



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01702/2018

**THE IMMIGRATION ACTS**

Heard via Skype for Business at Field House  
On 2 October 2020

Decision & Reasons Promulgated  
On 24 November 2020

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAMS MEYEAKHAIL GHAZNI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer  
For the Respondent: Mr S Karim, instructed by Liberty Legal Solicitors

**DECISION AND REASONS**

1. This is the rehearing of the appellant's appeal against the Secretary of State's decision of 22 January 2018 refusing asylum and humanitarian protection claims and also not accepting that the circumstances of his case meant that his removal from the United Kingdom would breach his rights under Article 8 of the European Convention on Human Rights.
2. Following the allowing of the appellant's appeal by a Judge of the First-tier Tribunal, the Secretary of State sought and was granted permission to challenge that decision, and in a decision made following a hearing on 4 December 2019 I found material

errors of law in the judge's decision and this is the remaking of the decision on the appeal. As set out at paragraph 23 of my earlier decision, it is accepted that the appellant is at risk of mistreatment which may amount to a breach of Article 3 on return to Afghanistan and that he is excluded from refugee protection or humanitarian protection.

3. Mr Clarke by agreement addressed me first. Among other things he placed reliance on guidance in the cases of Charles [2018] UKUT 00087 (IAC) and Mujahid [2020] UKUT 00085 (IAC), copies of which had been provided. Mr Clarke argued that as there was no contemplated removal and the appellant had limited leave to remain whilst there was no refusal of the human rights claim, hence there could be no appeal in the absence of such a refusal. With regard to the Restricted Leave policy, it was argued that the focus of the Upper Tribunal's jurisdiction was with regard to interference with human rights as a consequence of removal. The policy looked at circumstances in the United Kingdom. A grant of restricted leave was not an appealable decision. Section 87(1) of the 2002 Act had been withdrawn so that the Tribunal could not direct the Secretary of State to take any action to give effect to its decision.
4. It appeared that Mr Karim's case was to use the Article 3 medical findings which would bind the Secretary of State later on with regard to the Restricted Leave policy consideration. Mr Karim's skeleton identified three issues, first the issue of the concession on which the Tribunal had already ruled in the error of law decision, secondly the Article 3 medical issue and third the Article 8 and Restricted Leave policy issue. The judge had not found in the appellant's favour on Article 8 and there was no cross-appeal and no issue and it had not previously been raised as an issue.
5. With regards to the first issue, for the avoidance of doubt, with regard to the application of restricted leave in the future it was clear that any perceived concession was withdrawn.
6. The basis for the remaking was clearly set out at paragraph 23 of the error of law decision. Article 3 risk on return had been conceded but not the medical basis. The decision of the Supreme Court in AM (Zimbabwe) [2020] UKSC17 needed to be considered.
7. With regard to the case before the judge, it was quite important in relation to the grounds and jurisdiction. The asylum appeal had been withdrawn. The certification stood. The judge identified the single issue which was as set out in the summary of the appellant's representative's submissions at paragraph 39 of the judgment as to whether there were exceptional circumstances to warrant the appellant being granted indefinite leave to remain.
8. Things had moved on somewhat with regard to the jurisdiction issue. It was necessary to consider the statutory scheme as set out at sections 82 to 86 of the 2002

Act and even prior to that the description of the Tribunal's jurisdiction at section 12(4) of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal might take any decision a First-tier Judge could make if remaking the decision including findings of fact. Sections 82 to 86 made it clear that the jurisdiction was limited to the decisions under appeal and the right of appeal. It was clear from section 84 that an appeal under section 82 could only be brought on the basis that the appellant's removal would breach the United Kingdom's obligations under the Refugee Convention or in respect of humanitarian protection or that it would be unlawful under section 6 of the Human Rights Act 1998. Only the latter of these now applied, as the asylum appeal had been withdrawn, so it should be questioned whether there was a human rights refusal before the Tribunal. If so, it was the only ground of appeal.

