



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06457/2019
HU/06458/2019

THE IMMIGRATION ACTS

Heard at Manchester via Microsoft Teams
On 30 June 2021

Decision & Reasons Promulgated
On 13 July 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NBMN
UAIOM

(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Plowright instructed by SC Law Solicitors.
For the Respondent: Ms Everett, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. By a decision dated 20 February 2020 the Upper Tribunal set aside a determination of the First-tier Tribunal which dismissed the appeals of the above appellants on human rights grounds.

2. The first appellant, a citizen of Mauritius, was born on 7 December 1965 and the second appellant, her son, on 13 May 2020. The reference to 'M' in the decision below is to the first appellant and 'U' to the second appellant.

Background

3. The second appellant suffers from multiple health issues including autism, ADHD, epilepsy, intellectual disability, sensory processing disorder, and incontinence. The second appellant also receives one-to-one teaching assistant support at school together with speech therapy and assistance from other agencies. The updated assessment provided of the second appellant provide prior to the hearing indicates some improvement in relation to his toileting routine, but all other matters remaining the same.
4. The findings in relation to the first and second appellant's immigration history, first appellant's employment, second appellants medical condition, the existence of private life in the United Kingdom and the existence of family life between the first and second appellants recognised by Article 8, are all preserved findings.
5. Permission to appeal the decision of the First-tier Tribunal was sought on grounds drafted by Paul Richardson of Goldsmith Chambers asserting arguable legal error in the manner in which the First-tier Tribunal had assessed the article 8 aspects of the case.
6. It is not disputed in the appellant's addendum skeleton argument, drafted by Mr Plowright of Goldsmith Chambers dated 29 September 2020, that the original grounds relied solely on Article 8 ECHR but that he now seeks to amend the grounds of appeal to include a reference to Article 3.
7. It is stated Article 3 was referred to in the covering letter sent with the appellant's application dated 28 October 2018, specifically considered by the respondent in the refusal letter of 25 March 2019, that the original grounds of challenge to that decision referred generally to a breach of the appellant's human rights under the ECHR, and that Article 3 was referred to by the First-tier Tribunal at [15], meaning it is not a new matter.
8. The appellants assert that Article 3 is relevant to the outcome of the appeal and is particularly significant where the best interests of the child are relevant.
9. On behalf of the Secretary of States Ms Everett accepted that whether Article 3 or 8 was engaged depended upon the same factual matrix and indicated she would not be prejudiced by either or both being considered.
10. In light of the position of the parties and the fact that Article 3 ECHR was referred to at an earlier stage and is therefore not a new matter, in light of the being no prejudice to either party in considering this matter, and in light of the decision of the Supreme Court in AM (Zimbabwe) (see below) not having been considered previously when assessing the merits of this appeal, the scope of the hearing shall include consideration of both Article 3 on medical grounds and Article 8 ECHR.

11. Ms Everett confirmed she relied upon the Secretary of State's written submissions to date in relation to this matter and had no cross examination of the witnesses, which enabled the matter to proceed by way of submissions only.

The law

12. The leading decision on the issue of the correct test in a medical case such as this is AM (Zimbabwe) (Appellant) v Secretary of State for the Home Department (Respondent) [2020] UKSC 17, the summary of which, whilst not the full judgment, reads:

REASONS FOR THE JUDGMENT

In *D v United Kingdom* (1997) 24 EHRR 423, the ECtHR held that to remove a man who was on his deathbed to a state where no care was available for him would violate article 3; and it referred to the exceptional circumstances and compelling humanitarian considerations in his case [14]. In the *N* case, the House of Lords considered the ECtHR's decision in this case and others like it concerning article 3. It held that the test in such cases was whether the applicant's illness had reached such a critical stage that it would be inhuman to deprive him of the care he was receiving and to send him to an early death in the receiving state, unless there was care available there to enable him to meet it with dignity [15-17].

In *N v United Kingdom* (2008) 47 EHRR 39, the ECtHR held that, although there might be "other very exceptional cases in which the humanitarian considerations are equally compelling" to those in the *D* case, a high threshold for violation of article 3 should be maintained [18]. In *Paposhvili*, the ECtHR reconsidered what those "other very exceptional cases" were. It held (at para 183) that they should now be taken to include cases in which there were substantial grounds for believing that the applicant, while not at imminent risk of dying, would face a real risk in the receiving country of being exposed either to a serious, rapid and irreversible decline in health resulting in intense suffering, or to "a significant reduction in life expectancy" [22]. According to the Court of Appeal in the present case, the test for violation of article 3 following *Paposhvili* is no longer whether death is imminent in the removing state, but whether intense suffering or death is imminent in the receiving state because treatment is unavailable there [29]. The Court of Appeal was, however, mistaken in taking the ECtHR's phrase, "a significant reduction in life expectancy", to mean "the imminence of death" [30]. But what does the phrase mean? "Significant" here means "substantial": only a substantial reduction in life expectancy would reach the level of severity required by article 3. In addition, a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction [31].

