



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12276/2016 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Wednesday 30 September 2020

Decision & Reasons Promulgated
On Thursday 29 October 2020

Before

MR CMG OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE SMITH

Between

TTZ

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter, instructed by Jones White LLP

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As this appeal involves a protection claim, we consider it is appropriate to make that order. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND DIRECTIONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal A.M.S. Green promulgated on 5 August 2017 dismissing her appeal made on protection and human rights grounds ("the Decision").
2. The Appellant is a national of China. She came to the UK as a student on 20 January 2007. She has returned to China on one occasion since then, in 2008 when she returned for her brother's funeral. She claims to have lost contact with her parents in 2009. The Appellant was required to leave the UK in 2010 but was not removed then or since.
3. The Appellant claimed asylum in October 2016. She says that she is at risk from the Chinese authorities as she practises Falun Gong. She also claims to fear her ex-boyfriend. She says also that he will be aware that she has resigned from the Chinese Communist Party ("CCP") and that the Chinese authorities will persecute her for that reason.
4. The other main aspect of the Appellant's case is her medical condition. The Appellant has suffered from diabetes for some time, including when she lived in China. The Appellant says that her diabetes has deteriorated since she came to the UK. In January 2014, the Appellant was diagnosed with a kidney infection and her right-side kidney was removed in June 2014. Her left kidney function then started to deteriorate, and she was put on dialysis. The Appellant undergoes dialysis three times per week. She is also waiting to see if she would be suitable for a kidney transplant. The Appellant has end stage renal failure. The current medical evidence indicates that, without regular dialysis, she would die after between ten and twelve days. In addition to those conditions, the Appellant says that she suffers from deterioration in the sight in both her eyes. She has lost the sight in her left eye and continues to have problems with her right eye.
5. The Judge accepted that the Appellant practises Falun Gong but found that she did so discreetly at home and that she would not therefore come to the attention of the Chinese authorities ([10] of the Decision). The Judge did not accept the remainder of the protection claim for reasons given at [11] and [12] of the Decision. Even if the Appellant had suffered at the hands of her ex-boyfriend in the past (which the Judge did not accept as proven), it was implausible that he would be able to trace her on return to China. The Appellant was never a member of the adult league of the CCP. Even if she was a member of the youth league which the Judge accepted was possible, that would not place her at risk. The Judge's findings in relation to the protection claim, save as regards the risk arising from practising Falun Gong, are not challenged.
6. The Judge considered the Appellant's human rights claim based on her medical condition at [13] to [17] of the Decision. In so doing, he applied the law as it then

stood, specifically N v Secretary of State for the Home Department [2005] UKHL 31 (“N”) and GS (India) and others v Secretary of State for the Home Department [2015] EWCA Civ 40. The Judge received submissions on behalf of the Appellant concerning the judgment of the Grand Chamber of the European Court of Human Rights in Paposhvili v Belgium (application no 41738/10) (“Paposhvili”) but, although the Judge accepted his duty under the Human Rights Act 1998 to have regard to Strasbourg jurisprudence, it appears that he considered himself bound by domestic case-law.

7. The Appellant appeals the Decision on two grounds as follows:

Ground 1: The Judge has failed to take into account the country information emerging since the country guidance cases regarding the attitude of the Chinese authorities towards practitioners of Falun Gong.

Ground 2: The Judge erred by failing to take into account the guidance given by the ECtHR in Paposhvili. Further, the Judge has failed to take into account some of the evidence regarding the situation which the Appellant would face during and following her return in accessing medical treatment.

8. Permission to appeal was refused by First-tier Tribunal Judge Osborne on 12 December 2017 in the following terms so far as relevant:

“... 3. Contrary to what is stated in the grounds, in a careful and well-reasoned Decision and reasons the judge set out the pertinent issues, law and evidence relating to the facts of the appeal. In appeals of this nature it is the task of the judge to make findings of fact on the basis of the evidence and to provide adequately clear reasons for those findings. That is precisely what the judge did. The findings made by the judge were properly open on the basis of the evidence. The judge manifestly specifically addressed the issues related to the Appellant’s health and appropriately dealt with her appeals under Articles 3 and 8 ECHR.

4. Neither the grounds nor the Decision and reasons disclose any arguably material error of law.”

9. Permission to appeal was granted by Upper Tribunal Judge Finch on 5 March 2018 in the following terms so far as relevant:

“... The Court of Appeal has now handed down its judgment in *AM (Zimbabwe) and another v Secretary of State for the Home Department* and this casts doubt on the First-tier Tribunal Judge’s approach to *Paposhvili v Belgium* (application no. 41738/10).

Therefore, it is arguable that First-tier Tribunal Judge Green’s decision included arguable errors of law and that permission to appeal is required.”

Although Judge Finch did not refer to ground one expressly or implicitly in her decision, she did not refuse permission on that ground. We therefore proceed on the basis that permission was granted on both grounds.

