



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/04633/2017

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 12 April 2019**

**Decision & Reasons Promulgated  
On 29 April 2019**

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**AB  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Hussain

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. By a decision promulgated on 4 March 2019, I set aside the decision of the First-tier Tribunal and made directions for the remaking of the decision in the Upper Tribunal:

"1. The appellant, AB, is a citizen of Gambia and was born in 1970. He appealed to the First-tier Tribunal against a decision of the respondent dated 4 May 2017 to the First-tier Tribunal (Judge Turnock). The First-tier Tribunal, in a decision promulgated on 6 March 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The focus of the appeal in the First-tier Tribunal was the appellant's medical condition. The appellant suffers from left ventricular failure and significant hypertension. He has chronic kidney disease stage 5. At the time of the hearing before the First-tier Tribunal, he was not receiving kidney dialysis but I understand from his counsel that he is now receiving it. The appeal before the First-tier Tribunal turned on the application of AM [2018] EWCA Civ 64. The judge's finding at [50] is not challenged:

"I am satisfied that if the appellant does not receive appropriate treatment [in Gambia] then he would fall within the risk categories referred to in AM. The issue then becomes what treatment would be available for the appellant in the event of his return to Gambia."

3. The judge examined the evidence before him and concluded at [69];

"I am not satisfied that the appellant has established even to the low standard required that his is a case which falls within the test to be applied in the light of the decision in AM."

4. As regards AM, the judge cited [40-41]:

"It is true that if one read the phrase "would face a real risk ... of being exposed ... to a significant reduction in life expectancy" in para. [183] out of context, it might be taken to indicate a very wide extension of the protection of Article 3 in medical cases, since in very many such cases where a foreign national is receiving treatment at a higher level of effectiveness in the removing state than would be available in the receiving state (e.g. in the case of those suffering from AIDS) they would be able to say they would face a real risk of a significant reduction of life expectancy if they were removed. But this is not a tenable interpretation of para. [183] of Paposhvili, read in its proper context. *N v United Kingdom* was itself a case where removal resulted in a very significant reduction in life expectancy (as was also noted in Paposhvili at para. [178]), in which no violation of Article 3 was found, and the Grand Chamber in Paposhvili plainly regarded that case as rightly decided. *N v United Kingdom* was itself a Grand Chamber judgment, decided by 14 votes to 3. It is impossible to infer that by the formula used in para. [183] of Paposhvili the ECtHR intended to reverse the effect of *N v United Kingdom*. Moreover, the Grand Chamber's formulation in para. [183] requires there to be a "serious" and "rapid" decline in health resulting in intense suffering to the Article 3 standard where death is not expected, and it makes no sense to say in the context of analysis under Article 3 that a serious and rapid decline in health is not a requirement where death rather than intense suffering is the harm expected. In my view, the only tenable interpretation of para. [183], read in context, is the one given above.

In that regard, it is also significant that even on the extreme and exceptional facts of the Paposhvili case, where the applicant faced a likelihood of death within 6 months if removed to Georgia, the Grand Chamber did not feel able to say that it was clear that a

violation of Article 3 would have occurred for that reason had he been removed. Instead, all that the Grand Chamber held was that the applicant had raised a sufficiently credible Article 3 case that it gave rise to a procedural obligation for the relevant Belgian authorities to examine that case with care and with reference to all the available evidence. The violation of Article 3 which the Grand Chamber held would have occurred if the applicant had been removed to Georgia was a violation of that procedural obligation.”

5. In addition, the judge relied on [38] for the ‘risk categories’ to which he refers at [50]:

“So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], 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" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (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.”

6. The judge examined the evidence with his customary thoroughness. The grounds of appeal, however, submit that he failed to give proper weight to a document produced by the world health organisation (WHO) which dates from 2016. As a consequence, the judge’s conclusion, that treatment by way of dialysis would be available in Gambia, was flawed. I note that at [65], the judge observed that ‘it would have been helpful if more recent information had been provided [regarding the availability of the appropriate treatment in Gambia]’. The appellant submits that the WHO document was of more recent date but was ignored by the judge or given insufficient weight in his analysis.