In Paposhvili, the ECtHR also set out requirements (at paras 186 to 191) for the procedure to be followed in relation to applications under article 3 to resist return by reference to ill-health [23, 32]. One requirement is for the applicant to adduce evidence “capable of demonstrating that there are substantial grounds for believing” that, if removed, he or she would be exposed to a real risk of being subjected to treatment contrary to article 3. That is a demanding threshold for the applicant. His or her evidence must be capable of demonstrating “substantial” grounds for believing that it is a “very exceptional case” because of a “real” risk of subjection to “inhuman” treatment. He or she must put forward a case which, if not challenged or countered, would establish a violation of the article [32]. If the applicant presents evidence to that standard, the returning state can seek to challenge or counter it. Paposhvili states that, in doing so, the returning state must “dispel any doubts raised” by the evidence; but “any doubts” here should be read to mean any serious doubts [33].

The court should only refuse to follow a decision of the ECtHR in highly unusual circumstances, and there is no question of the court’s refusing to follow Paposhvili. In the light of that judgment, the court should now depart from the decision of the House of Lords in the N case [34].

The appellant first raised his article 3 claim in the Court of Appeal and, having accepted that it could not succeed at that level, he did not present evidence to support it. It was inappropriate for the Court of Appeal to extract medical reports from the evidence submitted in support of his article 8 claim, which did not address the Paposhvili requirements [36]. The court should not now determine whether the reports cross the threshold required of an applicant under article 3 following Paposhvili. The proper course is to allow the appeal and to remit the article 3 claim to be heard on up-to-date evidence [37].

13. Two headline points from the Supreme Court decision are:

- Substantive – in order to meet the relevant Article 3 threshold there must be a real risk of a serious, rapid and irreversible decline in the person’s health resulting in intense suffering or to a significant (defined as ‘substantial’) reduction in life expectancy;
- Procedural – It was for the applicant to prima facie meet the demanding test i.e. to demonstrate "substantial" grounds for believing that it was a "very exceptional" case because of a "real" risk of subjection to "inhuman" treatment. If an applicant presented evidence to that standard, the returning state could seek to counter it in the manner outlined in Paposhvili.

14. The Supreme Court set out a range of procedural duties for the domestic authorities requiring a rigorous assessment of the risk as required by the absolute nature of the Article 3 prohibition:

“It is for applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3....In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment” [186].

15. In Savran v Denmark (application no 57467/15) the appellant was a Turkish national who had lived since childhood in Denmark and had committed a number of serious offences. His progress was latterly good in an institution (he was suffering from schizophrenia amongst other problems) and he was mostly compliant with the regime. He was recommended for treatment in the community but the Danish authorities wanted to deport him. He said that would breach his Article 3 rights. The evidence was that the drugs he needed for his schizophrenia were available in Turkey as was hospital treatment; however psychiatrists had recommended that he needed close monitoring and follow-up both for the good of society to ensure he took his treatment (if he did not they considered he would become aggressive and non-compliant again) and also for his own good because he needed regular blood tests because of the potential toxicity of the medication and to help him integrate. He averred he had no family support in Turkey. By a majority of four to three the ECHR held that there would be a violation of Article 3 if he were returned without the authorities having obtained individual and sufficient assurances that the appropriate treatment including monitoring and follow-up would be available to him on return. The minority pointed to the fact that they considered the high threshold had not been reached. They said the majority had not assessed whether the possible consequences of the lack of treatment could be characterised as exposing the applicant to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy. They examined Article 8 separately (the majority had seen no need) but concluded, although they applied Maslov that there were no reasons to depart from the decision of the domestic court. They considered that the appellant’s mental illness and the need for treatment had been sufficiently addressed under Article 3 and Article 8 could not provide better protection in this respect.
16. The Upper Tribunal in AXB (Art 3 health: obligations: suicide) Jamaica [2019] UKUT 397 considered the case of Savran and held that:
 - (i) In a case where an individual, asserts that his removal from the Returning State would violate his Article 3 ECHR rights because of the consequences to his health, the obligation on the authorities of a Returning State dealing with a health case is primarily one of examining the fears of an applicant as to what will occur following return and assessing the evidence. In order to fulfil its obligations, a Returning State must provide “appropriate procedures” to allow that

examination and assessment to be carried out. In the UK, that is met in the first place by an examination of the case by the Secretary of State and then by an examination on appeal by the Tribunal and an assessment of the evidence before it;

