



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02379/2018  
HU/02389/2018  
HU/02397/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 January 2019

Decision & Reasons Promulgated  
On 29 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MFA (FIRST APPELLANT)  
MF (SECOND APPELLANT)  
MA (THIRD APPELLANT)  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr A Briddock, Counsel instructed by Lighthouse Solicitors  
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are a family of three from Pakistan. The second appellant was born on 18 June 1988. The third appellant, his wife, was born on 13 December 1985. The first appellant is the daughter of the second and third appellant. She was born on 15 August 2014.

2. The second and third appellants entered the UK in 2013 under a Tier 4 (General) Student visa which was valid until 30 September 2014. On 29 September 2014 they applied for further leave which was initially refused but then reconsidered and granted until 8 September 2016 because of the first appellant's medical condition. On 7 September 2016 the appellants applied for further leave which was refused on 27 December 2017. They appealed to the First-tier Tribunal where their appeal was heard by Judge of the First-tier Tribunal O'Keefe. In a decision promulgated on 4 October 2018 their appeal was dismissed. The appellants are now appealing against that decision.

### **Decision of the First-tier Tribunal**

3. The first appellant suffers from a rare medical condition known as Carnitine Transporter Deficiency ("CTD") and is dependent on drug therapy in the form of L-carnitine.
4. In her decision, Judge O'Keefe carefully considered the medical evidence adduced by the appellants and, based on that evidence, summarised the first appellant's condition as follows:
  - (a) The first appellant suffers from an incurable metabolic disorder and is dependent on drug therapy without which her condition will progress to further cardiomyopathy leading to heart failure and even death. However, with the drug therapy and appropriate support her life expectancy is good.
  - (b) Before the first appellant received treatment she presented with life threatening cardiac failure needing multiple resuscitations.
  - (c) Failing to take L-carnitine for one or two days would not be detrimental but anything longer than this would result in deterioration of her health.
  - (d) Maintaining the first appellant's health relies on treatment from cardiologists and metabolic specialists working together, along with the supply of L-carnitine.
5. The judge found that in 2015 the appellants travelled to Pakistan to investigate the availability of treatment. The judge stated that whilst in Pakistan they sought the opinion of Prof Dr Taeed Butt, a consultant in paediatric endocrinology, who advised the mortality rate in Pakistan for children with CTD is extremely high due to the lack of crossover of specialism in cardiology and metabolic medicine, and L-carnitine being unregistered and difficult to obtain.
6. The judge considered the evidence of Dr Grunewald, a consultant metabolic paediatrician at Great Ormond Street Hospital, who contacted Dr Afroze, an associate professor and clinical biochemical geneticist at Aga Khan University Hospital in Karachi. Dr Afroze advised that pharma-grade L-Carnitine is not available and that they relied on a nutritional supplement where purity and concentration is uncertain, which poses serious safety concerns. Dr Afroze also advised that there are no facilities to measure blood carnitine levels on site and that the testing of free carnitine is outsourced, which causes delay in receiving results

which in turn impacts on the accuracy of dosing the medication and increases the risk of unacceptable low carnitine levels that has a risk of life threatening complications. Dr Grunewald concluded that relocating the first appellant to Pakistan would pose a serious risk to her health.

7. The judge concluded that on the evidence before her it had been demonstrated that the first appellant is reliant on L-carnitine and that without it her health will deteriorate and result in the likely occurrence of serious cardiac problems. The judge found at paragraph 39 of the decision:

“Whilst the appellant may be able to access L-carnitine in Pakistan as a food supplement, the evidence provided to me by Professor Butt and Dr Grunewald, relying on information from Dr Afroze, demonstrates that the first appellant would not be able to access pharma-grade carnitine and would have to rely on importing the drug. I find that any delay in accessing the appropriate medication would be detrimental to the first appellant’s health”.

8. At paragraph 40 the judge considered the best interests of the first appellant and found that they are met by continuing to receive specialist medical care in the UK. She stated:

“The first appellant’s condition also requires supervision by both cardiac and metabolic specialists. The evidence before me demonstrates that it would be difficult for the first appellant to access such specialist medical care in one place. On the evidence before me considered as a whole, I find that it has been demonstrated that the appellant would not be able to access L-carnitine supplement in Pakistan without the delay associated in attempting to import pharma-grade supplements. Whilst there are cardiac and metabolic specialists in Pakistan, they are not in one place meaning that the first appellant would not have access to holistic treatment necessary to ensure that she is prescribed accurate and timely amounts of her medication whilst ensuring that her cardiac health is maintained. I find that her best interests are met by continuing to receive specialist medical care in the UK”.

