Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00860/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Remotely by Skype For Business On 12 November 2020	**Decision & Reasons Promulgated On 9 December 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

NA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Blackwood instructed Qualified Legal Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant ("NA"). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Pakistan who was born on 15 May 1985. He arrived in the United Kingdom with entry clearance as the spouse of a British citizen on 16 October 2008 with leave valid until 3 January 2011. On 5 January 2011, the appellant applied for indefinite leave to remain as the spouse of a British citizen. Having been granted limited leave to remain on 5 January 2011, an application for 'No Time Limit' was granted on 20 August 2013.

3. Between 23 January 2014 and 12 January 2018, the appellant was convicted on six occasions of eleven offences, including an offence against the person and a number of offences involving driving a vehicle whilst disqualified and uninsured. A number of different penalties were imposed upon the appellant, including a six weeks' period of imprisonment on 8 December 2015, a twelve week period of imprisonment on 13 November 2017 and a four month period of imprisonment on 19 January 2018.

4. Prior to the appellant's conviction on 18 January 2018, on 22 November 2017 he was served with notice of a decision intending to deport him on the basis that his deportation was conducive to the public good under s.3(5)(a) of the Immigration Act 1971. The appellant made submissions that amounted to a human rights claim. He relied upon both Art 8 and 3 of the ECHR in relation to the impact on his family and private life, including the impact upon his health as he suffered from a rare congenital condition known as thrombotic thrombocytopenic purpura (TTP) which required him to receive a regular infusion of a blood product, Factor VIII (Type 8Y).

5. On 9 October 2018, the Secretary of State refused his human rights claims under Arts 3 and 8 of the ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. In a decision sent on 27 November 2019, Judge Richardson dismissed the appellant's appeal. In relation to Art 3, the judge applied the approach set out in the House of Lords in N v SSHD [2005] UKHL 31 and concluded that, despite accepting the evidence that without treatment the appellant would die within months, his situation did not fall within the "exceptional circumstances" to establish a breach of Art 3 in a medical case following N v SSHD. In addition, in any event, treatment for the appellant's condition was available in Pakistan.

7. The judge made no decision in relation to Art 8 on the basis that that claim had been withdrawn at the commencement of the hearing.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal to the Upper Tribunal. The appellant's grounds challenged the decision on a number of bases. First, the judge failed to consider (because the Secretary of State had not referred the judge to these) a number of policies which were relevant to disposal of the appellant's appeal. Secondly, the

judge erred in failing to apply the correct threshold to Art 3 claims based upon a health condition set out in the Strasbourg Court's decision in Paposhvili v Belgium [2017] Imm AR 867. Thirdly, the judge failed to give anxious scrutiny to the evidence, and adequate reasons for her finding, that treatment in Pakistan was available and accessible. Finally, the judge failed to consider Art 8 of the ECHR.

9. The appellant was refused permission to appeal first, by the First-tier Tribunal on 3 January 2020; and secondly, by the Upper Tribunal on 4 February 2020. The appellant lodged Cart proceedings in the High Court. Permission was granted by HHJ Jarman QC (sitting as a Judge of the High Court) on 6 March 2020. Thereafter, by order of HHJ Keyser QC (sitting as a Judge of the High Court) the Upper Tribunal's refusal of permission to appeal was quashed. On 13 May 2020, the Upper Tribunal (VC Ockelton) granted the appellant permission to appeal.

10. The appeal was initially listed before me on 23 July 2020 at the Cardiff Civil Justice Centre for a remote hearing. That hearing was, however, adjourned as the respondent did not attend the hearing via Skype. I will return to this adjournment later as the appellant's legal representatives, subsequent to that hearing being adjourned, made an application for "wasted costs" under rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

11. The appeal was again listed before me on 12 November 2020 at the Cardiff Civil Justice Centre for a remote hearing by Skype for Business. Mr Blackwood, who represented the appellant, and Mr Howells, who represented the Secretary of State, attended the hearing remotely.

