Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002999
[HU/00520/2021]

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Friday 28 October 2022	**On Friday 9th December 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

MISS MARIE ROSE PARAISO

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Krushner, Counsel instructed on a direct access basis
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge G Clarke promulgated on 20 April 2022 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 7 December 2020, refusing her human rights claims (Article 3 and 8 ECHR). Those claims were based on the Appellant's private life in the UK, the situation she would face on return to the Philippines, and her medical conditions.

2. The Appellant is a national of the Philippines. She came to the UK on 11 December 2020 with leave as a student valid until 18 August 2012. She has submitted various applications since but all have been refused. She has had no leave since, at the latest, 19 September 2012. The Appellant has had a previous appeal on human rights grounds (in 2018/2019) which was also dismissed.

3. The Appellant claims that there would be very significant obstacles to her integration in the Philippines as she says that she was a victim of domestic violence at the hands of her former husband. It is to be noted that she has four adult children still living in the Philippines as well as other family members. The Appellant also relies on her medical conditions, both in terms of a heart condition and mental health condition. Particularly in relation to the former, she claims to be entitled to remain in the UK on the basis that her removal would breach Article 3 ECHR, relying on the case-law culminating in the Supreme Court's judgment in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 ("AM (Zimbabwe)"). We note as an aside that, following remittal of the appeal in AM (Zimbabwe) to this Tribunal, the appeal was again dismissed on Article 3 grounds in AM (Article 3, health cases) Zimbabwe [2022] UKUT 131 ("AM (Zimbabwe) UT").

4. Judge Clarke accepted that the Appellant was "the victim/survivor of at least one incident of domestic violence in 1996 at the hands of her then husband" ([87] of the Decision). However, for the reasons set out at [88] to [99] of the Decision, the Judge did not accept that the Appellant's ex-husband continues to pose a threat to her. That finding is not challenged. The Judge did not therefore accept that this posed a very significant obstacle to integration. The Judge considered the remaining issues relating to the Article 8 claim in this regard at [101] to [106] of the Decision but concluded that there were no very significant obstacles to the Appellant's integration in the Philippines ([107]). That conclusion is not challenged.

5. The Judge considered the medical evidence in the context of Article 3 ECHR at [68] to [79] of the Decision, concluding that the "Appellant's medical conditions to do not meet the criteria in [AM (Zimbabwe)]". Since that section of the decision is the main subject of challenge we will deal with the Judge's reasoning below. The Judge also incorporated his reasoning in this regard to his assessment of Article 8 ECHR outside the Immigration Rules. There is no direct challenge to that part of the Decision although we accept that Article 8 ECHR might fall to be reassessed depending on our view of the challenge relating to Article 3 ECHR.

6. As we have indicated above, the Appellant challenges the decision on the basis that the Judge has misdirected himself when assessing the health claim, predominantly under Article 3 ECHR and mainly in relation to the Appellant's heart condition. There is a further ground relating to the Judge's treatment of the evidence of Dr Persaud.

7. Permission to appeal was granted by First-tier Tribunal Judge Hollings-Tennant on 30 May 2022 in the following terms so far as relevant:

> "… 3. Whilst the Judge clearly considered the medical evidence adduced and accepted that the Appellant has heart failure which will require surgery, he arguably fell into error when explicitly stating that the cost of treatment is not something he could take into account [at paragraph 75]. This is a relevant factor in assessing the extent to which the Appellant would actually have access to treatment on return (see Savran v Denmark (57467/15). Further it is not clear whether the Judge considered the extent to which the Appellant would suffer a serious, rapid and irreversible decline in health leading to intense suffering or substantial reduction in life expectancy if she is unable to afford medication or heart surgery on return to the Philippines.
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> 4. As such, the grounds have identified an arguable error of law and permission to appeal is granted."

8. The Respondent filed a Rule 24 Reply dated 18 July 2022, drawing attention to AM (Zimbabwe) UT and asserting that the Judge has found that the Appellant does not meet the "initial threshold test".

