



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00282/2018

THE IMMIGRATION ACTS

Heard at Field House
On 26 September 2019

Decision & Reasons Promulgated
On 30 September 2019

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE D HARRIS

Between

SIKANDAR AMJAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance and no legal representation
For the Respondent: Mr P Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Young ("the judge"), promulgated on 16 April 2019, in which he dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim.
2. The Appellant, a national of Pakistan born on 26 November 1990, had come to the United Kingdom on 10 November 2009 as a Tier 4 student. Following a number of extensions to his original leave, on 30 August 2016 the human rights claim was made (at no stage has the Appellant made a protection claim and no question of humanitarian protection arises in this case). This was based on the Appellant's

physical health, in particular the fact that he suffered from a severe form of ulcerative colitis, a condition affecting the colon. It was said that he had been placed on a randomised trial of a new form of biological therapy called Etrolizumab. A number of alternative treatments have been tried without success and that his condition was severe enough to warrant his inclusion in the cohort of individuals selected for the trial. The trial was “double-blind” in that participants would be randomised into treatment groups receiving either active Etrolizumab and a placebo of an alternative biological therapy, Infliximab, or active Infliximab and a placebo of Etrolizumab.

3. The Appellant asserted that he needed to continue within the trial and that its cessation (as a result of his potential removal to Pakistan) would seriously jeopardise his health. His assertions were supported, to an extent, by evidence from relevant medical professionals in the United Kingdom including those within the Inflammatory Bowel Disease Service at Kings College Hospital, London, and a medico-legal report from Professor D Silk, Consultant Gastroenterologist, dated 9 August 2018. There was also evidence from medical professionals in Pakistan, asserting that the treatment he was receiving in the United Kingdom would not be available in that country.
4. In refusing the human rights claim, the Respondent concluded that the Appellant could not meet any of the relevant Immigration Rules and that there were no exceptional circumstances in his case., It was said that relevant treatment was available in Pakistan and that in any event his removal would not have such severe consequences as to violate article 3 ECHR in light of N v United Kingdom [2008] ECHR 453.

The judge’s decision

5. For reasons of his own, the Appellant elected to have his appeal decided without an oral hearing. It appears at that stage as though the Appellant had legal representation (Pasha Law Chambers Solicitors). The representatives had prepared a bundle containing the relevant medical evidence alluded to above.
6. Before turning to a detailed consideration of the medical issue, the judge refers to N, the decision of the Strasbourg Court in Paposhvili [2016] ECHR 1113, and the Court of Appeals decision in AM (Zimbabwe) [2018] EWCA Civ 64. The judge appears to proceed on the basis that the modestly altered test in medical cases as set out in Paposhvili was applicable.
7. At paras 38-40, the judge considers the medical evidence. In summary, he notes that Infliximab was a possible alternative to Etrolizumab, which may have been of benefit to the Appellant. However, none of the medical evidence addressed this particular issue. There was nothing from Professor Silk as to why the Appellant could not be placed on Infliximab, and there was no evidence emanating from Pakistan as to whether this therapy was available in that country. As a consequence, the judge concluded that the Appellant had not shown that there was an absence of relevant treatment for his condition in Pakistan.

8. At paras 41 and 42, the judge makes an alternative finding, stating that even if Etrolizumab and Infliximab were not available in Pakistan, the Appellant had not shown that the cessation of his current treatment would result in a “rapid decline” in his health leading to “intense suffering or death”. Professor Silk acknowledged that there was no data available on the risks or rates of flare-ups of the medical condition on discontinuation of Etrolizumab, and if surgery was required, there was only a 30/40% chance of this actually occurring within a three-year period after the discontinuation. On this basis, the judge concluded that the high threshold set by Paposhvili was not satisfied.
9. Article 8 is then considered. Citing GS (India) [2015] EWCA Civ 40, the judge concludes that once the Article 3 claim failed, on the facts of the Appellant’s case it was not possible for him to succeed under Article 8. Finally, the judge concludes that there were no “very significant obstacles” to the Appellant’s reintegration into Pakistani society, having regard to the relevant familial, cultural, and social connections to that country.

The grounds of appeal and grant of permission

10. It appears as though the Appellant drafted the grounds of appeal. In summary, they assert that the judge was wrong to have reached the conclusions he did on the core medical issue. One aspect of the challenge is that the judge was wrong to have raised the apparent possibility of the Appellant taking Infliximab instead of Etrolizumab and not then have given the Appellant and opportunity to respond. In addition, it is said that further evidence had been obtained after the judge’s decision to show that Infliximab was not in fact available in Pakistan.
11. Permission to appeal was granted by Upper Tribunal Judge Grubb on 9 July 2019. His grant focuses on an arguable unfairness in the judge not giving the Appellant and opportunity to respond to the question of whether Infliximab was an alternative treatment. He also makes the point that whilst judge applied the test set out in Paposhvili, the actual test under domestic law remains that in N.

The hearing

12. The Appellant did not attend the hearing and is not legally represented in any way. By a handwritten letter dated 25 September 2019, he stated that he was suffering from a flare-up of his ulcerative colitis and was unable to attend. In support of this assertion, he attached a standard form certificate (commonly referred to as a “Med 3” form) signed by his GP, dated 25 September 2019, and confirming that the Appellant was “not fit for work” for a period of some ten days due to a flare up of ulcerative colitis. The letter goes on to request that the Upper Tribunal sends his appeal back to the First-tier Tribunal for a “new hearing” in order that he could present his case and provide additional evidence. There is no specific request for the error of law hearing to be adjourned.
13. Mr Singh opposed any implicit suggestion that the hearing should be adjourned.