The Judge's Decision

12. The evidence before the judge was that the appellant suffered from a congenital form of TTP which was to be distinguished from an autoimmune form of TTP. The judge summarised the evidence at paras 31–38 of her determination as follows:

> "31. I have read carefully the written and oral evidence of Dr Rayment and I appreciate her attending at the hearing.
>
> 32. The appellant has a medical condition, TTP. He is receiving treatment in the UK on the National Health Service and is able to live a normal life apart from the requirement to ensure that he receives his medication at specific regular intervals. He is assisted in his day-to-day life by his former wife's mother who cleans and cooks for him and helps with his injections.
>
> 33. The disease has two forms, autoimmune and congenital. Both versions of the disease are rare in the UK. There are only three cases in Wales – the appellant, his brother and a third person. The appellant's condition is the congenital type. His brother [ ] also suffers from the disease.
>
> 34. It was claimed that the appellant's siblings suffer from the disease and that two siblings have died, one in 2005 at the age of 25 and a sister in July 2019.
>
> 35. Dr Rayment states that the appellant would die within about four months if not receiving his medication. She has also found a medical/welfare charity which is able to treat the autoimmune variant of TTP.

36. Dr Rayment describes the treatment of congenital TTP in the UK as giving Factor VIII used for haemophilia which contains a small amount of 13 enzyme which is sufficient and stops the disease from manifesting. The other is infusions of fresh frozen plasma donated by donors which requires hospital attendance. Factor VIII can be given in the home by the patient himself.

37. Dr Rayment was asked but did not directly reply to the question are there any other charitable/welfare organisations providing treatment apart from the one identified at the hearing.

38. The respondent has demonstrated that there is treatment is [*sic*] available in Pakistan for the congenital TTP. I was referred to the MedCOI Report. There was no documentary evidence on cost or whether any medication is available free of charge. It was suggested it is likely to be expensive in Pakistan. Dr Rayment commented that the cost of the appellant's treatment in the UK is £66,000. There was no documentary evidence to support that figure".

13. The judge then went on to consider case law, including N v SSHD, D v UK (1997) 24 EHRR 423 and Paposhvili. Then at paras 43–45, the judge reached her conclusions as follows:

"43. I am bound to follow **N** and the subsequent authorities which have endorsed **N** in the light of **Paposhvili**. The appellant's case is not a 'death bed' case. Although two of his siblings have died for an unnamed reason, he has two siblings he believes who have congenital TTP although there is no diagnosis and they are in their late 30s and late 40s respectively. The appellant has not shown very exceptional circumstances to bring him within **Paposhvili**.

44. Dr Rayment describes the claimant's treatment for TTP on the NHS as being Factor VIII as used in treating haemophilia. Factor VIII contains a small amount of Enzyme 13 which the claimant requires to provide the disease from manifesting. That is the medication currently being provided by the NHS to the appellant for congenital TTP. The claimant, unlike his siblings in Pakistan has a diagnosis. He has lost two siblings to an unnamed cause of death. His older siblings are in their late 30s and late 40s respectively. The appellant also knows what treatment he requires. He has not established substantial grounds to believe that he cannot receive it in Pakistan.

45. There was insufficient evidence before me to show to the civil standard of proof that there are no clinics or welfare foundations which treat haemophilia in Pakistan and could provide Factor VIII. Haemophilia is not a rare disease to the extent that congenital TTP is rare. In any event whilst TTP may be rare in the UK, there was no evidence before me that it is equally as rare in Pakistan. There is at least one welfare clinic in Pakistan providing treatment for autoimmune TTP and to that extent to suggest that TTP is not so rare in Pakistan as it is in the UK.

46. It is with regret that I am bound to reach this decision. The appellant's claim on Article 3 grounds fails and is dismissed".

The Submissions

14. On behalf of the appellant, Mr Blackwood made a number of submissions. I can summarise them as follows.

15. First, there were a number of policies which the Secretary of State did not bring to the attention of the judge and which were relevant to her assessment of whether the appellant could succeed under Art 3 (and Art 8) of the ECHR. He relied upon: "Considering Human Rights Claims" (2009) at page 19; "Human Rights Claims on Medical Grounds" (20 May 2014) at pages 14, 18 and 20; "Leave Outside the Immigration Rules" (27 February 2018) at pages 6–7; and "Country Policy and Information Note, Pakistan: Medical and Healthcare Issues" (August 2018). Mr Blackwood submitted that the respondent's failure to draw these documents to the judge's attention, led the judge into an error of law. He relied upon AA (Afghanistan) v SSHD [2007] EWCA Civ 12 at [13], [27]–[28] and [35]; Mandalia v SSHD [2015] UKSC 59 at [19] and [29]–[30]; and UB (Sri Lanka) v SSHD [2017] EWCA Civ 85 at [20]–[22].

