Upper Tribunal
(Immigration and Asylum Chamber Appeal Number: PA037402016

THE IMMIGRATION ACTS

Heard at: Stoke	**Decision and Reasons Promulgated**
On: 13 July 2017	**On: 28 July 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

CL
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Tetley (Counsel)
For the Respondent: Mr Bates (Senior Home Office Presenting Officer)

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant.

1. I have made an anonymity order because this decision refers to sensitive material relating to the appellant's medical condition.

Procedural history

2. The appellant, a 74-year-old citizen of the Philippines, has appealed against a decision of the First-tier Tribunal dated 7 December 2016 in which it dismissed an appeal against the decision of the respondent dated 17 May 2016 refusing her asylum and leave to remain in the United Kingdom ('UK'). At the hearing before the First-tier Tribunal the appellant withdrew her asylum claim and relied entirely upon the submission that her removal to the Philippines would lead to a breach of Articles 2, 3 and 8 of the ECHR. She relied upon her medical condition and her relationship in the UK with her daughter. The First-tier Tribunal dismissed the appeal on all grounds.

3. In grounds of appeal prepared on behalf of the appellant it was submitted that the First-tier Tribunal failed to consider relevant matters, failed to make any factual findings on the family life between the appellant and her daughter in the UK and failed to apply the guidance in Paposhvili v Belgium 41738/10 [2016] ECHR 1113, 13 December 2016 (Grand Chamber). Permission to appeal on all grounds was granted by Upper Tribunal Judge Gill on 12 April 2017.

Hearing

4. Mr Tetley relied upon the grounds of appeal, in particular the First-tier Tribunal's failure to direct itself in accordance with Paposhvili (supra). Mr Bates relied upon the rule 24 notice dated 26 April 2017 and invited me to find that any errors are not material. This is because, he submitted, the First-tier Tribunal has made findings of fact regarding the medical evidence open to it and has applied the relevant principles in Paposhvili even if it has not been referred to.

5. After hearing from both representatives I indicated that the appeal on Article 8 grounds was to be allowed, and I reserved my decision in relation to Article 3. I now give my decision, with reasons.

Legal framework

Article 3 in medical cases

6. In Paposhvili (supra) the Grand Chamber clarified the approach to be adopted to Article 3 medical cases as follows:

> "The Court considers that the "other very exceptional cases" within the meaning of the judgment in N which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, 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 the 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. The court points out that these situations correspond to a high threshold for the application of Article 3." [183]

7. The Court set out a range of procedural duties for the domestic authorities requiring a rigorous assessment of the risk as required by the absolute nature of the Article 3 prohibition and said this at [186].

> "It is for applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3….In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment".

8. Where such evidence is adduced, it is for the authorities of the returning state to:

   (i) dispel any doubts raised by it [187];
   (ii) "*consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances*" [187];
   (iii) assess the impact of removal "*by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State*" [188];
   (iv) verify whether the care available in the receiving state is "*sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3*" [189];
   (v) consider "*the extent to which the individual in question will actually have access to this care and these facilities in the receiving State*" given the "*cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care*" [190];
   (vi) obtain individual and sufficient assurances from the receiving state as to access to appropriate treatment where serious doubts remain [191].

9. The Court concluded as follows at [205]:

> "…in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities was insufficient for them to conclude that the applicant, if returned to

> Georgia, would not have run a real and concrete risk of treatment contrary to Article 3".

Article 8

10. It is now uncontroversial that in Article 8 jurisprudence, the meaning of 'family life' can extend in certain circumstances to include, inter alia, relationships between adults: see AA v UK [2012] INLR 1, R (Gurung) v SSHD [2013] 1 WLR 2546 and Singh v SSHD [2015] EWCA Civ 630 in which Sir Stanley Burnton said this at [24]:

> "I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

11. In the recent Court of Appeal decision of Raiv v SSHD [2017] EWCA Civ 330 the above principles were noted to be uncontroversial.

Error of law discussion

Article 3

12. The First-tier Tribunal made clear findings of fact that treatment for the appellant's illnesses, including her renal failure and the corresponding requirement for dialysis three times per week, is available in the Philippines – see [39] and [42]. However, the First-tier Tribunal failed to make any findings on the appellant's ability to access such treatment. If there was any doubt that this is a relevant part of the assessment in Article 3 medical cases, that has now been clarified by Paposhvili (supra).

13. It was clearly argued that the appellant would not be able to access treatment in the Philippines – see [31]. Both the appellant and her daughter set out why in the evidence before the First-tier Tribunal (witness statements, interview record, medical evidence and representations from solicitors). In summary, it was submitted that the appellant had no family to turn to in the Philippines and the distances involved combined with the impact of her illness and absence of income meant that she would not be able to practically access the dialysis

available in the Philippines. That evidence is summarised at [8] to [18] of the First-tier Tribunal decision. As set out in Paposhvili, the First-tier Tribunal was obliged but failed to consider the extent to which the appellant will actually have access to treatment given the cost of medication and treatment, the absence of a social and family network, and the distance to be travelled in order to have access to the required care.

