



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/00242/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 16 November 2017**

**Decision & Reasons
Promulgated
On 21 December 2017**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**S A M
(ANONYMITY DIRECTION MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Chirico, instructed by Wilson Solicitors LLP

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appealed to the First-tier Tribunal against the Secretary of State's decision of 25 January 2016 refusing her claim for asylum. In essence, her claim to be at risk on return to Jamaica, her country of nationality, is that she fears harm at the hands of PH, with whom she was in a violent domestic relationship in the United Kingdom. The appellant has been in the United Kingdom since September 2002, initially with leave to remain as a student nurse but has been an overstayer since 2007.

2. In an earlier decision following a hearing in January 2017 I found errors of law in the decision of the judge who dismissed S A M's appeal and ordered that the matter be reheard.
3. There has been some delay between that hearing and the remaking of the decision, as a consequence of attempts to find the location of PH since March 2013. The judge had been invited by counsel to draw the inference that PH had the freedom to go to Jamaica and therefore the opportunity to harm the appellant if he chose to do so, but the judge was not prepared to draw such an inference. Efforts were made, as I say, to try and discover where PH had been during the period from 2013 since if he had been in Jamaica or in prison he would not have been able to harm the appellant in any event, whereas if he had been in the United Kingdom during that period then that might indicate that he no longer had any adverse interest in her.
4. Following investigations carried out by Mr Norton, Senior Presenting Officer, as set out in a note to the Tribunal dated 26 May 2017, PH was last granted discretionary leave to remain in the United Kingdom in November 2008 and that leave expired in November 2011. There was no record of any application or decision or order since November 2008 and according to the Home Office records he had no leave to enter or remain in the United Kingdom at present. Investigations do not reveal any record of criminal conviction concerning him.
5. That was as far as it appears to have been possible to take matters. It must be a matter for comment and regret that the respondent is unable to say whether a particular person is in the United Kingdom or not, but, that being said, I am grateful for the efforts that have been made to obtain information about PH and his whereabouts and in particular to Mr Norton for taking matters as far as it appears it was possible to take them. In the circumstances Mr Chirico was content to proceed with the hearing today on the basis that it did not appear likely that any further evidence in relation to this matter would be found, and, as I shall refer to later, invited the Tribunal to make inferences and draw conclusions in light of the situation.
6. The appellant's evidence is that she had an unhappy and problematic childhood in Jamaica, including being the victim of sexual abuse from her cousins and ill-treatment by her uncle and her father's employer. As set out above, she came to the United Kingdom from Jamaica in September 2002, leaving behind her two children, who stayed in the care of her mother. Her relationship with the children's father had broken down in around 2000.
7. The appellant was not successful in renewing her student visa in 2006 but she wanted to stay in the United Kingdom to be able to provide funds for her children in the United Kingdom. She therefore carried on working. She met PH in May 2010. He became increasingly violent towards her and

this culminated in an incident when he threatened to hit her with a chopper and she managed to run away. She did not want to involve the police because she feared that he would report her to the immigration authorities. She was persuaded to return to him and for a period of time he behaved well but then he became angry again and among other things said he was a killer and would kill her and her family. The ill-treatment continued, including incidents of rape. She left home for the final time in March 2013. He had continued to ill-treat her and he uttered threats at the time when she left. This time she obtained the assistance of the police, which led to her being detained and transferred to an immigration centre. She said in her statement that she could not return to Jamaica because she and PH were from the same parish and she knew he had ties there, so could easily learn of her return and his grandparents were well-known in the community, so he was seen as being from a well-respected family. He would also be able to find her because there were a limited number of hospitals and care homes in Jamaica where she could go to find work as a nurse, which is the only job she has ever done. Nor did she believe she would be able to seek the protection of the police in Jamaica as she said they are corrupt and only investigate crimes for those who are willing to pay them bribes. She says in her statement she cannot return to Jamaica because PH is intent on hurting her and her family and still has links there and she has no doubt that he would learn of her return and ask someone living in Jamaica to kill her. She considered the only reason he had not killed her earlier was because she had given him a place to stay and food to eat. She describes him as a violent man who does not tolerate anyone who he thinks does not respect him and who will want to seek revenge on her.

