



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08052/2019 (P)

THE IMMIGRATION ACTS

Decided without a hearing under rule 34
On 15 June 2020

Decision & Reasons Promulgated
On 23 June 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

N V
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah instructed by Greater London Solicitors Ltd
(written submissions)

For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer (written
submissions)

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure of publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Sri Lanka who was born on 10 April 1993. He arrived in the United Kingdom, aged 15, on 12 May 2008 as an unaccompanied minor. He claimed asylum on 14 May 2008. On 5 November 2008, that application was refused but, due to his age, the appellant was granted discretionary leave until 9 October 2010. The appellant's leave then expired and he overstayed.
3. The appellant's immigration history thereafter is not entirely clear but is set out in paras [6]-[12] of the First-tier Tribunal's decision.
4. On 18 August 2012, the appellant was arrested on suspicion of having committed robbery and possession of a firearm. His immigration status was discovered and he was subsequently served with notice that he was subject to removal as an overstayer. He was again arrested on 2 November 2012 for drunk and disorderly.
5. On 9 November 2012, the appellant was convicted at North West London Magistrates Court on two charges of criminal damage and sentenced to a community order, a curfew with a tag imposed and he was ordered to pay compensation of £100.
6. On 10 January 2014, the appellant's (then) representatives contacted the Home Office in an effort to regularise the appellant's immigration position. However, on 16 December 2014, the Secretary of State maintained the refusal of his claim for asylum based upon his claim that his father had been involved or suspected of having been involved with the LTTE in Sri Lanka.
7. Shortly after, on 17 December 2014, the appellant was detained. Further representations were made by his legal representatives on 18 December 2014 and 9 January 2015. On 20 March 2015, those representations, relying on the country guidance decision in GJ and others Sri Lanka CG [2013] UKUT 00319 (IAC), were rejected on the basis that they did not give rise to a 'fresh claim' under para 353 of the Immigration Rules (HC 395 as amended).
8. On 5 March 2018, the appellant's present legal representatives made further representations on his behalf claiming asylum on the basis of his *sur place* activities. The appellant was interviewed on 18 June 2018.
9. On 22 January 2019, the Secretary of State again refused the appellant's asylum claim with an in-country right of appeal. The appellant appealed against that decision but the respondent's decision was withdrawn on 12 March 2019 before the appeal hearing could take place.
10. The respondent made a new decision, again refusing the Appellant's claims for asylum, humanitarian protection and under the ECHR on 8 August 2019.
11. The appellant again appealed to the First-tier Tribunal. In a decision sent on 14 October 2019, Judge Davidge dismissed the appellant's appeal on all grounds.

12. Initially, permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal. However, on 6 January 2020, the Upper Tribunal (UTJ Jackson) granted the appellant permission to appeal on two of the three grounds set out in the grounds of appeal but refused permission on a third ground.

Decision Without a Hearing

13. In the light of the COVID-19 crisis, in directions dated 1 April 2020 (and sent by email on 4 May 2020), I indicated that my provisional view was that the error of law issue (and whether the decision should be set aside if an error of law was established) could be decided without a hearing on submissions.
14. In response to those directions, Ms Jegarajah, on behalf of the appellant made written submissions both on the error of law issue and, although the directions did not invite this, on the proper disposal of the appeal if the decision were to be remade.
15. On behalf of the respondent, Ms Fijiwala made written submissions on the substance of the error of law issue.
16. Both representatives were content that, at least the error of law issue, should be decided without a hearing on the basis of the papers and submissions before me.
17. In the light of that, I have decided that it is fair and just to deal with the error of law issue without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

The Judge's Decision

18. Before Judge Davidge, the appellant's case was focused by his counsel (Ms Jegarajah) upon a claim based under Arts 3 and 8 of the ECHR that, due to his mental health, there was a real risk that he would commit suicide *in the UK* on discovering that he was to be removed. That, taken together with his relationship with an adult friend with whom he lived (Mr T), would also amount to a breach of Art 8, in addition to a breach of Art 3 of the ECHR.
19. Before the judge, Ms Jegarajah did not seek to rely upon the underlying asylum claim which the Secretary of State had previously rejected whether based upon the appellant's claim that his father had been involved with the LTTE in Sri Lanka or upon the appellant's own *sur place* activities in the UK (para 13 of the determination).
20. Further, Ms Jegarajah both in her oral submissions and written submissions before the judge focused the Art 3 and Art 8 claim as one based upon "domestic Arts 3 and 8 grounds" (see para 13 of the determination). In other words, Ms Jegarajah placed no reliance upon any risk to the appellant, whether of committing suicide or otherwise, on return to Sri Lanka itself. Indeed, the judge recorded that Ms Jegarajah was not "arguing that the appellant would be unable to obtain treatment in Sri Lanka" (para 14 of the determination). Instead, as I have said, she focused the claim upon the impact upon the appellant *in the UK* if he were to be removed to Sri Lanka.