- (ii) There is no free-standing procedural obligation on a Returning State to make enquiries of the Receiving State concerning treatment in that State or obtain assurances in that regard. Properly understood, what is referred to at [185] to [187] of the Grand Chamber's judgment in Paposhvili concerns the discharge of respective burdens of proof;
- (iii) The burden is on the individual appellant to establish that, if he is removed, there is a real risk of a breach of Article 3 ECHR to the standard and threshold which apply. If the appellant provides evidence which is capable of proving his case to the standard which applies, the Secretary of State will be precluded from removing the appellant unless she is able to provide evidence countering the appellant's evidence or dispelling doubts arising from that evidence. Depending on the particular circumstances of the case, such evidence might include general evidence, specific evidence from the Receiving State following enquiries made or assurances from the Receiving State concerning the treatment of the appellant following return.

The medical evidence

- 17. A number of reports have been provided in relation to the second appellants needs.
- 18. The second appellant places particular emphasis upon the reports of Dr Olivia Fiertag, a Consultant Child & Adolescent Psychiatrist. Dr Fiertag's initial report of 14 August 2019, was before the First-tier Tribunal, which has been updated in an addendum to that report, dated 19 March 2020.
- 19. Although not specifically referred to below all the evidence, medical and otherwise, provided from whatever source by the parties has been considered with the required degree of anxious scrutiny.
- 20. In Dr Fiertag's earlier report it was noted that the second appellants current medication was:
 - a. Guanfacine 3mg once a day
 - b. Sodium Valporate 300mg twice a day.
 - c. Lamotrigine 25mg 1 tablet twice a day.
- 21. In relation to the second appellants current treatment regime, it was written:
 - 16.1 Behavioural treatment: M has attended Triple P and Stepping Stones, parenting courses for support in managing U's challenging behaviour

relating to his Attention Deficit Hyperactive Disorder (ADHD) and Autism. U also receives 1:1 support in school from a teaching staff trained in managing behavioural problems relating to Autism and ADHD.

- 16.2 Speech and Language Therapy: U access this in school and outside of school.
 - 16.3 Occupational Therapy: U access this in school.
 - 16.4 Overall Learning Support: U receives continual 1:1 support in school to enable him to access his personalised curriculum to help him with his academic, speech and social development.
 - 16.5 Aggression management: U teachers have been trained in safe restraint.
 - 16.6 Medication: U receives Consultant Paediatric reviews and is prescribed Sodium Valporate and Lamotrigine to manage his epilepsy. U receives Consultant Child Psychiatric reviews regularly in CAMHS regarding his Autism and ADHD and is prescribed Guanfacine 3mg nocte for his inattention, hyperactivity, impulsivity and challenging behaviour.
 - 16.7 Social support: U's teachers encourage him to interact with his peers in school. U will be going on one weeks activity holidays this summer. He also attends a Saturday club once a week and is learning to ride a bike. He has been advised by CAMHS to liaise with social care for housing and respite support as part of his care.
 - 16.8 Incontinence clinic: U is under the care of the incontinence clinic. He needs to be prompted to go to the toilet. He is able to urinate in the toilet with prompting to go. He is not able to open his bowels in the toilet yet and requires nappies.
 - 16.9 Physiotherapy and orthotics: U has been referred to address concerns with his balance and motor skills.
22. In relation to the effect of withdrawing U's medication Dr Fiertag wrote:
- 19.1 If U's epilepsy medication (Lamotrigine and Sodium Valporate) is withdrawn I would expect his epileptic seizures to return and if he experiences further untreated seizures, he is likely to develop a further brain injury which could impact on his learning ability, social skills and overall mental and physical health.
 - 19.2 If U's ADHD medication (Guanfacine) is withdrawn I would expect his ADHD symptoms to return. This would include increasing levels of impulsivity, hyperactivity and inattention. The impact would be he would

be unable to engage with education and learning, as he has been, as he has been; he would be unlikely to be able to remain in the classroom environment. He would be vulnerable to developing sudden, aggressive and impulsive outbursts, to running off and encountering dangerous situations and be unable to utilise his speech and social skills he has learnt as his ADHD symptoms would make it too difficult for him to focus and engage with this. I would expect his aggression and severe challenging behaviour to return. He would likely require physical restraint. His quality-of-life would be reduced.