8. In a more recent statement the appellant said that she has not had contact with PH since he called her at Yarl's Wood in March 2013. She described him as being genuinely scared of the police. She had had contact with PH's sister and was sure that his sister had called her in March 2015 to find whether she was in the United Kingdom and to relay that information to PH. The appellant had said she did not want to talk to her and cut off the call. She is unaware of PH's whereabouts. She had been to a christening in August 2016 and a lady had said she had seen him around but she did not know how long ago that had been. Other people used to see him infrequently in Birmingham and said they had not seen him for a long time. She was aware of the fact that he was respectful of the police in the United Kingdom and scared of prison in the United Kingdom.
9. I consider first the question of risk on return.
10. It is clear that the appellant has been the victim of serious harm at the hands of PH in the past. It is clear from paragraph 339K of the Immigration Rules that the fact that a person has already been subject to persecution or serious harm or to direct threats of such persecution or such harm would be regarded as a serious indication of the person's well-

founded fear of persecution or real risk of suffering serious harm unless there are good reasons to consider that such persecution or serious harm will not be repeated.

11. The appellant is clearly mindful of the fact that she has had no contact with PH since he telephoned her in Yarl's Wood in March 2013. The evidence as set out in paragraph 8 of her witness statement of 5 September 2016 concerning his whereabouts is vague. It is entirely unclear from that whether or not PH is still in Birmingham. She felt sure that his sister called her in March 2015 to find out whether she was still in the United Kingdom and to relay that information to him. That does not appear to be something said by the sister and again it is entirely unclear what the reasons for the call were.
12. In the witness statement of her son MM he refers to a time when he was hit by a speeding vehicle in the West Indies in 2012. He says that as far as he is aware he has never been threatened by anyone in connection with PH nor does he know any of PH's family but considers that the hit and run was possibly connected to that relationship.
13. There is also reference in the appellant's daughter JM's statement to a person in 2012 asking if she was a person of her surname and had just come from England. She said it was possible this was connected to PH. There was also an incident when she was watched by a man who she found out was a police officer in plain clothing who said he wanted to kill anyone who wanted to date her and thereafter she received calls from strange numbers. These incidents unsurprisingly scared her, but again there is no evidence that they were at all connected to PH.
14. As regards the question of what inferences can or cannot be drawn from the silence on the part of PH towards the appellant since May 2013 and the limited information which Mr Norton was able to discover, which I have set out above, I do not consider that this can be equated to a real risk. I entirely appreciate that the appellant has a subjective fear of PH. That is amply testified to in her witness statements and in the medical reports. But the fact remains that it has been over four years since she had any contact with PH. If he is in Jamaica then it might be thought that some contact would have been made with her family by him if he retained any adverse interest in the appellant, and the evidence that I have set out above is far too vague for a finding in that regard to be made. Likewise, although I bear in mind the appellant's evidence about the fears that PH has of the police in the United Kingdom and his fears of prison here, that does not appear to have precluded his previous ill-treatment of her over a period of some time. Again, if he retained any adverse interest in her, I do not consider that it has been shown that these potentially inhibiting factors would have led him to refrain from contact with her and potential ill-treatment of her if he maintained the animosity towards her that he had previously had. I consider, bearing in mind the language of paragraph 339K, that there are good reasons to consider that the persecution or

serious harm will not be repeated, in that there has been no repetition or threat of repetition over a period of more than four years since the last occurrence.