The appellant's claim, as particularised by Ms Jegarajah, is set out at length at para 15 of the judge's determination.

21. In para 21 the judge said this:

"In respect of Art 3, the threshold of harm in the context of health cases is high, it was not argued in the grounds of appeal or before me that the medical evidence established an Art 3 claim in the context of treatment for the appellant's mental health in Sri Lanka, and on my consideration it does not."

22. At para 22 the judge added this:

"Ms Jegarajah, in her skeleton argument relied upon in submissions, argues the domestic Art 3 case in the context of a risk to the appellant's mental health arising in the United Kingdom during his detention and removal. The submission is that the Art 3 threshold is reached by a combination of harm having been caused to the appellant as a result of the state's previous failure to safeguard and protect him, and by maintaining removal knowing the harm that will be caused."

23. At para 23, the judge made findings rejecting the appellant's Art 3 claim as put on his behalf as follows:

"The argument, set out between paras 32 to 34 of the skeleton argument, lacks coherence. The expert's reports prepared for and relied on in the bail hearing and in the appeal reference detention as having an adverse effect on the appellant's mental health but that is an insufficient basis upon which to mount this extended submission which, at its root, is speculative. The proposition, of future harm based on a lengthy detention because of an inability to establish the appellant's nationality and identity to the satisfaction of the SLHC, is speculative. The argument fails to take account of either the bail provisions or the evidence from the Home Office records that on 14 February 2018 the SLHC confirmed their preparedness to issue an emergency travel document. Ms Jegarajah's submission, that I should give no weight to the screen shot evidence of the respondent's referring to the telephone call with the SLHC, and find the appellant stateless because there is nothing from the SLHC directly confirming that they have confirmed his identity and are prepared to recognise his nationality and issue a travel document to enable him to return, because the respondent can write what it likes on its computer records, is without merit."

24. In para 23 it is clear that the judge accepted the evidence from the Home Office that the Sri Lankan High Commission (the SLHC) accepted the appellant was a citizen of Sri Lanka and were prepared to issue an emergency travel document for him to travel to Sri Lanka.

25. Further, at para 32 of her determination, taking that evidence forward, the judge found that the appellant had failed to establish, as Ms Jegarajah had submitted, that he was stateless.

26. I should say at this stage that the ground that challenged this finding was the ground upon which UTJ Jackson refused the appellant permission to appeal. It was properly not pursued in Ms Jegarajah's written submissions. I see no basis upon which it could be successfully challenged. The judge was clearly entitled to rely upon the evidence presented by the Home Office in the form of its records of contact with the Sri Lankan High Commission.

27. Turning to the judge's consideration of Art 8, having set out the relevant law at paras 24-29 of her determination, the judge set out a number of "undisputed facts" at para 30(a)-(g) as follows:

- "(i) The appellant is Sri Lankan and has the identity claimed.
- (ii) The appellant has the immigration history I have set out.
- (iii) The appellant does not have a partner or a child.
- (iv) The appellant does not satisfy any of the immigration rules giving him any entitlement to remain.
- (v) The appellant has a diagnosis of post-traumatic stress disorder/anxiety.
- (vi) The appellant is an overstayer who made no effort to regularise his status when an adult; and
- (vii) The appellant has criminal convictions."

28. At para 31, the judge identified two areas of factual dispute: (i) whether the appellant was stateless; and (ii) whether the appellant enjoyed family life with Mr T. As I have already indicated, the judge found (at para 32) against the appellant on (i) and that is now beyond challenge.

29. As regards (ii), at para 33 the judge said this:

"Family Life

33. The evidence of Mr T is that, having been released to section 4 accommodation in Cardiff in 2015, the appellant felt too alone to stay there as he did not know anyone, and contacted Mr T, who went and picked him up and took him to London. He has lived with him ever since and was bailed to his address in 2018. I note from the psychological reports that on both occasions when the appellant has been interviewed by Dr Hilari he has been accompanied by his friend, and much of the information is apparently reported by him. Even allowing that the appellant receives significant support from his friend, as reflected in the information provided to Dr Hilari and observed by Dr Hilari in terms of their interaction during the two interviews, the limited evidence does not establish a relationship with a character and quality of a family relationship. This is not a blood relationship extending back to birth. It is common in the context of the 26 years lived by the appellant, a relatively recent relationship. It only arose as an adult and was formed when the appellant was here unlawfully. Rather, I find it is a relationship which is a significant part of the appellant's private life, as he has developed it in the UK, and can be adequately encompassed as part and parcel of the appellant's life in that context. A holistic assessment of the proportionality removal must encompass the factual matrix of the relationship between the appellant and Mr T."