23. In relation to the long-term prognosis and quality of life without medication Dr Fiertag indicates that long-term prognosis will be very poor with likely increased morbidity and premature mortality and that without ADHD medication U is unlikely to be able to manage his ADHD symptoms sufficiently to be able to access public environments, school, social situations, and learning.
24. In the addendum report Dr Fiertag addresses one of the core issues in this appeal, namely the availability of Guanfacine in Mauritius, and other issues relating to the availability of care to meet U's needs in the following terms:

7.0 Is the medication Guanfacine available in Mauritius:

- 7.1 Guanfacine is not available in Mauritius. Other long acting ADHD drugs commonly prescribed in the UK such as Atomoxetine are also not available. The only ADHD drug available is short acting Ritalin (methylphenidate hydrochloride). U requires a longer acting drug with 24-hour cover in view of his difficulties, and thus Ritalin would not be sufficient in managing his ADHD symptoms. Ritalin lasts 4-6 hours and cannot be taken in the late afternoon or evening as it affects sleep. Whereas Guanfacine provides approximately 24-hour cover when taken daily for ADHD symptoms. U requires Guanfacine to control his ADHD symptoms (hyperactivity, inattention and impulsivity). Left untreated, U's impulsive outbursts are likely to have potentially very dangerous consequences for himself and his overall behaviour will become more aggressive and challenging to manage.
- 7.2 Risperidone although available in Mauritius is not a drug U is taking. It is not licensed to treat ADHD and is licensed as an antipsychotic or for challenging behaviour in autism. U's ADHD requires treatment with Guanfacine and Risperidone is not an appropriate alternative for treating his ADHD. Risperidone can also affect the seizure threshold and as U has epilepsy it could worsen his epilepsy. Risperidone also commonly causes obesity and can induce a metabolic syndrome. At the time of my initial assessment of U, his autism symptoms were being managed adequately therapeutically with the existing therapy, educational and parental support in place and there was no indication for prescribing Risperidone.

7.3 I have reviewed the documents provided to me regarding the international pharmacy which imports drugs. I have also been informed by information from a member of the Royal College of Psychiatrists who worked in Mauritius recently, that if specific medications that are not licensed for use or available in Mauritius are required for treatment, there is a minimum 6 months governmental process to be undertaken to be able to see if they can be imported over from another country. It is not known whether this can be done in order to obtain Guanfacine from abroad for U.

8.0 **Guanfacine review and monitoring:**

8.1 Guanfacine is used as a treatment for ADHD where a short acting stimulant is not suitable and its use in these situations is supported by the NICE (National Institute of Clinical Excellence) guidance. The NICE guidance states that during the first year on Guanfacine the patient should be assessed every 3 months and 6 monthly monitoring should follow thereafter, with more frequent monitoring following any dose adjustments.

8.2 In the case of U, who has been on Guanfacine more than a year and who has complex ADHD, comorbid Autism and other learning and neurodevelopment needs, good medical practice would require a Child and Adolescent Psychiatrist overseeing his care for review every 6 months when the situation stable, and he may require more frequent reviews at other times. If his symptoms change over time, which can happen in the natural course of development through childhood and adolescence, then further reviews may be needed to consider medication adjustments in addition to the 6 monthly reviews.

8.3 Prior to initiation of treatment, patients cardiovascular status, including heart rate and blood pressure parameters, family history of sudden cardiac deaths/unexplained deaths, are assessed to identify patients at increased risk of hypertension, bradycardia, and QT/prolongation/risk of arrhythmia. Monitoring of heart rate and blood pressure parameters should continue on a weekly basis during dose titration and stabilisation and at least every 3 months for the first year, taking into consideration clinical judgement. 6 monthly monitoring should follow thereafter, with more frequent monitoring following any dose adjustment.

8.4 U psychiatric reviews are required to establish whether there has been an adequate response to the medication and if any side effects have developed (this medication can cause somnolence and sedation, syncope, hypotension, bradycardia, weight increase/obesity). The following physical measurements need to be made: height, weight, blood pressure, heart rate and BMI (body mass index). The results indicate whether any further change in medication dosage or type needs to be made and if any

further investigations/treatments needs to be undertaken in respect of any side effects.

- 8.5 Very careful monitoring of blood pressure is vital in patients taking Guanfacine, especially during times of dose adjustments as it can cause significantly low changes in blood pressure.
- 8.6 If U moves abroad he will need a Psychiatrist with experience of prescribing Guanfacine in children with autism, epilepsy, ADHD and other neurodevelopmental difficulties, to monitor this 6 monthly (or more frequently depending on need).

...

10.0 Child Psychiatrist provisions in Mauritius

- 10.1 In order to answer this question accurately I liaised with the Royal College of Psychiatrists and was provided with feedback from a Consultant Child and Adolescent Psychiatrist and Royal College Psychiatrist member who had recently worked in Mauritius (Dr Mohungoo).
- 10.2 There are no current Child and Adolescent Psychiatrists practising in Mauritius. There is no plan from the Ministry of Health to set up an appropriate child psychiatric service. There is no multidisciplinary CAMHS (Child and Adolescent Mental Health Service).

