Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03688/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision and Reasons Promulgated**
On 28 March 2018 **On 13 April 2018**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

WADLEY THOMAS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Lowis, counsel instructed by Duncan Lewis Solicitors
For the Respondent: Ms A Everett Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by a citizen of Jamaica against a decision of the First-tier Tribunal to dismiss his appeal against a decision of the Respondent on 17 July 2015 to refuse his application for leave to remain in the United Kingdom on human rights grounds.

2. The Appellant was born on 6 August 1954. He has lived in the United Kingdom since 2002 when he entered with permission to care for his sister who suffered from adult polycystic kidney disease. This is a serious congenital condition from which the Appellant and each of his adult siblings suffer or have suffered. His sister has died. He has a brother in the United States of America who needs dialysis treatment.

3. The Appellant is diabetic and has other health problems.

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4. The Appellant's leave to be in the United Kingdom lapsed in 2003. He has remained without permission. He was arrested in 2010 and was sent to prison for 6 months for using or possessing a false instrument. He was detained under immigration powers with a view to removal but he was unfit to fly and he was released subject to reporting conditions. He was then suffering from renal failure. He commenced dialysis in 2011.

5. The Appellant failed to report in March 2014.

6. The Appellant has benefitted from a kidney transplant whilst in the United Kingdom. It is not entirely clear who has paid for this treatment in the United Kingdom but it seems that he is a patient of the National Health Service.

7. The First-tier Tribunal Judge found that in the event of the Appellant's return to Jamaica the absence of immunosuppressant drugs could be expected to lead to his transplanted kidney being rejected and his treatment having to be continued by a less than ideal regime of dialysis if he could access the charitable support necessary to meet its cost.

8. However at paragraph 29 of her decision the First-tier Tribunal was unsure if immunosuppressant drugs are available in Jamaica. For a long time they clearly were not but the background evidence revealed plans to establish a new centre for kidney transplant patients and the Judge did not know if the plans had yet been given effect. If they had and if the Appellant could access treatment there his prognosis would be very different.

9. At paragraph 33 of her decision the First-tier Tribunal said:

> "Applying my findings to this test, I do not find the appellant to meet this high threshold. He is not dying, in fact his prognosis is currently good and his is fit to enough to travel. His life expectancy is likely to be reduced if returned to Jamaica as the medication he requires may not be available and the dialysis he then requires is not available to such a level as it would be here or otherwise that is *(sic)* ideal. However, as is made clear above, that is not sufficient on its own to invoke Article 3 protection. The illness from which the appellant suffers did not arise at the hands of the State, it is a genetic medical condition which unfortunately for the appellant has life shortening consequences."

10. She then dismissed the appeal.

11. Permission to appeal was given by the Upper Tribunal "in the light of Paposhvili (no.41738/10)." Clearly this is a reference to the decision of the Grand Chamber of the European Court of Human Rights in Paposhvili v Belgium on 13 December 2016 reported at [2017] Imm AR 867.

12. Before me Ms Lowis referred me to the decision of the Court of Appeal in AM (Zimbabwe) v SSHD [2018] EWCA Civ 64. She accepted that I was required to dismiss the appeal following that decision. Ms Everett agreed.

13. The short point is that in AM the Court of Appeal drew attention to the binding decision of the House of Lords in N v SSHD [2005] UKHL 31.

14. It was never Ms Lowis's case that matters should end with this appeal being dismissed. Although I am bound by N it was her case, supported by AM(Zimbabwe), that N was no longer a complete statement of the relevant law and needed to be looked at again by the Supreme Court. Ms Lowis asked me to grant a certificate under section 14A of the Tribunal, Courts and Enforcement Act 2007 so that rather than seeking permission to appeal to the Court of

Appeal the Appellant could seek permission to appeal directly to the Supreme Court.

15. In AM(Zimbabwe) at paragraph 38 the Court of Appeal said:

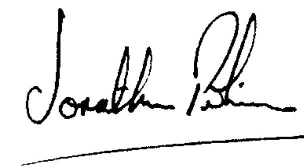
> "So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for 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."

16. I have considered carefully section 14A and particularly section 14A(4)(b).

17. However the difficultly in this case is that the First-tier Tribunal was *not* able to decide if immunosuppressant drugs are available in Jamaica. Ms Lowis contended that there are still "substantial grounds for believing" that the Appellant faces a serious decline in his health. I do not agree. There are substantial grounds for believing the he might face such a decline but that does not satisfy the test in Paposhvili. The Judge's uncertainty was consistent with the evidence before her and is not criticised in the grounds.

18. It follows that I dismiss the Appellants appeal and I do not grant a certificate under section 14A of the Tribunal, Courts and Enforcement Act 2007.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 11 April 2018