Pausing there for a moment, the judge found that although the relationship between Mr T and the appellant did not amount to "family life" so as to engage Art 8, it nevertheless was a relationship, the nature of which was, that amounted to a "significant part of the appellant's private life" so as to engage Art 8 and had to be taken into account, as the judge put it, as part of the "factual matrix" when assessing proportionality.

30. At paras 34 – 35, the judge considered the evidence of Mr T. It is fair to say that she was not impressed by him as a witness upon whose evidence she could rely. The judge said this:

“34. Mr T told me that he had tried but was unable to find the appellant’s family when he went to Sri Lanka. Mr T told me that he would be unable to provide any significant financial support to the appellant were he to return to Sri Lanka. Pressed to explain this apparent inconsistency with the level of support he currently provides, he explained that because the appellant is living as part of his household it does not result in any significant expenditure. I found his evidence did not sit well with the description of the devoted support he offers the appellant now further much was made by Ms Jegarajah, that, having had a significant criminal record in the past as shown by his PNC, Mr T had completely turned his life around, and is now a successful businessman with a healthy bank balance from a sizeable business operating 6 shops in and around London, and keen to help the appellant, in the context of his criminal record, to turn his life around.

35. I found his evidence had the hallmarks of expedience directed more to his friendship with the appellant and the benefits, as he perceived them to be at the time, than to providing a full and accurate account, and I found I could place no reliance on his evidence.”

31. The judge then went on in paras 36 – 37 to make a number of findings significant to the application of Arts 3 and 8 of the ECHR as follows:

“36. The appellant has been here since 2008, having left the country aged 15. He is now 26 and has mental health problems, identified when he was in detention in 2017 and for which he is receiving counselling in which the medical information indicates will not respond fully to treatment whilst he is concerned about his immigration status. I paused to note the absence of any evidence of the appellant suffering mental illness prior to 2017, and the fact that a sur place application at the time indicates that the appellant has had a significant period of much higher functioning than now reported and observed. The evidence does not establish when his functioning became so reduced.

37. It was not argued before me that the appellant would be at any risk on return to Sri Lanka. I find that I can place no reliance on the bare assertions of an absence of family support in Sri Lanka. The appellant has provided evidence by way of a UNHCR letter which shows his father as having been in Pakistan, at least at one stage, and there is nothing to explain the absence of information subsequently. The production of the letter implies family contact. It has never been suggested that the appellant’s mother is anywhere other than in Sri Lanka. Although Mr T will not be physically present, the appellant will have his mother. I find that he will be able to obtain medications and appropriate health treatment and care. Mr T told me he had visited Sri Lanka recently and I find he will be able to visit the appellant if he chooses. I am satisfied that the appellant will also have the financial support of Mr T. I find that he will not be a person without accommodation or resources. The appellant is familiar with the culture having lived there until 2008. I am satisfied, and it was not argued otherwise, that he will be able to integrate there.”

32. Then in paras 38 - 42 the judge dealt with the contentions made on behalf of the appellant that the appellant had been let down by social services and by the respondent in failing to carry out her tracing obligations. The judge rejected both

contentions. So far as relevant to the issues I have to decide paras 41 and 42 are in the following terms:

- “41. That the appellant was granted immigration bail at a time when there was no imminent prospect of removal because of a late made application for asylum on sur place grounds does not show that the respondent unlawfully detained the appellant. Albeit the medical evidence is that detention exacerbated his symptoms, that does not establish that the respondent knew of, or was responsible or culpable in the context of, the mental health issues then identified.
42. The anticipated failure of the respondent to prevent further deterioration in the appellant’s mental health in the context of the time he will spend here prior to removal has not been made out for the reasons I have already given.”

33. That latter reference in para 42 is a reference back to the judge’s findings, rejecting the submissions made on behalf of the appellant, that he would be detained pending removal as he was stateless and no emergency travel document could be obtained.
34. Then at paras 43 and 44, the judge went on to apply her findings to Art 8 and concluded that the appellant’s removal would be proportionate.
35. First, the judge found that “private but not family life exists in the UK” (para 43).
36. Second, the judge found any interference was proportionate (para 44):

“As conceded, I find that the requirements of the domestic private life rules at para 276 are not met. I give significant weight to the public interest in his removal as a person who does not have any rule-based entitlement (sic) to remain. In terms of the other s117 factors, the respondent did not dispute that the appellant has good enough English to facilitate integration into the UK, and that he will be able to continue to be financially independent by relying on Mr T. Accordingly, nothing adverse flows from the financial and language position. There was no dispute before me that the appellant had at best precarious immigration status until October 2010 when his status became unlawful. I give some weight to his relationship with Mr T which has been significantly beneficial to him since 2015. There is no merit in the statelessness point. I do not find any significance in the past harm points raised on his behalf. I have conducted a balance sheet assessment. This is a case where significant weight attaches to immigration control. I find the positive factors are outweighed by the negative. In short this is not a case where removal would place the UK in breach of Article 8 obligations.”

