Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05224/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th February 2019	**On 27 March 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MT
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss G. Loughran, instructed on behalf of the Appellant
For the Respondent: Ms A. Everett, Senior Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The appellant appeals with permission against the decision of First-tier Tribunal, promulgated on the 19th September 2018 dismissing her appeal against the decision to refuse her human rights claim. Permission to appeal was granted on the 9th January 2019.

2. The appellant is a citizen of the Philippines. She entered the UK on the 19th March 2013 with entry clearance as a domestic worker with a visa valid until 7 August 2013. She had remained in the UK without leave since that date.

3. On 17th December 2014 the appellant applied for further leave to remain outside the Immigration Rules. The basis of her claim was that in view of her medical condition return to the Philippines would be a breach of Article 3 of the ECHR.

4. The respondent refused her claim in a decision taken on the 9th March 2017.

5. The basis of her claim was that she had end stage kidney failure for which she required dialysis three times per week, and she would require a kidney transplant. It was stated that if she returned to the Philippines, she would be unable to afford treatment and her family could not support her.

6. The decision letter considered the medical evidence that had been supplied with the application form (a report dated 13 June 2016). The respondent accepted that the appellant had an incurable condition but that she could continue receiving dialysis and took into account the dialysis was available in the Philippines as was appropriate medication. The respondent made reference to her financial circumstances and that she would be unable to afford treatment however, it was considered that those circumstances did not make a claim exceptional or entitled to remain in the United Kingdom. The decision letter also made reference to alternative sources of financial assistance for medical health and in particular sponsorship through Phil health. The COI report referred to sponsored membership Phil health being available to those belonging to the lowest 25% of the population.

7. The respondent set out the relevant case law concerning Article 3 claims at page 6 of the refusal letter. The respondent concluded that the appellant was not in the final stages of a terminal illness and that of the appellant had not shown that she could not access dialysis upon her return, her condition would not rapidly deteriorate. In the event the dialysis is not available the appellant had not shown that she was unable to obtain palliative care or family support.

8. The appellant also made reference to her mental health as part of her Article 3 claim. By reference to a COI report dated 13 March 2013, the respondent set out that there were appropriate medical facilities available to the appellant in the Philippines.

9. Her claim was also considered under Article 8 of the ECHR for the reasons set out at page 9 of the refusal letter the respondent considered that there were no "exceptional circumstances" to demonstrate that a grant of leave outside the rules. The respondent

noted that her private life had been developed on the basis that she had no permission to remain permanently and thus had no legitimate expectation of stay. It was also noted that her last period of leave to remain expired on 7 August 2013 and that she had overstayed in the UK since that date without making any attempt to regularise her stay and acclaimed NHS treatment she was not entitled to.

10. The appellant issued grounds of appeal on 23 March 2017. In those grounds it was argued that:

    (1) the decision was contrary to the U.K.'s obligations under the European Convention of Human Rights and unlawful under section 6 of the Human Rights Act 1998.

    (2) The decision was contrary to Article 3 of the ECHR and that the respondent erred in failing to consider that the appellant's case was aligned far closer to D, rather than to N. Removal of the appellant would bring certainty and immediacy of death and was sufficient to bring the case within the "exceptional" category recognised by the ECHR jurisprudence.

    (3) It was further argued that the respondent erred in law by failing to consider the recent judgement of Paposhvili v Belgium (application number 41738/10) and the representations made by the appellant dated the 1/2/17 in respect of Article 8, it was submitted that removal would breach her rights under Article 8 and that there were no compelling public interest grounds of her removal. The respondent failed to take into account the foreseeable consequences for the appellant's mental health of the decision and its implementation upon the effective enjoyment of her right to respect for private life.

11. The appeal came before the First-tier Tribunal on 11 September 2018. The judge heard evidence from the appellant and two witnesses called on her behalf. In a decision promulgated on 19 September 2018 he dismissed her appeal on all grounds.