14. Having specific regard to rules 2 and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we concluded that we should proceed to reach an error of law decision in the Appellant's absence. We noted that there had been a previous adjournment of an error of law hearing by Upper Tribunal Judge Canavan on 15 August 2019. This was because the Appellant was too unwell to attend. Judge Canavan made it very clear in her Decision and Directions Notice that there would be no further adjournments unless "good reasons" were given. In reaching our conclusion, we take into account the undisputed fact of the Appellant's medical condition and the possibility of flare-ups. On the other hand, the Med 3 form specifically relates to unfitness to work, not unfitness to attend a hearing. In any event, notwithstanding some concerns as to the actual ability of the Appellant to attend, as we read his letter, he has not sought an adjournment of the error of law hearing. Rather, it is implicit in the letter that he wishes us to make an error of law decision and, by way of disposal, to remit his case back to the First-tier Tribunal. In all the circumstances, it is both fair and in the interests of justice for us to determine the question of error of law at this stage.
15. We heard brief submissions from Mr Singh. He acknowledged that the judge may have overlooked an item of evidence from Dr Mohammad Usman, a medical professional from Pakistan, in which he stated that "neither" of the drugs which the Appellant was taking at the time (the doctor's letter is dated 5 December 2016) were available or licensed for use in that country. Mr Singh acknowledged that this evidence could have been referring to Etrolizumab and Infliximab. However, despite this possible error, Mr Singh submitted that it was not, in all the circumstances, material to the outcome of the appeal. The judge had wrongly applied the test in Paposhvili, when it should have been that in N. Thus, the threshold for the Appellant to have met was even higher than that applied by the judge. Further, it was submitted that even on the slightly lower threshold, the judge had been fully entitled to have reached the alternative conclusion that the evidence was insufficient for the Appellant to have succeeded.

Decision on error of law

16. We conclude that the judge has not materially erred in law such that we should set his decision aside under section 12(1)(a) of the Tribunals, Courts and Enforcement Act 2007.
17. The fact that the Appellant elected to have his appeal decided without an oral hearing did not assist him in the sense that matters arising from the evidence could not have been addressed then and there. Be that as it may, the judge was still obliged to deal with the appeal fairly and give adequate consideration to all relevant evidence before him.
18. On our initial reading of the decision, we formed the view that the judge may have acted unfairly in failing to give the Appellant an opportunity to respond to the possibility of Infliximab as an alternative treatment. With the assistance of Mr Singh, we have been directed to the letter of Dr Usman, referred to above. We are satisfied that the judge failed to have specific regard to this evidence. Given that it states that Infliximab was not available in Pakistan, this evidence was relevant to the judge's

consideration of whether that possible alternative had a bearing on the Appellant's case. In this regard, there is an error on the judge's part.

19. However, notwithstanding this error, the insuperable obstacles in the Appellant's path towards showing that it made a material difference to the outcome of the appeal are as follows.
20. First, the applicable legal test was not that under Paposhvili, but that set out in N [2005] UKHL 31; [2005] 2 AC 296 (it is of course the judgment of the House of Lords that represents the binding domestic authority, not the subsequent judgment of the Strasbourg Court). That particularly high threshold remains applicable until and unless the Supreme Court decides otherwise.
21. Second, whether in relation to his primary finding in para 40 or his alternative finding at paras 41 and 42, the judge was, in our view, entitled to conclude that *on the evidence before him*, the very exacting threshold under Paposhvili had not been met. Professor Silk's evidence was that there was a 50% chance of a flare-up within two years of cessation of the treatment. If surgery were required as an alternative treatment on the grounds that neither Etrolizumab nor Infliximab were available in Pakistan, the evidence was that there was a 30/40% chance of this occurring at three years after cessation. On the evidence before the judge, it could not be said that the fact of a colectomy would, of itself, be sufficient to meet the relevant threshold. The same applies to the possibility of developing pouchitis. Taking the judge's reasoning and conclusions as a whole and in light of the evidence, we cannot justifiably find that he materially erred in law.
22. If, as it should have been, the even more demanding threshold in N were applied to the factual matrix, the judge would have inevitably arrived at the same conclusion. Indeed, the sustainability of his decision would be that much the clearer.
23. Third, we conclude that, on the particular facts of this case, the judge was also entitled to find that once the Article 3 claim failed, the Article 8 claim (based as it was almost entirely on the medical condition) must also fail in light of GS (India). In truth, there was nothing of any substance to the Article 8 claim apart from the medical condition.
24. Fourth, and for the sake of completeness, the judge was entitled to conclude that there were no "very significant obstacles" to the Appellant's reintegration into Pakistani society, given the focus of the applicable test on a wide range of factors, not simply an individual's medical condition.
25. We wish to make it clear that in reaching our decision, we have not had regard to the additional evidence sent in by the Appellant in support of his challenge in the Upper Tribunal. The letter from Dr Usman, dated 28 June 2019, cannot inform our consideration of whether the judge materially erred in law on the evidence then before him. Having said that, there is nothing preventing the Appellant from providing the Respondent with this further evidence and requesting that it be considered on a compassionate basis. Whether that is done is not of course a matter for us.

Anonymity

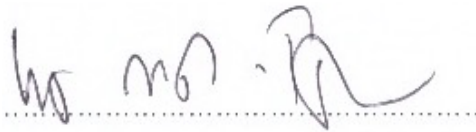
26. The First-tier Tribunal made no anonymity direction and nor do we.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal shall stand.

The Appellant's appeal to the Upper Tribunal is dismissed.

A handwritten signature in dark ink, appearing to read 'W. M. Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 26 September 2019

Upper Tribunal Judge Norton-Taylor