37. As a consequence, the judge dismissed the appellant’s appeal on the only two grounds relied upon, namely under Arts 3 and 8 of the ECHR.

The Appellant’s Challenge

38. The appellant relies upon three grounds in his grounds of appeal which are numbered 2, 3 and 4. More appropriately, I will call these grounds 1, 2 and 3.

39. Ground 1, seeks, in essence, to argue that the judge had failed properly to apply the Court of Appeal's decision in J v SSHD [2005] EWCA Civ 629 in assessing the appellant's claim under Art 3 (in particular) that he was at real risk of committing suicide. The ground places some reliance upon the Strasbourg jurisprudence, in particular the case of Paposhvili v Belgium [2017] Imm AR 867. It places reliance upon the Strasbourg court's view that Art 3 entails a procedural requirement that the respondent should undertake investigations as to the access to care and the existence of social and familiar networks (as the grounds put it) in the receiving state, namely Sri Lanka. Further, reliance is placed upon the expert evidence of Dr Hilari that there is a significant risk of suicide in the UK when the appellant is informed of his removal.
40. Ground 2, as I have said, concerned the judge's finding that the appellant was not stateless and permission to challenge that finding was refused by UTJ Jackson.
41. Ground 3 contends that the judge failed properly to consider the relationship between the appellant and Mr T in finding that there was no family life. It is said that their relationship was one "akin to a *de facto* family". As a consequence, it is contended the judge failed to take into account the impact on the relationship with Mr T if the appellant were removed to Sri Lanka.
42. In her written submissions, Ms Jegarajah expanded upon the appellant's challenge under these grounds.
43. Reliance is again placed upon the Court of Appeal's decision in J v SSHD and now the Supreme Court's decision in AM(Zimbabwe) v SSHD [2020] UKSC 17.
44. Relying upon AM (Zimbabwe) Ms Jegarajah prays in aid the Supreme Court's adoption of the Strasbourg court's approach in Paposhvili that, in addition to those health cases previously covered by Art 3 (namely the so-called 'death bed' cases), an individual can succeed by establishing that on removal to his country of origin if he/she will suffer a "significant reduction in life expectancy". She places reliance, in particular, upon the judgment of Lord Wilson at [31].
45. Ms Jegarajah also places reliance upon the Supreme Court's adoption of the Strasbourg court's view in Paposhvili that there is a procedural requirement imposed upon the respondent by Art 3. Once an individual has demonstrated that there are substantial grounds for believing that if removed he/she would be exposed to a real risk of treatment contrary to Art 3, then the respondent (the Secretary of State) is better placed to collect evidence about the availability and accessibility of suitable treatment in the receiving state (see [23] and [33] of Lord Wilson's judgment).
46. Placing reliance upon the expert evidence of Dr Hilari, Ms Jegarajah submits that the appellant has established a breach of Art 3 and that the judge was wrong to dismiss the appeal notwithstanding that the decision in AM (Zimbabwe) postdated the hearing as it is declaratory of the law. The evidence shows that the appellant would be at risk of suicide in the UK *or* on return to Sri Lanka.

The Respondent's Case

47. The respondent's position is set out in the written submissions of Ms Fijiwala.
48. First, it is submitted that the appellant cannot rely upon AM (Zimbabwe) which postdated the judge's decision. In any event, Ms Fijiwala submitted that the appellant's Counsel at the hearing before the judge did not argue that treatment was not available to the appellant for his condition in Sri Lanka and so the appellant could not succeed in establishing a breach of Art 3 on return to Sri Lanka even applying AM (Zimbabwe) and so any error was not material to the judge's decision.
49. Secondly, in applying J v SSHD Ms Fijiwala submits that the judge, consistently with J, found that the act of removing the appellant did not create a real risk of suicide. She pointed out that the appellant's asylum claim had been found not to be objectively well-founded and that finding was not challenged in the appeal before the judge. Further, the expert report whilst it considered the impact of the appellant's past detention on his mental health it was now accepted by the judge (and this was also not challenged) that the Sri Lankan High Commission was prepared to issue an ETD and so the issue of detention in the UK and its impact on the appellant's health was resolved.
50. Thirdly, Ms Fijiwala relies upon the judge's finding in para 42 that it had not been established that the respondent would fail to prevent further deterioration in the appellant's mental health if he was to be removed. She also found that the appellant had, in the receiving state, support from his mother (even if not Mr T's support) and that he could obtain the appropriate medication and health treatment such that there was an effective mechanism to reduce the risk of suicide in the receiving state.
51. Finally, as regards Art 8, Ms Fijiwala submitted that the judge had fully considered the nature of the relationship between Mr T and the appellant in considering the impact upon the appellant of his removal as part of his private life in the UK.