15. As a consequence I do not consider that she has shown that she faces a real risk from PH, and therefore I do not need to address issues of sufficiency of protection and internal relocation.
16. A further argument put forward by Mr Chirico was that based on the same facts, an Article 3 claim should succeed. He drew on the skeleton argument he had prepared for the case of NG (Morocco) on which the Court of Appeal has granted permission in order to consider how the guidance given by the European Court of Human Rights in Paposhvili (Application no. 41738/10) (13 December 2016) is to be applied in Article 3 cases. The position in this regard is complicated, as Mr Chirico accepted, by the fact that very recently the Upper Tribunal in EA & Ors [2017] UKUT 00445 (IAC) has concluded that the test set out in Paposhvili is not a test that it is open to the Tribunal to apply by reason of it being contrary to judicial precedent. Mr Chirico relied in part on the procedural requirements set out in Paposhvili, which would require the respondent to make specific enquiries prior to a removal decision and/or to obtain specific assurances from the receiving state. A decision to remove without making enquiries or obtaining assurances would be unlawful. He argued that serious doubts were raised in this case by what had happened in the past and there was a duty on the respondent to dispel those doubts and this had not been done and sufficient enquiries had not been made. In light of the appellant's fear of harm from PH the Secretary of State was under the same duty of enquiry as that adumbrated in Paposhvili. It was an integral part of Article 3 with regard to removal.
17. Paragraph 339K, to which I have referred above, was also of relevance in this regard. The process required of the Secretary of State should be seen as being part of the paragraph 339K provision and the two should be read together. He argued that this was not inconsistent with what had been held by the Court of Appeal in GS (India) [2015] 1 WLR 3312, which was the authority which the Upper Tribunal in EA concluded stood in the way of following Paposhvili. Mr Bramble argued that even if Paposhvili were to be taken into consideration, the level of harm which gave rise to Article 3 breach as identified in that case was not met on the facts of this case.
18. Although I am not formally bound by the decision in EA, I am persuaded by the logic in that decision that Paposhvili does not fall to be applied by the Upper Tribunal as it goes contrary to precedent, bearing in mind what was said in EA, quoting from Manchester City Council v Pinnock [2011] UKSC 6 that it would be wrong for the court not to follow a line of authority in the Court of Human Rights where there is a clear and consistent line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of UK law and whose reasoning does not appear to overlook or misunderstand some argument or point of principle.

In EA the Tribunal identified that on the one hand Paposhvili represented a departure from the clear and constant case law identified by the Court of Human Rights at paragraph 179, and also that it is a decision which was not consistent with UK domestic law as set out in GS (India). I regard that as extending to the point made by Mr Chirico concerning what was said in Paposhvili with regard to the making of enquiries and the obtaining of assurances. Such reasoning is not to be found in authorities such as GS (India). I am of course mindful of the fact that permission to appeal was granted in NG (Morocco), but that is a matter of arguability only at this stage, and it is not clear when the matter will be considered by the Court of Appeal, the hope being that it would be heard in January or February of next year. As I say, I am persuaded by the reasoning in EA and consider that that reasoning extends to both the enquiry and assurance point made by Mr Chirico as part of the reasoning in Paposhvili and the test set out there for situations involving the removal of a seriously ill person when substantial grounds have been shown for believing that he or she, whether or 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, or 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. That is not part of the Article 3 test under United Kingdom law, and accordingly I consider that no support in the appellant's case can be derived from Paposhvili.

19. Mr Chirico also argued that the appellant should succeed under paragraph 276ADE(1)(vi). In this regard he attached significance to the medical evidence. There is a report of Dr Whittaker-Howe of 17 August 2016. She concluded that the appellant met the diagnostic criteria for posttraumatic stress disorder (PTSD) to multiple traumatic events and that she had suffered from this since childhood. If she were to be returned to Jamaica there would be an increase in the severity and frequency of her PTSD symptoms. Dr Whittaker-Howe concluded that the appellant was at low risk of suicide. If she were returned to Jamaica she did not expect her mental health to have a significant impact on her ability to care for herself, although an increase in PTSD severity would make it more difficult. If she were to return to Jamaica her mental health presented a number of challenges that could make work more difficult and in addition her subjective fear for her own safety could prevent her from leaving the house, reducing opportunities for work. Dr Whittaker-Howe considered, however, that the appellant's motivation to provide for her family reduced the impact of her mental health on her occupational functioning.
20. There is also a report from Professor Katona dated 4 October 2017. He considered that the appellant currently fulfils the criteria of posttraumatic stress disorder and also has significant and disabling depressive symptoms, although these are in his view best understood as secondary to her complex PTSD. He considered that the PTSD was caused by the combination of the repeated domestic abuse she experienced at the hands of her former partner PH and her earlier prolonged childhood abuse. Other