9. It was clear from section 84(c) that jurisdiction was defined by the fact that removal would be unlawful under section 6 of the Human Rights Act. Section 85 set out matters to be considered, but that went back to the right of appeal. Section 86 was concerned with the obligation of the Tribunal to determine any matter arising. So, there was a clear focus as to the jurisdiction and that was whether removal would be unlawful under section 6 of the Human Rights Act.
10. As to whether there was a human rights decision, paragraph 88 of the refusal letter of 22 January 2018 addressed this. There would be no further grant because of the appeals process. The Specialist Appeals section of the Home Office confirmed this. So currently the appellant had section 3C leave but since it was accepted that he would face Article 3 risk there was no intention to remove. It was necessary to appeal the refusal of the human rights claim and show that removal was unlawful.
11. The headnote to Mujahid at paragraph 1 was of relevance. That made it clear that a person in the United Kingdom who made a human rights claim was asserting that he or she or someone connected with them had, for whatever reason, a right recognised by the ECHR which was of such a kind that removing them from or requiring them to leave would be a violation of that right. That was on all fours with the current scenario. The appellant had limited leave to remain and he disliked that and had an Article 3 claim on a different basis. It was thought that that could lead to indefinite leave to remain. It was relevant to consider subparagraph 2 of the headnote to Mujahid. There was no refusal of a human rights claim in this case. The appellant placed reliance on a medical condition and this was to be reconsidered by submitting evidence to the Secretary of State in any future reconsideration of leave. There was no human rights refusal as leave had been granted. If the appellant disliked the policy under which the grant had been made, then it was challengeable by way of judicial review.
12. Mr Clarke also argued that weight should be attached to paragraphs 31 and 32 in Mujahid. In particular, at paragraph 32 it was said that the refusal of a human rights claim made by a person in the United Kingdom could occur only where the Secretary of State's case in response to the claim was that she did not consider her obligations

under section 6 to require her to respond to the claim by recognising the human right to remain in the United Kingdom and so granting the individual leave to remain. The appellant had obtained status via a human rights claim, so there had been no refusal of a human rights claim in this appeal.

13. With regard to the Restricted Leave policy, when one looked at the issue of removal, even if it was not agreed that there had not been a refusal of a human rights claim, the policy simply could not bite in a statutory appeal. The Tribunal could not direct the Secretary of State to apply the policy in a particular way. The grant of leave was not appealable. Nor could the Secretary of State be directed to make findings, as section 87 had been withdrawn.
14. As regards the decision in Charles, reference was made to paragraphs 46 to 48 if the Tribunal did not agree with Mr Clarke's argument about jurisdiction. As a matter of statute, what type of leave the appellant got was irrelevant to how removal would violate his human rights. At page 23 of the policy it was said that those granted restricted leave might claim a breach of their rights with regard to Article 8 protection. Mr Clarke relied on the point that the focus was specific to their circumstances in the United Kingdom and the test of exceptionality. There was distinct consideration for that in an appeal looking at the circumstances following removal. The Tribunal's jurisdiction did not bite on the Restricted Leave policy. Therefore, what type of leave the appellant might get was irrelevant to how removal would affect his human rights. A grant of restricted leave precluded removal.
15. With regard to paragraph 48 in Charles, what was said about hypothetical removal had to be seen in the light of the more recent decision in Mujahid. It qualified the effect of the absence of an intention to remove on an appeal. The word "hypothetical" could be variously interpreted.
16. In the alternative, if the Tribunal disagreed with regard to Article 3 and Article 8, Mr Karim would argue with respect to the medical evidence but the only evidence the Tribunal had was fairly historic. The appellant's condition was not chronic. He suffered from PTSD, anxiety and depression. There was the Helen Bamber Foundation Report from 2014 and the psychiatrist's report from March 2018. There was no current evidence and it should be questioned whether the conditions still presented themselves and what the prognosis was. The real risk test as set out in AM was not met concerning serious, rapid and irreversible decline. It was accepted that the appellant would be ill-treated to the Article 3 level whether he had medical conditions or not. Torture would meet the AM test. Article 8 was not raised and it included physical and moral integrity and that standard would be met if the Article 3 claim were accepted, as it was. But it did not help the appellant. The Restricted Leave policy process was separate and it allowed him to make a future application on up-to-date evidence as to whether there were exceptional circumstances. Mr Clarke argued that that made no difference. There was no refusal of a human rights claim, so no reason to consider an Article 3 medical claim.