10. On 29 March 2018, the Respondent filed a Rule 24 Reply seeking to uphold the Decision on the basis that the Court of Appeal in AM (Zimbabwe) v Secretary of

State for the Home Department [2018] EWCA Civ 64 held that the judgment in Paposhvili did not alter the test in N and therefore there was no legal error in the Decision. However, the Respondent went on to accept that, since the Court of Appeal had indicated that the Supreme Court ought to consider the issue, it would be appropriate to stay the matter pending the Court of Appeal's decision on permission to appeal. Permission to appeal was thereafter granted and the appeal in AM (Zimbabwe) was heard substantively by the Supreme Court. The Supreme Court gave judgment on 29 April 2020 (AM (Zimbabwe v Secretary of State for the Home Department [2020] UKSC 17) ("AM (Zimbabwe)").

11. On 17 August 2020, the Tribunal gave directions requiring any further evidence about the Appellant's medical condition and/or availability of treatment therefor in China to be filed by 16 September 2020. Further evidence was filed by the Appellant on 16 September and 23 September and by the Respondent on 21 and 22 September 2020. We refer to the evidence in the Appellant's supplementary bundle as [ABS/xx]. We also received a written skeleton argument from Mr Jarvis on the morning of the hearing. We also have before us the Appellant's bundle from the First-tier Tribunal hearing (to which we refer hereafter as "[AB/xx]"), the Appellant's skeleton argument and Respondent's written submissions before the First-tier Tribunal Judge.
12. At this stage, the issue for us is whether the Decision contains an error of law. If we conclude it does, we need to consider whether to set aside the Decision based on that error. If we decide to do so, we would either re-make the decision or remit the appeal to the First-tier Tribunal to do so.
13. The hearing before us was conducted remotely via Skype for Business with the agreement of both parties. There were no technical difficulties and both advocates confirmed that they were able to follow the proceedings throughout.

DISCUSSION AND CONCLUSIONS

Ground 1

14. Although Mr Winter did not expand upon this ground in his oral submissions, he did not abandon it and we therefore need to consider it. We can do so shortly.
15. The ground concerns the Judge's findings concerning the Appellant's claim to be at risk as a practitioner of Falun Gong. The essence of this ground is that the Judge failed fully to take into account the Country Policy and Information Note entitled "China: Falun Gong" Version 1.0, November 2016 ([AB/70-85]) ("the 2016 CPIN").
16. Although the grounds link the complaint in this regard to the 2016 CPIN, they do not actually cite the passage relied upon. However, what is said to have been overlooked is the reference to the possibility that the Appellant would be spied on by a "neighbourhood community" which would provide information to the Chinese authorities. Given the wording, that appears to relate to [2.3.9] of the 2016 CPIN which reads as follows:

“Since the determination in LL was handed down, it has been reported that the Chinese authorities reportedly instruct neighbourhood communities to report Falun Gong members to officials and offer monetary rewards to citizens who informed on Falun Gong practitioners.”

17. The Judge accepted at [10] of the Decision that “the Appellant practices Falun Gong on a discrete [sic] basis at home”. The Judge finds that “[s]he has learnt about the practice from videos and is not in touch with any other practitioners”. That finding is based on the Appellant’s evidence recorded at [7(v)] of the Decision. It is not suggested that the Judge has misunderstood that evidence.
18. Having set out and considered the country guidance in relation to Falun Gong and the 2016 CPIN to which the Appellant makes reference, the Judge concludes as follows:

“10. ... I do not believe that the Appellant’s practice of Falun Gong is anything more than private and discrete [sic] and there is no evidence to suggest that she intends to practice [sic] publicly and as such she will not be at risk of persecution at the hands of the Chinese authorities for her practice.”

19. On the evidence before the Judge and based on the country guidance and other evidence including the 2016 CPIN, there is no error in the Judge’s finding in this regard. The Appellant’s case is that she practises Falun Gong privately and discreetly within the boundaries of her own home (in part because her medical condition prevents her doing more). She does not even have contact with other practitioners. For that reason, there is no basis for asserting that neighbourhood communities would be aware of her practice and therefore no evidential support for a claimed risk on this account. The Judge had regard to the 2016 CPIN as he referred to it. Having recorded the highly discreet way in which the Appellant practises Falun Gong, the Judge did not need to refer to the passage of the 2016 CPIN concerning neighbourhood informants as it was not relevant. There is no error in failing to cite or consider this passage.

Ground 2

20. The way in which ground 2 was originally pleaded recognised that Paposhvili was not binding on the Tribunal but that the Tribunal should follow “clear and constant jurisprudence of the European Court of Human Rights”. At that time, of course, Paposhvili had yet to be considered alongside N by the Supreme Court. That has since occurred, and we therefore take account of what is said by the Supreme Court in AM (Zimbabwe) when determining this ground. If, as Mr Winter submitted is the case, Judge Green applied N rather than Paposhvili, that would be an error of law but there would then be the question whether that error of law made any difference. In particular, as Mr Winter very fairly conceded, since we are only here concerned with whether the Judge has erred in law, the issue has to be assessed based on the evidence before the Judge and not any later evidence.