9. We had before us a core bundle of documents relating to the appeal as well as the Respondent's bundle before the First-tier Tribunal and the Appellant's bundle before the First-tier Tribunal. We were also handed during the hearing a letter dated 9 February 2022 concerning the Appellant's heart condition which we did not have previously but which was before Judge Clarke and to which we refer below.

10. The matter comes before us to determine whether the Decision contains a material error of law. If we consider that it does, we then need to consider whether to set aside the Decision for that reason. If we set aside the Decision, it is then necessary for us either to re-determine the appeal or remit the appeal to the First-tier Tribunal to do so. Having heard submissions from Mr Krushner and Mr Kotas, we indicated that we would reserve our decision and issue that in writing which we now turn to do.

DISCUSSION AND CONCLUSION

11. The Judge directed himself at [68] to AM (Zimbabwe) and the prior judgment of the European Court of Human Rights in Paposhvili v Belgium [2016] ECHR 1113. The hearing took place before this Tribunal's guidance in AM (Zimbabwe) UT and the Judge could not therefore be expected to have regard to that. There can be no argument that the Judge misdirected himself in relation to the law which applies. As the Judge stated at [68] of the Decision, "[t]he test is no longer that the Appellant is at imminent risk of dying but rather that there are substantial grounds for believing that the individual faces a real risk of being exposed to either a serious, rapid and irreversible decline in their state of health, resulting in intense suffering or a significant reduction in life expectancy". As the Supreme Court observed at [32] of its judgment that threshold is a demanding one, equating as it does with the Article 3 threshold of torture, inhuman and degrading treatment. Moreover, as the Supreme Court also there made clear the burden of demonstrating that the threshold is met lies with the applicant. It was therefore for the Appellant to make out a prima facie case that the absence

of treatment following removal would lead to consequences for her which meet the Article 3 threshold.

12. The Judge set out at [70] and [71] of the Decision the medical evidence which he had before him. That included a letter from Dr Ali Vazir, Consultant Cardiologist at the Royal Brompton Hospital dated 9 February 2022 which Mr Krushner said was put before Judge Clarke as the most up-to-date medical evidence and the high point of the Appellant's evidence in relation to her heart condition. The "history" section of that letter is as set out at [71] of the Decision. As Mr Krushner accepted in the course of his submissions, neither that letter nor the other medical evidence relating to the Appellant's heart condition sets out what would be the effect of the Appellant not receiving the "mitral valve repair" treatment. She has been on the NHS waiting list for this since 2019. As the 9 February letter indicates, that treatment has not yet been carried out as "it has been unclear whether she is eligible for NHS treatment".

13. Having set out the evidence, the Judge then turned to consider whether that evidence met the test which applies at [72] onwards as follows:

> "72. I accept that the Appellant's mitral regurgitation is defined as 'symptomatic severe' but there is nothing in this most updated assessment that the Appellant's condition is critical or that she is in need of emergency or urgent surgery for her heart failure. As Dr Almoosa points out, the Appellant has been on a waiting list since 2019. If the Appellant's condition was life-threatening, notwithstanding the difficulties posed by the Pandemic for the NHS, I find that she would have received surgery rather than being on a waiting list for over 2 years.
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> 73. I also find that the Appellant has failed to prove that there is no suitable treatment available to her in the Philippines or that she would be denied access to such treatment. The Reasons for Refusal letter relies on a website that states that there are a number of hospitals in Manila where the Appellant can receive her heart surgery. There will, of course, be a difference in the standard of treatment that the Appellant is likely to receive in the Philippines compared to what she receives on the NHS but this is not the test. The issue is whether the treatment is available in the Philippines and whether the Appellant can access it.
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> 74. I find that the Appellant has failed to prove that she cannot access medical treatment in the Philippines for her medical conditions. The Appellant has failed to adduce any evidence that there are no such facilities or that she would be denied access to such treatment. She is a national of the Philippines and there is nothing to suggest that she would be denied access to treatment.
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> 75. I accept, as did the previous Immigration Judge, that the Appellant will have to pay for her treatment in the Philippines and that the treatment will be expensive. However, <u>the cost of the treatment is not something that I can take into account.</u>
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> 76. I also rely on the fact that the Appellant has 4 children in the Philippines, all of whom are now over 18 years of age. In her oral evidence, she confirmed that her sister-in-law provides her 4 children with rent-free accommodation, that her sister and brother provide her children with food

and that her brother is a Government Official in the Philippines. While wages are unlikely to be as high in the United Kingdom, I find that the Appellant has numerous relatives who will be able to assist her with covering the costs of her heart operation.

