



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/01636/2015

THE IMMIGRATION ACTS

Heard at Field House
On 7th November 2018

Decision & Reasons Promulgated
On 7th December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR DAT VAN NGUYEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Record, Chambers of Celia Record

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Vietnam, appealed to the First-tier Tribunal against a decision made by the Respondent on 16th January 2015 to refuse to grant him asylum and/or humanitarian protection in the UK.
2. First-tier Tribunal Judge C A S O'Garro dismissed the appeal in a decision promulgated on 26th January 2015. The Appellant now appeals to this Tribunal with permission granted by Upper Tribunal Judge Rintoul on 4th September 2018. Permission to appeal was granted on the basis that it is arguable that the First-tier

Tribunal Judge erred in concluding that, in the light of **Paposhvili v Belgium [2017] Imm AR 867** that removing the Appellant, who is on kidney dialysis, would not be in breach of Articles 3 and/or Article 8 of the European Convention on Human Rights.

3. The application for permission to appeal to the Upper Tribunal contends that the judge erred in her assessment of Articles 3 and 8.
4. The judge sets out the issue at paragraph 26 of the decision where she said that what is in dispute is whether the Appellant can return to his country and access treatment for his medical condition. The Respondent's position before the First-tier Tribunal was that the Appellant could receive treatment in Vietnam whereas the Appellant asserted that he could not. The judge looked at what treatment was available in Vietnam and considered the background evidence relying on an extract from the Country of Origin Information Service Report (COIR) at paragraphs 30-31 of the decision highlighting that the Report states that Vietnam had developed a simple device for a Continuous Ambulatory Peritoneal Dialysis (CAPD) which only requires a plastic bag and a catheter and can be used in any clean, well-lit place. The judge concluded that, although hospitals in Vietnam have limited dialysis machines to treat the thousands of citizens who require treatment, a person who has renal failure and cannot get hooked up to a dialysis machine in a hospital can make use of the CAPD as an alternative. The judge also went on to find at paragraph 32 that the objective evidence shows that there is a health insurance programme which would help the Appellant to access private healthcare. The judge found that medical facilities are available and that the Appellant's circumstances do not reach the high threshold required for there to be a breach of Article 3.
5. At the hearing before me Miss Record submitted that it is not in dispute that the Appellant has end-stage kidney disease. She submitted that medical evidence before the Tribunal was that, if the Appellant could not access dialysis in Vietnam, he would die
6. Miss Record criticised the judge's approach to the COIR relying on paragraph 38 of **AM Zimbabwe [2018] EWCA Civ 64** which analyses the decision in **Paposhvili**. In her submission the focus of the European Court of Human Rights is not now confined to deathbed cases but applies in circumstances where

"Substantial grounds have been shown for believing that [the Appellant], 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 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" (paragraph 183 of **Paposhvili**).
7. Miss Record relied on the medical evidence which was before the First-tier Tribunal Judge. She relied on the letter from Barts Health NHS Trust following the Appellant's attendance at the clinic on 24th January 2017 where the consultant nephrologist stated "I am writing to confirm that this patient requires haemodialysis

therapy, three times a week, at Whipps Cross Hospital. This is a life sustaining and life saving treatment without which he is unable to survive.”

8. She referred also to a further letter from the same consultant following a clinic on 27th June 2017 where the consultant stated

“I am the dialysis consultant for the above patient. He has end-stage kidney disease with no chance of his native kidneys recovering. He has haemodialysis treatment three times a week at Whipps Cross Hospital on patient’s ward. Recently his urine output has reduced which indicates that he is now even more dependent than previously on haemodialysis. Specifically should his haemodialysis treatment be interrupted or suspended for any reason he is at a very high risk of death explicitly if he moves to or lives in an environment where haemodialysis is not readily available then he would die”.
9. Miss Record submitted that the point is whether or not, within days of getting to Vietnam, the Appellant could access treatment. She relied on the skeleton argument which was before the First-tier Tribunal where it stated at paragraph 5 that the Appellant would most likely die if his treatment is interrupted or stopped. She pointed out that the skeleton argument raised the issue that the Home Office did not appear to have put in place any travel arrangements which would guarantee the Appellant’s health during that arrangement and on his arrival in Vietnam. In her submission the Secretary of State’s duty of care applied to the Appellant as they would be removing him to another country and the duty of care would be to have in place a framework where his condition would not be exacerbated or his treatment interrupted.
10. She referred to paragraph 41 of Paposhvili, pointing out that even on the extreme facts of the Paposhvili case the Grand Chamber was unable to say that it was clear that a violation of Article 8 would have occurred but that there was a procedural obligation to examine the case with care and with reference to all the available evidence. She submitted that that had not happened in this case.
11. Miss Record addressed the decision in EA and Others (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 00445 (IAC) and in her submission there is a procedural obligation in issue in this case and the issue is whether the Appellant would be treated appropriately in Vietnam and she accepted that there was no authority going to that point.
12. Ms Isherwood submitted that there was no material error in this case. The Appellant’s case in her submission had been put forward as being one where he could not afford the treatment in Vietnam but the background evidence shows that there is treatment available and the evidence before the judge was that the Appellant’s younger brother had raised funds to fund a visa application for him to come to the UK as a kidney donor. Therefore it was likely that the family had some money and this is a factor taken into account by the judge at paragraph 35. In her submission the decision in AM (Zimbabwe) indicates clearly at paragraph 7 that the