Discussion

Ground 1

52. In J v SSHD the Court of Appeal recognised that a claim under Art 3 based upon a risk of suicide to an individual subject to removal could arise in three situations. At [17], Dyson LJ (with whom Brooke and Lloyd LJ agreed) identified three potential stages as follows:
- "These are: (i) when the appellant is informed that a final decision has been made to remove him to Sri Lanka; (ii) when he is physically removed by aeroplane to Sri Lanka; and (iii) after he has arrived in Sri Lanka."
53. In relation to those three stages Dyson LJ went on to recognise that stage (i) is a "domestic case" and that stage (iii) is a "foreign case". Stage (ii), although less clear, is to be "treat[ed] as a domestic case".

54. At [26]-[31], Dyson LJ set out the basis of a claim under Art 3 based upon a risk of the individual committing suicide in the country of return (a "foreign case"):

"26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see *Ullah* paras [38-39].

27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in *Soering* at para [91], the court said:

"In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which *has as a direct consequence the exposure of an individual to proscribed ill-treatment.*" (emphasis added).

See also para [108] of *Vilvarajah* where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka..."

28. Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of *D* and para [40] of *Bensaid*.

29. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of *Bensaid*).

30. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.

31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights."

55. The importance of the domestic/foreign distinction is that, inter alia, in relation to a claim based upon the impact to an individual's health on removal, Art 3 has been interpreted as applying a 'high threshold' derived from the case law such as *D v UK* (1997) 24 EHRR 423 and the House of Lords' decision in *N v SSHD* [2005] UKHL 31

and the subsequent case in *Strasbourg of N v UK* (2008) 47 EHRR 39. That is the third point made by Dyson LJ in [28] of his judgment in *J*. The jurisprudence on Art 3 is summarised by Lord Wilson in *AM(Zimbabwe)* at [13]-[26].

56. It is in relation to that ‘high threshold’ that the Supreme Court in *AM (Zimbabwe)* applied the more generous approach of the Strasbourg court in *Paposhvili*. Lord Wilson (with whom Lady Hale, Lady Black and Lord Kitchin agreed) disproved the Court of Appeal’s view that *Paposhvili* only achieved a “very modest” extension of the previous position (at [27]-[31]):

“27. We need to analyse the effect of the decision in the *Paposhvili* case and, first, to survey the analysis of its effect conducted by the Court of Appeal. It was that court’s view, at para 39, that the decision reflected only a “very modest” extension of the protection against return given by article 3 in cases of ill-health. The Court of Appeal fastened in para 39(iv) upon the Grand Chamber’s questionable choice of language that the previous approach to such cases needed only to be “clarified”. And it buttressed its restrictive view of the effect of the decision by claiming in para 39(ii) that the Grand Chamber had noted that there had been no violation of article 3 in the *N* case and in para 40 that the Grand Chamber had “plainly regarded that case as rightly decided”. But the careful reader of paras 178 to 183 of the judgment in the *Paposhvili* case may find it hard to agree with the Court of Appeal in this respect. Of course the Grand Chamber noted that *it had been held* in the *N* case there had been no violation of article 3; but there is no express agreement on its part with that conclusion and, subject to the precise meaning of the new criterion in para 183 of the judgment (to which we should now turn), its application to the facts of the *N* case would suggest a violation.

28. The Court of Appeal interpreted the new criterion in para 183 of the judgment in the *Paposhvili* case, at para 38 as follows:

“This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, 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 (ie 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.”

29. The criticism of the above passage made by the appellant and by the AIRE Centre largely relates to the second sentence. In relation, however, to the first sentence, they suggest that, irrespective of the precise meaning, in context, of “a significant reduction in life expectancy” in para 183 (as to which see para 31 below), the paraphrase of “death within a short time” favoured by the Court of Appeal may not be entirely accurate. In relation to the second sentence, their

criticism is directed to the words “the imminence (ie likely ‘rapid’ experience) of ... death in the receiving state” attributable to the non-availability of treatment. They point out that the Grand Chamber was addressing exposure “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” (italics supplied); and they contend that the Court of Appeal has misinterpreted those words so as to refer to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or *in* a significant reduction in life expectancy. The Secretary of State, for her part, rejects their criticism as narrow and syntactical, apt perhaps to the construction of a statute but inapt to the present context in which the meaning of para 183 should be informed by “case law and realism”. Her reference to case law turns out to be an indorsement of the questionable conclusion of the Court of Appeal that in the *Paposhvili* case the Grand Chamber approved its decision in the *N* case. What remains is her reference, rather undeveloped, to realism.

30. There is, so I am driven to conclude, validity in the criticism of the Court of Appeal’s interpretation of the new criterion. In its first sentence the reference by the Grand Chamber to “a significant reduction in life expectancy” is interpreted as “death within a short time”. But then, in the second sentence, the interpretation develops into the “imminence ... of ... death”; and, as is correctly pointed out, this is achieved by attributing the words “rapid ... decline” to life expectancy when, as written, they apply only to “intense suffering”. The result is that in two sentences a significant reduction in life expectancy has become translated as the imminence of death. It is too much of a leap.