77. Furthermore, the Reasons for Refusal letter also refers to a website which states that there are facilities available for mental health conditions in the Philippines. Once more, I rely on the fact that the Appellant has failed to adduce any objective evidence that no such facilities or treatment exist.

78. I also find that the Appellant has failed to prove that she would be denied access to such treatment for her mental health. The Appellant may have to pay for her treatment but this is not a factor that concerns me in respect of Article 3. I of the same view [sic] as the previous Judge who stated,

> *'29. I have not been provided with any evidence that the Appellant has reported a significant reduction in life expectancy due to her condition. Neither does the medical evidence that I have highlighted demonstrate that she is not fit to fly at present. Furthermore, I note that as accepted by the Appellant the treatment she requires is available in Manila and whilst the costs are shown to be quite high, however, I am unable to take the costs of treatment insofar as assessing the Appellant's circumstances with reference to Article 3 of the ECHR. As I have already highlighted, I am not satisfied that there is any sufficient evidence to show that she is at risk from her husband if she were to return to Manila and certainly that is where her family lives and she would be in a position to access treatment as required.'*

79. I find that the Appellant's medical conditions do not meet the criteria in AM Zimbabwe v Secretary of State for the Home Department [2020] UKSC 17."

14. The Appellant's grounds focus on the two sentences we have underlined in the extract from the Decision above. It is pointed out that accessibility of treatment includes affordability.

15. The Respondent's position is that even if the Judge were wrong to say what he did in this regard, this section of the Decision has to be read as a whole and the Judge found at [72] of the Decision that the Appellant had not met the threshold. In response, Mr Krushner said that there was no finding that the requisite threshold was not met. We disagree for the following reasons.

16. Although this Tribunal's decision in AM (Zimbabwe) UT was not promulgated until after the Decision and Judge Clarke could not therefore have referred to it, we consider it appropriate to set out the reported guidance there given as it neatly summarises the approach to be taken in Article 3 medical cases as follows:

> "1. In Article 3 health cases two questions in relation to the initial threshold test emerge from the recent authorities of AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 and Savran v Denmark (application no. 57467/15):

> (1) Has the person (P) discharged the burden of establishing that he or she is "a seriously ill person"?
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> (2) Has P adduced evidence "capable of demonstrating" that "substantial grounds have been shown for believing" that as "a seriously ill person", he or she "would face a real risk":
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> [i] "on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,
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> [ii] of being exposed
>
> [a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or
>
> [b] to a significant reduction in life expectancy"?
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> 2. The first question is relatively straightforward issue and will generally require clear and cogent medical evidence from treating physicians in the UK.
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> 3. The second question is multi-layered. In relation to (2)[ii][a] above, it is insufficient for P to merely establish that his or her condition will worsen upon removal or that there would be serious and detrimental effects. What is required is "intense suffering". The nature and extent of the evidence that is necessary will depend on the particular facts of the case. Generally speaking, whilst medical experts based in the UK may be able to assist in this assessment, many cases are likely to turn on the availability of and access to treatment in the receiving state. Such evidence is more likely to be found in reports by reputable organisations and/or clinicians and/or country experts with contemporary knowledge of or expertise in medical treatment and related country conditions in the receiving state. Clinicians directly involved in providing relevant treatment and services in the country of return and with knowledge of treatment options in the public and private sectors, are likely to be particularly helpful.
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> 4. It is only after the threshold test has been met and thus Article 3 is applicable, that the returning state's obligations summarised at [130] of Savran become of relevance - see [135] of Savran."