16. Secondly, Mr Blackwood submitted that the judge's decision was based upon the House of Lords approach to Art 3 in medical cases set out in N v SSHD which had now been overruled by the Supreme Court in AM (Zimbabwe) v SSHD [2020] UKSC 17. He submitted that the evidence engaged Art 3 as, without treatment, the appellant faced a "significant reduction in his life expectancy" which the Supreme Court acknowledged fell within Art 3. It was then, Mr Blackwood submitted, for the Secretary of State to show that treatment to avoid the significant reduction in the appellant's health was both available and accessible.

17. Thirdly, in regard to those issues, Mr Blackwood submitted that the judge had confused the availability of treatment in Pakistan between the treatments for the congenital form of TTP (which the appellant suffered from) and the autoimmune form of TTP (which the appellant did not suffer from). He submitted that the evidence had not properly been considered. In particular, the judge relied upon the MedCOI response but that had failed to include the actual response received from Pakistan on 15 September 2018 which was only referred to in the footnotes. He also relied on the fact that there was evidence, obtained by those representing the appellant, from Dr Zia in Pakistan who stated that the treatment which the appellant requires was not available in Pakistan (see page 30 of the appellant's bundle).

18. Further, Mr Blackwood submitted that the question of accessibility, and whether or not the treatment if available was only at some cost, had not properly been considered by the judge. Dr Rayment had only found a "medical/welfare charity" which provided treatment for the autoimmune form of TTP – which was not the variant from which the appellant suffered. The judge had also been wrong not to consider Dr Rayment's view, expressed in her oral and written evidence, that the cost of the appellant's treatment in the UK was £66,000.

19. Mr Blackwood submitted that the judge's finding that the appellant had not established a breach of Art 3 applying AM (Zimbabwe) was legally flawed.

20. Finally, in relation to Art 8 Mr Blackwood, at least initially, submitted that the judge had been wrong not to consider Art 8 which could be engaged despite an adverse finding under Art 3 and he relied upon the decision in SL (St Lucia) v SSHD [2018] EWCA Civ 1894. Initially, at least, he submitted that the judge had been wrong to consider that the appellant's (then) Counsel had withdrawn reliance upon Art 8. He submitted that, in any event, it was a Robinson obvious point. Mr Blackwood acknowledged, however, that no submissions had been made by the appellant's (then) counsel in respect of Art 8 going beyond the appellant's health condition.

21. On behalf of the Secretary of State, Mr Howells submitted that the relied upon cases concerned with an obligation to put before a judge policy documents were distinguishable. These policy documents were concerned with the 'threshold' or scope of Art 3. They were, he submitted, concerned with an interpretation of Art 3 which was for the Tribunal rather than the Secretary of State. He accepted, however, that the medical CPIN document was concerned with treatment options but did not deal with the appellant's particular condition and so was irrelevant.

22. Secondly, as regards AM (Zimbabwe), Mr Howells accepted that the evidence was that the appellant would die within four months without treatment. He accepted that, following AM (Zimbabwe) that engaged Art 3 of the ECHR. However, he submitted that the judge had found that the appellant would be able to obtain treatment and that, in the absence of evidence concerning the cost of any treatment in Pakistan, it was open to the judge to find the treatment was both available and accessible and that, therefore, no breach of Art 3 had been established. Mr Howells submitted that the judge was entitled to find that treatment was available following the MedCOI response. He accepted that he did not know why the material from Pakistan upon which this response was based had not been served. He pointed out, however, that no request for that material had previously been made by the appellant. He accepted that there might be an apparent conflict in the evidence, between the MedCOI Report and Dr Zia, however the judge was entitled to rely upon the MedCOI response.

23. Finally, as regards Art 8, Mr Howells submitted that, based upon his records of the hearing, the Presenting Officer had made submissions on Art 8 and its application based upon SL (St Lucia). However, those submissions had preceded Counsel for the appellant's submissions and it did not appear that Counsel had advanced any factor beyond the appellant's health condition to support a claim that there was a breach of Art 8 based upon the appellant's private life returning to Pakistan.

Discussion

24. The appellant's claim under Art 3 was founded on the impact upon his health, due to his suffering from the congenital form of TTP, if he returned to Pakistan. The medical evidence, which the judge accepted, was that without treatment the appellant would die within four months.

