Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14463/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
Remotely by Skype for Business	**On 19 January 2021**
On 3 December 2020	

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MMR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

DECISION AND REASONS

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. 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

The appellant is a citizen of Bangladesh who was born on 1 September 1981. The appellant arrived in the United Kingdom on 26 May 2005 with entry clearance as a work permit holder with leave valid from 10 May 2005 to 10 May 2007. The appellant overstayed. On 13 July 2011, he was notified of his liability to be removed as an overstayer and served with notice IS.151A. The appellant did not leave the UK. He made an application for leave outside the Rules on 7 March 2012 which was refused on 13 November 2012. A further application made on 23 July 2013 was refused on 20 August 2013. Thereafter, he was detained on 9 January 2015 with a view to removal on 16 January 2015. He brought proceedings by way of judicial review and permission was refused on 4 August 2015.

On 29 January 2019, the appellant made an application for further leave to remain in the UK based upon his private and family life in the UK. In particular, he relied on the fact that he was suffering from chronic hepatitis B and suffered from advanced liver disease (cirrhosis). Amongst other treatments, he was receiving a life-prolonging drug called Tenofovir. Although he accepted that this drug was available in Bangladesh, he claimed that it was expensive and he would not be able to afford it and that he also needed other monitoring and healthcare which he could not afford. He relied both upon Art s 3 and 8 of the ECHR.

On 9 August 2019, the Secretary of State refused his human rights claim under Art 3 and Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

The appellant appealed to the First-tier Tribunal. In a decision sent on 7 November 2019, Judge Suffield-Thompson dismissed the appellant's appeal under both Art 3 and Art 8 of the ECHR.

As regards the appellant's medical condition, the judge found that Art 3 would not be breached by his return to Bangladesh as treatment was both available and accessible for his hepatitis B and chronic liver disease. She was not satisfied that the appellant met the test, in health cases, to establish a breach of Art 3 as set out in the Court of Appeal's decision in AM (Zimbabwe) v SSHD [2018] EWCA Civ 64 which had modified the House of Lords' approach in N v SSHD [2005] UKHL 31 in the light of the Strasbourg Court's decision in Paposhvili v Belgium [2017] Imm AR 867.

The Appeal to the Upper Tribunal

The appellant sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal (Judge Scott-Baker) on 30 March 2020. However, on 27 August 2020 the Upper Tribunal (UTJ Finch) granted the appellant permission to appeal, inter alia, on the basis that the applicable test in health cases under Art 3 had changed as a result of the Supreme Court's

decision in AM (Zimbabwe) v SSHD [2020] UKSC 17 decided since the First-tier Tribunal's decision.

In the light of the COVID-19 crisis, the appeal was listed at the Cardiff Civil Justice Centre on 3 December 2020 for a remote hearing by Skype for Business. I was based in the Cardiff Civil Justice Centre in court and Mr Blackwood, who represented the appellant, and Mr Howells, who represented the Secretary of State, joined the hearing remotely by Skype.

The Submissions

Mr Blackwood relied upon the grounds of appeal which he expanded upon in his skeleton argument and oral submissions. He also relied upon an additional point (without objection from Mr Howells) raised in an "addendum" to his skeleton argument.

First, Mr Blackwood submitted that the judge had applied the wrong test applicable in Art 3 cases involving health issues after the Supreme Court's decision in AM (Zimbabwe). He submitted that in para 53 of the determination, the judge had applied the test as set out in the Court of Appeal's decision in AM (Zimbabwe) following its interpretation of the Strasbourg decision in Paposhvili requiring there to be imminence of intense suffering or death. The Supreme Court, Mr Blackwood submitted, had interpreted Paposhvili as requiring that there be a real risk of either a serious, rapid and irreversible decline in an individual's health resulting in intense suffering, or a substantial reduction in life expectancy. Here, Mr Blackwood submitted on the basis of Dr Uriel's evidence, there was a "significant risk" of the appellant's hepatitis B infection 'flaring' which could be life-threatening. As a result, Mr Blackwood submitted that the judge had materially erred in law, albeit understandably, by applying the Court of Appeal's explanation of Paposhvili rather than the Supreme Court's approach which, of course, he acknowledged post-dated the judge's decision.

Secondly, Mr Blackwood submitted that in finding that treatment (in particular Tenofovir) would be available and accessible to the appellant, the judge made two false assumptions based upon the evidence. She had relied upon the appellant's father ("F") and his brothers ("B1" and "B2") receiving the same treatment as the appellant (namely Tenofovir) for their own hepatitis B condition in Bangladesh. Mr Blackwood submitted that the medical evidence concerning F did not show that he suffered from hepatitis B or was in receipt of Tenofovir as a treatment. Secondly, although B1 and B2 each suffered from hepatitis B, the evidence was that they were receiving different treatments from that required by the appellant. The evidence showed, Mr Blackwood submitted, that they received the drug, Omesoft and not Tenofovir. Consequently, Mr Blackwood submitted that the judge's finding that treatment required by the appellant would be available and accessible because it was being obtained by the appellant's father and brothers from the town/city that was two and a half hours' drive away, was not properly based in the evidence.

