Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10341/2017**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 7 February 2019 and 9 May 2019 **On 22 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

FLOR ZULEIMA ROJAS QUILINDO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani, counsel (7 February 2019).
Ms E Lagunju, counsel (7 May 2019).
For the Respondent: Mr E Tufan, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dated 19 July 2018 dismissing her appeal against the respondent's decision of 31 August 2017 refusing her leave to remain on human rights grounds.

Background.

2. The appellant is a citizen of Colombia born on 4 October 1969. She first entered the UK on 4 May 2000 and claimed asylum. Her application was refused in February 2001 on non-compliance grounds. In December 2006 she applied for an EEA residence card and her application was refused on 7 September 2010. In March 2011 she was served with a notice informing

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her of her liability to detention and removal and on 20 September 2011 she applied for leave to remain outside the Rules. There were a number of further unsuccessful applications and, finally, on 5 June 2017, the appellant made her present claim on human rights grounds.

3. The basis of her claim can briefly be described as follows. She seeks to remain in the UK because she is receiving specialist medical treatment for a rare condition, immune thrombocytopenia (ITP), which can lead her to bleed uncontrollably. The bleeding may be caused by various different things such as knocks or sometimes internal bleeding with no obvious cause which does not stop and as a result could be fatal. It was also claimed that as the appellant has been in the UK for 17 years, it would be a breach of article 8 by reason of her family life with her relations for her to be returned to Colombia where for medical reasons she would have severe difficulty in reintegrating away from her family in the UK.

4. The respondent was not satisfied that the appellant could meet the requirements of the Rules or that there were exceptional circumstances justifying the grant of leave outside the Rules. He found that the appellant's medical condition did not reach the high threshold set out in D v UK [1997] 24 EHRR 423 and N v UK (2008) 26565/05 and accordingly, removal would not be in breach of article 3.

The Decision of the First-tier Tribunal.

5. In his decision the judge set out the appellant's case and the arguments in support at [16]-[42] and the respondent's case at [43]-[54]. His findings and conclusions are set out at [55]-[86]. He accepted that the appellant was suffering from ITP and had been receiving treatment in this country since 2008. He referred to a letter of 13 April 2018 from a consultant haematologist at Guy’s and St Thomas’ describing the appellant's condition as being challenging to manage and refractory to multiple medications. The appellant had had a minor injury in 2015 but due to her low platelet count, this had developed into a significant clinical problem complicated by a bleed in the joint, which left the appellant debilitated. The appellant’s condition was being managed with a combination of romiplostim and azathioprine and has required specialist haematology input on a weekly basis for several months as she remains symptomatic with bleeding symptoms and platelet counts falling to single figures.

6. The judge said that, as he understood the medical evidence, there was no suggestion that the appellant was currently in imminent danger of death although it was clear that were her condition to deteriorate, death was likely to be an outcome at some point. He found that it was clear from the statement (1A155A) from Dr Bernal, a doctor in Colombia, that there was treatment for her condition there. He commented that the doctors in the UK could speak to the doctors in Colombia about the treatment the appellant was receiving and it seemed to him that there was no obvious reason why the appellant could not pass the information in the report he had been provided with to the doctors in Colombia. The judge found there was no suggestion that the appellant was currently "a deathbed case"

and, on that basis, she did not begin to meet the requirements of D or N. He added that, even if he were bound by Paposhvili [2017] Imm AR 867, it did not appear that there was sufficient evidence to show that she could meet the test in that judgment. He was also not satisfied that the facts were such that the appellant was entitled to leave to remain under article 8 outside the Rules.

7. At [83] the judge said that for the reasons he had given he did not find that the appellant's medical condition was such that removal to Colombia would be in breach of the appellant's rights under article 3 or article 8 in relation to her physical and moral integrity because treatment was available in Colombia and there was funding available from her family in this country, which could be used for treatment there. For these reasons the appeal was dismissed.

The Grounds and Submissions.

8. In the grounds of appeal, it is argued that the First-tier Tribunal erred in law by failing to grasp the factual matrix of the case, making errors of fact particularly on the medical evidence, failing to consider all the material evidence and, finally, by failing to make necessary findings on all aspects of the claim.

