



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05367/2017**

THE IMMIGRATION ACTS

Heard at Field House
On 7 December 2018

**Decision & Reasons Promulgated
On 19 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A M G

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer

For the Respondent: Mr B Bundock, instructed by Duncan Lewis & Co, solicitors

DECISION AND REASONS

1. To preserve the anonymity direction deemed necessary by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier

Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Heatherington, promulgated on 18/05/2018 which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was born on 23/06/1951 and is a national of South Africa. On 16/03/2017 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Heatherington ("the Judge") allowed the appeal against the Respondent's decision on article 8 ECHR grounds. Grounds of appeal were lodged and on 2 November 2018 Upper Tribunal Judge Frances gave permission to appeal stating

"It is arguable that the Judge failed to apply the very high threshold applicable in Article 3 cases following D v UK, N v UK and GS(India) [2015] EWCA Civ 40. The Judge arguably misdirected herself in assessing Article 8. The grounds are arguable. "

The Hearing

5. For the respondent, Mr Walker adopted the terms of the grounds of appeal. He told me that the Judge fails to give adequate reasons for finding that the threshold for engaging article 3 in a medical case is approached in this case. He referred me to N 2005 UKHL 31, D v UK (1997) 24 ECHR and GS (India); EO (Ghana); GM (India); PL (Jamaica); BA (Ghana) and KK (DRC) v SSHD [2015] EWCA Civ 40 . Relying on GS (India), Mr Walker told me that the appellant's article 8 claim cannot succeed because the appellant's claim cannot succeed on article 3 medical grounds. He urged me to set the decision aside.

6. (a) For the appellant, Mr Bundock adopted the terms of his rule 24 response. He told me that the grounds of appeal do not identify an error of law and that the Judge's findings of fact are flawless. Relying on Piglovska v Piglovski [1999] 1 WLR 1360 he told me that there was no error in the Judge's decision making and that the Judge gives adequate reasons for finding that the article 3 threshold is breached.

(b) Mr Bundock took me through the history of the appellant's application and told me that the Judge's article 8 assessment is flawless. He told me that the Judge took correct guidance in law and that the Judge's fact-finding process is beyond criticism. He told me that the respondent's grounds of appeal focus on

medical issues, when the Judge has made clear findings that article 8 private life exists. He told me that the Judge's article 8 decision is not dependent upon the article 3 decision, but proceeds on different facts and circumstances. He said there was considerable force in the article 8 private life findings.

(c) Mr Bundock urged me to dismiss the appeal and to allow the decision to stand.

Analysis

7. In AM (Zimbabwe) v SSHD [2018] EWCA Civ 64 it was decided that the European Court had not ruled that on the medical evidence adduced it would in fact have been a violation of Article 3 to remove Mr Paposhvili to Georgia, rather that Belgium would have violated the procedural aspect of Article 3 had they removed Mr Paposhvili without consideration of his medical condition. Whilst N was binding authority up to Supreme Court level, the Court of Appeal said that Paposhvili relaxed the test only to a very modest extent. The applicant would have to face a real risk of rapidly experiencing intense suffering to the Article 3 standard because of their illness and the non-availability there of treatment available to them in the removing state or face a real risk of death within a short time in the receiving state for the same reason. 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. On the facts those appellants could not bring themselves within that test.

8. At [27] the Judge makes a number of findings in relation to the appellant's health. At [27(iii)] the Judge finds that the appellant is not in the final stages of a terminal illness. The Judge finds at [27(v)] that the appellant is not an imminent risk of dying if the medication care and treatment that she now receives continues, and [27(vii) &(viii)] the Judge finds that if the appellant returns to South Africa she will not have access to the drug crucial to the maintenance of her current health, as a result she will be exposed to suffering, reduction in life expectancy, and a serious, rapid and irreversible decline in health which will, eventually, prove fatal.

9. Even in the face of those findings, N still binding authority. AM may be perceived to have softened the approach slightly, but the Judge's findings do not amount to findings of a real risk of death within a short time or a real risk of rapidly experiencing intense suffering. In the final sentence of [26] the Judge asks the wrong question. The Judge looked for a significant reduction in life expectancy when, in fact (and law), he should be looking for evidence of experiencing intense suffering or a real risk of death within a short time. That is a material error of law.

10. The Judge's article 8 assessment commences at [29]. At [30] the Judge finds that the appellant is a member of Mr Hyde's household and viewed as a

grandmother to his children, there is a strong emotional tie in their relationship and there is evidence of dependence. The Judge says

“Family life within the meaning of article 8 arises if there are sufficiently close factual ties. There are. To establish family life, it is necessary to show that there is a real, committed or effective support or relationship between the family members. There is.”

11. Having made those findings, the Judge goes on to find that article 8 family life does not exist because a relationship by blood or marriage is missing. The evidence in this case is that there is financial and emotional dependency, but the relationship between Mr Hyde’s family and the appellant is not a romantic partnership. However, the financial and emotional dependency forms a significant part of article 8 private life.

12. The renewed Grounds of appeal directed at article 8 are misconceived. It is clear from the decision that there is much more to the article 8 private life consideration than the medical arguments advanced under the article 3 appeal.

13. At [32] the Judge correctly applies section 117B of the 2002 Act. The Judge gives little weight to the appellant’s private life in accordance with the statute. S. 117B does not say that no weight can be given to the appellant’s private life. The Judge goes on to find that even when little weight is attached to the appellant’s private life the extent of the article 8 private life, and the effect of removal from the UK, is still sufficient to outweigh the public interest in immigration control.

14. In Green (Article 8 – new rules) [2013] UKUT 254 (IAC) the Tribunal said that

“Giving weight to a factor one way or another is for the fact finding Tribunal and the assignment of weight will rarely give rise to an error of law.”

15. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

16. The Judge reached a conclusion that the respondent does not like, but she reached that conclusion after taking correct guidance in law and by applying the correct legal test. The Judge found that article 8 private life is engaged. The Judge took a balance sheet approach to her proportionality assessment. The conclusion she reached is well within the range of reasonable conclusions available to the Judge.

17. In R (on the application of Luma Sh Khairdin) v SSHD (NIA 2002: Part 5A) IJR [2014] UKUT 00566 (IAC) it was held where the Upper Tribunal is considering, pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007, whether there is an error of law in the decision of the First-tier Tribunal involving Article 8 proportionality, the task of the Upper Tribunal is confined (at that point) to deciding if the First-tier Tribunal's assessment of where to strike the balance was unlawful, according to the error of law principles set out in R (Iran) [2005] EWCA Civ 982. In R (Iran) v SSHD (2005) EWCA civ 982 the Court of Appeal was of the firm view that a decision on proportionality of an Immigration Judge who has properly directed himself can only be overturned on reconsideration on traditional public law grounds.

18. There is no error of law in relation to the article 8 appeal.

Decision

A handwritten signature in black ink, appearing to read 'Paul Doyle', is centered on the page. The signature is written in a cursive, flowing style.

19. I set aside the decision in relation to the article 3 appeal and substitute my own decision

20. The appellant's appeal is dismissed on article 3 ECHR grounds

21. The Judge's decision on the article 8 ECHR appeal (promulgated on 18 May 2018) stands so that the appellant's appeal is allowed on article 8 private life ECHR grounds.

Signed

Date 11 December 2018

Deputy Upper Tribunal Judge Doyle