21. Dealing first with the Judge's self-direction as to the law, that is set out at [14] and [15] of the Decision. Having rehearsed what was said by the respective courts in N and Paposhvili, the Judge went on as follows:

"14. Paposhvili differs from current domestic case law including because it appears to put the burden of proof on the returning state. In R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements) [2017] UKUT 164 (IAC) there is a reminder that to the extent that Paposhvili runs counter to binding domestic case law, the latter must, of course, prevail at Tribunal level.

15. In GS (India); EO (Ghana); GM (India); PL (Jamaica); BA (Ghana) and KK (DRC) v SSHD [2015] EWCA Civ 40 it was held that the case of a person whose life would be drastically shortened by the progress of natural disease if he was removed to his home State did not fall within the paradigm of Article 3 ECHR. Such a case could only succeed under that Article if it fell within the exception articulated in D v United Kingdom (1997) 24 EHRR 423. In that case the claimant was critically ill and close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support."

22. Although, as we observed in the course of submissions, the last sentence of [14] of the Decision is not entirely clear, we accept that by "the latter", the Judge intended to refer to "binding domestic case law" and therefore concluded that he was obliged to follow N. That must be the case when read with what follows in [15] of the Decision.
23. We turn then to the current legal position as set out by the Supreme Court in AM (Zimbabwe). The difference between N and Paposhvili was explained by the Supreme Court in the following way:

"27. We need to analyse the effect of the decision in the *Paposhvili* case and, first, to survey the analysis of its effect conducted by the Court of Appeal. It was that court's view, at para 39, that the decision reflected only a 'very modest' extension of the protection against return given by article 3 in cases of ill-health. The Court of Appeal fastened in para 39(iv) upon the Grand Chamber's questionable choice of language that the previous approach to such cases needed only to be 'clarified'. And it buttressed its restrictive view of the effect of the decision by claiming in para 39(ii) that the Grand Chamber had noted that there had been no violation of article 3 in the *N* case and in para 40 that the Grand Chamber had 'plainly regarded that case as rightly decided'. But the careful reader of paras 178 to 183 of the judgment in the *Paposhvili* case may find it hard to agree with the Court of Appeal in this respect. Of course the Grand Chamber noted that *it had been held* in the *N* case there had been no violation of article 3; but there is no express agreement on its part with that conclusion and, subject to the precise meaning of the new criterion in para 183 of the judgment (to which we should now turn), its application to the facts of the *N* case would suggest a violation.

28. The Court of Appeal interpreted the new criterion in para 183 of the judgment in the *Paposhvili* case, at para 38 as follows:

'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 (ie 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.'

29. The criticism of the above passage made by the appellant and by the AIRE Centre largely relates to the second sentence. In relation, however, to the first sentence, they suggest that, irrespective of the precise meaning, in context, of 'a significant reduction in life expectancy' in para 183 (as to which see para 31 below), the paraphrase of 'death within a short time' favoured by the Court of Appeal may not be entirely accurate. In relation to the second sentence, their criticism is directed to the words 'the imminence (i.e. likely 'rapid' experience) of ... death in the receiving state' attributable to the non-availability of treatment. They point out that the Grand Chamber was addressing exposure '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*' (italics supplied); and they contend that the Court of Appeal has misinterpreted those words so as to refer to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or *in a significant reduction in life expectancy*. The Secretary of State, for her part, rejects their criticism as narrow and syntactical, apt perhaps to the construction of a statute but inapt to the present context in which the meaning of para 183 should be informed by 'case law and realism'. Her reference to case law turns out to be an indorsement of the questionable conclusion of the Court of Appeal that in the *Paposhvili* case the Grand Chamber approved its decision in the *N* case. What remains is her reference, rather undeveloped, to realism.

30. There is, so I am driven to conclude, validity in the criticism of the Court of Appeal's interpretation of the new criterion. In its first sentence the reference by the Grand Chamber to 'a significant reduction in life expectancy' is interpreted as 'death within a short time'. But then, in the second sentence, the interpretation develops into the 'imminence ... of ... death'; and, as is correctly pointed out, this is achieved by attributing the words 'rapid ... decline' to life expectancy when, as written, they apply only to 'intense suffering'. The result is that in two sentences a significant reduction in life expectancy has become translated as the imminence of death. It is too much of a leap.

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.

32. The Grand Chamber's pronouncements in the *Paposhvili* case about the procedural requirements of article 3, summarised in para 23 above, can on no view be regarded as mere clarification of what the court had previously said; and we may expect that, when it gives judgment in the *Savran* case, the Grand Chamber will shed light on the extent of the requirements. Yet observations on them may even now be made with reasonable confidence. The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But 'Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle ...': *DH v Czech Republic* (2008) 47 EHRR 3, para 179. It is clear that, in application to claims under article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold, set out in para 23(a) above, is for the applicant to adduce evidence 'capable of demonstrating that there are substantial grounds for believing' that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish 'substantial grounds' to have to proceed to consider whether nevertheless it is 'capable of demonstrating' them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate 'substantial' grounds for believing that it is a 'very exceptional' case because of a 'real' risk of subjection to 'inhuman' treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a 'prima facie case' of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement: see para 112 of a useful analysis in the Determination of the President of the Upper Tribunal and two of its senior judges in *AXB v Secretary of State for the Home Department* [2019] UKUT 397 (IAC). Indeed, as the tribunal proceeded to explain in para 123, the arrangements in the UK are such that the decisions whether the applicant has adduced evidence to the requisite standard and, if so, whether it has been successfully countered fall to be taken initially by the Secretary of State and, in the event of an appeal, again by the First-tier Tribunal.

