Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09438/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 March 2018	**On 10 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

R S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr G Dolan (counsel) instructed by AMZ Law, solicitors

DECISION AND REASONS

1. To preserve the anonymity order deemed necessary by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant,

2. The Secretary of State for the Home Department brings this appeal but to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Clarke, promulgated on 16 November 2017 which allowed the Appellant's appeal against the respondent's decision to refuse the appellant's protection claim.

Background

3. The Appellant was born on 10/08/1980 and is a national of Liberia. The appellant arrived in the UK of 17 December 2004 and claimed asylum that day. That application for asylum was refused on 20 January 2005 for want of insistence because the appellant absconded. The appellant's appeal rights were exhausted on 5 January 2005. It was not until February 2011 that the appellant contacted the respondent again. He renewed his claim for asylum and his application was refused on 30 September 2014. Further submissions were submitted for the appellant on 8 February 2016. In a decision dated 5 September 2017 the respondent refused the appellant's renewed protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Clarke ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 29/12/201 First-tier Tribunal Judge Lever gave permission to appeal stating

> 1. The respondent seeks permission to appeal against the decision of Judge of the First-tier Tribunal Clarke, who in a decision promulgated on 16 Nov 2017 allowed the appellant's appeal inferentially under A3-medical grounds and A8.
>
> 2. The grounds assert that the Judge erred in placing reliance on the case of Paposhvili and not taking account of EA(Paposhvili not applicable) [2017] UKUT 00445. Further it is said the Judge failed to give adequate reasons for his findings under A8.
>
> 3. The Judge had provided a short decision and noted that the appellant failed to attend the hearing. At [10] the Judge appeared to rely upon Paposhvili and it is arguable that he misdirected himself in this regard and produced little information within the decision in respect of the respondent's evidence from background material. In like manner it is arguable that his findings under A8 do not necessarily demonstrate a proper balancing act between the public interest and the appellant's private life which as he acknowledged counts for little given his unlawful status in the UK and his absconding for a significant period whilst in the UK. That combination means it is arguable that an error was made in this case.
>
> 4. There was an arguable error of law in this case

The Hearing

5. (a) Mr Bramble for the appellant moved the grounds of appeal. He told me that there are two grounds of appeal. The first is that the Judge's approach to the case of Paposhvili v Belgium is incorrect, as a result the Judge's article 3 assessment is wholly undermined. The second is that the Judge's flawed article 3 findings infect the Judge's article 8 findings.

(b) Mr Bramble told me that the respondent made two decisions in this case. The first decision was made in September 2014, the second decision (on the appellant's renewed claim) is dated 5 September 2017. In those decisions the respondent considered medical evidence produced for the appellant. He told me that that medical evidence demonstrates that between 2014 and 2017 the appellant was not receiving any psychiatric care or assistance. He told me that the medical reports do not support the appellant's account and do not support the Judge's conclusions. He complained that the Judge took the appellant's claim at face value, and that there was insufficient evidence for the Judge to conclude that there is a significant risk of suicide and that article 3 would be breached if the appellant is removed. He told me that the Judge's findings at [12] to [14] of the decision are inadequately reasoned.

(c) Mr Bramble told me that the Judge has proceeded on assumption rather than on evidence and that (in any event) the decision is devoid of analysis of the evidence placed before the Judge. He told me that the Judge used the findings in relation to article 3 as her reasoning in relation to article 8, so that the Judge has failed to resolve conflicts in the evidence. He urged me to allow the appeal and set the decision aside.

6. (a) For the appellant Mr Dolan referred me to EA & Ors (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 445**.** He took me straight to [15] of the decision and told me that, there, the Judge finds that the appellant meets the requirements of paragraph 276 ADE(1)(vi) of the rules. He told me that that is a clear, safe and unassailable finding which is all that is required for the appellant to succeed on article 8 ECHR grounds. He reminded me that the Home Office was represented before the First-tier and the appellant was not.

(b) Mr Dolan told me that the psychiatric evidence produced was not contested and that the conclusions reached by the Judge are well within the range of reasonable conclusions available to the Judge. He insisted that the respondent's challenge is nothing more than a disagreement with the facts as the Judge found them to be.

