



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeals: HU/22868/2018  
HU/22880/2018  
HU/22876/2018  
HU/22872/2018 (V)

THE IMMIGRATION ACTS

Heard by *Skype for Business*  
On 8 February 2021

Decision & Reasons Promulgated  
On 25 February 2021

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

K D + 3

and

Appellants

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr N Paramjorthy, instructed by FLK, Solicitors  
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are Albanian nationals, husband, wife, daughter, and son. Their case centres on the medical condition of the third appellant, aged 9.
2. The decision of Designated FtT Judge McCarthy, promulgated on 16 May 2019, clearly sets out the facts at that date.

3. This determination should be read also with the decision of Ut Judge Bruce, dated 15 December 2020, based on the SSHD's concession that the decision of Judge McCarthy should be set aside in light of the judgement of the Supreme Court in *AM (Zimbabwe)* [2021] UKSC 17 and of the need for a rounded assessment of the medical evidence going to the likely impact of removal on the third appellant.

4. *AM* established the legal test:

"[22] Following a careful analysis of the decision in the *D* case and of its own decision in the *N* case, the Grand Chamber in the *Paposhvili* case expressed the view in para 182 that the approach hitherto adopted should be "clarified". The Convention is a living instrument and when, however appropriately, the ECtHR charts its growth, it may generate confusion for it to claim to be providing only clarification. The court proceeded as follows:

"183. The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N v The United Kingdom* (para 43) 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 of the Convention in cases concerning the removal of aliens suffering from serious illness."

5. The appellants provide an updating report, dated 2 February 2021, from the Consultant Paediatric Urologist at Great Ormond Street Hospital for Children:

"[The third appellant] was reviewed by myself on the 18th November 2020. She has a complex urogenital and intestinal anomaly called Cloacal malformation. She had major surgery in Albania and under myself in 2017 to achieve stability and has become socially dry and stable from her chronic kidney failure. She is clearly growing and is in much better health than when I first met her in 2017. All her care has been so far privately funded and not through the NHS. With her reconstructive surgery under GOSH and close monitoring, she has remained stable and her health continues to improve.

Her current situation is that she has some wetting through the channel we made to drain the urine which could be because of abnormal bladder behaviour for which she has been scheduled for further investigations and work up.

Her prognosis remains guarded in terms of needing a kidney transplant but if careful and regular monitoring continues, then it is likely she will need kidney replacement only much later in life. In the absence of regular and careful monitoring and timely intervention when needed, she will progress to end stage kidney failure and will need kidney replacement therapy such dialysis and kidney transplant."

6. Mr Bates submitted on these lines. The respondent accepts that the child suffers from a serious ongoing medical condition, and that while treatment is available in Albania, that might not be sufficient to cater for her complex needs in the event of further complications. However, he observed that there has been no need for direct intervention since the surgery in 2017, the child's condition has clearly improved, and at present she needs only monitoring and surveillance. Treatment available at a hospital in Tirana was adequate to cope with urinary infections which might occur. Her condition, now that it was stabilised, could be monitored in Albania. There could be liaison with Great Ormond Street. The appellants founded partly on travel difficulties from Albania, and it appeared that Albania has currently suspended flights to the UK, but they had not provided evidence of what the practical difficulties might be. The case was to be tested as at the date of the hearing, when the article 3 threshold, which remains a high one, was not crossed.
7. Mr Paramjorthy said that if the need for medical attention was to arise while the child was in Albania, there would be travel and quarantine difficulties.
8. Evidence was lacking, and I am not persuaded these difficulties would be as severe as claimed. Although neither side provided any direct reference to the regulations, I proceed on the assumption that there is exemption from quarantine on urgent medical grounds. However, it is in the public realm that there are current obstacles to international travel, in a rapidly changing environment. The appellants' evidence is that they fear that travel from Albania to the UK for urgent medical reasons might not be straightforward. That is not fanciful.
9. Mr Paramjorthy also suggested that availability of travel for private treatment in the UK would not defeat the principles of *AM*. I doubt that proposition. It is difficult to see why persons of means, readily able to protect themselves through travel and treatment, would qualify for protection under article 3.
10. The appellants rely on *SQ* [2013] EWCA Civ 1251 at [17]:

“Stripped of its references to torture and punishment, Article 3 provides:

"No one shall be subjected to inhuman or degrading treatment ...".

It is well known that a contracting state may infringe Article 3 if it returns a person to a country where he would be at substantial risk of inhuman or degrading treatment: see *Soering v United Kingdom* [1989] 11 EHRR 439, which provided the jurisprudential basis for *D*. However, the imposition of a "high threshold" is equally well established and this is underlined by the test of exceptionality illustrated by *D* and *N*. On the other hand, Article 3 confers an unqualified right. Ultimately the question is whether what is likely to befall the claimant crosses the high threshold and the test of exceptionality. Whether or not the required level of severity is reached in a particular case depends on all the circumstances of that case. I accept that there are circumstances in which the threshold will be reached in relation to a child where it would not be reached in

the case of an adult. As Baroness Hale said in *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536 (at paragraph 9):

"The special vulnerability of children is also relevant to the scope of the obligation of the State to protect them from such treatment."

She referred to "the instructive case" of *Mayeka and Mitunga v Belgium* [2006] 46 EHRR 449. However, in the present case the evidence, taken at its highest, and making every allowance for the age of MQ, does not establish that the high threshold is satisfied. To put it bluntly, MQ would not be returning to an early and solitary death in Pakistan. He had been receiving treatment and blood transfusions without contracting HIV, hepatitis B or C before leaving Pakistan. He also received chelation therapy although his mother states in her witness statement that he sometimes missed that treatment for a month or two because they did not have the money to pay for the best medication and sometimes they had to use inferior alternatives. In 2010, MQ contracted malaria and typhoid but it is not established that this was the result of receiving unscreened blood transfusions."

11. Mr Paramjorthy submitted that the proposition in *SQ* was consistent with *Paposhvili* and with *AM*. Mr Bates did not dispute that point. I accept that the threshold, as it now stands, may be met by a child in some cases where it would not be met by an adult.
12. While every case turns ultimately on its own facts and circumstances, I observe in passing that the present case appears stronger than that of *MQ* (the child of *SQ*).
13. Having considered the medical evidence as a whole, including the latest report, and drawing the above threads together, I conclude as follows. The child suffers from a rare and serious condition. For the time being, she needs only careful monitoring, which is available in Albania. There is no doubt that she will need further major treatment in the longer term. There is a real risk, in the shorter term, that a need for further intervention may arise. Such intervention is available in the UK but not in Albania. Timeliness of intervention may be crucial. There is a real risk that her health might decline, through lack of timely intervention, to an extent which meets the test in *Paposhvili*. Even if the case might be borderline for an adult, it reaches the threshold for a child.
14. The decision of the FtT has been set aside. The decision substituted is that the appeal, as originally brought to the FtT, is allowed.
15. An anonymity direction remains in place.

*Hugh Macleman*

10 February 2021  
UT Judge Macleman

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.