33. In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the *Paposhvili* case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of

suitable treatment in the receiving state. What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel 'any' doubts raised by the applicant's evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to 'serious doubts', he will realise that 'any' doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond *all* doubt is a concept rightly unknown to the Convention.

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."

24. Although the Supreme Court has now made clear that there is a difference between *N* and *Paposhvili* in relation to the thresholds which apply, it is worthy of note that the Court did not endorse what was said by Judge Green about the burden of proof at [14] of the Decision. As is made clear at [32] of the judgment, the burden remains (primarily at least) on an appellant. It is only where an appellant provides evidence which shows that there are substantial grounds for believing that he or she will be subjected to inhuman treatment which meets the threshold of Article 3 ECHR that he or she can succeed. We note what is said by the Supreme Court thereafter which may indicate some form of shared burden in terms of the facilities and treatment available in the receiving State. We observe that, depending on the case, it may well be correct to say that a State has better means of investigating this. However, in some cases where an individual is suffering from a particularly acute or unusual condition and is being treated by a very senior consultant or specialist in the UK, that consultant or specialist may actually be better placed to provide the information via contacts in the receiving State.
25. We turn back to the Decision and how the Judge Green applied the domestic law as it then stood to the evidence as follows:

"16. In paragraphs 50-65 of the refusal letter the Respondent has referred to objective evidence concerning the availability of healthcare in China for the Appellant. I note that kidney dialysis is available. I also note that kidney transplants are available. The Chinese healthcare system also provides treatment for diabetes. I have also taken account of the articles exhibited in the Appellant's

bundle about the availability of kidney dialysis treatment. I accept that in one article [1 AB 19] that in rural and remote areas of China the proportion of individuals with end-stage kidney disease who are treated with dialysis is about 20%. However, the same article acknowledges that several national Peritoneal Dialysis (“PD”) centres of first rate scale and quality have sprung up, but the development of PD varies widely among geographic regions across China. The article also referred to the fact that the Chinese government has dedicated itself to continually increasing the coverage and level of medical service for patients with end-stage kidney disease. **On the evidence, I am not satisfied that the Appellant has met the high threshold required to trigger Article 3 ECHR. She will be able to receive treatment for her kidney disease and diabetes in China.**”

[our emphasis]

26. Although as we have accepted, the Judge may have considered that the threshold remained that set out in N, as is clear from this passage, his conclusion is not that the Appellant’s case did not reach the exceptional threshold because her condition was not sufficiently severe but because there was no real risk as she would receive treatment for it in China in the same way as she does currently in the UK. Indeed, we doubt that it could be said that a removal which would occasion death in under a fortnight if the Appellant were deprived of treatment would not breach Article 3 ECHR even applying the pre-Paposhvili cases. That was not the issue in this case. The real issue in this case is whether the Appellant’s condition could be managed as it is currently, by treatment in China. That test is therefore consistent with the way in which it was framed by the Supreme Court in AM (Zimbabwe) (see in particular [29] of the judgment cited at [23] above, where the Court makes clear that the evidence is focussed on an imminence of death or significant and irreversible decline in health attributable to lack of treatment in the receiving State). The substance of the Judge’s finding is therefore that the Appellant’s evidence failed to show that there is a real risk that treatment will not be available and therefore she will not suffer Article 3 ill-treatment as she will continue to receive the treatment she needs to survive.
27. We therefore turn to the complaints made in ground 2 concerning the evidence and the Judge’s treatment of it. First, it is said that the Judge failed to take account of the Appellant’s evidence that she could not afford to pay for treatment in China. Second, the grounds assert that the Judge has failed to consider that the Appellant would not be able to arrange the necessary dialysis within the short timeframe available following removal, that the Appellant would face a 30 hour journey to China, that she has lost contact with her family and would be financially prohibited from accessing the necessary treatment.
28. Most of the foregoing matters rely on the Appellant’s own evidence and we therefore begin with her statement which reads as follows so far as relevant on this issue:
- “4. I feel constantly tired even as I am giving this statement, when I do the dialysis I feel great but shortly after the dialysis is complete. I slowly feel worse and worse over time. I would not even be fit to travel to China in my present condition. From Glasgow to my hometown Fuqing City it is 30 hours to travel by plane. This is not including any waiting time and not including any possible delays during the trip or any problems at the borders. I need to transfer from Glasgow via London, then

Amsterdam and then Beijing and then my hometown of Fuqing city – this length of travel is not compatible with my medical condition.