11.00 Other information

- 10.3 Feedback from U's school (October 2019) indicated that U's behaviour deteriorated following my initial assessment, including aggression, to the extent he required exclusion. In order to manage his challenging behaviour, a multidisciplinary approach is advised. This should include regular child psychiatric reviews to ensure U's ADHD and Autism symptoms are well managed and his medication optimised. This should also include paediatrician reviews of his epilepsy and incontinence, occupational therapy and speech and language therapy to help his social skills and speech, and specialist teachers support to enable him to access the curriculum.
- 10.4 The letter from school (March 2020) sets out U's complex needs and current educational support, which is in keeping with my assessment of U. I also emphasise U's vulnerability and risk of deterioration in mental health with that any change in routine, such as the changing environment, staff member, teacher. Secondary transition will be a crucial time for U and his school will need to advise on whether his needs can be met in a mainstream environment, and what further support he will need in

secondary education. Children with his level of complex needs may need a specialist school environment.

- 10.5 I have reviewed the documents of the schooling provisions in Mauritius. The information from Northfields seems to indicate it caters for children with more mild learning difficulties than U and for those without the multi-complex and severe difficulties that U displays. The list of schooling provisions also does not mention any provision that can cater for U's multiple severe and complex difficulties. He will need support for severe ADHD, autism and learning disability as well as physical conditions, epilepsy, incontinence and speech and language problems. There was one school that mentions autism, but that school does not mention catering for U's other conditions and therefore is unlikely to be suitable.

Discussion

25. The Secretary of States written submissions, filed in response to the Covid 19 directions issued by the Upper Tribunal, focused on the appellant's case pursuant to Article 8 ECHR, that being the only basis of challenge to the respondent's decision at the time the document was drafted.
26. In that document, which is the one relied upon by Ms Everett, it is written:
10. The preserved finding from [30] of the FTT J's decision is that the Second Appellant, whose tenth birthday is in a matter of days, has multiple health issues including autism, attention deficit hyperactive disorder [ADHD], epilepsy, intellectual disability, sensory processing disorder and incontinence.
11. The Respondent accepts that the medical and educational provisions in Mauritius to meet the Second Appellants complex condition would not be of the same standard as he has experienced in the UK. It is not, however, a question of comparing provision in the two countries. The Second Appellant received treatment for his medical condition before coming to the UK with the First Appellant on 28 February 2016 when he was aged five years and ten months. Further, the Respondent relies on the four documents submitted on 11 March 2020. It is accepted that Intuniv (Guanfacine), the medication taken by the Second Appellant in the UK to control his ADHD, is not available in Mauritius; the first two documents show that two online pharmacies (Pharmacy Rc World and Global Care Rx) could potentially deliver Intuniv (Guanfacine) to Mauritius. The third document is about a school in Mauritius which offers special educational needs support, Northfield's school. The fourth document is a list of special educational needs schools in Mauritius.
12. The consolidated bundle from SG Law Solicitors includes recent email exchanges between the First Appellant and various organisations in

Mauritius, in response to the additional evidence submitted by the Respondent. It is noted from these exchanges:

- a) A pharmacist at Anichem Pharmacy, a pharmaceutical distribution company in Mauritius, indicates that it would be possible to apply for an exceptional import permit from the Ministry of Health in order to import Intuniv (Guanfacine), although obtaining such a permit might be difficult (UT 96-97).
 - b) Autisme Maurice, an NGO which caters for autistic children, confirms that provision in Mauritius is limited; that children with ADHD and autism are not admitted to mainstream schools but to specialised services run by NGOs; that one to one provision is offered by private practitioners but quite expensive and difficult to access; that – although Autisme Maurice was fully booked until April 2021 – it would, on application for admission, give priority to the Second Appellant as soon as a school place became available (UT 165).
13. The consolidated bundle also includes an addendum psychiatric report dated 19 March 2020 from Dr Olivia Fiertag (UT 177-182). Dr Fiertag confirms that the Second Appellant requires the continuation of his Intuniv (Guanfacine) medication as the alternatives are not suitable; that she has been informed by a British psychiatrist that the Mauritian Government process for considering the importation of medication which is unlicensed or unavailable takes a minimum of six months; that withdrawal of Intuniv (Guanfacine) would have adverse effects for the Second Appellant, including return of his ADHD symptoms; and that Northfields and Autisme Maurice did not seem to be suitable for the Second Appellant.
 14. In the Respondent's submission, the evidence shows that the First Appellant would be able to apply to import into Mauritius the medication that the Second Appellant needs to manage his ADHD symptoms. There does not seem to be any reason why the First Appellant could not initiate this process from the UK. If the application was approved, she could then purchase this medication.
 15. It is not disputed that the medication that the Second Appellant requires for his epilepsy is available in Mauritius [see [20] and [31] of the FTTJ's decision].
 16. It is also submitted that the First Appellant would be able to apply to enrol the Second Appellant at a school in Mauritius which supports children with special educational needs. This includes the school run by Autisme Maurice. Again, there does not seem to be any reason why the First Appellant could not initiate this process from the UK.

