



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15411/2019**

THE IMMIGRATION ACTS

**Heard at Manchester Via Teams
On the 18 October 2021**

**Decision & Reasons Promulgated
On the 17 November 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**VOLODYMYR PISKUNOV
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jacobs

For the Respondent: Mr Tan, Senior Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 15 June 2021, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:
 1. The appellant is a male citizen of Ukraine who was born on 7 June 1947. By a decision dated 27 August 2019, the Secretary of State refused his claim on human rights grounds. He appealed to the First-tier Tribunal which, in a decision promulgated on 12 March 2020, dismissed his appeal. The appellant now appeals, with permission, to the Upper Tribunal.
 2. The appellant is suffering from stage 4 renal cancer. Before the First-tier Tribunal, he argued, citing *Paposhvili* (application no: 41738/10) and *AM*

(*Zimbabwe*) [2018] EWCA Civ 64, that his medical condition was so serious and the circumstances concerning his ability to access appropriate treatment in Ukraine such that he should succeed under Article 3 ECHR.

3. On 29 April 2020, a little over a month after the First-tier Tribunal promulgated its decision, the Supreme Court delivered its judgment in *AM (Zimbabwe)* [2020] UKSC 17. Mr Tan, who appeared for the Secretary of State at the Upper Tribunal initial hearing, did not seek to the law was other than as stated by the Supreme Court in *AM (Zimbabwe)* notwithstanding that the Court had not clarified the law at the time the judge promulgated her decision. Whilst that is so, it is equally clear that no criticism attaches to the judge. The sequence of events in this appeal does, however, give rise to difficulties in applying law to a decision of the First-tier Tribunal which was written in ignorance of that law.

4. At [182] the Grand Chamber in *Paposhvili* had clarified the approach which should thereafter be adopted as follows:

183. The Court considers that the ‘other very exceptional cases’ within the meaning of the judgment in *N v The United Kingdom* (para 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

At [34] of *AM (Zimbabwe)*, the Supreme Court held:

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.

In her submissions in the instant appeal filed on 12 November 2020, the Secretary of State acknowledged that the First-tier Tribunal’s decision at

[34] was now at odds with the law as clarified by the Supreme Court in *AM (Zimbabwe)*. At [34], Judge Ghandi stated:

In any case, the case law shows that the fact that treatment is not affordable in Ukraine is not sufficient to amount to a breach [of] the appellant's Article 3 ECHR rights.

However, the Secretary of State argues that any error of law is immaterial. The judge had made findings at [21-33] that the appellant had failed to adduce adequate evidence regarding his condition and likely treatment/consequences of the withdrawal of treatment. This 'lacuna in the evidence' [Secretary of State's submissions, 10] meant that, even applying the test in *AM (Zimbabwe)*, the claim could not succeed 'in the absence of supporting medical evidence to meet the relevant threshold.' The judge had dismissed the appeal because the appellant had failed to discharge the burden of proof; her comments at [34] were no more than obiter comments which added nothing in the disposal of the appeal.

5. The problem for the Secretary of State lies in the new approach in *Paposhvili* concerning the obligations on the parties to the gathering of evidence, an approach which is summarised by the Supreme Court in *AM (Zimbabwe)* at [23];

23. Its new focus on the existence and accessibility of appropriate treatment in the receiving state led the Grand Chamber in the *Paposhvili* case to make significant pronouncements about the procedural requirements of article 3 in that regard. It held

(a) in para 186 that it was for applicants to adduce before the returning state evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, they would be exposed to a real risk of subjection to treatment contrary to article 3;

(b) in para 187 that, where such evidence was adduced in support of an application under article 3, it was for the returning state to "dispel any doubts raised by it"; to subject the alleged risk to close scrutiny; and to address reports of reputable organisations about treatment in the receiving state;

(c) in para 189 that the returning state had to "verify on a case-by-case basis" whether the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure to treatment contrary to article 3;

(d) in para 190 that the returning state also had to consider the accessibility of the treatment to the particular applicant, including by reference to its cost if any, to the existence of a family network and to its geographical location; and

(e) in para 191 that if, following examination of the relevant information, serious doubts continued to surround the impact of removal, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant.

[my emphasis]

6. Upper Tribunal Judge Smith drew attention to [23b] of *AM (Zimbabwe)* when granting permission in the instant appeal. It is clear that any investigative obligation on the returning state (the United Kingdom) only

arises if the appellant adduces evidence ‘capable of demonstrating that there are substantial grounds for believing’ that, if removed, he would be exposed to a real risk of treatment contrary to Article 3 ECHR. At [27], Judge Ghandi noted that the appellant was being treated free of charge in the United Kingdom under a clinical trial; however, the ‘treatment trial in Ukraine is finished.’ The judge recorded that, ‘the only affordable treatment in the Ukraine is sunitinib which was not suggested by the Royal Marsden Hospital’ where the appellant is receiving treatment in the United Kingdom.