(c) Mr Dolan told me that the Judge's treatment of Paposhvili v Belgium is flawless and argued that the Judge was not bound by EA, the decision in which was not available until after the Judge had promulgated her decision. He told me that the Judge found that the appellant is at risk of suicide and that that finding was based on psychiatric evidence before the

Judge. He urged me to dismiss this appeal and to allow the decision to stand.

Analysis

7. At [8] the Judge summarily dismisses the appellant's asylum claim and declares that she moves on to consider article 3 at [9] of the decision, where she summarises the respondent's position. At [10] the Judge discusses Paposhvili v Belgium (Application no 41738/10,13.12.16). At [11] & [12] the Judge discusses the burden and standard of proof.

8. The Judge's findings in relation to article 3 are restricted [13] and [14] of the decision. At [17] the Judge appears to make her findings from Dr Attalla's report, but, in reality, only repeats the conclusion of one report. Dr Attalla provided two psychiatric reports. No meaningful analysis of either report is carried out by the Judge. In the first sentence of [14] the Judge summarises the respondent's position before setting out her conclusion.

9. It is difficult to see how the Judge arrived at her conclusions. The Judge does not properly analyse the evidence nor does the Judge set out adequate findings of fact. Instead the Judge appears to rush to a conclusion.

10. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

11. The Judge's decision relies heavily on Paposhvili v Belgium. Paposhvili differs from current domestic case law including because it appears to put the burden of proof on the returning state. In R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements) [2017] UKUT 164 (IAC) there is a reminder that to the extent that Paposhvili runs counter to binding domestic case law, the latter must, of course, prevail at Tribunal level. The Upper Tribunal decided in EA & Ors (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 445 that the test in Paposhvili was not a test that it was open to the tribunal to apply because it is contrary to judicial precedent.

12. The Court of Appeal in AM (Zimbabwe) v SSHD [2018] EWCA Civ 64 decided that the European Court had not ruled that on the medical evidence adduced it would in fact have been a violation of Article 3 to remove Mr Paposhvili to Georgia, rather that Belgium would have violated the procedural aspect of Article 3 had they removed Mr Paposhvili without consideration of his medical condition. Whilst N was binding authority up

to Supreme Court level, the Court of Appeal said that Paposhvili relaxed the test only to a very modest extent. The applicant would have to face a real risk of rapidly experiencing intense suffering to the Article 3 standard because of their illness and the non-availability (there) of treatment available to them in the removing state or face a real risk of death within a short time in the receiving state for the same reason. The boundary had simply shifted from being defined by imminence of death in the removing state, even with treatment, to the imminence of intense suffering or death in the receiving state occurring because of the lack of treatment previously available in the removing state. On those facts the appellants could not bring themselves within that test.

13. In GS (India); EO (Ghana); GM (India); PL (Jamaica); BA (Ghana) and KK (DRC) v SSHD [2015] EWCA Civ 40 it was held that the case of a person whose life would be drastically shortened by the progress of natural disease if he was removed to his home State did not fall within the paradigm of Article 3. Such a case could only succeed under that Article if it fell within the exception articulated in D v United Kingdom (1997) 24 EHRR 423. In that case the claimant was critically ill and close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

14. The Judge does not provide adequate reasoning for finding that the threshold to engage article 3 was met in this case. There is no meaningful analysis of the medical evidence, and the decision contains inadequate findings of fact. The Judge has not reconciled Paposvili with the existing caselaw. EA tells me that the Judge was wrong to rely on Paposhvili.

15. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal’s decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

16. The lack of findings of fact and the inadequacy of reasoning are material errors of law. The lack of explanation for reliance on Paposhvili is a material error of law. I must set the decision aside.

17. I consider whether or not I can substitute my own decision but find that I cannot do so because of the extent of the fact-finding exercise necessary. Both parties agree that further fact finding is necessary in this case.

Remittal to First-Tier Tribunal

18. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if 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.

19. This case is remitted because the fact-finding exercise has not yet been carried out. A complete re-hearing is necessary.

20. I remit this case to the First-tier Tribunal to be heard before any First-tier Judge other than Judge S J Clarke.

Decision

21. The decision of the First-tier Tribunal is tainted by material errors of law.

22. The Judge's decision dated 16 November 2017 is set aside. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 6 April 2018

Deputy Upper Tribunal Judge Doyle