25. At the time of the judge's decision, the application of Art 3 in health cases was governed by the House of Lords' decision in N v SSHD. The judge correctly

identified (at paras 40–43), that the decision in N v SSHD restricted Art 3 claims based upon the impact upon an individual's health on return to their own country to so-called "death bed" cases. The fact that an individual's life expectancy would be reduced, significantly or otherwise, on return could not found a claim under Art 3. That was the decision of the House of Lords in N v SSHD as the judge recognised in para 40 of her determination.

26. The judge cannot be faulted for applying the law as it was thought to be at the time of her decision. She was bound by N v SSHD as the Court of Appeal recognised in AM (Zimbabwe) prior to that case being appealed to the Supreme Court (see [2018] EWCA Civ 64) and also in PF (Nigeria) v SSHD [2019] EWCA Civ 1139.

27. However, when AM (Zimbabwe) reached the Supreme Court, the Court adopted a different approach to that in N v SSHD seeking to apply, and explain, the Strasbourg Court's subsequent decision in Paposhvili. As a declaration of the law, that interpretation, and application of Art 3 in health cases, had retrospective effect, in the sense that it was always the law even if the law had previously been understood to be otherwise. Therefore, if the judge applied Art 3 in a way contrary to the Supreme Court's approach in AM (Zimbabwe), albeit through no fault of her own, she would have misdirected herself and would, as a result, have erred in law. It is plain to me that the judge did misdirect herself in law.

28. In AM (Zimbabwe), the Supreme Court approved the approach in Paposhvili. The Supreme Court held ([27]–[31]) that, in health cases, a breach of Art 3 could be established in one of two situations:

> where the evidence established that there were reasonable grounds for believing that there was a real risk that, in the absence of appropriate treatment
>
> (1) an individual would be exposed to a serious, rapid and irreversible decline in his or health resulting in intense suffering; or
>
> (2) an individual would suffer a significant reduction in life expectancy.

29. Whether a reduction in life expectancy is "significant" was explained by the Supreme Court at [31] (per Lord Wilson) as follows:

> "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."

30. Consequently, a "significant" reduction in life expectancy is a "substantial" reduction. Whether a reduction in life expectancy is "significant" takes its colour from the context, in particular having regard to the measure of the reduction given the age of the individual.

31. The Supreme Court also made plain that in determining whether a breach of Art 3 was established, it was necessary to consider whether (1) treatment was available; and (2) if it was, whether it was accessible by the individual (see [23(b)]-[23(e)]). The Supreme Court identified that, once Art 3 was engaged based upon the appellant establishing the implications to his health on return without treatment, it was for the state, essentially to "dispel any doubts" concerning the availability and accessibility of treatment. At [32]–[34], Lord Wilson said this:

> "32. … 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."

32. In this case, the judge, in my view, fell into error for the following reasons.

33. First, in the light of the Supreme Court's decision in AM (Zimbabwe) the judge applied too high a threshold for Art 3 to be engaged on health grounds. The Supreme Court 'departed from' (i.e. overruled) N v SSHD (see [34]). The Court strongly indicated that N v SSHD (where the individual's life expectancy was less than 2 years without treatment) was now wrongly decided on its facts (see [27]). The position, not challenged before me, based upon the medical evidence, was that the appellant would die within four months if he did not receive medication. That was certainly capable of amounting to – if not in fact being - a "significant reduction in life expectancy" for the appellant aged 35-years-old and which, following AM (Zimbabwe), would engage Art 3 of the ECHR.

34. Secondly, the judge's assessment of the availability and accessibility of treatment for the appellant's congenital form of TTP is flawed. It is clear from the medical evidence, and this was not disputed before me, that the treatment for the autoimmune variant is different from the treatment for the congenital variant of TTP. Dr Rayment's evidence was that she had only been able to discover treatment in Pakistan for the autoimmune variant of TTP. There was, however, evidence led by the appellant that treatment for the congenital variant of TTP was not available in Pakistan. Consequently, in the email exchange between Dr Zia and those representing the appellant (at pages 30–32), when directly asked whether the appellant could obtain access to lifelong replacement of ADAMTS13 enzyme either in the form of regular plasma infusion or Factor VIII concentrate, Dr Zia replied as follows:

> "We only done Plasmapheresis on TTP an Autoimmune Disorder and we do long sessions of Plasmapheresis on TTP Patients and During long sessions we remove maximum plasma and replace it with FFP (Fresh Frozen Plasma) ... No any other Clinical intervention is being done in Pakistan ... What you are suggesting that is an advanced therapy which is not available in Pakistan".