7. The question in the appeal is, therefore, whether the appellant had done enough to demonstrate substantial grounds for believing that he would be exposed to Article 3 ECHR suffering in Ukraine. His ability to access appropriate treatment and to pay for it are plainly relevant considerations in answering that question; understandably, following *N v United Kingdom* [2008] 47 EHRR 39, Judge Ghandi had, at [34], discounted that factor in her analysis.

8. As Judge Ghandi observed [21], this is a difficult case. Ultimately, I find (for the obvious reason that her decision pre-dated *AM (Zimbabwe)* in the Supreme Court) that it is not possible to be sure that the First-tier Tribunal has addressed the test articulated by the Supreme Court at [23a] (see [5] above). It is difficult, if not impossible, to disentangle from the reasoning the fact that, whatever evidence had or had not been adduced by the appellant in respect of his ability to pay for treatment in Ukraine, the judge was throughout of the view that an inability to pay could not in any event assist the appellant in the appeal. There remains the danger of construing and possibly distorting the Tribunal’s findings in order to apply a test of which the judge had been unaware and which she did not seek to apply.

9. I have concluded, therefore, that, skilfully advanced as it was by Mr Tan and (in writing) Ms Willcocks-Briscoe, the Secretary of State’s submission should be rejected. I set aside the First-tier Tribunal decision. Mr Jacobs, who appeared for the appellant at the Upper Tribunal initial hearing, referred me to his client’s Rule 15(a) application to adduce fresh evidence. He also indicated that, before remaking the decision, the Upper Tribunal would benefit from up to date medical evidence. I agree and, in the light of {23(b)} of *AM (Zimbabwe)*, it is likely that the respondent will also seek to make enquiries of the receiving state, Ukraine. The appeal will be remade in the Upper Tribunal at a resumed hearing but not before 1 August 2021; I am aware of the urgency so far as the appellant is concerned but the parties must have sufficient time to prepare their respective cases.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The appeal shall be remade in the Upper Tribunal following a resumed hearing. Both parties may rely on new evidence provided copies of any documentary evidence is filed at the Upper Tribunal and served on the other party no less than 10 days prior to the resumed hearing.

2. Following an adjournment in the late summer of 2021, the resumed hearing eventually took place remotely at Manchester on 18 October 2021.
3. The appellant’s daughter, Ms Lena Tsekhanovych, gave evidence in English (an interpreter in Russian was present and assisted the Tribunal in

communicating with the appellant, who was present but who did not give oral evidence). She adopted her witness statements as her evidence in chief and was cross examined by Mr Tan, who again appeared for the Secretary of State. The evidence which she gave was not challenged in his submissions by Mr Tan, save in one respect (which I address below). I found her to be a wholly truthful witness who is plainly very concerned for the welfare of her father. I am grateful to her for the assistance which she has provided to the Tribunal.

4. I have considered all the evidence in this appeal in remaking the decision. That evidence includes the documents bringing up to date the evidence concerning the appellant's current medical condition and the background evidence sent in by Mr Tan concerning the availability of treatment in Ukraine. Perhaps unsurprisingly, that evidence is general in nature and not specific to the appellant.
5. The appellant is suffering kidney cancer Stage 4 with metastatic advanced renal cell carcinoma. He has been receiving immunotherapy in the United Kingdom although this therapy is currently paused following the recent stabilising of his condition. The parties agree that immunotherapy is not currently available in Ukraine. It is apparent from the evidence obtained since the initial hearing by both parties that chemotherapy is available in Ukraine. The appellant has not hitherto received any chemotherapy for his cancer. Dr Odarchenko Serhly, a Ukrainian oncologist consulted by Ms Tsekhanovych on a visit to Ukraine, confirms that the only alternative available treatment is chemotherapy which he does not consider will be suitable for the appellant. He further states that immunotherapy would only be available on the 'black market'. Dr McTavish, the appellant's United Kingdom GP, states that the appellant's life expectancy will reduce from one year to several months if immunotherapy is stopped entirely. Dr Sarwar, the appellant's United Kingdom oncologist, states that, without access to immunotherapy, the appellant's life will be 'in danger' and his life expectancy reduced to 'short months.'
6. As I have recorded above, the test to be applied in this appeal on Article 3 ECHR grounds is that articulated in *AM (Zimbabwe)*: is the appellant facing a real risk of being exposed to serious, rapid and irreversible decline in his state of health resulting in intense suffering or significant reduction in life expectancy? In his submissions, Mr Tan challenged the evidence of Ms Tsekhanovych on one point only, namely her statement that, whilst her father's immunotherapy has currently been paused following the stabilising of his condition, she has been informed by her father's United Kingdom treating doctors that it is likely to be resumed by the end of 2021. Mr Tan submitted that there was no direct evidence from any of the medical experts to support that claim. Whilst it would have been helpful to have had direct evidence from an expert witness, I accept that Ms Tsekhanovych has been told in discussion with the treating doctors that her father's immunotherapy will need to be resumed in the short term (i.e. weeks rather than months). The statement is consistent with the medical evidence which does not suggest that the course of immunotherapy is now