burden of proof is on the Appellant to show that there would be a significant risk of deterioration in his health and possible death in Zimbabwe.

13. She referred to paragraph 39 which highlights elements of the decision in **Paposhvili** and paragraph 40. Her submission was that even in **Paposhvili** no breach was found. In her submission the Appellant bears the burden of proof and the judge in this case properly considered the Appellant's evidence. So at paragraphs 4 and 5 the judge set out the Appellant's condition and noted at paragraph 5 that the Appellant claimed that he could not return to Vietnam as the cost of dialysis and the transplant is very expensive. She highlighted paragraph 22 where again the Appellant's claim is stated that he cannot return to Vietnam because he will die as he will not receive the medical treatment he needs for his medical condition.
14. Ms Isherwood submitted that the judge accepted the medical condition at paragraph 26 and highlighted the issue in dispute at paragraph 27. The judge considered the background evidence at paragraphs 30 and 31 acknowledging the high threshold required at paragraph 32. She highlighted at paragraph 35 the judge took into account that the Appellant has a younger brother who agreed to be a donor and who had applied to come to the UK as a kidney donor and found that the Appellant had provided no credible explanation why that money is no longer available to assist him with the private treatment in Vietnam. Just as the family were able to raise that money when it was deemed necessary for the Appellant's brother to come to the UK as a donor in the judge's finding the family can similarly raise similar funds to pay for the Appellant's medical treatment in Vietnam if that is the only way he can receive medical treatment.
15. In her submission the judge had evidence on which to base the findings made. She further submitted that in terms of the mechanics of removal the Secretary of State would put in place appropriate arrangements for the Appellant's removal.
16. In response Miss Record referred to paragraph 40 of the decision in **AM (Zimbabwe)** which highlighted that Article 3 would be breached if it was established that there would be a serious and rapid decline in health resulting in intense suffering to the Article 3 standard where death is not expected. She submitted that the evidence before the judge showed that even if treatment was interrupted the Appellant would be at risk of death. She submitted that paragraph 44 of **AM (Zimbabwe)** which relates to the Appellant in that case had HIV but not AIDS and she submitted that this highlights a difference between that case and this.

Error of Law

17. I have taken into account the submissions put forward by both parties and the case law.
18. In **AM (Zimbabwe)** the Court of Appeal concluded that whilst **N v UK Application 26565/05** was binding authority up to Supreme Court level, **Paposhvili** relaxed the test only to a very modest extent. The boundary had simply shifted from being defined by imminence of death in the removing state even with treatment to the

imminence of intense suffering or death in the receiving state occurring because of the lack of treatment previously available in the removing state. At paragraph 38 of **AM (Zimbabwe)** Sales LJ said:

“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 (i.e. likely rapid experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state”.

19. In this case the judge accepted that the Appellant has end-stage kidney disease, that he receives dialysis three times a week and that he will need to continue receiving dialysis three times a week unless he is able to have a kidney transplant [26]. The judge identified that the issue in dispute is whether the Appellant can return to his country and access treatment for his medical condition. It is clear that the judge considered the background evidence at paragraphs 30 and 31. His analysis of that background evidence has not been significantly disputed. The judge also considered the objective evidence showed that there is a health insurance programme. The judge also found that, based on the fact that the Appellant’s family previously raised £8,300 for his younger brother to come to the UK, there was no credible evidence why this money was no longer available and no evidence as to why they could not raise similar funds to pay for the Appellant’s medical treatment in Vietnam.
20. On the basis of these findings it was open to the judge to find that there are medical facilities available for the Appellant to receive treatment in Vietnam.
21. In the circumstances it was open to the judge to find that the high threshold required to show a breach of Article 3 had not been met.

Notice of Decision

22. The decision of the First-tier Tribunal does not contain a material error of law.

The decision of the First-tier Tribunal will stand.

No anonymity direction is made.

Signed

Date: 5th December 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there is no fee award.

Signed

Date: 5th December 2018

Deputy Upper Tribunal Judge Grimes