17. In response, Mr Karim said that the jurisdiction point had only been raised today but he would deal with it. It was necessary to look at the decision appealed. It was clear from page 2 of the decision that it was a refusal under Article 8 but restricted leave was granted. A right of appeal was stated at page 3 and also with the section 120 statement. No issues had been raised about jurisdiction there nor previously before the Upper Tribunal. With regard to Mr Clarke's argument that there had to be a refusal of a human rights claim and in considering whether there had been such a refusal, the argument was that jurisdiction was limited to whether there would be removal. The grant was not a human rights grant made under a policy and that was clear. This contrasted with the situation discussed at paragraphs 30 and 32 of Mujahid. The focus was on the situation where indefinite leave to remain was applicable on an Article 8 basis, but rather from a lesser period of leave and there were still Article 8 grounds and it was deemed not to be a refusal of an Article 8 claim. That was the position before the Tribunal. There was a refusal of a human rights claim or claims in this case. There was the Article 3 medical issue and also a paragraph 276ADE issue on moral and physical integrity. Hence there was a human rights refusal and no grant of leave with respect to any of those but just a grant under the Restricted Leave policy. Bearing in mind what was said in Mujahid and the Secretary of State's duties under section 6 of the Human Rights Act and the provisions of the 2002 Act at section 82, there had to be a refusal of a, not the human rights claim and there had been such a refusal.
18. As regards Mr Clarke's point in connection with section 84, the only ground of appeal available when there was a removal decision, that would mean that in all entry clearance cases the fact that they involved family reunion as there was no removal would not apply and that could not have been intended. So, the phrase "removal would be in breach" had to be more widely viewed. The Tribunal was referred to what had been said in Baihinga [2018] UKUT 90 (IAC), which confirmed what Mr Karim was arguing. There could be a human rights claim when entry clearance was refused.
19. There was also the reference to hypothetical removal at paragraph 48 in Charles. If there was no intention to remove, then why grant only six months. It was necessary to deal with hypothetical removal at the end of the six month period. Paragraphs 59 and 65 of Charles were also relevant on the point.
20. It was also relevant to bear in mind what had been said in Balajigari that the provisions engaged Article 8 although there was no actual removal decision. The grant of leave was made under a policy, not on a human rights basis and the appellant argued with regard to the 2018 decision that hypothetical removal would interfere with the Article 8 claim. Article 8 had been pursued below.
21. Mr Clarke made the point that it was a conclusion in the appellant's favour and that it had not been challenged.

22. Mr Karim continued, arguing that the decision was silent on Article 8, so it could not be there to be dismissed or abandoned. The situation in Mujahid was very different. There was an Article 8 application and the appellant had obtained Article 8 leave on a different basis. Here there had been no grant in respect of Article 3 medical rights or Article 8 but under the policy. Taken all together, the decision gave a right of appeal and on balance, on the authorities there was jurisdiction, so the subsequent arguments needed to be addressed.
23. As regards the concession argument, it was the case that the point had previously been considered as Mr Clarke had said, but the question was whether there was a concession as to the law, separate from one on the facts. The Presenting Officer at the First-tier Tribunal hearing had made several factual concessions with regard to the appellant's circumstances and was recorded as making a concession with regard to the medical conditions but that did not mean that the child should be granted leave but there was paragraph 70 also and also the reference at paragraph 10 of the skeleton.
24. With regard to the Article 3 medical claim the law had moved on in the form of AM (Zimbabwe). Whilst there had been an error of law by the judge, now the decision was being remade and the Tribunal could conclude that the earlier decision was correct and AM confirmed the law as it always had been. As regards Mr Clarke's point that the evidence was historic, the judge had accepted that the condition of the appellant was serious and there was no challenge to his findings of fact and there was no need to update evidence, this had not been directed and there was no challenge to the factual findings.
25. As regards the third point, the judge had not addressed Article 8 although it was a ground of appeal pursued before her. Having regard to all the factors set out at paragraph 20 of Mr Karim's skeleton, the Tribunal could conclude that any hypothetical removal would fall under paragraph 276ADE or Article 8. As there would be torture, that the medical claim was made out did not automatically follow and there could be a person who could resist torture in contrast to the appellant and it would not always follow. The physical step of removal could cause severe mental distress. On the facts of the case, on each basis the appellant succeeded, either Article 3 or Article 8.
26. By way of reply, Mr Clarke argued that with regard to the reference to a right of appeal in the decision letter, at that stage it was a refusal of a particular claim which had been withdrawn at the appeal. The right of appeal did not signify, it was a question of the statute. As regards the contrast made between leave under a policy and refusal of a human rights claim, leave was always granted under a policy. The refusal letter conceded Article 3 and granted leave on that basis. As to removal and whether it had to be hypothetical or not, Mr Karim did not address the argument that Charles was inconsistent with Mujahid but argued for the former. Charles was an in-country case but the claim was originally certified but in Mujahid it was clear that there had to be a removal. If the appellant were abroad and an entry clearance