5. Given the fact that I must do dialysis about every 2 days, this length of travel would have a negative impact on me and would potentially represent risk to my life. If I do not do the dialysis on time my body will get poisoned and I may die as a result. Also, I would not be able to arrange with a Chinese hospital to give me the dialysis as required, particularly within the short timeframes involved. Furthermore, I would need money to get this done – in China all healthcare is private and costs money.

6. My medical condition is preventing me from being able to work sometimes faint and feel dizzy – I would not be able to sustain myself, let alone pay for dialysis. The payment policy in Chinese hospitals is very strict. They would not treat me without any payment in advance. I have also completely lost sight in my left eye and my sight in my right eye is starting to deteriorate as well. The problems with my eyesight, I suspect are due to my diabetes, but I have had diabetes for many years and have been on medication for many years and all of a sudden, I lost my eyesight. I had surgery a few times on both my eyes but I still lost the eyesight in my left eye. I am attending regular check-ups to review my right eye's health. I would not be able to receive this support in China and this would potentially led to me losing my right eye's sight completely.

7. Since I travelled back to China in 2008 I kept in touch with my family in China until 2009. During 2009 sometimes they contacted me. They kept changing their phone number so they were difficult to reach. They do not use e-mail or social media. Afterwards, I have lost contact with them – I cannot trace them – I tried to phone them and also sent family friends to my hometown to try to find them and they were unable to do so – no one is in touch with them. The neighbour also tried to make contact with them but nobody could find them. My remaining family in China consists of my mother and my father. I am not sure they are still alive as I have not heard from them in 8 years. I do not have any other relatives in China. I do not have anyone else back in China to look after me.

8. Because of my medical conditions I would not be able to work back in China, if I cannot work I cannot afford medical care. I cannot afford accommodation in China as I do not have savings and I would not even able to survive. My health condition has deteriorated over time since my health problems started. I am now on a kidney transplant waiting list and my condition is now at the stage where I must have a transplant. I would never get this transplant in China – it is impossible because I do not have money for this treatment. If I go back to China I only have one choice – to wait for my death. Furthermore, I will probably not have to wait for long as I will be dead soon. I would not be able to survive if I was required to return to China.”

29. We observe that the “30 hours” which the Appellant says it would take to travel to China appears lengthy even assuming that she was required to do the journey in one rather than taking breaks between the various stages. Her supplementary statement refers to a flight of 13 hours from Glasgow to China (not including waiting times or changing flights) which appears more realistic. We wonder therefore whether the reference to “30 hours” was a typographical error. Even if it was not, the Appellant does not explain why she would be obliged to travel from Glasgow to her home area in one go, why she could not break her journey or why she could not stop in Beijing

for treatment. The Appellant's evidence offers no reason why she could not make arrangements for some initial dialysis treatment in China before return.

30 Dealing with the contact which the Appellant says she does not have with her family in China, her evidence in this regard is set out by the Judge at [7(vi)] of the Decision. His conclusion in that regard (at [18] of the Decision) is that the Appellant does have family in China (even if she is not presently in contact) and also has friends there who the Judge says could help her. The Judge therefore clearly had regard to her evidence on this point.

31. In terms of the other evidence put forward on the Appellant's behalf before Judge Green concerning her medical condition, that was as follows:

(1) Letter from NHS Greater Glasgow and Clyde Renal Services, Dialysis Unit dated 22 June 2017 ([AB/9-10]) which confirms that the Appellant attends dialysis for four hours, three times per week and is being assessed for renal transplantation. The regularity of attendance is confirmed by the hospital in a letter dated 24 May 2017 ([AB/11]). The letter from NHS Renal Services makes the following observations about return to China:

“... If she were moved to China, she would require to continue hospital haemodialysis on a regular basis as detailed above. I am uncertain whether that treatment is available for all in China. Without renal replacement therapy she would die within 1-2 weeks. She would be able to travel but only a short distance and dialysis therapy would need to be arranged for visits ...”

Although Mr Winter relied upon the latter sentence to corroborate the Appellant's account that she would be unable to undertake the long journey to China, on our reading, this relates only to travel within China following return and says nothing about whether the Appellant would be fit to undertake the return flight to China in the first place.

(2) A further letter from the renal services department dated 20 July 2017 ([AB/7]): this confirms consideration of the Appellant for a kidney transplant but says that “[t]here are a couple of issues which need to be addressed before this can happen”. Judge Green was therefore entitled to note at [13] of the Decision that “[t]here is some confusion over whether she has been listed for a kidney transplant in this country”.

(3) An article entitled “Health and Medical Care in China” published on the site of China Expert International Ltd which indicates that it is an organisation providing “Services and Solutions for Doing Business in China, with China and for Expats in China” ([AB/15-16]). The content of the document is targeted at foreigners visiting China or living in China who may or will require private health insurance. It does not deal with Chinese nationals. As such, what it has to say about the need for insurance and payment is not relevant. It also says nothing about services for kidney dialysis.