9. Permission to appeal was refused by the First-tier Tribunal but granted on renewal by the Upper Tribunal. When granting permission, UTJ Jackson identified the issues as follows:

> "It is not arguable that the First-tier Tribunal's decision fails to make necessary findings on all aspects of the appellant's claim, particularly in relation to article 8, nor that the judge had failed to grasp the factual matrix of the case. The decision contains a very detailed consideration of the appellant's circumstances and medical condition, which accurately describes how rare her medical condition is, what treatment is currently available in Colombia and the treatment currently and for what reasons in the United Kingdom. The examples of errors of fact are not generally arguably either errors of fact and/or could not amount to a subsequent error of law which could have a material difference on the outcome of the appeal period
>
> The only point in the grounds which has any arguable merit is that the First-tier Tribunal appears to assume the appellant's medical records can be transferred to Colombia and as such the treatment that she is currently provided could then be made available to her there. It is arguable that there is no evidential basis that such treatment is likely to be available in Colombia. The evidence is that it is currently not available. Even in the absence of a detailed prognosis if the specific current treatment is discontinued, the First-tier Tribunal recognises the likely, possibly fatal consequences of uncontrollable bleeding and acknowledged that the appellant was resistant to treatment with steroids, which was available in Colombia. The findings on article 3 and article 8 are arguably affected by this point.

> I do not restrict the grant of permission to the specific ground of appeal which I found to be arguable, however, the appellant should consider the comments above as to what is properly arguable and pursued in this case."

10. In her submissions, Ms Nnamani adopted her grounds, arguing that the judge had not properly understood the reality of the appellant's condition. She was receiving treatment in the UK which was not available in Colombia. The judge failed, so she argued, to make a clear assessment of what treatment was available there and in particular had failed to take proper account of the fact that the appellant's doctors in the UK had found a mode of treatment which was effective.

11. Mr Tufan submitted that the judge had assessed the evidence with care and reached findings properly open to him. The fact remained that treatment was available in Colombia even if not the same as in the UK. The fact that a different standard of treatment was available in different countries was not a relevant factor to be considered when assessing article 8. He submitted that the judge had properly considered issues of private and family life and was entitled to find that removal would not be in breach of either article 3 or 8.

Consideration of whether there is an Error of Law.

12. I agree with UTJ Jackson that many of the grounds do not raise any properly arguable point of law. There is no substance in the submission that the judge failed to grasp the factual matrix of the case or that he did not properly understand the reality of the appellant's condition.

13. I also agree that the only arguable point is that identified in the grant of permission relating to the assumption that the judge proceeded on the basis that medical records could be sent to doctors in Colombia and that the treatment the appellant is currently receiving would be available there. The appellant's case, in substance, is that her condition is being kept under control by her current medical team using various combinations and doses of drugs to keep her platelet level normal. The bleeding is currently being managed by romiplostim, she requires specialist haematology input weekly and has been hospitalised frequently. In Colombia there appears to be only steroid treatment or removal of the spleen. There was some evidence before the judge that the treatment currently being received in the UK was not available in Colombia.

14. For these reasons I am satisfied that the judge proceeded on the erroneous assumption that her current treatment in the UK could be continued and maintained in Colombia when the albeit limited evidence on this issue suggested that this was not the case. To this extent, I am satisfied that the judge erred in law in his assessment of whether the appellant was able to meet the high threshold of article 3 and in his consideration of article 8.

15. It was submitted on behalf of the appellant that if there was an error of law, the proper course would be for the matter to be remitted for a full

rehearing before the First-tier Tribunal, but Mr Tufan submitted that the right course would be for the appeal to be retained in the Upper Tribunal. On this issue I agree with Mr Tufan. There is no justification for a full rehearing before the First-tier Tribunal. This is an appropriate case for the appeal to remain in the Upper Tribunal for the decision to be remade.

Further evidence.

16. At the conclusion of the error of law hearing I gave the appellant permission to rely on the medical evidence annexed to the letter from her solicitors dated 4 February 2019 indexed and paginated 1-7, subject to it being served on the respondent. I also gave permission to either party to file further documentary evidence relating to the medical issues under articles 3 and 8. The appellant has filed two further documents attached to a letter from her solicitors dated 30 April 2019 indexed and paginated 1-3.

17. The relevant documentary evidence is therefore original appellant’s bundle before the First-tier Tribunal (1A), indexed and paginated 1-155A, the documents submitted with the letter of February 2019, (2A1-7), the documents with the letter of 30 April 2019 (3A1-3), the letters from Guy's and St Thomas's NHS dated 15 March 2018 (4A) and 13 April 2018 (5A) and the respondent’s appeal bundle.