9. The judge considered the first appellant’s claim under Article 3 ECHR. She noted that it had been conceded by the appellants that the high threshold required for Article 3 under *N v SSHD* [2005] UKHL 31 was not met. Following *AM (Zimbabwe) v SSHD* [2018] EWCA Civ 64, the judge considered whether the lower threshold in *Paposhvili v Belgium* [2017] Imm AR 867 was satisfied and concluded that it was not. At paragraph 45 the judge stated that although the appellant’s condition was likely to deteriorate in Pakistan it had not been demonstrated that “it is defined by the imminence of intense suffering or death”. The judge found that the treating doctors had not given a timescale for the first appellant’s likely deterioration, or indicated whether the deterioration would be rapid. She stated at paragraph 46:

“On the evidence before me considered as a whole, I find that it has not been demonstrated that the prognosis for the first appellant’s health falls within the test as set out in *AM* should she return to Pakistan”.

10. The judge then turned to Article 8 ECHR, directing herself to consider the Court of Appeal judgments in *SL (St Lucia)* [2018] EWCA Civ 1894 and *GS (India) v SSHD*

[2015]. She stated that an Article 8 claim is not merely an Article 3 claim with a lower threshold and that it does not provide some sort of safety net.

11. The judge referred to *MM (Zimbabwe) v SSHD* [2012] EWCA Civ 279 where it is stated that:

“The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8 is where it is an additional factor to be weighed in the balance with other factors which by themselves engage Article 8”.

12. At paragraph 52 of the decision the judge found that it had not been demonstrated that Article 8 is engaged as the first appellant’s Article 8 claim was centred entirely around her medical condition and there were no other aspects to her private life claim given her very young age. She concluded that because Article 8 was not engaged the appeal must fail.

### **Grounds of Appeal**

13. There are four grounds of appeal:
14. The first ground of appeal submits that it was perverse, based on the accepted and uncontested medical evidence, for the judge to find that there is not a real risk that the first appellant would suffer an Article 3 ECHR breach to the *Paposhvili* standard if removed to Pakistan.
15. The second ground of appeal contends that the judge failed to properly take into account the lack of holistic services available in Pakistan and the non-availability of pharmaceutical grade L-carnitine.
16. The third ground of appeal argues that the judge erred by failing to appreciate that *AM (Zimbabwe)* is authority for the proposition that the appeal should be allowed on Article 8 grounds as this case provides that where a person facing removal can show she satisfies the test in *Paposhvili* her removal should be stayed.
17. The fourth ground of appeal contends that the judge failed to consider the first appellant’s best interests when considering proportionality of her removal from the UK under Article 8 ECHR.

### **Submissions**

18. Before me, Mr Briddock expanded upon the arguments in the grounds of appeal. He argued that, based on the judge’s own findings, it was simply perverse to find *Paposhvili* was not met and that if had been found to be met, then under *AM (Zimbabwe)* the appeal should have been allowed under Article 8. Mr Briddock’s argument in this regard was that the only reason given by the judge for not finding the *Paposhvili* standard was met was that the first appellant’s treating doctors had not provided a timeline for her death in the absence of the required medication. However, in his view a timeline had been given in that the doctors had explained that if the first appellant went for more than two days without L-carnitine then her health would deteriorate and she would be at risk of further cardiomyopathy leading

to heart failure and potentially death at any time. He distinguished the case from those where patients suffered from a disease with a recognised timeline where a doctor could readily set out the likely course of events. In this case there is not a timeline as such but rather the first appellant after going for just two or three days without her required medication would face a serious risk of cardiomyopathy. He noted that before the appellant had been diagnosed and put on the correct treatment this is exactly what had happened to her.

19. Mr Briddock contrasted the factual matrix in this appeal to those in other cases where leave to remain had been sought on the basis of a serious health condition. He argued that the factual matrix in this case was in fact similar to *Paposhvili* itself. He contrasted the severity of the position of the first appellant with the appellants in *MM (Malawi) v SSHD* [2018] EWCA Civ 2482 where in his view the risks faced by the appellants were far less serious.
20. With respect to the Article 8 ECHR, Mr Briddock contended that the judge had, at paragraph 40, properly assessed the first appellant's best interests, finding that these are met by her remaining in the UK, but had then failed to factor this into the proportionality assessment. I put it to Mr Briddock that the judge had not carried out a proportionality assessment because she had not found Article 8 was engaged. His response was that reading the decision as a whole it appears that proportionality was assessed and that, in any event, it was not open to the judge to find Article 8 was not engaged given the factual findings which are not in dispute.
21. Mr Tarlow's response was that the challenge to the judge's decision is merely a disagreement and that the decision contains valid and clear reasoning. In particular, the judge found that a timescale for the accepted deterioration that would occur in Pakistan had not been given and in light of this she was entitled to find that the *Paposhvili* threshold was not met. Mr Tarlow also argued that there was no error in the Article 8 analysis because the judge found, as she was entitled to, that Article 8 was not even engaged and therefore there was no need to proceed with a proportionality analysis.