application was made or setting aside a deportation order, that was where the hypothetical removal came in. It was a question of whether there was continued exclusion or removal and it still needed a removal or an intended removal.

27. By way of reply, Mr Karim argued that on the last point, a grant of six months' leave under a policy, whether otherwise a person would get longer, this envisaged some intention of a removal and if not, it should be questioned why indefinite leave to remain would not be granted or a longer period. A possible removal was envisaged. There could be a removal if there was a change of circumstances and hence the idea of a hypothetical removal. The decisions were not in conflict but were looking at different scenarios. As regards the argument that all leave was made under a policy, Mr Karim was not sure about this. If a person satisfied the Rules they would succeed on that basis. Policies were for cases outside the Rules. It was clear that if hypothetical removal were included, then it applied here.
28. I reserved my decision.

## **Discussion**

### **Jurisdiction**

29. The Secretary of State's argument on this point as I understand it is that the appellant has been granted restricted leave to remain and there is no proposal to remove him, and as a consequence the Tribunal does not have jurisdiction to consider his claim since a right of appeal only exists where the Secretary of State has decided to refuse a human rights claim and the appeal is on the basis that the appellant's removal from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.
30. As pointed out by Mr Karim, the decision letter of 22 January 2018 refers to the refusal to grant asylum, or humanitarian protection, on the basis that in each case the appellant fell to be excluded from the protection of the Refugee Convention or from a grant of humanitarian protection. It was also concluded that the circumstances of his case did not mean that his removal from the United Kingdom would breach his right to respect for family and private life under Article 8. It was, however, decided that he should be granted restricted leave.
31. I am grateful to Mr Karim for providing a copy of the Secretary of State's guidance on restricted leave. The only passage of this actually quoted to me was by Mr Clarke with regard to Article 8 claims in respect of duration of leave and conditions and the Secretary of State's approach in that case.
32. Mr Clarke placed his reliance on what was said by the Upper Tribunal in Mujahid. In that case the appellant applied for indefinite leave to remain based on ten years' long residence by reference to paragraph 276B of the Immigration Rules. The appellant was instead told that he would fall to be granted limited leave to remain

for 30 months on the basis of exceptional circumstances were he to make a valid application for such leave. He paid the immigration health surcharge and was subsequently granted limited leave to remain for 30 months. He appealed this decision.