35. That evidence, although it took a couple of email exchanges to obtain, is clear.

36. Against that, the respondent relies upon the MedCOI response (at pages I1–I5 of the respondent's bundle). It states at para 1.3.1

> "MedCOI advise that Factor VIII plus Von Willebrand Factor (combination – Dried Factor VIII Fraction, Type 8Y is available)".

37. That appears to be a reference to the treatment by Factor VIII, Type 8Y which the appellant receives in the UK.

38. Mr Blackwood objected that the original evidence upon which this paragraph is based, namely a response received from Pakistan on 15 September 2018, has not been provided to the appellant. That is undoubtedly the case but, as Mr Howells submitted, it has also not previously been requested. On the face of it, this evidence supports the respondent's position and, as was pointed out to me, the appellant's specific circumstances, and the treatment he requires, are spelt out in the document. It would, in my judgment, have been desirable (subject to any issues of confidentiality) if the actual response from Pakistan had been disclosed. It may well be, particularly given the evidence to the contrary obtained by the appellant's representatives, that the Secretary of State *should* disclose this material, if at all possible, in order to discharge her obligation under Art 3 as envisaged by the Supreme Court in AM (Zimbabwe). Given my view as to the disposal of this appeal, I would anticipate that, subject to any issues of confidentiality, that disclosure would be forthcoming.

39. In any event, before the judge there was conflicting evidence which, on the face of it, said that treatment was both available and not available in Pakistan for the congenital variant of TTP with which the appellant suffered. The judge did not grapple with that conflict in the evidence. Instead, at para 38 she simply stated that:

> "The respondent has demonstrated that there is treatment available in Pakistan for the congenital TTP, I was referred to the MedCOI Report".

40. In failing to resolve this (apparent) difference in the evidence concerning the availability of treatment in Pakistan, the judge erred in law.

41. Further, in dealing with the availability of treatment at paras 44–45 of her determination which I set out above, the judge appears to have placed an unwarranted burden of proof upon the appellant to show that "no clinics or welfare foundations" provided the treatment the appellant needed. She appears to have inferred, that because treatment for the autoimmune TTP variant in Pakistan is available, at least in one welfare clinic, then the congenital variant of TTP (with which the appellant suffers) is not "so rare" in Pakistan and appears to have inferred that treatment might, therefore, be available for it. None of that reasoning is, in my judgment, sustainable in the light of AM (Zimbabwe) and the obligation on the Secretary of State to assist in resolving or dispelling any doubts about whether treatment is available (or indeed accessible) in the country of return. The inference the judge draws from the fact that treatment for the *autoimmune* form of TTP is available, does not seem to me to be a rational basis for an inference that treatment for the *congenital* form of TTP is available given that the treatments are different.

42. Added to that, however, is the issue of whether, even if available, treatment would be accessible. Dr Rayment gave evidence that the appellant's treatment cost £66,000 in the UK. Whilst the judge took the view that there was no documentary evidence to support that figure, it was part of Dr Rayment's written evidence and her oral evidence. That there was no accounting evidence of the cost was not, in itself, a good reason for not accepting Dr Rayment's oral and written evidence of the costing of the treatment in the UK. Of course, the issue concerned the accessibility of the treatment in Pakistan. As Mr Howells submitted, there was in fact no evidence of the actual cost of treatment in Pakistan. The only evidence concerning the places where treatment was available was in paras 1.4.1 and 1.4.2 of the MedCOI Report. Two of those facilities are described as a "private facility" whilst one, in Rawalpindi is described as a "public facility". The document does not, however, indicate whether any treatment would be free of charge and, if not, at what cost. Indeed, the document contains a specific disclaimer that:

> "The information is limited to the availability of medical treatment, usually at a particular hospital/clinic/health institute, in the country of origin; *it does not provide information on the accessibility of treatment*". (my emphasis)

43. Of course, the appellant's case, based upon his evidence obtained from Pakistan, was that treatment was not available. The respondent's case was that it was available. As part of that evidence, and the respondent's obligation recognised in AM (Zimbabwe), it was incumbent on the Secretary of State also to provide evidence concerning the accessibility, including the cost, if any, of treatment which she claimed was available contrary to the appellant's evidence.