17. That guidance makes a number of points which are pertinent to this case. First, it is not sufficient for an appellant to show that he or she is seriously ill. He or she has to show "by clear and cogent medical evidence from treating physicians in the UK" that, due to a lack of access to treatment in the country of return, he or she will face consequences which will either lead to the high threshold of decline in health "resulting in intense suffering" or will lead to "a significant reduction in life expectancy". As we have already pointed out, and as Mr Krushner accepted, there is no medical evidence which sets out the consequences for the Appellant if she does not receive the treatment which she has been awaiting (for three years) in the UK. Even if the evidence is sufficient to show that she is "seriously ill" (which itself may be debatable in this case as the Appellant's illness is described in various places as "chronic" which suggests it is long-standing but not necessarily serious), the evidence comes nowhere close to showing that the Appellant would suffer the consequences set out at paragraph 1(2) of the guidance in AM (Zimbabwe) UT. We agree with Mr Kotas that the Judge's primary finding at [72] of the Decision is that the Appellant has not provided

evidence to show that she meets that high threshold. It is for her to establish the prima facie case in that regard and the Judge's finding is that she has not done so.

18. Following on from that, as the guidance also makes clear, it is not sufficient for an appellant to show that his or her condition will worsen. The evidence needs to show the deterioration which reaches the high threshold implicit in Article 3 ECHR. As Mr Krushner accepted, the medical evidence in this case does not deal expressly with what will happen to the Appellant if she does not receive treatment whether in the UK or in the Philippines. There is not even evidence to show that her condition will worsen let alone that it will do so to the degree necessary to establish an Article 3 breach.

19. Turning back then to the Decision, although we accept that the Judge has gone on to consider what treatment would be available to the Appellant on return to the Philippines, he has done so on the basis of additional findings (for example, "I also find.." at [73] of the Decision). In our view, that makes clear that the Judge's primary finding at [72] is that the threshold of showing a sufficient deterioration in the Appellant's condition has not been met.

20. Moreover, on the evidence we have seen, which culminates in the "high point" of the letter dated 9 February 2022, the Appellant could come nowhere near to establishing that the high threshold is met. For those reasons, any error of approach in relation to the cost of treatment is immaterial. It is not entirely clear to us why the Judge thought that cost was not relevant to his assessment but we surmise that the Judge might have had in mind that he could not take into account that treatment in the UK would or might be free whereas it would come at cost to the Appellant in the Philippines. However, we do not need to reach any conclusion in that regard as we are satisfied that the Judge did not err in making his primary finding that the high threshold to establish an Article 3 breach is not met due to the insufficiency of the medical evidence in showing the impact of the lack of treatment on the Appellant's condition.

21. We have largely confined our consideration to the medical evidence concerning the Appellant's heart condition since that is the main focus of the Appellant's grounds. However, the second part of the Appellant's challenge relates to her mental health condition which itself focusses on the Judge's assessment of the report of Dr Persaud. Mr Krushner was content to leave that ground to his pleaded case and we have therefore considered it on that basis.

22. The Judge dealt with Dr Persaud's evidence at [57] to [64] of the Decision. Having read Dr Persaud's report we are amply satisfied that the Judge was entitled to make the criticisms which he did of that report. There are examples given explaining why the Judge had the "significant reservations" which he did. We reject the Appellant's ground which suggests that the Judge did not consider the report in the round. He clearly did so.

23. As Mr Krushner pointed out, and as is said in the grounds, the Judge did not however reject Dr Persaud's diagnosis of PTSD, low mood, anxiety and depression. However, as with the medical evidence of the Appellant's heart condition, the report does not deal with the impact of lack of treatment on the Appellant's mental health. When we asked Mr Krushner about the medical evidence concerning the treatment which the Appellant is receiving for her mental health in the UK, he confirmed that the Appellant is receiving primary care only by way of medication. There is no evidence express or otherwise about the impact of the withdrawal of that medication even if such medication is not available or accessible in the Philippines (as to which we could see no evidence in any event).

CONCLUSION

24. For the foregoing reasons, we are not persuaded that there is an error of law in the Decision. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge G Clarke promulgated on 20 April 2022 does not involve the making of an error on a point of law. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed: L K Smith

Upper Tribunal Judge Smith Dated: 3 November 2022