Further submissions.

18. Ms Lagunju, whilst accepting that this was not a case where death was imminent, submitted that it was a case where the appellant suffered from a condition where intense suffering and death would follow from a lack of treatment. The appellant had suffered from ITP for some 11 years and a number of treatments had been tried but she had become resistant to steroid treatment and was now being treated with romiplostim injections on a regular basis. She submitted that the evidence showed that she would not be able to receive the same treatment on return to Colombia and that the only treatments available there, steroids or removal of the spleen would not be effective.

19. She referred in particular to the letter of 5 March 2019 (3A2) from Dr Lopez, a haematologist in Colombia, that the treatment available there would not be effective nor would it control the symptoms presented when the appellant's platelets were low. The medical evidence in the letter dated 15 March 2018 from Guy's and St Thomas’ (4A) was that the appellant would not be able to stop her medication in the near future and that she would need to remain under the close supervision of a specialist haematologist.

20. She argued that even if the appellant could not reach the high threshold under article 3, she would meet the test in Paposhvili. This should be taken into account when considering article 8. She submitted that article 8 was engaged as the appellant had an emotional and financial dependency on her family in this country and, taking into account the

length of her residence with the dire consequences of coming off her current medication, removal would be disproportionate.

21. Mr Tufan submitted that the appellant could not reach the high threshold for engaging article 3 in the light of N. The judgment of the Court of Appeal in AM (Zimbabwe) v Secretary of State [2018] EWCA Civ 64 confirmed that N was still binding and any adjustment to the article 3 threshold in Paposhvili did not form part of English law. In any event, the appellant's circumstances, so he argued, would not reach the Paposhvili threshold. He further submitted that the appellant did not meet the requirements of article 8. Even assuming evidence of an absence of some treatment in Colombia, that would not in itself engage article 8.

Assessment of the issues.

22. The first issue in this appeal is whether the appellant's medical condition is such that she is able to meet the high threshold set out in N. Article 3 is only engaged in very exceptional healthcare cases involving removal to another country with an absence or lesser standards of healthcare in "deathbed" cases, circumstances in which the death of the applicant would be imminent if removed. As Lord Hope said at [50] of N, for the circumstances to be very exceptional it would need to be shown that the appellant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him or her to a place which lacked the medical and social services needed to prevent acute suffering when dying.

23. The judgment in Paposhvili, which extended the threshold to cases where there was an imminence of intense suffering or death which might only occur through the absence of treatment previously available was considered by the Court of Appeal in AM (Zimbabwe). The Court confirmed that all courts below the Supreme Court were bound by the judgment in N and that, in any event, the effect of the judgment in Paposhvili was that it relaxed the test for a violation of article 3 in medical cases but only to a very modest extent: per Sales LJ at [37].

24. The second issue is whether, even if article 3 is not engaged, the appellant is able to rely on article 8. The law on this issue has been considered by the Court of Appeal in GS (India) v Secretary of State [2015] EWCA Civ 40 and recently reaffirmed by the Court of Appeal in SL (Saint Lucia) v Secrearary of State [2018] EWCA 1894.

25. In GS India, Underhill LJ said at [111]:

> "First the absence or inadequacy of medical treatment, even life preserving treatment, in the country of return, cannot be relied on at all as a fact engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may or may not be available in the country of return may be a factor in the proportionality

> exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the no obligation to treat principle."

26. In SL (Saint Lucia), the Court considered whether Paposhvili had any impact on the approach to article 8 claims but rejected that submission. At [27], Hickinbottom LJ said:

> "... As I have indicated and as GS India emphasises, article 8 claims have a different focus and are based upon entirely different criteria. In particular, article 8 is not article 3 with merely a lower threshold: it does not provide some sort of safety net where a medical case fails to satisfy the article 3 criteria. An absence of medical treatment in the country of return will not in itself engage article 8. The only relevance to article 8 of such an absence will be where that is an additional factor in the balance with other factors which themselves engage article 8...".

27. It is clear from the medical evidence and was accepted by the First-tier Tribunal that the appellant is suffering from ITP. This is a condition where patients have a decreased number of platelets in their blood due to immune destruction and altered reduction in their bone marrow and, in consequence, they can be at a significantly increased risk of spontaneous bleeding complications. It is clear from the letter of 13 April 2018 (5A) that this has been a challenging condition to manage and has been resistant to a number of medications.