14. In these circumstances, the First-tier Tribunal was obliged to assess whether the appellant adduced evidence capable of demonstrating that there are substantial grounds for believing that her removal would lead to a real risk of being subjected to treatment contrary to Article 3, whilst bearing in mind that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment. The First-tier Tribunal found that no evidence was provided by the appellant to show the travel distances involved [40] and there was no evidence that the appellant would not be able to obtain dialysis within a short period of her flight landing in the Philippines, the First-tier Tribunal has also erred in law [42]. This indicates a flawed approach for two reasons: first, there was some evidence emanating from the appellant and her daughter; second, the First-tier Tribunal has not considered whether that evidence was sufficient to require the SSHD to dispel any doubts about the evidence, in accordance with the principles set out in Paposhvili.

15. In addition, the First-tier Tribunal's reasons for rejecting the conclusions of the appellant's treating consultant nephrologist and treating consultant cardiologist that the appellant is not fit to fly are inadequate. The reasoning provided for this is limited to an absence of a formal assessment and "*in particular, no evidence from either clinician has been provided to explain why she was previously fit to fly but now apparently is not*" – see [43]. It is difficult to understand what is meant by a "formal assessment", although it is correct to observe that the clinicians have not provided any detailed explanation for the conclusions reached. In any event, there is an obvious explanation for the failure to address the appellant's ability to fly to the UK in May 2015 – this was never an issue in dispute. As recorded in the witness statements and the GP's letter dated 1 February 2016, the appellant's condition deteriorated very shortly after her arrival and she has not flown since. Indeed, this is recorded by the First-tier Tribunal at [15].

16. I am satisfied that the First-tier Tribunal's approach to the assessment of Article 3 contains errors of law and should be set aside.

Article 8

17. This is a case that potentially involves the family and private life of the appellant, who is not a foreign national offender, but in relation to whom it is

now accepted cannot meet the requirements of the Immigration Rules. As such the test to be applied by the First-tier Tribunal is that of compelling circumstances – see Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 13 (IAC) at [44]. In order to assess whether there are compelling circumstances, the First-tier Tribunal should have applied the five stage Razgar v SSHD [2004] 2 AC 368 questions. Of particular importance in this case are the following: identifying the relevant family and private life to be respected, determining the weight to be attached to these in accordance with Article 8 jurisprudence and Part 5A of Nationality, Immigration and Asylum Act 2002; taking into account the public interest considerations; conducting the relevant balancing exercise.

18. The First-tier Tribunal has properly addressed the appellant's private life at [45]-[46] but there has been no assessment of the nature and extent of family life between the appellant and her daughter. The appellant has been completely reliant upon her daughter and lived with her since May 2015. Whilst it is true to observe, as the First-tier Tribunal did at [47] that contact could be maintained, this is not a viable substitute for an assessment of the nature and extent of family life. The fact that contact might be maintained is a relevant factor when conducting the balancing exercise. Where, as here, the appellant relies upon the family life she has with her daughter in the UK, the First-tier Tribunal should begin the Article 8 assessment by assessing the nature and extent of family life and whether there is the requisite "something more" to enable the relationship between mother and adult daughter to constitute family life for Article 8 purposes. This step has been omitted.

19. In addition, the balancing exercise appears to have been undertaken only in relation to private life at [48] with no clear reasoning as to why family life has been left out. In so far as the First-tier Tribunal's decision is to be interpreted as suggesting that even if there is family life, there would be no breach because contact can be maintained, such a finding fails to take into account relevant considerations: (i) the nature and extent of family life dramatically changed when the appellant became ill and entirely dependent on her daughter after she left the Philippines; (ii) the appellant's evidence that she has no family in the Philippines willing to assist her.

20. I am satisfied that the First-tier Tribunal's approach to the assessment of Article 8 family life contains errors of law and should be set aside.

Conclusion

21. When the decision is read as a whole I am satisfied that the First-tier Tribunal decision contains material errors of law in relation to both Articles 3 and 8 of the ECHR. For the reasons set out above important findings of fact are either infected by errors of law or missing and findings of fact therefore need to be

remade entirely. Given the extent of the factual findings required, I am satisfied that it is appropriate for the matter to be remitted to the First-tier Tribunal.

Decision

22. The decision of the First-tier Tribunal contains an error of law and is set aside. It shall be remade by the First-tier Tribunal.

Signed: Ms Melanie Plimmer Dated: 28 July 2017
Judge of the Upper Tribunal