### **Error of law**

22. In my view, the decision contains a material error of law such that it must be set aside.
23. This is a case which concerns the removal from the UK of a child. Where removal of a child is contemplated the First-tier Tribunal must consider that child's best interests. Although the judge, at paragraph 40, reached a conclusion as to the first appellant's best interests - finding that "her best interests are met by continuing to receive specialist medical care in the UK" - this finding was not factored into the assessment of the Article 8 claim.
24. As is made clear in numerous higher court judgments, including, for example, *ZH (Tanzania) v SSHD* [2011] UKSC 4, the best interests of a child play a central role in an Article 8 case and are a primary (although not a paramount or determinative) consideration when removal is considered.

25. Mr Tarlow argued that the failure to consider the best interests of the first appellant when assessing Article 8 was not an error because the judge found (and was entitled to find) that Article 8 was not engaged. I disagree. The threshold for the engagement of Article 8 is not high and it is clear from the judgment of the Court of Appeal in *SQ (Pakistan)* [2013] EWCA Civ 1251 that Article 8 will ordinarily be engaged when a child has been receiving medical treatment in the UK, even for far less time than the first appellant.
26. In *SQ (Pakistan)*, the child in question, who suffered from beta thalassaemia, had been in the UK for only a very short time when his appeal was heard, and the First-tier Tribunal in that case was quick to dismiss his Article 8 private life claim. The Court of Appeal rejected the First-tier Tribunal's approach, finding that notwithstanding the short period of time the child had been in the UK the real issue was proportionality. At paragraph 24 of the judgment it states:
- “It was incumbent upon the judge to identify all features of MQ's private life which would be subjected to interference upon his removal. These were headed by the discontinuation of the treatment he is receiving in this country. It seems to me that the issue of interference admits of only one answer here and the FTT erred in coming to the contrary conclusion. The real issue is proportionality. Unfortunately, the FTT seems to have excluded health considerations and the discontinuation of the UK treatment from its *ZH* assessment. That was a material error of law”.
27. The first appellant was born, and has lived her entire life, in the UK. In light of the medical evidence it is clear that the quality and nature of her life is likely to be radically different in the UK to that which she will experience in Pakistan, and it is in her best interest to remain in the UK. In these circumstances, it was not open to the judge to conclude that Article 8 was not engaged and that a proportionality assessment was not required. As the Court of Appeal found in *SQ (Pakistan)*, where the circumstances were, in my view, far less compelling, “the real issue is proportionality”.
28. The failure to consider the proportionality of removing the first appellant from the UK, taking into account as a primary consideration that it is in her best interests to remain in the UK, was an error of law. The decision must therefore be set aside.
29. The appellants are not able to succeed on their other grounds of appeal. The judge has set out in a comprehensive and clear way the serious medical condition faced by the first appellant and the implications for her of moving to Pakistan. The judge has then applied these facts to the *Paposhvili* test.
30. In *AM (Zimbabwe)* it is explained that the relaxation in *Paposhvili* to the test for a violation of Article 3 in the case of removal of a foreign national with a medical condition is only modest. At paragraph 38 Sales LJ stated that:
- “The boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely rapid experience) of intense suffering or death in the receiving state, which may only occur because of the

non-availability in that state of the treatment which had previously been available in the removing state”.

31. It is undoubtedly the case that the first appellant will suffer significant detriment by moving to Pakistan where, *inter alia*, her parents will likely face a very difficult challenge of finding adequate medication and care. They will, for example, have to look into importing medicine and/or rely on substandard alternatives. The implications for the first appellant will be extremely serious. However, it does not necessarily follow from this that she will face imminent or rapid intense suffering or death and in my view it was open to the judge, for the reasons she gave, to conclude that the *Paposhvili* threshold was not met.