17. The First Appellant would require funds to purchase the Second Appellants medication and (possibly) to support his education. A preserved finding from [37] of the FTTJ's decision is that the First Appellant, who is well educated, had a good job in Mauritius teaching English with the British Council prior to coming to the UK; and that she had worked in the UK as an administrator for City and Guilds. It is submitted that the First Appellant should be able to obtain a good, reasonably paid job on return to Mauritius. The First Appellant also gave evidence to the FTTJ that the accommodation in Mauritius where she lived with the Second Appellant remains unoccupied; that she has a sister and a brother in Mauritius; and that her brother assisted her in the UK. On return to Mauritius, the First Appellant could seek practical and financial assistance from her relatives there. The First Appellant also has relatives in the UK from whom she could seek financial support.
18. The Respondent accepts that the best interests of the Second Appellant are to remain in the UK, where the medical and educational provision to meet his needs is superior to that in Mauritius. Following *ZH (Tanzania) [2011] UKSC 4* and subsequent case law, however, the best interests of the child are a primary consideration, not the paramount consideration; and they can be outweighed by other factors, including the public interest.
19. The public interest is strong. The Appellants do not meet the Immigration Rules; and Section 117B (5) provides that little weight should be given to a private life established in such precarious circumstances. The Appellants are not British Citizens and have no right to reside in the UK; they have been in this country for four years only, having previously lived in Mauritius. They entered the UK so that the Second Appellant could receive privately funded medical treatment but then became dependent on public funds for accommodation, medical services and education. In circumstances where the Appellants do not meet the Rules, it is appropriate to consider the cost to the public purse in continuing to provide medical services and supported education for the Second Appellant, as part of the public interest represented by the "economic well-being of the country" in ECHR Article 8(2) [see [61] of Lewison LJ's judgement in *EV (Philippines) [2014] EWCA Civ 974*].
27. The respondent's position is therefore that the outcome of the proportionality balancing exercise means the public interest outweighs the appellants private interests and the best interests of the second appellant.
28. The appellants rely upon the fact Dr Fiertag maintained there were no current Child and Adolescent Psychiatrists practising in Mauritius.
29. Mr Plowright, in his submissions, focused on the four main issues arising in this appeal being:

- a. The availability of the medication required by the second appellant, ADHD Medication – Guanfacine, which it was accepted by all the parties could not be obtained at this time in Mauritius. The key question being whether it could be imported.
- b. Whilst at the moment the second appellant was on a dose of 3 mg a day, the evidence available shows that the dosage needs to be monitored as a result of physical and mental health issues, giving rise to the question of whether it could be adequately monitored in Mauritius sufficient to meet the needs of the second appellant.
- c. The availability of multidisciplinary healthcare and the presence of a Child and Adolescent Psychiatrist in Mauritius.
- d. The availability of appropriate schooling for the second appellant in Mauritius.

30. Further evidence in relation to the availability of medication in Mauritius has been provide din the form of a letter signed by a pharmacist based at Anichem Pharmacy in Mauritius who writes:

Please note that Intuniv 3mg is not available in Mauritius. It is also not registered with our Ministry of Health. However, an exceptional import permit may be obtained from our Ministry of Health, but there is no guarantee that it will be approved.

It is very complicated to get such approval as a medical board will have to be constituted to examine the child more often they recommend medication available in Mauritius only.

31. Intuniv is a reference to Guanfacine.
32. There is also within the appellant’s bundle a letter from the Pharmacy Board of the Ministry of Health & Wellness in Mauritius dated 6 March 2020, confirming that Intuniv 3mg (Guanfacine) is not available in Mauritius with no suggestion of any mechanism that could be employed through the Ministry to obtain the same.
33. I accept the appellants have established that at the date of the hearing the drug Guanfacine required to control U’s ADHD and other issues referred to above is not available within the health service and that although the Secretary of State indicates that it can be obtained through a private personal import, there is no evidence of the appropriate consent to the drug being imported having been granted by the Ministry of Health or any indication that this it is likely to occur within the foreseeable future, clearly not within the six month period referred to.
34. In relation to U’s schooling, Ms Everett did not challenge Mr Plowright’s submission that although there is schooling available in Mauritius the available information indicates that assistance can be provided to those with moderate needs but does not indicate that it will be adequate for a child with severe needs

such as U. This is a position supported in the addendum report of Dr Fiertag referred to above.