12. The judge's findings of fact and analysis of the evidence can be summarised as follows: –

    (1) The judge took into account the medical report dated 13 June 2016 which confirmed that the appellant had irreversible end-stage kidney disease and that she had commenced dialysis on 21 June 2014 and received it three times a week. He recorded the evidence that if the dialysis ended, she would die most likely within two or three weeks (paragraph 5). He further recorded the evidence that if dialysis was reduced to 2 sessions per week there would be a long-term detrimental effect on the life expectancy of the appellant and such a reduction would increase the risk of premature death. The judge recorded the medical evidence stating that there may be some short-term effects of reducing the dialysis to 2 times per week if the appellant could not control her fluid intake. Such a reduction dialysis may also lead to worse control of waste products leading to symptoms such as

itching, cramps, restless legs, nausea, weakness, fatigue and exhaustion and in the longer-term bone disease and other complications.

(2) The judge took into account and email at page S107 which demonstrated the dialysis is available in the Philippines and that it could be arranged in advance so that upon removal the appellant could access dialysis on her arrival without delay. He concluded that the minimum that she would receive is the 90-day package B which would be authorised by Phil health which would include 90 days dialysis treatment per annum which would be less than two sessions a week (1.73) as opposed to the three sessions a week that she received in the United Kingdom.

(3) The judge found that the appellant could receive dialysis in the Philippines and therefore death would not be imminent and that the Article 3 claim was not made out. The judge found that she would be likely to be offered package B (90 day dialysis) and whilst this was less than three days a week that she was currently receiving, taking into account the medical evidence, a reduction in dialysis may not necessarily lead to the appellant experiencing some if not all of the side effects listed (see paragraph 54).

(4) He reached the conclusion that the appellant would not suffer a rapid decline health and would not rapidly experience intense suffering. He found that some of the problems referred to in the medical report were described as a long-term detrimental effect and therefore they were not rapid. He found that the immediate short-term effects referred to by the medical evidence would only occur if the appellant could not control her fluid intake. The judge found that as the appellant presented as a "sensible individual and having been warned about such short-term effects I find no reason why she could not control a fluid intake." He went on to state "in any event, I do not accept that the short-term effects, even if they occur, would amount intense suffering to the standard envisaged in either Paposhvili or AM. He therefore concluded that the appellant had not shown that there were substantial grounds for believing that there would be a real risk of a rapid decline in her health and/or that she would rapidly experience intense suffering and thus the test set out in AM had not been satisfied (see paragraph 57)).

(5) So far as travelling to the dialysis centre was concerned, he found two centres available approximately an hour away by bus and that she would be able to access those centres. He took into account that she travelled to receive dialysis now and the distance was a similar journey time (see paragraphs 60 – 61).

(6) The judge accepted that the appellant and her family were poor and had little income but noted from the witness statements of her parents that they were able to afford their own medical care. Neither said that they had to pay anything to Phil health although they had to pay for medication.

He recorded that he found it surprising that the witness statement did not deal with the position of her parents in relation to Phil health.

(7) He found that she would be able to access dialysis to the Phil health scheme and she could now enrol in that scheme as the documents demonstrated that overseas workers were covered (see paragraphs 64 and 65).

(8) The judge therefore concluded that returning the appellant to the Philippines would not be in breach of Article 3 on medical grounds (see paragraph 66).

(9) The judge took into account her mental health and the medical evidence of a psychologist (page S 75). He found that arrangements could be put in place for her dialysis before the appellant returned to the Philippines and it addressed the issues at paragraph 9.6.1.2 and 9.6.1.3 of the report. He considered that any stability could be given to the appellant by resolving her immigration status by return and that either remaining in the UK or being returned would provide permanent stability. He also considered what was said about the withdrawal of dialysis treatment but reached the conclusion that the discovery of a chronic life-threatening condition will be likely to result in high levels of anxiety and depression and thoughts of suicide whether that discovery occurred in the UK or the Philippines.

(10) As to Article 8, he took into account immigration history; having entered on 19 March 2013 had been in the UK for 5 ½ years. He took into account the witness statements to show that she built up a substantial private life with friends, church and in her medical treatment. While she claimed to have a partner, they did not live together and had not met until December 2017 and thus had only known each other for a short time. He was not persuaded that they had "family life" and that he was a boyfriend. However, he took into account the relationship in terms of private life.

(11) The judge found she could not meet the immigration rules and taking into account section 117B public interest considerations, he attached little weight to the private life that she had established since at all times her presence had been precarious. In the alternative any family life that she had established was at a time when her immigration status was unlawful and gave little weight to it. The appellant was not self-sufficient, and nor would she ever be as she was dependent upon government support and it also incurred high charges using the NHS.