7. As I indicated to the representatives at the hearing, the WHO document is somewhat problematic. It consists of nothing more than a single page of A4 and is in the form of a fact sheet. At the foot of the document there are number of categories dealing with ‘Medicines in primary care facilities’ and ‘Procedures’. In this latter category is ‘Renal replacement therapy by dialysis’. As the box for this category is

not filled in, then the key to the fact sheet indicates that the treatment is 'not generally available.' I say the document is problematic in part because it is so brief and lacking in detail but also because it indicates that the availability of dialysis treatment in Gambia has diminished to zero from a time when it could be obtained, if only for children. That in itself appears to me to be very surprising. Having said that, the fact remains that the judge's analysis fails to address this evidence and, given the very significant obligation to take the greatest care to consider what treatment, if any, in reality this appellant may expect to receive in Gambia, I am drawn to the conclusion that the judge's analysis is flawed. I therefore set aside his decision. However, I shall not remake the decision without first receiving more extensive evidence not only concerning the availability now of dialysis treatment in Gambia but also as to the appellant's current medical condition. Both parties may rely upon fresh evidence which was not before the First-tier Tribunal provided they send copies of that evidence to each other and to the Upper Tribunal no less than 10 days prior to the resumed hearing.

### **Notice of Decision**

8. The decision of the first-tier tribunal set aside. The Upper Tribunal (Upper Tribunal Judge Lane) shall remake the decision following a resumed hearing at Bradford on a date to be fixed. (2 hours allowed)."

2. At the resumed hearing at Bradford on 12 April 2019, the appellant attended. During the course of the hearing, he became very unwell and fell from his chair. First aiders and an ambulance were summoned and the appellant received treatment in the court room. Happily, he was able to leave the court without assistance following the conclusion of the hearing.
3. The appellant's representatives have now obtained a number of helpful items of additional evidence. I have also received background material relating to the availability of medical treatment in Gambia from the Secretary of State. I have had regard to these new documents and to the existing papers which were before the First-tier Tribunal in reaching my decision.
4. The focus of the resumed hearing was the Court of Appeal's comments in *AM (Zimbabwe)* (see above) in particular at [38]:

"So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], 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" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a

real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (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."

5. Mr Diwnycz, who appeared for the Secretary of State, do not seek to question any of the new expert evidence produced by the appellant, in particular the report of Dr Ceesay which deals with her the availability of treatment in Gambia and the letter from Dr Garthwaite, the appellant's treating surgeon at St James's University Hospital, Leeds. The latter confirms that the appellant now has no native kidney function at all and is entirely reliant upon dialysis. He requires dialysis regularly three times every week. If he misses a dialysis session, his blood will fill with high levels of poisons which will damage heart 'very quickly.' The doctor is unequivocal as regards the impact of the appellant missing dialysis sessions. He writes, 'it is likely that without regular dialysis [the appellant] would die.' Dr Ceesay states that, despite the increasing burden of kidney disease in Gambia, the number of dialysis machines available throughout the country of 2 million people remains the same - 14 machines in total. The country does not have a national renal registry and many patients are obliged to wait for weeks and months for their turn to come for treatment. The only dialysis centre in the Gambia has a sole funder, the Ida Bass Foundation in the United Kingdom, but the doctor indicates that 'these funds are not readily available.' I draw the inference that an already precarious system of dialysis provision is rendered even less stable because there is no plurality of funding for the system and apparently little, if any, government funding.
6. Having regard to the evidence discussed at [5] above, I find that there exists a reasonable likelihood that the appellant would miss a dialysis treatment(s) within a short period after returning to Gambia. Obviously, circumstances beyond the appellant's control might lead to him missing a dialysis session here in the United Kingdom but I do not consider that such a risk would not cross the relatively low threshold of reasonable likelihood; the evidence indicates that that is emphatically not the case in Gambia where the risk of the appellant not accessing dialysis is manifest.
7. Applying the analysis of the Court of Appeal in *AM* to those findings, I find that the appellant would be exposed to an 'imminent' or 'likely 'rapid' experience' of intense suffering and, indeed, in the light of the particular nature of his condition, death. The appellant is not an individual who could in any way afford to miss a single, let alone several, dialysis treatments; his kidney condition is so bad that any disruption at all to his regime of dialysis will be fatal; there is no suggestion in the evidence that any treatment other than dialysis could prevent him from immediate suffering and death. That would be true whether he is in the United Kingdom or

elsewhere but because he would return to a country where dialysis treatment exists but where the likelihood over a short period of time of the appellant missing a treatment is very high I am bound to conclude that his removal to Gambia will expose him to a breach of his rights under Article 3 ECHR. Accordingly (and I stress my decision has no application beyond the very specific facts of this appeal) I find that his appeal should be allowed.

**Notice of Decision**

The appeal of the appellant against the decision of the Secretary of State dated 4 May 2017 is allowed on human rights grounds (Article 3 ECHR)

Signed

Date 22 April 2019

Upper Tribunal Judge Lane

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.