31. It remains, however, to consider what the Grand Chamber *did* mean by its reference to a “significant” reduction in life expectancy in para 183 of its judgment in the *Paposhvili* case. Like the skin of a chameleon, the adjective takes a different colour so as to suit a different context. Here the general context is inhuman treatment; and the particular context is that the alternative to “a significant reduction in life expectancy” is “a serious, rapid and irreversible decline in ... health resulting in intense suffering”. From these contexts the adjective takes its colour. The word “significant” often means something less than the word “substantial”. In context, however, it must in my view mean substantial. Indeed, were a reduction in life expectancy to be less than substantial, it would not attain the minimum level of severity which article 3 requires. Surely the Court of Appeal was correct to suggest, albeit in words too extreme, that a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction. But even a reduction to death in the near future might be significant for one person but not for another. Take a person aged 74, with an expectancy of life normal for that age. Were that person’s expectancy be reduced to, say, two years, the reduction might well - in this context - not be significant. But compare that person with one aged 24 with an expectancy of life normal for that age. Were his or her expectancy to be reduced to two years, the reduction might well be significant.”

57. At [34] Lord Wilson reached the following conclusion:

“34. This court is not actively invited to decline to adopt the exposition of the effect of article 3 in relation to claims to resist return by reference to ill-health

which the Grand Chamber conducted in the *Paposhvili* case. Although the Secretary of State commends the Court of Appeal's unduly narrow interpretation of the Grand Chamber's exposition, she makes no active submission that, in the event of a wider interpretation, we should decline to adopt it. Our refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances such as were considered in *R (Hallam) and R (Nealon) v Secretary of State for Justice (JUSTICE intervening)* [2019] UKSC 2, [2020] AC 279. In any event, however, there is no question of our refusing to follow the decision in the *Paposhvili* case. For it was 15 years ago, in the *N* case cited at para 2 above, that the House of Lords expressed concern that the restriction of article 3 to early death only when in prospect in the returning state appeared illogical: see para 17 above. In the light of the decision in the *Paposhvili* case, it is from the decision of the House of Lords in the *N* case that we should today depart.

58. The Supreme Court recognised that the threshold in Art 3 required proof that on return to the individual's country of origin there was a real risk *either* of "a serious, rapid and irreversible decline in [the individual's] state of health resulting in intensive suffering" *or* of "a significant reduction in life expectancy" (see [27] – [31]). The practical availability and affordability of suitable care or treatment in the country of return was relevant to determining whether a breach of Art 3 could be established (see [23] and [33]).
59. The Supreme Court's approach provides a clear basis for the claim in a "foreign" case of a real risk of suicide in the country of return. A "real risk of suicide" will, on the face of it, fall within the rubric of a "significant reduction in life expectancy" subject to Lord Wilson's point in [31] of his judgment that "significant" means "substantial" in the context of the particular individual's circumstances.
60. The effect of AM (Zimbabwe) is that, in the context of a "foreign" case where a risk of the individual committing suicide is alleged, then the third point made by Dyson LJ in [28] of I has to be read subject to the more expansive content of Art 3 accepted by the Supreme Court.
61. It is reliance upon this adoption of Paposhvili that Ms Jegarajah, in part, now relies.
62. Undoubtedly Ms Jegarajah is correct that the effect of AM (Zimbabwe) is declaratory of the law and was, therefore, the applicable law at the time that the judge reached her decision. Of course, the judge cannot be criticised for applying, indeed she was bound to apply, the previous jurisprudence until the Supreme Court, as it eventually did, reached a different conclusion in AM (Zimbabwe).
63. There are a number of difficulties with Ms Jegarajah's submissions.
64. Perhaps as a result of the understanding of the 'high threshold' applicable under Art 3 until this change, Ms Jegarajah did not advance any case before the judge that the appellant could succeed on the basis of the risk to him in Sri Lanka. She based his case wholly upon the impact upon his mental health *in the UK* and not in Sri Lanka.

In para 5 of her written submissions Ms Jegarajah states that the appellant's case "before the First-tier tribunal" was that he was at risk of committing suicide in the UK in detained and if "he is successfully returned". With respect, the latter is simply not how the case was put to Judge Davidge. The judge records that expressly in para 14 (and para 37) of her determination.