(4) An article entitled “Chinese farmers set up DIY dialysis clinic in battle to reform crumbling healthcare system” ([AB/17-18]). This is an article published

by the Telegraph dated in April 2009; there is no basis for saying that it is a reliable source of information in general terms many years later.

(5) An article written for the World Kidney Forum entitled “Peritoneal Dialysis in China: Meeting the Challenge of Chronic Kidney Failure” which appears to date back to 2014/15 ([AB/19-23]). This is both more recent and more relevant. Its starting position is that China has “an increasing prevalence of end-stage kidney disease and relatively insufficient medical and economic resources, particularly in rural and remote areas”. The study states that “[p]roviding dialysis treatment to patients with end-stage kidney disease is a public health challenge that puts a large economic burden on individuals and health care resources”. Thereafter, the study looks at and advocates the benefits of using peritoneal dialysis as a less expensive form of treatment. Of particular relevance is the section dealing with the “Chinese Government Policy” for treatment which states as follows:

“The Chinese government has paid increasing attention to the treatment available for patients with end-stage kidney disease in the past few years. Uremia is 1 of 8 major serious diseases covered by National Social Medical Insurance. A joint document developed in 2012 by relevant government departments specified that coverage provided by the New Rural Cooperative Medical Care plan should reach 70% of the total medical costs of these major diseases. Recently, with the advancement of health care system reform in China, basic medical insurance now covers >95% of urban and rural residents, and a high-reimbursement policy for catastrophic diseases including end-stage kidney disease has been established.”

Mr Winter relied on one section of the report which speaks of the cost of treatment. However, as is clear from the report read as a whole, this concerns the overall cost to the State and not to the individual.

32. Leaving aside the paucity of relevant evidence produced on the Appellant’s behalf, the Judge relied in his findings concerning availability of treatment at [16] of the Decision on information coming from the Respondent as set out at [50] to [65] of the letter giving the reasons for the decision under appeal. The relevant parts of that letter read as follows:

“53. I have considered the treatment available in China. It is noted that objective evidence shows that there is kidney dialysis and treatment available. An article in the Oxford Journal on the website [details given – dates from 2014] notes that:

‘Renal replacement therapy is rapidly expanding in China and two-times weekly dialysis is common, but detailed data on practice patterns are currently limited...’

Dialysis access and prescription

A native arteriovenous (AV) fistula for HD access was used by 88% of China DOPPS patients compared with 91% in Japan, 58% in North America and 70% in Eur-A/NZ (Table 1). The mean number of prescribed HD sessions per week was lower in China (2.8) than in the other DOPPS countries (range 3.0-3.1) (Table 1, Figure 1A). Twenty-six percent of HD patients in China were dialyzing less than three times weekly (88% of this group were undergoing two-times weekly dialysis) compared with 1-6% in other

DOPPS countries. The median Chinese facility reported 26% of patients dialyzing less than three times weekly (22% two times weekly) compared with a range of 0-4% for the median facility in other DOPPS countries (Figure 1B).

Dialysis-related prescriptions, laboratory values and quality of life associated with two-times weekly HD in China

Patients dialyzing two times weekly (versus three times) in China were much more likely to be prescribed session lengths >270 or 300+ min (Table 3). On a weekly basis, these patients were dialyzed for an average of 8.4h compared with 12.0h for patients dialyzing three times weekly. Average blood flow rates and vascular access were similar. Patients dialyzing two times weekly (versus three times) in China had similar erythropoietin-stimulating agent prescription rates (95%) but were less likely to be prescribed intravenous iron (33 versus 43%), vitamin D (48 versus 60%) or a phosphate binder (52 versus 60%)

55. The website [details given – dates from 2015] contains an article referring to the Shunjing Renal Hospital which is a private hospital in Jian:

'DaVita Kidney Care, the dialysis arm of DaVita HealthCare Partners, is forming what the company is calling a first-of-its-kind joint venture kidney care specialty hospital chain in north eastern China to expand its global operations.

The chain, which will be in the Shandong province, will be owned by DaVita and Xiaoyi Zhang, president of Shunjing Renal Hospital. Shunjing is the only private hospital approved for dialysis services in the province's capital city of Jinan, China. Unlike a dialysis center, the renal hospitals will attempt to mitigate or delay the need for dialysis by addressing conditions like hypertension and obesity that are common among chronic kidney disease patients.'

56. The website Kidney Service China [details given] notes:

'In China, kidney disease patients have more alternative treatment. Apart from Dialysis and Kidney Transplant, there are many Traditional Chinese Medicine techniques and natural remedies are available for patients...

57. The website [details given] has a feature on Shijiazhuang Kidney Disease Hospital and this is described as:

'Shijiazhuang Kidney Disease Hospital is located in Shijiazhuang, the capital city of Hebei Province. It was founded in 1986 and has already been a modern Nephrology Institution with a system of medical treatment, teaching and research after 28 years' development.