(12) If returned to the Philippines, she would derive support from her family. He concluded that there was an "overwhelming public interest in the appeal in maintaining immigration control" and that there was also the issue of the economic well-being of the United Kingdom. Having carried out the balancing exercise, he found that there was "very little in the appellant's favour" this dismissed her appeal under Article 8.

13. The appellant sought permission to appeal that decision and initially permission was refused by the First-tier Tribunal. On 9 January 2019, Upper Tribunal Gill granted permission.

14. Thus, the appeal came before the Upper Tribunal. I heard submissions from each of the advocates which I shall incorporate and refer to in my analysis and conclusions.

Decision on the error of law:

15. Ground one relates to the analysis of the medical evidence before the Tribunal. The judge found [56] that the appellant could access 90 sessions of dialysis, which would be averaged out at 1.7 sessions per week. He therefore concluded that on that evidence she would not suffer a rapid decline in her health and would not rapidly experience intense suffering. He further concluded that the immediate short-term effects upon her health referred to in the medical report would only occur if the appellant could not control her fluid intake. On this issue the judge reached the conclusion that: "the appellant presents as a sensible individual and having been warned about such short-term effects I find no reason why she could not control her fluid intake…".

16. The medical evidence set out at [AB 37] at paragraph 6 sets out the complications arising from the reduction in dialysis from the three sessions that she presently undertook to the two sessions (1.7 sessions). Prof Levy made reference to the long-term detrimental effects on the length of her life increasing the risk of premature death and risk of complications from renal failure, cardiac arrest and bone disease. Apart from the long-term detrimental effects he made reference to the "immediate short-term effect if she was unable to control her fluid intake". He stated that she would be likely to be very susceptible to "rapid accumulation of fluid in the chest (pulmonary oedema) which could be fatal or giving rise to emergency admission to hospital. This would commonly occur within a few days of a reduction in her dialysis regimen." He went on to make reference to other conditions as a result which could give rise to irreversible damage.

17. Therefore, the medical evidence set out the consequences after the reduction of dialysis and the immediate short-term effects upon her health if the appellant was unable to control her fluid intake. There was no evidence before the judge as to how the appellant would control her fluid intake or in what circumstances or even as to what was meant by "fluid intake" in the context of her treatment. The only source of evidence was that referred to in the medical report.

18. Miss Everett submitted that every change of routine would be different and that the judge had made a finding based on her being able to manage her condition in the past. She submitted that the appellant was not in the position of a young child but someone who had been able to manage her condition to a degree.

19. Against that background, I am satisfied that the judge did fall into error when considering that medical issue. I accept the submission made by Miss Loughran that there was no evidence before the Tribunal as to what was meant by "fluid intake" and therefore the finding made had no proper evidential basis.

20. Furthermore, whilst Miss Everett submitted that the judge was entitled to reach the finding based on his assessment of her being a "sensible person", the judge made no reference to her past ability to manage the condition and there was no evidence in this regard before the Tribunal.

21. Even if it could be said that she could manage her condition in the UK, as Miss Loughran submitted, it did not necessarily follow that she could do so in the Philippines and the conditions there were a relevant factor in reaching an overall decision. At paragraph 57 (appellant's witness statement) the appellant sets out the likely conditions and what would be necessary for effective dialysis to take place. In this regard she sets out that a proper waste purification system would be required, further evidence was given that there was no safe drinking water. Those paragraphs also make reference to the facilities for her in her parents' home all of which was relevant to any type of dialysis which would be undertaken. Therefore, the reasoning based on her presentation as a "sensible person" does not engage with all of the evidence before the Tribunal.

22. The judge also found at [56], in the alternative that he was not satisfied that the short-term effects, even if they occurred would amount to "intense suffering". At paragraph 41 of the decision, the judge cited paragraph 38 of AM (Zimbabwe) and another v SSHD [2018] EWCA Civ 64 which stated as follows:

> "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 the 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"(paragraph [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 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 be 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 that state of the treatment which had previously been available in the removing state."

23. However, whilst acknowledging that relaxation of the test, Sales LJ considered "it does so only to a very modest extent". The Article 3 threshold in medical cases remains high (see MM (Malawi)).