65. Ms Jegarajah now seeks to overturn the judge's decision on a basis not even argued by her before the judge. Nevertheless, perhaps the declaratory effect of AM(Zimbabwe) permits Ms Jegarajah to make this point, and rely upon the Supreme Court's decision, despite the lack of any claim based upon a risk of committing suicide in Sri Lanka being made before the judge. I will proceed on that basis.
66. Any error was not, however, material. In fact, the judge went on to consider whether the appellant could establish a risk of suicide if returned to Sri Lanka sufficient to engage Art 3 in her subsequent findings, in particular in para 21 and in para 37 which I have set out above. The judge made a number of crucial findings. First, the judge found that the appellant would have family support in Sri Lanka. She found that he would have his mother and he would be accommodated and not be without resources (see para 37). That factual finding is not challenged. Secondly, and the contrary was not argued before the judge, she found that the appellant would be able to obtain treatment in Sri Lanka for his mental health (see paras 14 and 37). Thirdly, the position was that the appellant's fears, to the extent they were based upon his asylum claim, were not well-founded. That had been concluded by the Secretary of State and was not contested before the judge. Consequently, the judge found, in effect, that the circumstances in which the appellant would find himself in Sri Lanka did not engage Art 3 because it had not been established that there was a real risk that he would commit suicide in Sri Lanka.
67. Ms Jegarajah's contention that the expert evidence (see para 32 of the written submissions) and the absence of support from Mr T in Sri Lanka was crucial does not stand up to scrutiny. The judge was clearly well aware of the expert evidence and was largely directed to the implications to the appellant *in the UK* (see quotations set out at para 9 of the written submissions citing paras 97-98 of Dr Halari's main report). The report does postulate a "significant deterioration in the appellant's mental health" on return (see para 96 of the report) but this is in the context of reliving the trauma of his past experiences and questioning about that by the Sri Lankan authorities (see paras 100-107 of the report). However, the appellant's asylum claim was, by the time the case was heard by Judge Davidge, accepted as not well-founded. His fears, upon which Dr Halari's views were based, had no objective basis. Also, Dr Halari's views were also reached at a time when the appellant's position and that of Mr T (not accepted by the judge) was that the appellant would have no support from family in Sri Lanka. In fact, the judge found his mother was there and could provide support and accommodation. Further, the judge did not accept Mr T's evidence that he would not be able to continue to provide some financial support (and indeed could visit) but that, in any event, the appellant would have the support of his mother in Sri Lanka.

68. Consequently, even if the judge had applied the approach in AM (Zimbabwe), she would undoubtedly have dismissed the appeal under Art 3 on the basis that it had not been established that there would be a “significant reduction in life expectancy” for the appellant on the basis of a real risk that he would commit suicide on return to Sri Lanka. Subject to the adjustment required by AM(Zimbabwe), the judge’s decision is consistent with, and applied the substance of, the approach set out by Dyson LJ in [] at [26]-[31].
69. I agree with Ms Fijiwala’s submission that the judge’s understandable error in applying the law prior to the Supreme Court’s decision in AM (Zimbabwe), was not material to the judge’s decision that a breach of Art 3 on the basis of risk on return to Sri Lanka had not been established.
70. In large measure, this deals with Ms Jegarajah’s additional submission that applying the Art 3 procedural requirement in Paposhvili, adopted by the Supreme Court in AM (Zimbabwe), the Secretary of State had an obligation to enquire whether treatment was available for the appellant in Sri Lanka. The procedural requirement is set out in [33] of Lord Wilson’s judgment as follows:
- “33. In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the *Paposhvili* case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state. What will most surprise the first-time reader of the Grand Chamber’s judgment is the reference in para 187 to the suggested obligation on the returning state to dispel “any” doubts raised by the applicant’s evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to “serious doubts”, he will realise that “any” doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond *all* doubt is a concept rightly unknown to the Convention.”
71. Leaving aside, that this was not a live issue before the judge and that therefore, it is difficult to see why the Secretary of State was required before the judge to engage in this enquiry, the procedural obligation only arises if the appellant has established that there are substantial grounds for believing that there is a real risk of a breach of Art 3 (see Lord Wilson at [33]). The judge found that there was not taking into account the appellant’s personal circumstances and support available in Sri Lanka and because it had not been suggested to the judge that appropriate treatment would not be available. In any event, the appellant led no evidence before the judge, because it was accepted treatment was available for his mental health as set out at paras 44-47 of the respondent’s decision letter. All that was left was Dr Halari’s view at para 107 of his report that though “medical services are available”, the appellant was unlikely to access them because he would be unable to trust medical professionals because of his fear that he would be arrested and killed. But, as I have

already pointed out, that fear is not well-founded and, again, Dr Halari's view is based upon the (false) premise that the appellant would have no support in Sri Lanka when, in fact, he would have his mother. The judge's finding that, taken with her other findings, that "he will be able to obtain appropriate medication, treatment and care for his mental health" (para 37) was entirely legally sustainable and fatal to an Art 3 (or Art 8) claim based upon any real risk of committing suicide in Sri Lanka.