### **Remade Decision**

32. In re-making the decision my starting point is that the factual findings of the First-tier Tribunal, which are comprehensive and clear, are preserved in full. I also, for the reasons set out above, accept the First-tier Tribunal’s conclusion in respect of Article 3 ECHR.
33. The first issue to be determined is whether the private life of the first appellant engages Article 8(1) ECHR. The threshold for the engagement of Article 8(1) is not high and I am satisfied that it is met in this case, where the first appellant was born in and has lived her entire life in the UK, and where she has had extensive medical treatment in the UK that has not only kept her alive but has profoundly affected the quality and nature of her life.
34. As Article 8 is engaged, it is necessary to consider whether removing the first appellant with her parents to Pakistan would represent a disproportionate interference with her private life in the UK. This requires a balancing exercise where factors on both sides of the scales are weighed against each other.
35. As explained at paragraph 7 of *AE (Algeria)* [2014] EWCA Civ 653, which concerned the removal of a child with a serious medical condition, “everything will ultimately depend on the balancing exercise pursuant to Article 8.2.” In *AE (Algeria)*, Kay LJ stated at paragraph 9:

“It is not possible to be confident that the approach to Article 8 was free from material legal error. What was required was a structured approach with the best interests of Maya and her siblings as a primary consideration but with careful consideration also of factors pointing the other way. Such factors include but are not limited to the overstaying of the children and their mother and the illegal entry and bogus asylum claim of the appellant father. The latter is no doubt what the UT had in mind when referring to the need to maintain immigration control. Moreover, I do not consider that it would be inappropriate for the future cost and duration of Maya's treatment and care in this country to play a part in the balancing exercise as matters relating to the economic wellbeing of this country, given the strains on the public finances”.
36. A similar point is made at paragraph 27 of *SQ (Pakistan)*, where it is stated.

“I do not intend to predict or seek to influence the outcome of the present case on remittal. On the one hand, MQ can pray in aid his lawful entry and his status as a child with the protection of the ZH approach. On the other hand, he arrived with his serious medical conditions at an advanced stage and, although not an unlawful entrant, it will be relevant to consider whether his arrival here was a manifestation of health tourism. If it was, that would fall to be weighed in the balance. After all, this country is under no international obligation always to act as the hospital of the world. The difficult question is whether it would be disproportionate to remove this child in the light of all the evidence in the case, including the medical evidence which, at present, is not as clearly presented as it could be”.

37. Weighing in the first appellant’s favour is that it is firmly in her best interests to remain in the UK. Whilst the consequences of removing her from the UK are not sufficiently severe to meet the tests in *N* or *Paposhvili* they are nonetheless extremely significant. If she remains in the UK she will, on the balance of probabilities, continue to obtain an uninterrupted supply of L-carnitine and lead a full and relatively healthy life. In contrast, if she moves to Pakistan she will, on the balance of probabilities, have a precarious existence where she will be dependent on the ability of her parents to source medication in difficult circumstances and be reliant on a medical system that will not provide her with the co-ordinated and multi-disciplinary care that she needs.
38. Also weighing in the first appellant’s favour is that her parents came to the UK lawfully and have at all times been in the UK with lawful leave. Moreover, this is not a case of “health tourism”. The first appellant was born in the UK with her condition. Her parents did not move to the UK in order to take advantage of the National Health Service.
39. A further factor weighing in the appellant’s favour is that the second and third appellants, appreciating that they were not entitled to remain in the UK, diligently attempted to ascertain whether suitable treatment would be available for the first appellant in Pakistan. This demonstrates a respect for the immigration system of the UK.
40. On the other side of the scale, weighing against the appellants is that have no basis under the Immigration Rules to remain in the UK. It is a statutory requirement under Section 117B(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) to have regard to the public interest in the maintenance of effective immigration controls. As the appellants have no basis under the Immigration Rules to remain in the UK, the integrity of the immigration system weighs in favour of their removal.
41. Also weighing in favour of removal is that the appellants have family support in Pakistan and would not face any significant difficulties integrating into society. The second and third appellants would, on the balance of probabilities, be able to find work and provide for all aspects of the first appellant’s life (apart from the medical issue discussed in detail above).



42. A further factor which weighs against the appellants is that the first appellant is likely to be a significant financial burden on the NHS given the need for medical treatment, co-ordinated consultant lead care, and medication for the remainder of her life.
43. The second and third appellants are both in employment and earning incomes such that they are financially independent within the meaning of Section 117B(3) of the 2002 Act. They also speak English which is relevant under 117B(2) of the 2002 Act. Accordingly, these considerations do not count against them.
44. The other considerations in Section 117B of the 2002 Act are not applicable in this case.
45. There are factors of substantial weight weighing on both sides of the scales in the Article 8 balancing exercise. After carefully weighing all of the relevant factors - and recognising, in particular, that although the best interests of the first appellant are an important consideration they can be outweighed by other factors - I have reached the view that the proportionality assessment falls in favour of the appellants. Accordingly, the appeal is allowed under Article 8 ECHR.

### **Notice of Decision**

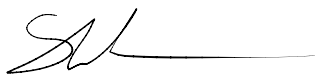
The decision of the First-tier Tribunal contains a material error of law and is set aside.

I remake the decision by allowing the appeal under Article 8 ECHR.

### **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.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 21 January 2019