factors such as her separation from her children and her mother and the breakdown of past relationships and continuing immigration uncertainty might well aggravate her mental symptoms but did not provide a clinically plausible explanation for her core PTSD symptoms. If returned to Jamaica, he considered that her fear of the consequences for herself and her immediate family was objectively well-justified and that she would feel frightened and under constant threat following forced return to Jamaica which would result in worsening in her PTSD and associated depressive symptoms and hinder her severely in working to support herself and her family and in meeting her own and her family's basic needs such as food and accommodation. She told Professor Katona that she would feel unable to access mental health care if returned to Jamaica because of the stigma attached to that. He accepted that she would be unlikely to seek out and secure the specialist mental health care she needed. There was consistent research evidence that victims of abuse are at greater risk of being revictimised. He considered that if she were forced to return to Jamaica without appropriate specialist therapeutic treatment to address her vulnerability she would in his clinical opinion be very likely to experience further abuse. He also considered that her suicidal thoughts would be likely to increase in intensity if she were forced to return to Jamaica and she would be at real risk of suicide in the UK once she had lost all hope of being allowed to return and that risk would remain during the removal process and, despite the protective factor of being reunited with her children and mother, once she was back in Jamaica. Objective reassurance about the help and support she might receive in Jamaica would only have a very limited effect in reducing her suicide risk.

21. The hurdle that the appellant has to surmount in succeeding under paragraph 276ADE(1)(vi) is that there exist very significant obstacles to her integration into Jamaica. Mr Chirico referred to the decision of the Court of Appeal in Kamara [2016] 4 WLR 152 concerned with the concept of a foreign criminal's integration into a country but which it was argued was equally applicable in this case, as not being confined to the mere ability to find a job or to sustain life while living in the other country. The idea of "integration", it was said, calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.
22. In this regard, as Mr Chirico accepted, the appellant is of course a national of Jamaica and lived there for over 30 years before coming to the United Kingdom. She would return to her children and her mother. Into this would have to be factored her subjective fear of PH and the medical evidence which I have set out above concerning her mental health and the impact on her of return.

23. I do not downplay the significance of the difficulties that the appellant would experience on return to Jamaica. She has some complex PTSD depressive elements, and there is a risk of suicide albeit assessed by the doctors as low in the case of Dr Whittaker-Howe and somewhat higher in the case of Professor Katona. I think these assessments ought to have factored into them to an extent the conclusions that I have come to that there is no real risk on return to the appellant. I appreciate the subjective fear that she has, but the absence of an objective basis for that fear must, I think, be relevant to the paragraph 276ADE(1)(vi) evaluation. Her fears and her mental health problems are such as to present obstacles to her integration into Jamaica, bearing in mind that she told Dr Whittaker-Howe that she would not access mental health facilities in Jamaica because of the stigma attached to that. Hopefully that is a viewpoint that she can be persuaded to move away from, given the benefits that would clearly accrue to her from ongoing mental health treatment, albeit to a more limited extent in Jamaica than that available in the United Kingdom. But the test set out in the subparagraph is a high one. It is not just a matter of obstacles or indeed of significant obstacles. There are required to be very significant obstacles to integration in order for the test to be met. In my judgment that high threshold is not crossed in this case even bearing in mind the problems for the appellant on return to which I have referred above. She will have the support of her children, now adults, and her mother. She will return to a community with which she is familiar, and a society with which she is also familiar. These are all matters that have to be factored in to the points on the negative side of the balance from her point of view and I consider, as I say, that these matters brought together do not show that the high threshold in this case under the Immigration Rules is crossed.
24. Nor do I consider that the claim can succeed under Article 8 outside the Rules. I bear in mind the points Mr Chirico referred to in his skeleton and submissions as to paragraph 276ADE(1)(vi), the delay in processing the appellant's asylum claim, the length of time she has been in the United Kingdom, her potential to make a strong positive contribution in the United Kingdom, the extremely serious violence which she has suffered in the United Kingdom and the failure of the United Kingdom to protect her from domestic violence and the need for a cooling off period in those circumstances. These do not in my view, however, amount to compelling factors in this case which are such as to render her removal disproportionate, and therefore I find that the appeal cannot succeed under Article 8 outside the Rules either.
25. For all these reasons and on all these bases the appeal is dismissed.

Notice of Decision

The appeal is dismissed.

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

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

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 20 December 2017

Upper Tribunal Judge Allen