44. Consequently, the judge erred in law in finding that no breach of Art 3 had been established. The judge misdirected herself as to the appropriate test to be applied under Art 3 and failed properly to consider whether treatment would be "available" and, if so, "accessible" on return to Pakistan.

45. In the light of this conclusion, the judge's decision to dismiss the appellant's appeal under Art 3 involved a material error of law and cannot stand.

46. I have reached this decision without needing to resolve Mr Blackwood's submissions based upon the judge's failure to consider, because the respondent did not provide her with these documents, the policies upon which Mr Blackwood placed reliance. On this issue, however, I do not accept Mr Blackwood's submissions.

47. Neither AA(Afghanistan) nor Mandalia assists the appellant.

48. AA (Afghanistan) concerned an appeal when the grounds of appeal included as a ground of appeal that an immigration decision was "not in accordance with the law". The Court of Appeal concluded that the respondent's decision was not "in accordance with the law" when a relevant policy, there the policy on unaccompanied minors, had not been properly taken into account by the respondent and the judge had erred in law by not so concluding (see [16]). That ground of appeal is no longer available under s.84 of the NIA Act 2002 as amended by the Immigration Act 2014.

49. The same is true in relation to Mandalia where the challenge was, ultimately, to the respondent's decision in a points-based system case where it was alleged that, on the basis of Casework Instructions, the Secretary of State had a policy on "evidential flexibility" which she had not applied. It was a case, therefore, which not only directly relied upon a failure to consider a policy but also, like AA (Afghanistan), was at a time when one of the grounds of appeal was that an immigration decision was "not in accordance with the law" which it would have been if the respondent failed to apply a relevant policy (see R (Lumba v SSHD [2011] UKSC 12).

50. The final case relied upon, namely UB (Sri Lanka) involved a failure to disclose relevant background material, based in the Secretary of State's guidance on the possible implications of membership of the TGTE (a proscribed organisation) for return to Sri Lanka. That case, therefore, goes no further than indicating that policy guidance relevant to the substance of an individual's claim before the First-tier Tribunal, should be disclosed by the Secretary of State in order to assist the First-tier Tribunal to make a decision on the merits of the individual's appeal. It begs the question as to the relevance of any policy.

51. In this case, all but one of the documents relied upon by Mr Blackwood and which I refer to above, relate to how the Secretary of State applies Art 3 of the ECHR or, in one case, reaches decisions outside the Rules under Art 8. The "Human Rights Claim Guidance" and the "Human Rights Claim Medical Guidance" (set out at paras 13 and 14 of the Grounds), go no further than guidance to caseworkers on how the case law requires the respondent to approach Art 3 (and Art 8). In fact, as I pointed out to Mr Blackwood during his submissions, the Guidance is based upon N v SSHD since it predates AM (Zimbabwe). In its interpretation of Art 3, it is, therefore, based upon an approach which no longer represents the law. It is difficult to see how this could (now) be said to have assisted the judge in reaching a lawful decision under Art 3. In any event, I accept Mr Howells' submission that the proper scope of Art 3 (or indeed Art 8) is a question of law (and fact) for the judge who has properly to apply those provisions whatever is said, for the benefit of decision makers within the Home Office, in guidance. It cannot be argued that, to the extent that the guidance lowered the threshold for Art 3 (which of course it could not), the appellant would be entitled to succeed under Art 3.

52. As regards the "Leave Outside the Immigration Rules Guidance" (LOTR) (set out at para 15 of the Grounds), it states that:

> "Where the Immigration Rules are not met, and where there are no exceptional circumstances that warrant a grant of leave under Article 8, Article 3 medical or discretionary policies, there may be other factors that when taken into account along with the compelling compassionate grounds raised in an individual case, warrant the grant of LOTR."

53. As I pointed out to Mr Blackwood during his submissions, the passage upon which he placed reliance, is concerned with the situation where an individual cannot succeed under Arts 3 or 8 of the ECHR and a decision maker is considering whether, nevertheless, to grant leave on a discretionary basis outside any claim based upon

human rights. I fail to see how that could have been relevant to the judge's assessment of the appellant's Art 8 claim, let alone his Art 3 claim.