35. There is also an issue of whether there will be sufficient resources available to the first appellant. In addition to the day-to-day costs of her and her son she will have to meet the costs of importing Guanfacine from abroad and meeting the cost of schooling. It is a preserved finding that the first appellant will be able to obtain employment and there is insufficient evidence provided to warrant a finding that meeting the needs of U in Mauritius will be cost prohibitive or result in deprivation or unnecessary difficulties being experienced by this family unit.
36. What is also of relevance is the opinion of Dr Fiertag of the need for U to be monitored by a Child and Adolescent Psychiatrist with there is no evidence of any such specialist professional practicing in Mauritius.
37. It is also clear from the material provided that U benefits from a multidisciplinary approach to meeting his needs, including assistance from the Child Mental Health services. It was not made out that such multidisciplinary services will be available to him in Mauritius.
38. The Secretary of State has not filed sufficient evidence or lodged any challenge to the opinion of Dr Fiertag as to the impact upon U of either discontinuing Guanfacine and the resultant deterioration in U's mental and physical health if he could not access equivalent healthcare and educational support that he is receiving in the UK, although that is not however the relevant test.
39. Dr Fiertag was asked her opinion on whether U's psychological vulnerability would exasperate his physical health condition if he were returned to Mauritius, together with the psychological impact and his quality of life if treatment was to be withdrawn. In her original report dated 14 August 2019 it is written:

25.0 To your knowledge, would psychological vulnerability exasperate U's physical health condition if he were to return to Mauritius.

- 25.1 U's mental health and physical health would deteriorate if he could not access the equivalent healthcare and educational support that he is receiving in the UK. As this is not available in Mauritius, I would expect his mental and physical health to deteriorate.
- 25.2 U's physical health needs regular U monitoring in view of his epilepsy and epilepsy medication and the AHDH and ADHD medication. He also needs regular prompting and monitoring to open his bowels and urinate.
- 25.3 If U's ADHD is not controlled with medication he is at risk of being injured physically in view of his unawareness of danger and frequent running off and aggression towards himself and others (when his ADHD and Autism is being treated this risk is reduced drastically).
- 25.4 U's diet and weight is dependent on having regular prompting and support with eating at home and school. If his psychological health

deteriorates then his ability to eat properly may be impacted and this would impact on his physical health.

- 25.5 U's ability to go to the toilet is dependent on having regular prompting at home and school. If his psychological health deteriorates then this is likely to impact on his ability with toileting and potential further physical complications arising from this.
- 25.6 If U were to be in Mauritius there are no specialist schools that could enrol him that have the expertise to manage his physical needs in addition to his psychological needs. If U is not able to go to school then his psychological health would deteriorate with a subsequent detrimental impact on his physical health.
- 26.0 **What would be the psychological impact and his quality-of-life if treatment is withdrawn and the impact of not receiving an education, taking into consideration his illness.**
- 26.1 U's quality-of-life would be significantly reduced if his healthcare treatment and education is withdrawn. He is likely to become emotionally distressed; his challenging behaviour and aggression will increase; he will be unable to develop further with his speech and learning and unable to develop further life independent living skills. He will be unable to access peer social situations as he currently is and find it even harder to be out of the house. His physical health is likely to be affected as a consequence of the physical impact of not receiving this support.
40. As found in AXB, there is no free-standing procedural obligation on the UK to make enquiries of the Receiving State concerning treatment in that State or to obtain assurances in that regard.
41. As also found in AXB, the burden is on the individual appellant to establish that if he is removed there is a real risk of a breach of Article 3 ECHR to the standard and threshold which apply. That standard was identified by the Supreme Court in AM (Zimbabwe) as being the need to show a real risk of a serious, rapid and irreversible decline in the person's health resulting in intense suffering or to a significant (defined as 'substantial') reduction in life expectancy.
42. It is not made out that there will be a significant reduction in U's life expectancy as the evidence provided does not establish to the required standard that this is a foreseeable consequence of returning U to Mauritius.
43. The meaning of the word 'intense' is used to describe something that is very great or extreme in strength or degree and 'suffering' as serious pain which someone feels in their body or their mind. The appellant therefore needs to establish a serious, rapid and irreversible decline resulting in a significant consequence.
44. It is accepted that if U is returned to Mauritius at this stage, and without the key medication he requires being available, the evidence supports the claim that he

will suffer a decline which may be serious and rapid, but if the medication did become available it has not been shown to be irreversible. I must however assess the matter as it is at the date of the hearing where there is no evidence of the necessary permits or permissions being granted to enable the drug U requires to be imported into Mauritius within a reasonable time. If there was a guarantee that the health authorities in Mauritius would grant the necessary permit it may have been possible to ensure U was able to take the necessary quantity of drugs back with him to cover the period after which they will become available, but there is no such guarantee on the evidence.