Part I The Condition of the Infrastructure

- 1. The scale of the hospital. Shijiazhuang Kidney Disease Hospital is the largest kidney disease specialized hospital with the most complete equipments in China. The construction of the hospital was designed and projected according to the standard of fully-good first class specialized hospital of the government... There are 1320 staff members and 1090 open beds. Our hospital is one of the kidney specialized hospitals with the largest scale and the most abundant medical power.'*

58. Another website [details given] describes this same hospital as having some of the most advanced treatments for Kidney disease in the world:

'Shijiazhuang Kidney Disease Hospital is very famous both in China and many other countries. So far, patients from 68 countries have received treatment here. Other doctors and patients wonder why so many foreigners prefer to come here for treatment regardless

of long distance and cost. This is because this hospital has five superiorities: 1. Beautiful and comfortable environment 2. The most advanced equipments all over the worlds 3. Professional and experienced kidney expert team 4. All-around service and independent international department 5. Systemic and effective treatment plans louder than any word'

...

60. You have also been advised of the Voluntary Returns Scheme who could assist you with accessing suitable treatment for your condition upon return to China as well as financial assistance if required. While it is noted that you have parents residing with you in China and it is noted that you have provided no evidence as to why they could not assist you with any support upon return."

The documents underpinning the citations in the decision letter appear in the Respondent's bundle.

33. Although we accept that the material relied upon by the Respondent and by the Judge when reaching his findings at [16] of the Decision says very little about the cost of and funding for treatment in China, there is a complete lack of evidence about this on the Appellant's side. There appears to be no reliable evidence supporting the assertion that she would be obliged to pay for treatment and would not obtain it otherwise. We observe that she has not been back to China for twelve years and was not suffering from renal failure when she was last there. She gives no source for her assertion about the cost of, and need to pay for, treatment.
34. That then leads us on to make certain observations about the evidence which has been produced since the First-tier Tribunal hearing. As we indicated at [11] above, the parties were invited to adduce further evidence about treatment in China, and have done so. As we have already noted, it was accepted that this evidence could not be taken into account when considering whether the Judge had made an error of law but it could be relevant to the materiality of any error.
35. The Appellant places reliance on a report of Dr Thi Lan Anh Tran who is a researcher into human rights law in "socialist political systems" including China. She has a PhD in law obtained at the University of Leeds. She has worked for the Vietnamese Government and as a research assistant for the United Nations' Specialist Rapporteur to Cambodia. She is currently a consultant and managing partner at VietBrit Consulting. She has made "numbers of research and consultant trips to China" but does not say when she was last there. Dr Tran was provided with the Decision and the Appellant's statement as well as a letter from the Appellant's doctors and "other relevant documents and related cases". It is not clear whether that includes the Respondent's decision letter and articles relied upon (as set out above).
36. Dr Tran says that she has used her "own research and data" about the issues, including the Chinese healthcare system and the Hukou registration system. She has relied upon information about availability and cost of treatment in China "with the assistance from [her] colleague in China and two UK's residents with Chinese nationality who recently received medical treatment in China during their trips in China in the year 2017 and March 2018." She has also relied upon a phone interview

with a Czech national who underwent a kidney transplant in China in 2016. It is not clear to us what relevance the position of a Czech national can have to that of a Chinese national. Dr Tran does not say what are the qualifications of her “colleague in China” to offer information about the workings of the Chinese healthcare system. It is not said what treatment the two Chinese nationals were seeking.

37. We make the following general observations about Dr Tran’s report. First, we somewhat doubt the value of the opinion of an expert in human rights law on the workings of a healthcare system in a country where she has never apparently lived or worked or needed to seek healthcare herself: the opinion would derive neither from her experience nor from her expertise. Second, as we have noted, she does not say who is her colleague and whether he/she is someone with greater first-hand knowledge of how the healthcare system operates or whether his/her information is also provided merely from research of publicly available documents. Third, many of the assertions made in the report are not underpinned by reference to documents or are referenced to documents which are of some antiquity (for example, footnotes 2-5 all relate to documents from 2010).
38. Dr Tran has included a section about “Health insurance policy in China”. However, that deals with developments only up to 2009/2010. The following section concerning “State-run health insurance in China” is more up to date and explains how state-funded health insurance works in China. It is clear that, contrary to the Appellant’s evidence, there is insurance in place including for persons who are unemployed (see [1.17]).
39. Having accepted that the Appellant would be able to enrol into the insurance program following Hukou re-registration (see below), Dr Tran makes the rather surprising and unreferenced assertion that “[w]ith this insurance, very likely, the Appellant will be refused by the hospital due to her serious illness”. The only support for this appears to be an article from a doctor dating back to 2017 that this type of insurance plan “may lead to hospitals rejecting patients with serious illnesses” or provided “an incentive to doctors to use cheap drugs and low-cost, low-quality treatments”. We note that this section of Dr Tran’s report ([1.13] to [1.17] with the exception of her assertion which we have noted above) is lifted directly from the article referenced at footnote [15] which is written by a Chinese individual living in the US comparing his experiences of the US healthcare system with the Chinese one. It is not clear from where he has obtained his knowledge and the article which has led Dr Tran to her conclusion about the availability of treatment for the Appellant is at best double hearsay based on an article written by a journalist relying on another article written by one doctor.
40. Dr Tran also says that the Appellant would not be able to access any healthcare insurance until she is re-registered as her “Hukou registration is likely to have been deleted/removed from household registration”. That assertion is unreferenced either there or in the section dealing with that issue (part 4 and not part 3 as stated). We accept that Dr Tran may be right to say that, without a hukou, it is very difficult to access public services (based on what is said in the “Country Policy and