54. The one potential exception to what I have said, is the "Medical CPIN" which is referred to in para 16 of the appellant's Grounds. That policy would, it appears, be relevant to the extent that it provided information about what treatment was available or, as to its accessibility, in Pakistan. The appellant's grounds do not spell out how specifically it would be relevant in relation to the treatment of the appellant's TTP in Pakistan. Mr Howells told me that it contains no information on the availability of treatment. In those circumstances, in itself, the fact that this document was not drawn to the judge's attention does not, in my view, establish any error of law in her reaching her conclusion.

55. However, as I have already determined, the judge did materially err in law in dismissing the appellant's appeal under Art 3. That decision must be set aside and be re-made. It was common ground between both representatives that the appeal should be remitted to the First-tier Tribunal for a fresh decision, based upon all the evidence, under Art 3.

56. It remains whether, when remitted, the judge should also consider Art 8 of the ECHR. Having heard argument from both representatives, and in the light of what is said by the judge and in the Record of Proceedings, it seems reasonably plain to me that the appellant's (then) Counsel did not rely upon Art 8 beyond a contention that, even if a breach of Art 3 was not established, a breach of Art 8 was established based upon the appellant's medical condition.

57. As I pointed out to Mr Blackwood during his submissions, the appellant was subject to deportation and the respondent had decided that he was a "persistent offender" and one whose offences had caused "serious harm". Despite him not having been sentenced to a period of imprisonment of twelve months or more, the appellant was therefore a "foreign criminal" to whom s.117C of the NIA Act 2002 (as amended) applied. No submissions had been made, and none were recorded, on the application of s.117C if reliance was being placed upon Art 8. The appellant could only have succeeded if he could establish either Exception 1 or Exception 2 in s.117C(4) and (5) or that there were "very compelling circumstances" over and above Exception 1 or Exception 2 (see s.117C(6)). That would be very surprising if reliance was being placed on Art 8 on a 'broader' basis that the health implications for the appellant. Mr Blackwood acknowledged that potential inference.

58. I do not accept that the appellant's Counsel relied upon Art 8 beyond the appellant's medical condition. I am not, therefore, persuaded that the judge materially erred in law in failing to consider Art 8 if her decision in respect of Art 3 had been sustainable. Of course, for the reasons I have given, it is not sustainable. However, there is no adverse decision under Art 8 and I see no reason why it should not be open to the appellant to rely upon Art 8, should he wish to, when the appeal is remitted to the First-tier Tribunal for rehearing.

Decision and Disposal

59. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

60. It was common ground between the representatives, and with which I agree, that the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing in respect of the appellant's claim under Art 3 and, to the extent he wishes to rely upon it, Art 8 of the ECHR. The appeal to be heard by a judge other than Judge Richardson.

Costs

61. Prior to the hearing, on 27 August 2020 the appellant's legal representatives made an application for "wasted costs" under rule 10 of the Upper Tribunal Procedure Rules. The basis of this claim was that the respondent did not, through a representative, attend the hearing on 23 July 2020 listed for a remote Skype hearing. The appellant's counsel did attend and the hearing was adjourned in the absence of the respondent.

62. In response, the Secretary of State filed submissions by email dated 2 September 2020 seeking to resist a costs order. The respondent pointed out that the "list split" for the 23rd July, issued by Field House on 8th July, did not show the appeal as listed. She accepted that the Hearing Notice "must have" been received but the case must have been added to the list after the "list split" was issued. She apologised for the oversight.

63. Mr Blackwood indicated that he maintained the application for costs and submitted that the respondent's explanation that the "list split" issued for the relevant date did not contain the appellant's hearing had to be seen in the light of the fact that, it appeared to be accepted, that the respondent had received a Notice of Hearing. He invited me to find that the respondent had acted "unreasonably".

64. Whilst the appellant's application seeks a "wasted costs" order, in fact that cannot be the basis of the application. It is clear that a "wasted costs" order under s.29(4) of the Tribunals, Courts and Enforcement Act 2007, which by virtue of rule 10(3)(c) of the Procedure Rules could be made in these appeal proceedings, is one made against a legal or other representative of a party (see s.29(4)(b)) on the basis that there has been "improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative" (see s.29(5)). That does not apply where the respondent is "represented" by a Presenting Officer in a statutory appeal (see Awuah & Ors (Wasted Costs Orders - HOPOs - Tribunal Powers) [2017] UKFTT 555 (IAC) (McCloskey J (UTIAC President) and Judge M Clements (FtTIAC President)).