33. A Judge of the First-tier Tribunal was satisfied that the appellant did not have a right of appeal to the Tribunal and the matter came before the Upper Tribunal as a consequence of judicial review proceedings.
34. As noted above, it was concluded by the President that, as was said at paragraph 31, the presumed removal of an individual from or the presumed requirement on that individual to leave the United Kingdom was an essential element in order for there to be an appeal, given the definition of "human rights claim" in section 113(1) of the 2002 Act. The President went on to say that a person who makes a human rights claim is asserting that they or someone connected with them have, for whatever reason, a right recognised by the ECHR which was of such a kind that removing them or requiring them to leave would be a violation of that right. In the case of a qualified right, such as Article 8, a violation might result from the fact that it would be disproportionate to remove or to require the person to leave. Accordingly, the refusal of a human rights claim made by a person who was in the United Kingdom could occur only where the Secretary of State's case in response to the claim was that she did not consider her obligations under section 6 of the 1998 Act required her to respond to the claim by recognising the human right to remain in the United Kingdom and so granting the individual leave to remain.
35. I agree with Mr Karim that the context here is significantly different from the situation before me. The appellant in Mujahid was simply granted a lesser degree of leave than the degree of leave which he had sought. It was not a case where the Secretary of State took the stance that she was not obliged by section 6 of the 1998 Act to respond to the claim by granting leave. She granted leave under the Restricted Leave policy, as a matter of discretion.
36. An appellant is entitled to appeal to the Tribunal where as in section 82(1)(a) the Secretary of State has decided to refuse a protection claim made by him and also under (b), the Secretary of State had decided to refuse his human rights claim. It is clear that the appellant in this case appealed not only the protection decision but also the human rights decision, as can be seen from the judge's decision.
37. I do not think it can properly be said that the absence of a removal decision means that there is no jurisdiction for the Upper Tribunal to consider this appeal. The fact that under section 82(1)(c) an appeal must be brought on the ground that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 does not exclude the question of a hypothetical removal which was directly referred to, for example at paragraph 48 in Charles. It was said there that the issue is whether the hypothetical removal or requirement to leave



would be contrary to Article 8. The point was emphasised at paragraph 59 and again at paragraph 65.

38. My conclusion on this point is that the Tribunal does not lack jurisdiction and there is nothing in the legislation or in Mujahid to the contrary.

### Concession

39. Mr Karim's argument on this point is that as the respondent made a concession before the First-tier Tribunal and has not resiled from that concession there is no good reason to ignore it. It is argued that the concession was not in respect of the law but in terms of the facts of the case and the application of those facts to the Restricted Leave policy of the Secretary of State. It is recorded at paragraph 38 of the judge's decision that the Presenting Officer before her accepted that three years' leave would give the appellant the certainty that he required for his mental health and recognised that six months' leave was not enough for him to obtain employment or provide him with the stability that might be required to aid his recovery. The Presenting Officer is recorded as saying that the key issue was whether the appellant should have been granted the normal period of leave that was granted for medical cases and accepted that the appeal could be allowed on that basis.
40. At paragraph 63, which formed part of the judge's reasoning, she noted that the Presenting Officer had accepted that six months' rolling leave was problematic, first because an applicant is usually unable to obtain employment since he only has leave to remain for six months and secondly there may often be a sense of instability. The Presenting Officer, she said, had accepted that the lack of stability might not aid the appellant's recovery and submitted that the normal period of leave granted to applicants relying upon Article 8 medical applications is three years and that after the three year period they are normally offered a further period of leave to remain followed by indefinite leave to remain.
41. As I said at paragraph 21 of my error of law decision, I do not accept that this can be said to be a concession made on behalf of the Secretary of State. As I noted there, the inherent difficulties in the six months' rolling leave are inherent in the policy itself and no particular difficulties peculiar to this appellant had been identified in what was said there. I do not consider that the Presenting Officer can be said to have done anything more than note the difficulties attaching to the lesser period of leave where restricted leave is granted rather than the clear advantages over that to an appellant of three years' leave, but on my reading of what is recorded of his submissions, this falls well short of a concession that the case was an appropriate one for three years' leave to be granted.