Thirdly, Mr Blackwood submitted that the judge erred in law in finding that the treatment would be accessible because either it was free or, if not, the

appellant or his family could afford to pay for it. He relied on the evidence, set out in the judge's determination, that as regards the treatment received by F and B1 and B2, they only accessed it intermittently because they could not afford it. Further, the judge had erred in law in concluding that the appellant would not be able to work, and therefore earn money in order to pay for any treatment, based upon Dr Uriel's evidence. The judge had mischaracterised Dr Uriel's evidence as stating that the appellant could not take a "really laborious job" when, in fact, Dr Uriel's evidence was that he could not sustain "a laborious job". Mr Blackwood pointed to F's evidence, in his witness statement, that the appellant would only be able to find "arduous" work.

Mr Howells accepted that the judge had been wrong to apply the Court of Appeal's interpretation of the applicable test to Art 3 and 8 in health cases in the light of the Supreme Court's decision in AM (Zimbabwe).

However, Mr Howells submitted that that error was not material. The judge had found that the treatment needed by the appellant, in particular Tenofovir, was both available and accessible in Bangladesh. He submitted that it had been accepted before the judge that Tenofovir was available and that the only issue was access to it. Mr Howells submitted that the judge had considered any potential obstacles to obtaining the drug, in relation to costs, location and family support. She had found that it was available free but, in any event, the appellant could meet the cost. Mr Howells accepted that there did not appear to be any evidence that the appellant's brothers or father were receiving Tenofovir and, as I understood his submissions, he accepted Mr Blackwood's interrogation of the evidence that the appellant's father did not even suffer from hepatitis B. However, Mr Howells submitted that the judge was entitled to rely upon the appellant's own evidence that treatment was available to him in his local town and not, as he said in his evidence, that he could not access it there. As regards cost, Mr Howells submitted that the judge found that the appellant could obtain financial support from his family, in the UK, as he had done whilst in the UK such that even if the appellant could not obtain work in Bangladesh he would have the available funds.

Discussion

As was common ground before me, the judge did misdirect herself as to the applicable test to establish a breach of Art 3 in a health case. She applied, at para 53, the approach set out in the Court of Appeal's decision in AM (Zimbabwe) seeking to give effect to the Strasbourg decision in Paposhvili. Hence, she required there to be established an imminence of intense suffering or death in the receiving state. However, subsequent to the judge's decision, the Supreme Court rejected the interpretation of Paposhvili as requiring an "imminence of death" (see [30]). Rather, the Supreme Court concluded that in order to succeed under Art 3 there must be substantial grounds for believing that there is a real risk of the individual being exposed either "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" (see [29]). What is a "significant" reduction in life expectancy was considered to be a "substantial"

reduction in life expectancy (see [31]). I, therefore, accept Mr Blackwood's submission that the judge erred in law in applying the wrong test for Art 3.

Mr Howells, as I have said, accepts that. However, he does not accept that the error is material. That is because the judge found that the treatment required by the appellant (in particular Tenofovir) was both available and accessible to him and, in those circumstances, he would not be exposed to a real risk of suffering or a significant reduction in his life expectancy as required by the Supreme Court for a claim under Art 3 to succeed.

It was accepted before the judge that Tenofovir was available in Bangladesh. I have carefully read the judgment, including what is set out as Counsel for the appellant submissions, it does not appear to me to be the case that the appellant accepted anything more than Tenofovir was available in Bangladesh. At para 34, the judge said this:

> "It was accepted by the appellant and [Counsel for the appellant] that the drug is available and in fact the appellant's father and two brothers have the same illness and receive this treatment so this was not in dispute. I find therefore that the medication that the appellant needs is available in Bangladesh."

On its face, this appears to be a record of an acceptance by the appellant's Counsel that Tenofovir was available not least because the appellant's father and two brothers, all of whom suffered from hepatitis B, also received this treatment. That cannot, in my judgment, have been the likely submission of Counsel for the appellant. As Mr Blackwood submitted, and Mr Howells accepts this, the evidence did not establish that the appellant's father and brothers were receiving the same treatment as the appellant would need. In fact, the appellant's father did not even suffer from hepatitis B. Further, evidence in relation to each of these individuals (helpfully set out in paras 20 – 22 of Mr Blackwood's submissions) showed what treatment they were receiving. Although B1 and B2 had hepatitis B, the relevant medication they were receiving was Omesoft and not Tenofovir. Either the judge misunderstood what was being submitted on the appellant's behalf or she misunderstood the underlying evidence. Either way, any acceptance that Tenofovir was available went no further than it being available in Bangladesh. It did not establish that the appellant's father and brothers were receiving it in the nearby town/city which was about two and a half hours' drive away where they received treatment.

Mr Howells relies upon the appellant's evidence which is related in para 35 of the determination as follows:

> "The appellant accepts that there is treatment available, but the issue submitted is that it is not readily accessible for this appellant. The appellant gave evidence that he lives in a village two and a half hours' drive from the main town/city where he could get the drug from. He states that this will cause him real issues with accessing the medication when he needs it. I find this is not a bar to receiving treatment as many people live in rural areas and will have to travel to obtain medical help. He stated that his father and brothers received their medications from the city so I find no reason why they cannot all travel together, or take it in turns, to travel to the city or town or

> where they can obtain their medications from. If they are able to make the journey, then I see no reason why the appellant cannot do so."

