his condition. His family in Pakistan wished to see him and would support him, while in the UK he has no relatives and lives with a sympathetic friend and his family.

15. In response, Mr Byrne said that an evidential basis had not been laid for the respondent's submission. The materials which the appellant placed before the FtT included a well-documented history of medical interventions and reviews in the UK. He suffers from a primary psychotic illness, with depressive symptoms. It was an error to suppose that a daily tablet was all the care required. In Scotland, there is a statutory mental health regime surrounding the appellant with safeguards, including compulsory intervention if needed. That was to be contrasted with the inadequacy of mental health provision in Pakistan.

16. I reserved my decision.

17. The appellant suffers from serious mental disorder, and his case is a sad one, as is clear from the decision of Judge Lea and from the previous decision of Judge D'Ambrosio. Those are not unsympathetic decisions. They are not based on depreciating the appellant's evidence and circumstances, but on a realistic evaluation. The grounds on which this case was first brought to the FtT (which have become the second ground, as now argued) are only a complaint that matters were not considered when they plainly were, and disagreement with the outcome. The appellant was unable to specify any aspect of the evidence which was not considered by the FtT, and which might have made a difference.

18. The FtT said at [14] that the appellant's case was well short of the high test for article 3.

19. Recasting that in terms of *Paposhvili*, the appellant has not founded on any evidence showing a real risk, on account of the absence of appropriate treatment in Pakistan or the lack of access to such treatment, that he might be exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in his life expectancy. The evidence is that his situation, which presently does not involve such risk, would be much the same (or even slightly better, as the FtT thought, although that is not the crux).

20. The appellant has not specified any evidence "about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it", such that the onus "to collect evidence about the availability and accessibility of suitable treatment in the receiving state" might pass to the SSHD. In any event, the respondent did refer the FtT to considerable information about facilities in Pakistan before the FtT. The appellant has not shown that, based on all the background evidence from both sides, the FtT erred in concluding as it did.

21. There is no error in the FtT's decision, apart from the retrospective change of legal approach to medical cases in general. There is nothing in the tests, as now stated, which, on the evidence before the FtT and the findings it made, might have led to another outcome.

22. The decision of the FtT shall stand.

23. No anonymity direction has been requested or made.

Hugh Macleman

16 December 2020
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.