28. I also note from this letter that the appellant was offered the option of abdominal surgery to remove her spleen, which can be effective in some patients with a 50% risk of failure, but she declined after reviewing pros and cons of the procedure. According to this report, splenectomy is considered as third line treatment and before proceeding to a splenectomy there would be a ferrous scan to determine if the platelet destruction is predominantly in the spleen as this would increase the chances of success to up to 70%. This was not done as the appellant did not wish to have a splenectomy due to the risk of bleeding whilst other options were available.

29. It is clear from the medical evidence that high dose steroids have not worked by themselves and that the appellant's condition is currently being managed with injections of romiplostim. The medical report from Guy's and St Thomas' dated 2 January 2019 [2A6-7] shows that the appellant had completed four doses of rituximab in October 2018 but since then she has had two relapses of her ITP, the first associated with gum bleeding, requiring a short course of steroids and the last with a platelet count of 12 but no bleeding. She last had romiplostim two weeks previously and the platelet counters increased to 850 and 650 at the date of examination on 31 December 2018 so romiplostim was held off on that appointment. The most recent medical evidence, the appointment letter from Guy’s dated 24 April 2019 (3A1) confirms that the appellant is still attending as an outpatient.

30. In the letter of 13 April 2018, the consultant, referring to the current management as a combination of romiplostim and azathioprine and to

regaining control whilst she is on romiplostim, expressed uncertainty about whether this treatment was available in Colombia. The evidence from the Colombian doctors supports the submission that it is not. The letter from Dr Cubillos dated 30 January 2019 (2A1) simply says that treatment is limited in Colombia. The letter of 24 January 2019 from Dr Velez (2A4) is more specific saying that currently in Colombia the drug use and management of this disease are oral doses of steroids, then azatriopina (which I assume is the same as azathioprine) and if there is no platelet increase maintained over time, the patient is offered the option of removal of the spleen but a splenectomy did not ensure the disappearance of the disease and symptoms may reappear after that intervention. The only treatment not said to be available is romiplostim.

31. Serious as the appellant's condition is, it does not reach the high threshold for engaging article 3 nor the modestly enlarged threshold in Paposhvili. There is treatment available from haematologists in Columbia. If it does not include romiplostim, it does cover treatment by steroids and removal of the spleen. The evidence does not satisfy me that there is an imminent threat of death or of imminent intense suffering arising from a lack of treatment in Colombia.

32. I now turn to the question of article 8. I am not satisfied that the appellant's family life is sufficient to engage article 8. I accept that she has relatives in this country and gets on well with her nephews and nieces, but I am not satisfied that this amounts to family life within article 8. However, the length of her residence in the UK, now some 19 years, does engage private life. It appears from the evidence that the appellant is not able to speak English fluently. As the First-tier judge noted at [84] of his decision, a Spanish interpreter was needed at the First-tier Tribunal and that although the appellant could speak some English, no English test of the type normally undertaken by those wishing to stay had been taken or passed. She does not therefore benefit from s.117B(2).

33. The appellant was largely if not wholly financially dependent on her family and is therefore financially independent (s.117B(3)). She relies on private life but s. 117B(4) provides that little weight should be given to private life established when in the UK unlawfully. The appellant's presence in the UK has been substantially unlawful and precarious (s.117B(5)). In assessing proportionality, I take into account that the medical treatment of ITP in Colombia is more limited but, as already set out, treatment is available by steroids or a splenectomy, which has at least reasonable prospects of success even though the appellant, perhaps for understandable reasons, has chosen not to proceed with this in this country in the light of the treatment she is currently now receiving.

34. When the various factors are looked at as a whole, I am satisfied that removal would be proportionate to a legitimate aim. The evidence about the appellant's medical condition and treatment does not outweigh the public interest in maintaining immigration control. To give it such weight in the present case would in substance be to elevate article 8 to be a safety

net where the appellant's medical condition fails to satisfy the article 3 criteria.

35. Cases involving serious medical issues such as the appellant's, with the attendant risks to health, inevitably attract sympathy. However, I am not satisfied for the reasons I have given that the appellant can meet the requirements for a grant of leave either under article 3 or article 8.

Decision.

36. The First-tier Tribunal erred in law and the decision is set aside. I remake the decision by dismissing the appeal under both article 3 and article 8.

Signed: H J E Latter Dated: 20 May 2019

Deputy Upper Tribunal Judge Latter