Although it was not specifically drawn to my attention, the judge's finding appears to be based upon what the appellant said in para 15 of his witness statement (at page 9 of the bundle) where he says that Tenofovir is only available in big pharmacies in big cities, there are none close to his village, but he then identifies that it may be obtained from his local town/city (Sylhet Sadar) although it might take seven to ten days to order in. This, as Mr Howells' submission recognises, is some evidence of the availability of Tenofovir in the appellant's local town/city. There is, therefore, some merit in Mr Howells' submission that the judge had some evidential basis for concluding that the drug was available in the local town/city. It is, however, wholly unclear upon what basis the appellant said this in his witness statement. The judge was undoubtedly influenced in para 34 (the paragraph immediately preceding the one in which she sets out the appellant's evidence) by her understanding of the evidence that the appellant's father and brothers, suffering from hepatitis B themselves, also received Tenofovir which was available from the local town/city. That, it is accepted by both parties, had no evidential basis. Given the close proximity in the judge's reasoning there is, in my judgment, a real danger that the judge failed properly to grapple with the evidence concerning the availability of Tenofovir locally for the appellant.

That, of course, concerns the availability of treatment for the appellant in a local town/city. Taken with the misdirection as to the correct test to be applied, it makes that error material and requires that the judge's decision be set aside and should be re-made.

It was also the appellant's case that the cost of any treatment was prohibitive given his family's circumstances and his own inability to work. At para 36, the judge found that the appellant would be able to access free treatment in his local town/city. Leaving aside whether it is even available there, the judge reached this finding despite there being evidence that public facilities in Bangladesh that could potentially provide the treatment were "few" and were limited. She did so on the basis of the appellant's oral evidence that his father and brothers were receiving free treatment. Of course, the treatment they were receiving was not Tenofovir. The judge had previously (wrongly) assumed they were receiving the same treatment (see para 34). Her finding, therefore, that Tenofovir was available free was based upon a mistake as to the treatment being received, on the evidence, free by the appellant's father and brothers.

Mr Blackwood, in any event, relied upon the evidence before the judge that the family members had paid for their treatment. However, that evidence (at pages 162, 165, 183 and 178 - 179 of the appellant's bundle) relates to 2012. It was, however, the appellant's evidence that he could not afford this treatment and, indeed, the treatment which his family paid for was only obtained intermittently because they could not afford it. There certainly was evidence before the judge that, at least from the appellant's family in the UK, he could receive continued financial support which would meet the relatively

low cost of Tenofovir at 75p per tablet. If this were the only challenge to the judge's findings, I would be reluctant to interfere with her assessment of the evidence concerning available resources to pay for Tenofovir. Even if the judge misapplied Dr Uriel's evidence including that the appellant could, in fact, obtain employment in a "laborious" but not "really laborious" job, the evidence of support from UK relatives would nevertheless underpin her finding that treatment could be afforded. However, there are a number of errors that precede that issue in the appeal which cause me to conclude that the errors require a fresh look at all the evidence again as, in fact, UTJ Finch indicated when granting permission.

In the result, I reach the following conclusions. First, the judge erred in law in directing herself as to the appropriate test under Art 3 in the light of the Supreme Court's decision in AM (Zimbabwe). Secondly, the judge misunderstood the evidence concerning what, if any, treatment was being received by the appellant's father and brothers in Bangladesh and in concluding that it was the very treatment which the appellant required. Thirdly, in relation to whether the treatment was available free – assuming it was available at all in the appellant's local town/city – the judge, in part, based her finding upon the fact that treatment was being received free by the appellant's father and brothers. That cannot, of course, be a reference to the treatment which the appellant required since they are not receiving Tenofovir as treatment. Fourthly, although the judge says that the appellant in his oral evidence stated that they were receiving free treatment, she fails to grapple with the contradictory evidence he gave in his written statement that they pay for their medicines and that they "go without them when they are short of money" (see para 18 of his statement).

These errors, in my judgment, sufficiently undermine the judge's assessment of the evidence, her findings and application of Art 3, so as to make her decision in relation to Art 3 unsustainable as a matter of law.

Decision

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.

It was common ground between the parties that if the judge's decision could not stand, the appropriate disposal of the appeal was to remit it to the First-tier Tribunal for a fresh hearing in order to remake the decision.

In my judgment, given the nature of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the appropriate disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing (before a judge other than Judge Suffield-Thompson) in order to remake the decision under Art 3 of the ECHR.

Neither party addressed me in relation to Art 8. The judge's decision to dismiss the appeal on that ground was not challenged. The finding that a breach of Art 8 has not been established is therefore preserved. Of course, if entirely new factual material establishing a basis relevant to showing a breach of Art 8 is put before the First-tier Tribunal, no doubt the Tribunal would take that into account. However, otherwise, the decision to dismiss the appeal under Art 8 stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
21 December 2020