Information Note China: Background information including actors of protection and internal relocation” – March 2018 [ABS/31-79] – “the 2018 CPIN”). However, the 2018 CPIN says nothing about the lapsing of a hukou or need to re-register after a particular period. What it does say at [16.1.3] is that “[h]ukous do not expire, but the supporting documentation (such as identity cards) must be renewed every 10 years, otherwise they do expire”. It may be that this is what Dr Tran had in mind. In any event, however, as we pointed out to Mr Winter in the course of submissions, whether it is the hukou or identity card which has to be renewed, there is no evidence that this cannot be done from outside China, in other words before the Appellant returns. There may be some constraints on this given the Appellant’s protection claim but we see no reason why her representatives would be unable to source general information about this option even if the Appellant were unwilling to approach the authorities herself at this stage.

41. Finally, Dr Tran makes a number of unsupported assertions about the Appellant’s travel to China which go way beyond her expertise as a lawyer and into the realms of assertions about medical conditions which, so far as we can see, she is entirely unqualified to make (see, by way of example, the assertion in the conclusion that the Appellant “will face with the death risk at any time during the journey” to China). We accept that there is a further letter from the Appellant’s GP dated 22 September 2020 which refers to “a significant risk to [the Appellant’s] health if she were to travel back to China or be removed back to China” which might conceivably be meant as a comment about the journey itself but the letter does not go so far as to say that she is presently unfit to fly and in any event we would not expect the Respondent to put an individual on a plane if there were medical evidence of unfitness to travel.
42. Having considered the Decision, and in particular what is said at [16] of the Decision alongside the evidence which was before Judge Green, we are not persuaded that there is any error of law in the Decision. We come back to our earlier conclusion that the Judge’s findings are based on there being evidence that the Appellant would be able to access treatment in China such that there was not a real risk of her suffering ill-treatment which would reach the “high threshold required to trigger Article 3 ECHR”. Although we accept that the Supreme Court has held that Paposhvili makes more than modest changes to the previously accepted case law and that N is no longer to be followed, the Court nonetheless noted that the threshold to be demonstrated by an appellant remains one which is not “undemanding”. In other words, it remains a high threshold. Whatever the trigger point for the engagement of Article 3 in a health case, therefore, the burden was still on the Appellant to make out a real risk. It is her failure to do so which led the Judge to find as he did at [16] of the Decision.
43. We have already remarked on the paucity of the Appellant’s evidence which was before Judge Green and the evidence which the Respondent had put forward and on which Judge Green relied. There is no error of law in his finding based on that evidence. We are therefore satisfied that the second ground is not made out.

44. Our primary conclusion, therefore, is that the Decision contains no error of law on either ground. Even if we had been persuaded that there was an error in the Judge's reliance on case law prior to Paposhvili, we would have reached the conclusion that the error could not make any difference based in particular on the evidence which was before the Judge. As we have already identified, the Applicant failed to provide sufficient evidence to show that treatment would not be available to her in China. Even if the Judge had before him Dr Tran's report, we are satisfied that the evidence put forward could not make any difference to the finding that the Appellant has failed to show a real risk of a breach of Article 3 ECHR due to the lack of substantiated evidence about the availability (including cost) of treatment in China. Finally, even if we had been persuaded to set aside the Decision, we would have concluded on the evidence presently available that the outcome should be the same as the Appellant has failed to discharge her burden of showing that there is a real risk of ill-treatment in China based on the lack of available treatment for her medical conditions in that country.
45. We have made a number of observations about Dr Tran's report with which we did not need to deal in light of our conclusions regarding the lack of any error of law. We have done so, however, in order to identify the gaps and deficiencies in her report and to assist in showing the sort of evidence which the Appellant would need to put forward in support of her case.
46. As Mr Winter accepted, it may well be that, in light of the observations which we made about Dr Tran's report, the Appellant would be better served by making further submissions to the Respondent based on different evidence or at least fully referenced evidence which plugs the gaps we have identified.
47. Mr Jarvis very helpfully conceded that if the Appellant were to put forward the sort of evidence which is now needed post AM (Zimbabwe) to show a real risk that Article 3 would be breached on return, the Respondent would, at the very least, treat the further submissions as a fresh claim which would give the Appellant a further right of appeal. Indeed, he gave an undertaking to that effect.

DECISION

We are satisfied that the decision of First-tier Tribunal Judge AMS Green promulgated on 5 August 2017 does not disclose an error of law. We therefore uphold that decision.

Signed: *L K Smith*
Upper Tribunal Judge Smith

Dated: 26 October 2020