Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03174/2017

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 5th February 2018	**On 15th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR ZION AGYEKUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born on 6th August 1977. The Appellant has extensive immigration history being served with IS96 as an overstayer in June 2016 and thereafter in September 2016 claiming asylum. The Appellant's claim for asylum was based upon a fear that if returned to Ghana he would face death due to his medical condition. The medical condition centres on the Appellant's requirement of needing a lung transplant. The Appellant's application was refused by Notice of Refusal dated 16th March 2017.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Somal sitting at Stoke on 5th May 2017. In a decision and reasons promulgated on 10th May 2017 the Appellant's appeal was dismissed.

3. Grounds of Appeal were lodged to the Upper Tribunal on 23rd May 2017. On 12th September 2017 First-tier Tribunal Judge Hodgkinson granted permission to appeal setting out that it was arguable that the judge had erred in failing to consider the potential application of the judgment in *Paposhvili v Belgium (41738/10)* which application was clearly argued before the judge but was not referred to by her. Further, Judge Hodgkinson considered it was arguable that the judge had erred in her consideration of proportionality with reference to the Appellant's ability to continue his family life in Ghana with his partner and that his medical condition had also not been taken into account with reference to the judge's assessment of proportionality.

4. The Secretary of State responded to the Grounds of Appeal under Rule 24 on 13th October. Quite often Rule 24 responses lack detail and an analysis but this Rule 24 sets out in detail the case law. I have read the Rule 24 in detail. It is on that basis the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears in person. His instructed solicitors have written to the Tribunal advising they are unable to send a representative to the hearing and that they had requested a postponement but that this had been previously rejected. With respect to the Appellant's solicitors their reason for non-attendance, namely that they were "double booked", would be unlikely to persuade any judge that a case should be adjourned. On that basis the Appellant appears in person. The Secretary of State appears by her Home Office Presenting Officer, Mr Bates.

Submissions/Discussions

5. I started by explaining to the Appellant the procedure before the Tribunal. Whilst acknowledging that it was his appeal he agreed that it would be appropriate for Mr Bates to make his submissions first and I then indicated to the Appellant that I would listen to him without interruption. Mr Bates starts by taking me to the Rule 24 response, pointing out that the Tribunal is bound by the long established principles set out by the House of Lords in *N v Secretary of State for the Home Department [2005] UKHL* and reaffirmed by the Court of Appeal in *GS (India) and Others v Secretary of State for the Home Department [2015] EWCA Civ 40* whereby the Court of Appeal confirmed that foreign nationals may be removed from the UK even where their lives will be drastically shortened due to a lack of healthcare in their home states and that removal in those circumstances does not breach Articles 3 or 8 ECHR except in the most exceptional cases. Mr Bates reminds me that those authorities are binding upon the Tribunal and remain good law and that the Tribunal is obliged to follow them.

6. Mr Bates submits that the judgment of the European Court in *Paposhvili v Belgium* is not binding upon the UK courts and takes me to the most recent authorities of *EA and Others (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 00445 (IAC)* where the Upper Tribunal held that the test in *Paposhvili* is not a test that is open to the Tribunal to apply by reason of it being contrary to judicial precedent. He further takes me to the most recent authority of *AM (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 64* and submits that that authority endorses the view to be found in *EA*.

7. He points out that whilst Article 3 if reached is an absolute right family life is a qualified right and it is appropriate to consider proportionality and the public interest has to be considered in such applications. He reminds me that we are dealing with purported treatment to a non-British national and that that is why Article 3 is very rarely met. He submits that these issues have been addressed by the judge at paragraphs 23 onwards and that at paragraph 26 it was conceded by the Appellant's representative that he could not meet the Immigration Rules, and thereafter at paragraph 27 the judge appropriately dealt with the Appellant's family relationship stating at paragraphs 30 and 34 that family life is a qualified right and that the Appellant's relationship with Ms Jones was, in legal terms, a precarious relationship and that if the Appellant were removed then it would be open to Ms Jones to return to the position that she was in prior to that relationship.

8. Consequently, Mr Bates concludes by stating that whilst there is significant medical evidence there has been no material error of law and the case law shows that the Appellant cannot succeed, along with the fact that the issue of proportionality reflects the fact that the public interest in the circumstances of this case would favour the removal of the Appellant. He asked me to dismiss the appeal.