24. In terms of the evidence, I accept the submission made by Miss Loughran that the finding failed to properly take into account the written evidence set out in the medical report at paragraph 6 and that if those circumstances arose, the medical evidence referred that to the consequences as being fatal, therefore even taking account of the high threshold, the judge had not applied the medical evidence to the applicable test.

25. Ground 2 relates to the evidence concerning the availability of treatment under the Philhealth scheme. The judge had reached the conclusion that dialysis was available in the Philippines and that the appellant could access this (see paragraph 60). At paragraphs 64 – 65, the judge took into account the evidence as to the availability of the Phil health scheme. Miss Everett on behalf of the respondent submitted that the judge did consider the evidence as to the scheme and was entitled to reach the finding that whilst it might be of some cost to the appellant it was available. She submitted the judge had stated that he was not clear whether the appellant's parents are accessing healthcare or not but that he was entitled to say that there was no evidence the appellant had approached them.

26. Miss Loughran referred the Tribunal to the evidence relied upon by the judge which was at page 392 of the bundle. It referred to the scheme offering 90 sessions to members annually and that as at 2013 all citizens are entitled to cover by Phil health with the government pledging poor families will be provided with insurance free of charge.

27. I accept the submission made by Miss Loughran that the evidence of the Phil health scheme and its availability is unclear and that there appears to be some confusion in the evidence as to who it applies to, whether any contribution is required and whether treatment for dialysis is free and whether there is or has been any attempt to reclassify dialysis as free treatment. There is a reference to the legislation in 2018 but no evidence as to whether or not that has occurred. Furthermore, there was evidence before the Tribunal that the scheme itself was not effective (see AB page 384). There was also an email at page 107 which made reference to the cost of treatment and refers to be a "registered member". The analysis made of the judge of the availability of treatment was in the context of the appellant being covered by that scheme. However, it was unclear on what basis the material supported a conclusion that she was a member or would be entitled to be a member or on what basis. Some of the findings made on this issue also did not take into account all the available evidence, for example, at [63) the judge found that the appellant's parents were able to afford the medical care but that was not consistent with the evidence given by the appellant which demonstrated that they went without their medication had struggled to meet their own medical needs.

28. A further issue arises from the submissions of the parties as to how the appellant could practically access any treatment. The judge set out his findings at paragraph 61 that there were two centres available to the appellant an hour away by bus and compared the journey and distance time to be similar to that taken in the United Kingdom.

29. It is submitted by Miss Loughran that the judge failed to take into account the evidence as to the journey from the UK to the Philippines. She gave the approximate flight time from the UK to the capital being over 13 hours and the appellant's evidence that there would be a further 21 hours by bus and three hours by boat and overall a figure of 36 hours was given as to the overall period of travel that there would be before arriving at her home and therefore obtaining treatment.

30. Miss Everett on behalf of the respondent submitted that the journey was a matter of risk and that any change in her routine would be done in a structured way and there was no evidence that the journey itself would be fatal. She submitted that it could be staged or an alternative her parents could come and stay in Manila and she could access treatment there.

31. When looking at the issue of travel, Miss Everett is right to submit that this was not akin to a situation of being on life support. However, the judge's finding at paragraph at 61 solely related to accessing treatment in her home area. In my judgment it was open to the judge to find that the journey of one hour away was similar in time to the journey made in the UK for treatment. However, the issue raised in the grounds and in the submissions made relate to travel from the UK to the Philippines before any treatment could be accessed. It does not appear that this evidence was taken into account by the judge (as set out in her witness statement) and he made no findings as to how the journey would take place or in the context of any detrimental impact on her health. The submission made by Miss Everett was that the journey could be taken in stages, but there was no evidence to make any finding in this regard.

32. For those reasons, I am satisfied that the errors identified in the grounds are made out. As those errors go to findings of fact and analysis of evidence, I set aside the decision and do not reserve any of the findings.

33. As to remaking the decision, given the nature of the errors I accept the submission made by Miss Loughran that further evidence will be required and further clear findings made, including updating evidence relevant to the appellant circumstances. She therefore submits that the appeal should be remitted to the First-tier Tribunal.

34. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

35. Thus, I have reached the conclusion that it is appropriate to remit it to the First-tier Tribunal for a fresh decision on all matters.

Notice of Decision

36. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. It is remitted to the First-tier Tribunal for a fresh hearing.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Upper Tribunal Judge Reeds*

Upper Tribunal Judge Reeds

Date 25/3/2019