complete and will not resume. Indeed, the experts are unanimous in stating that without continuing immunotherapy, the appellant's life expectancy will be significantly reduced; given that the appellant may not in any event live for more than a year, it follows that active immunotherapy is likely to be resumed in the near future. Even if the drug therapy is not resumed soon, it is only by remaining in the care of his United Kingdom treating doctors that the appellant can be monitored and, when required, active therapy resumed. If the Secretary of State is submitting that the appellant can live in Ukraine for a significant period of many months or longer without requiring immunotherapy (in the wider sense of both drugs and active monitoring) and that, as a consequence, the test in *AM (Zimbabwe)* is not met, I reject that submission.

7. Mr Tan's submission regarding the resumption of immunotherapy was part of wider argument concerning life expectancy. The appellant is now 74 years old which is already in excess of average life expectancy in Ukraine (72.5 years (2019)). Life expectancy in the United Kingdom is 81.52 years (2020). The Supreme Court addressed this aspects of the *AM (Zimbabwe)* test at [31] but gave no clear guidance:

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. [my emphasis]**

It is not clear whether the Supreme Court are assessing life expectancy by reference to averages pertaining in the United Kingdom or the country of return. In my opinion, it should be by reference to life expectancy in the United Kingdom that the assessment should be made. If, by way of extreme example, a person aged 50 were to be returned to a country where the life expectancy is 25 years it would follow that his reduction in life expectancy could never be 'significant'. Taking all the circumstances into account including his current age, I find that for the 74 year old appellant a period of a year (his life expectancy if he continues to receive appropriate treatment) would be 'significantly' reduced if he were only to

live for 'short months.' He is not prevented from meeting the test in *AM (Zimbabwe)* simply because he has already lived longer than the average Ukrainian.

8. Mr Tan's remaining submissions may be summarised as follows. First, he submits that, although immunotherapy is not available in Ukraine (he did not suggest that the appellant could seek it on the 'black market'), he could receive targeted chemotherapy which may afford him with a life expectancy not significantly different from that which he would enjoy should he remain and be treated in the United Kingdom. Secondly, the appellant would have access to palliative care in Ukraine which would prevent him from intense suffering.
9. I have considered the first of those submissions in the light of the medical evidence. That evidence (both from treating doctors in the United Kingdom and Dr Odarchenko Serhly in Ukraine) is unanimous. It is explicit in the evidence of the treating doctors that, if the current immunotherapy treatment is discontinued, the appellant's decline will be rapid and terminal. It is implicit that, if similar results could be achieved by alternative treatments (such as chemotherapy), the doctors would have said so. In short, there is no evidence to indicate how long the appellant might live were he to receive chemotherapy. Dr Serhly addresses the suitability of chemotherapy directly in his letter and unequivocally states that it would not be appropriate. I acknowledge that Dr Serhly has not treated the appellant and practises in a Ukraine where he may have little, if any, direct knowledge of immunotherapy. However, he does have experience of the treatment of kidney cancer with chemotherapy and I find that his opinion should be given weight. Against this medical evidence, which is specific to the appellant, Mr Tan puts forward background material, which indicates nothing more than that chemotherapy is available in Ukraine. I find that the only appropriate treatment for the appellant's condition is immunotherapy. If he returns to Ukraine and does not receive that treatment, his life expectancy will be significantly reduced.
10. As regards the second submission (palliative care), it is difficult to make any firm finding given that the evidence fails to address the availability of such treatment in Ukraine or the likelihood that such care would prevent intense suffering during the terminal stages of the appellant's cancer (whether it is administered together with immunotherapy or not). In any event, the appellant only has to satisfy one limb of the *AM (Zimbabwe)* test ('intense suffering **or** significant reduction in life expectancy') and I find that he satisfies the second.
11. I refer to my findings and analysis set out above. I find that, if he is returned to Ukraine, the appellant will be exposed by his inability to access immunotherapy treatment for his advanced kidney cancer to a serious, rapid and irreversible decline in his state of health resulting in a significant reduction in life expectancy. I allow the appellant's appeal on human rights (Article 3 ECHR) grounds.

Notice of Decision

I have remade the decision. I allow the appeal on human rights (Article 3 ECHR) grounds.

Signed
Upper Tribunal Judge Lane

Date 4 November 2021