The Evidence of the Appellant

9. The Appellant became extremely distressed during the hearing, as did his partner. He indicated he was not in a position to debate the legal issues but that he had been told to rely on the Grounds of Appeal to the First-tier Tribunal, all of which I have read and considered. He points out that in 2013 he was diagnosed with lung disease and he requires a lung transplant. He has been receiving care and unless he has a lung transplant his life will be limited and that his consultant in the UK is extremely concerned that he will die if he is referred back to Ghana because of the lack of hospital facilities there for people requiring lung transplants and having medical care.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational

conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

12. This is clearly a very distressing case. The medical condition of the Appellant is not one that is challenged by the Secretary of State. The medical evidence appears to show he requires a lung transplant. He is receiving treatment at present in the UK and he has a relationship with Ms Jones with whom he had been living for some eight months at the date of the First-tier Tribunal Judge's decision. I do, however, have to remind myself that this is a court of law and not a court of sympathy and the issue that is before me is to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge.

13. That purported error of law is based on the proposition that *Paposhvili v Belgium* is applicable to the Appellant's medical circumstances. I am afraid that the law just does not support such a proposition, indeed the matter has recently received consideration not only in the Upper Tribunal in *EA* but in the decision of *AM (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 64*. That case points out that the decision of the House of Lords in *N v Secretary of State* is binding authority so far as the court is concerned regarding the test to be applied in domestic law in this type of case and that:

> "It is common ground that this is so even though it appears that the European Court of Human Rights has more recently, in *Paposhvili*, decided to clarify or qualify to some degree the test previously laid down in *N v United Kingdom*, which corresponds with that set out by the House of Lords in *N v Secretary of State for the Home Department*".

14. The Court of Appeal found that paragraph 183 of *Paposhvili* lacks the test of violation of Article 3 in the case of removal of a foreign national with a medical condition and that it did so only to a very modest extent.

15. I am merely dealing with the issue as to whether there has been a material error of law in the analysis by the First-tier Tribunal Judge. I am satisfied that the judge has quite properly considered the case and has followed the law. To that extent the judge has not erred at all and certainly not materially. However, it is appropriate to recite and bear in mind a paragraph from *AM* – this of course being a decision that was not before the First-tier Tribunal Judge – it seems to me that paragraphs 32 and 33 of *AM* cover the circumstances of this case and indeed Mr Bates does not seek to challenge me on this point. For the benefit of the Appellant and his legal representatives (albeit that they were not present) it is appropriate within this decision to recite those paragraphs:

> "32. There is also a significant number of other cases involving claims by foreign nationals to resist removal from the UK by invoking Article 3 on medical grounds which are already in the system, in which again reliance is sought to be placed on *Paposhvili* even though the claims have been dismissed by application of *N v Secretary of State for the Home Department* and *N v United Kingdom*. In those cases, orders have been made in a similar way to prevent the removal of the appellants from the UK until final determination of their cases, which are on hold until the position in relation to the adoption of the guidance in *Paposhvili* into domestic law has been clarified.
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> 33. In addition, similar new claims based on application of Article 3 on medical grounds may be brought forward at any time. In relation to those claims, all courts below the Supreme Court will be bound by the decision in *N v Secretary of State for the Home Department,* but claimants may contend that they have grounds for saying that their cases are covered by the new guidance in *Paposhvili* (in particular at para. [183]) and that any question of their removal from the UK should be stayed until the Supreme Court has decided to modify domestic law (potentially decisively in their favour) by reference to that guidance. "

16. However, the Appellant should be aware that the Court of Appeal in *AM* considered that those particular cases fell a long way short of satisfying the test in paragraph 183 of *Paposhvili* and so that the Appellant should be well aware that there is absolutely no certainty that even if clarification is given by the Supreme Court that his case would be covered by it.

17. It is further briefly appropriate to consider the aspect of proportionality because that was raised as a Ground of Appeal. Mr Bates has dealt with that extensively in his submissions to me but more importantly this has been dealt with by the judge at paragraphs 23 to 34. The judge's analysis is thorough and detailed and the judge has come to findings which she was perfectly entitled to.

18. For all the above reasons, whilst I acknowledge it will be of great disappointment to the Appellant, as a matter of law I am satisfied that there are no material errors disclosed in the decision of the First-tier Tribunal Judge whose decision, albeit that it predates the most recent case law, addresses all the relevant case law quite properly and discloses no material error. In such circumstances the Appellant's appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed Date 14 March 2018

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date 14 March 2018

Deputy Upper Tribunal Judge D N Harris