72. Turning now to the appellant's position in the UK, much of the submissions and the evidence of Dr Halari was based upon the premise that the appellant would be detained in the UK (and therefore would suffer a deterioration in his mental health) because he is stateless and there would be at least (if not more) a delay in attaining an ETD. The judge did not accept that the appellant was stateless and that the Sri Lankan High Commission would not issue an ETD. That finding, given UTJ Jackson's refusal of permission on the grounds seeking to challenge it, stands.
73. The judge dealt with the 'domestic' aspect of the appellant's Art 3 claim (which was of course the only aspect pursued before the judge by the appellant's counsel) the judge rejected this at paras 23 and, in her reasons for rejecting the reliance upon past harms caused by social services and the respondent, at paras 38 - 42. Again, the judge was well aware of the expert evidence but that evidence was in large measure based upon a premise that the appellant would be detained as a stateless person pending resolution of whether he could obtain an ETD. The judge's unchallengeable finding in paragraph 23 was that this is a false premise. The judge noted the impact upon the Appellant (as claimed) on his mental health during detention at para 36. Whilst in the UK he continues to enjoy the support of Mr T. And that the medical evidence is that "detention exacerbated his symptoms" (para 41).
74. Accordingly, I am satisfied that the judge did not materially err in law in dismissing the appellant's appeal under Art 3.

Ground 3

75. Turning to the ground which challenges Art 8, of course the judge's finding has to be seen in the context of her conclusions in relation to the appellant's failure to establish a real risk of suicide either in the UK or in Sri Lanka and, in that context, the support which will be available to him through his mother, and possibly financially through Mr T in the UK, whilst he is in Sri Lanka. The judge was well aware that the appellant had a close relationship with Mr T. She recognised as much in para 33 of her determination. Although she did not conclude that the relationship between Mr T and the appellant was such as to give rise to "family life", she nevertheless considered that it was an important part of the appellant's private life in the UK. She described it as a "significant part" of that private life.
76. Both in Ground 3 and Ms Jegarajah's written submissions, it is contended that there were "*de facto* family ties" between the appellant and Mr T. Without reference to any case law, this appears to be a contention that the appellant's relationship amounted to 'family life' as there was "effective, real or committed support" given by Mr T to the appellant (see Kugathas v SSHD [2003] EWCA Civ 31 at [17]). It is clear that such

a relationship may arise between adults in appropriate circumstances (see, e.g. Uddin v SSHD [2020] EWCA Civ 338): all will depend upon the particular facts. It may well be that the relationship between the appellant and Mr T did have some hallmarks of a dependent relationship, potentially giving rise to family life for the purposes of Art 8. However, the judge's view (at para 33) was that the relationship, though close and dependent, was essentially a relationship formed between the appellant (as an adult) with Mr T as a close friend. Friends are usually distinguished from, and are not the same as, family. I am unable to say that the judge's conclusion was irrational or not reasonably open to her on the evidence.

77. In any event, I am unpersuaded that the judge's characterisation of the relationship had any material impact upon her application of Art 8. Providing she took into account the nature of the relationship, and the impact upon it if the appellant was removed, in other words considered the substance of the relationship and claimed impact, then there will be no material error in the application of Art 8 (see Singh and Singh v SSHD [2015] EWCA Civ 630 at [25] per Sir Stanley Burnton).
78. The judge found the evidence of Mr T on the whole not to be reliable (see para 35). She did not accept that the impact of the appellant moving to Sri Lanka would be that Mr T would not continue to provide any further financial support and that Mr T could, as he had done in the past, visit Sri Lanka this time to visit the appellant (see para 37). The judge also took into account, and these findings are not challenged, that the appellant would have support in Sri Lanka not least from his mother and accommodation and resources to live there. She found that, having lived there until 2008, the appellant would be able to reintegrate back in Sri Lanka. She also, had well in mind, that the appellant's claim had as a central feature the risk to him of committing suicide. She found that that risk was not real and established if he returned to Sri Lanka (see para 37).
79. I do not accept Ms Jegarajah's submission that by categorising the relationship between the appellant and Mr T as amounting to private life, but not family life, the judge failed fully to have regard to the implications to the appellant if he were returned to Sri Lanka.
80. Having, brought forward her earlier findings, the judge, albeit it briefly, carried out the balancing exercise at para 44 of her determination taking into account the public interest and reached the conclusion that the public interest outweighed the positive factors in the appellant's favour. The grounds do not suggest, and I see no possible basis upon which they could do so, that the judge's assessment was irrational and, therefore, unlawful. The judge took into account the factors weighing in the appellant's favour and against the appellant on the public interest side. The appellant may not agree with some of the judge's findings but they are legally unchallenged and, in my judgment, unchallengeable. In carrying out the balancing exercise, the judge undoubtedly reached a rational and legally sustainable conclusion that the appellant had not established a breach of Art 8.

81. Accordingly, I am satisfied that the judge did not materially err in law in dismissing the appellant's appeal under Art 8 of the ECHR.

Decision

82. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of a material error of law. That decision stands.

83. The appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
15 June 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email