### Article 3 Medical Claim

42. The judge followed the reasoning in Paposhvili v Belgium (Application No 41738/10) in concluding that in the absence of appropriate treatment in the receiving state the appellant would be exposed to a serious, rapid and irreversible decline in his mental health which would result in intense suffering. She concluded that the case did not meet the threshold set out in such authorities as N [2005] UKHL 31 or what had been said by the Tribunal in GS and EO [2012] UKUT 00397.
43. Events have moved on of course, and now we have the guidance of the Supreme Court in AM (Zimbabwe), which essentially adopts the Paposhvili test. Although it may be that the judge was wrong as a matter of law at the time as to what she concluded was the appropriate test, it is now the case that that is the applicable test.
44. The judge had before her a report from the Helen Bamber Foundation of 30 July 2014, stating among other things that the appellant was suffering from moderately severe PTSD with depressive features caused by the torture which he had suffered, details of which are set out in particular at paragraphs 52 to 54 of the judge's decision, amounting to a large number of scars resulting from such matters as shrapnel wounds and beatings.
45. The judge also considered the psychiatric report of 2 March 2018 by Dr Clive Timehin, who stated that the appellant suffered from severe post-traumatic stress disorder and depression, set out the medication that the appellant was on and stated that he would need trauma-focussed CBT to help aid his recovery. He needed ongoing psychiatric treatment and support even after psychological therapy had been completed. He said that the prognosis in PTSD associated with psychosis is not as good as uncomplicated PTSD and this meant that the appellant was prone to relapses of depression and anxiety and impairment in his resilience and coping with stressful life events. If he was detained and threatened with deportation he was very likely to decompensate into a severe psychotic state and there could be a risk of harm to him. He was not fit to travel to Afghanistan as the prospect of this would make him relapse quickly and develop a resistance to treatment and increase the likelihood of an incomplete recovery and further impairment in his functioning and quality of life.
46. I do not agree that it is simply a matter of restoring the judge's conclusions in light of the fact that as it turns out she was correct in the legal test that she applied. The decision is being remade and that has to take into account, as Mr Clarke pointed out, the relative age of the medical reports and more significantly the fact that there is nothing more recent than 2 March 2018 concerning the appellant's health. The Paposhvili test involves the need to show substantial grounds for believing that the person, 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.

47. It does not seem to me that the evidence demonstrates that this high threshold is crossed in this case. Certainly, the medical evidence shows significant mental health problems experienced by the appellant, but the fact that the evidence is more than two and a half years old does not assist the appellant nor does it assist me in coming to a conclusion, but I consider that even if the state of his mental health is as it was as described in March 2018, it falls clearly short of the AM (Zimbabwe) test. Accordingly, the Article 3 claim does not succeed.

### Article 8

48. The question here is whether there are other reasons under Article 8 with reference to the policy as to why the appeal should be allowed and a finding be made that more than six months' leave should be granted. Mr Karim quoted from MBT [2019] UKUT 414 (IAC), where it was said as follows:

"However, Article 8 may be engaged by a decision to refuse to grant indefinite leave to remain where, for example, the poor state of an individual's mental and physical health is such that regular, repeated grants of restricted leave are capable of having a distinct and acute impact on the health of the individual concerned."

49. He also quoted from MS [2015] UKUT 539 (IAC), where the following was said:

"There is sufficient flexibility within the RLR policy for decision makers to depart from the usual rule of only granting RLR for a maximum of six months at a time and of imposing the conditions described."

50. It is clear, as was also said in the headnote and quoted by Mr Karim, that very strong evidence is needed to prevail over the public interest and public protection considerations which are given effect in the three purposes of the RLR policy so as to make it unreasonable for the respondent not to grant RLR for more than six months or not to impose the usual conditions.
51. Mr Karim prays in aid the following points. First, the medical circumstances, second, the acceptance by the respondent in the First-tier Tribunal that having longer periods of leave would aid in the appellant's recovery, third, the evidence contained in the appellant's witness statement, especially at paragraphs 12 to 17, detailing his health problems and the views of Dr Timehin, which, inter alia, contain the diagnosis of severe PTSD and depression, fourth, the historic nature of the ill-actions of the appellant (although in his statement he said this was due to duress) and fifth, the current pandemic and its consequences on society and the inability to work/obtain support that six months' leave normally entails.
52. I have considered these circumstances individually and together. I consider that they fall well short of being such as to make out an Article 8 claim that can succeed. There are individual circumstances of relevance but they do not, in my view, amount to

very strong evidence such as to make it unreasonable for the respondent not to grant RLR for more than the usual six month period. There is no up-to-date evidence that regular, repeated grants of restricted leave are capable of having a distinct and acute impact on his health.

53. Accordingly, the Article 8 argument does not succeed.

**Notice of Decision**

This appeal is dismissed.

No anonymity direction is made.



Signed

Date 5 November 2020

Upper Tribunal Judge Allen