45. I accept the appellants have established that the consequences for U can be classed as “suffering”. They will clearly be serious but assessing the impact of the withdrawal of the core medication upon U is to effectively “throw a hand grenade” into his life structure, his functioning, and the progress that he has made to date across all fronts , which is more likely than not to have the consequences identified in the evidence.
46. It is also the case that U requires the important assistance from a Consultant Child and Adult psychiatrist, not only to monitor but also guide his treatment, the presence of which may have alleviated some of the consequences of suffering or reduce the intensity of the same if one was present, but the evidence does not support a finding that one is. Indeed, the evidence from the appellant, not contested by the Secretary of State, is that there is no such professional assistance available in Mauritius.
47. I accept that there is other medication available but these were discussed by Dr Fiertag in her report and although they may have some effect will clearly not address U’s needs sufficient to avoid his suffering.
48. There is also an absence of a multidisciplinary approach or services available in Mauritius the evidence of which is clearly a material part of enabling U to properly function, without which he is not likely to attain what he is capable of and to develop into as well balanced and functioning adult as he possibly can. If U deteriorates as indicated in the medical evidence, including a return of any incontinence issues, there is a real risk of his being humiliated within a school environment, particularly by any peers, which could result in isolation and psychological suffering.
49. I find it is the combination of issues in this case that leads to a finding that the appellant has established that the Secretary of State’s decision to remove the second appellant from the United Kingdom will result in intense suffering sufficient to meet the required standard of proof.
50. As found in AM (Zimbabwe), if the appellant provides evidence which is capable of proving his case to the standard which applies, the Secretary of State will be precluded from removing the appellant unless she is able to provide evidence countering the appellant’s evidence or dispelling doubts arising from that evidence. Depending on the particular circumstances of the case, such evidence might include general evidence, specific evidence from the Receiving State following enquiries made or assurances from the Receiving State concerning the treatment of the appellant following return.

51. The Secretary of State's position in this appeal is that the drug U requires can be obtained on the Internet but that is a matter discussed above and bar the genetic limited evidence showing that drugs can be purchased in this manner, there is nothing further to dispel the doubts arising from the evidence that Guanfacine could not be obtained within a reasonable period of time. There is, in particular, no evidence obtained from Mauritius, following enquiries by the Secretary of State, that a permit to import the drug is likely to be forthcoming, and can be made available within a very short period.
52. Even if such evidence had been obtained to show the required medication could be obtained there is clearly no evidence provided to show a Consultant Adult or Child Psychiatrist, or professionally qualified equivalent with the required skill sets, is available in Mauritius, or evidence of the availability of a suitable package to meet U's particular needs
53. On the facts of this appeal I therefore find that the appellant has made out that return to Mauritius will breach the second appellant's rights pursuant to Article 3 ECHR on health grounds, and I allow his appeal on that basis.
54. In the alternative, had the appeal of the second appellant failed in Article 3 grounds it would have been allowed in Article 8 grounds on the basis that the interference with second appellant's private life had not been shown by the Secretary of State to be proportionate.
55. It is accepted that the private life the second appellant has was developed in the United Kingdom at the time that his status has been precarious, but it is important to recognise that throughout this time he has always been, and still is, a child. The impact upon a child is also a relevant consideration – SQ (Pakistan) [2013] EWCA Civ 1251 considered.
56. The nature of the second appellant's private life includes his connection with the medical and education authorities providing services to meet his needs, including his physical and moral integrity, and potential to develop in as near a normal manner as possible, which he will not be able to do without a similar support package being available, which it is not.
57. I have taken into account the argument concerning the economic well-being of the United Kingdom and the substantial costs involved in providing for the second appellant in terms of his care and monitoring by the NHS and specialist schooling provision. I do not, however, find this to be the determinative issue, although I have given it considerable weight as I also do to the fact that neither appellant has a legal right to remain in the United Kingdom.
58. It is clearly the case, as conceded by the Secretary of State, that the best interests of the second appellant are to remain in the United Kingdom. Whilst not the determinative factor I find on the specific facts of this case, taken cumulatively, that considerable weight can be given to the best interests' argument which counters the Secretary of State economic argument referred to above.
59. I find that as the first appellant is the primary carer of the second appellant, being his mother, it is not proportionate pursuant to Article 8 ECHR to sever their relationship by expecting her to return to Mauritius alone. I find it appropriate in all the circumstances for the first appellant to be granted leave in line with the second appellant.

60. If the situation changes and the required drugs are proved to be available at some point in the future, depending upon the second appellant's degree of progress (if any) at that time, it may warrant the situation being reviewed in relation to the leave granted to both the first and second appellant, but this will obviously depend upon the second appellant's needs and the presence of appropriate medical professionals to monitor his situation, which is not present at the date of this hearing.

Decision

61. **I allow the appeals of both appellants on human rights grounds.**

Anonymity.

62. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 9 July 2021