65. Rather, the application must be related to rule 12(3)(d) which states that the Upper Tribunal may make an order in respect of costs:

> "If the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings".

66. In order to succeed the appellant must establish that the Secretary of State acted "unreasonably" in the conduct of the proceedings by failing to attend the hearing on 23 July of this year.

67. In Ridehalgh v Horsefield [1994] Ch 205, the Court of Appeal (Lord Bingham MR and Rose and Waite LJJ) provided what is the accepted interpretation of the statutory phrase "improper, unreasonable or negligent" in the context of a "wasted costs order". Lord Bingham MR said this (at p232):

> "**"Improper, unreasonable or negligent"**
>
> A number of different submissions were made on the correct construction of these crucial words in the new section 51(7) of the Supreme Court Act 1981. In our view the meaning of these expressions is not open to serious doubt.
>
> > "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
> >
> > "*Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.*
>
> The term "negligent" was the most controversial of the three. It was argued that the 1990 Act, in this context as in others, used "negligent" as a term of art involving the well-known ingredients of duty, breach, causation and damage.
>
> Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach:
>
> > (1) As already noted, the predecessor of the present Order 62 rule 11 made reference to "reasonable competence". That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders.
> >
> > (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to

> the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.
>
> We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.
>
> In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence : "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well- informed and competent would have given or done or omitted to do"; an error "such as no reasonably well-informed and competent member of that profession could have made" (Saif Ali v Sydney Mitchell & Co, at pages 218 D, 220 D, per Lord Diplock).
>
> We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. *Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended*." (my emphasis)

68. That approach has been approved by in the IAC Chambers leading cases of Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 59 (IAC) and Thapa & Ors (costs; general principles; s9 review) [2018] UKUT 54 (IAC).

69. In Thapa, the UT noted that the guidance in Cancino meant that the power to award costs under rule 10 should be exercised with "significant restraint" (at [28]).

70. To make an award of costs, the appellant must persuade me that the conduct of the respondent was "unreasonable" as set out in Ridehalgh v Horsefield; it caused the appellant to incur unnecessary costs; and it is just to make a costs order (see Cancion at [18] and [19]).

71. It is, perhaps, noteworthy that the hearing on 23 July was within a few weeks of remote hearings beginning in the UT at the Cardiff CJC. Previously, hearings on a particular day were conventionally all listed for 10am. It was only as a result of the introduction of remote hearings that the UT began listing individual hearings on a particular day in three specific slots in the morning and afternoon. It is clear from the documents attached to the respondent's costs submissions that the "list split" for 23 July at the Cardiff CJC only contained a case to be heard in the morning, whilst the appellant's case was, as it turns out, listed in the afternoon. The respondent

relied upon that "list split" although recognising that the case must have been listed and a Notice of Hearing sent prior to that date. It is said that the appellant's case must have been added to the list after the "list split" was issued. That is, in my view, a reasonable inference. The appellant's representatives state that they received the Notice of Hearing on 9 July – the day after the "list split" was issued. It would appear that, relying upon the "list split", the respondent overlooked any Notice of Hearing sent subsequent to the "list split" which included notice of the appellant's appeal being listed in the afternoon of 23 July. The respondent's submissions state that she has no record of any amended "list split" subsequently being issued.

72. On the basis of the material before me, I am persuaded that, in the light of the "list split" which on the evidence was the only "list split" issued by the UT, the respondent made an honest mistake in overlooking the later listing of the appeal and proceeding on the basis that no case was listed in the afternoon. The respondent was entitled reasonably to rely upon the "list split" issued by the UT. It was an unfortunate oversight but one that has to be seen in the light of the (then) very recent emergence of remote hearings following the national shutdown due to the COVID-19 crisis. Having regard to all the circumstances I have set out above, I am not persuaded that the respondent's conduct reaches the threshold justifying an order of costs under rule 10(2)(b) of the Tribunal Procedure Rules. For these reasons, I decline to make an order of costs in favour of the appellant against the respondent under rule 10(3)(d).

Signed

Andrew Grubb

Judge of the Upper Tribunal
23 November 2020