Case No: C5/2017/2946

Neutral Citation Number: [2018] EWCA Civ 1365
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT
Appeal Nos IA/32788/2015 & IA/32789/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/18

Before :

LORD JUSTICE HICKINBOTTOM

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Between :

THE QUEEN ON THE APPLICATION OF
(1) MM (MALAWI)
(2) MK (MALAWI)

Applicants

- and -

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

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- -

David Chirico and **Keelin McCarthy** (instructed by **Elder Rahimi Solicitors**)
for the **Applicants**
Lisa Giovannetti QC and **Rory Dunlop** (instructed by **Government Legal Department**)
for the **Respondent**

Hearing date: 12 June 2018

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Judgmen

t**Lord Justice Hickinbottom:**

1. The Applicants are nationals of Malawi. The First Applicant entered the United Kingdom on 10 October 2004 on a student visa. The Second Applicant entered on the same day on a visitor visa. They married whilst lawfully in the United Kingdom.

2. In 2010, the First Applicant felt very unwell, and, as well as being diagnosed with having a number of both physical and psychiatric conditions, she was discovered to be HIV positive. From May 2010, she was treated with antiretroviral ("ARV") drugs. She initially had considerable side effects, and her therapy was varied until her HIV infection was satisfactorily controlled with a combination of two drugs, Kaletra liquid and Truvada dispersible tablets. The First Applicant has to take these drugs in liquid form because, as a result of an oesophageal stricture, she is unable to swallow solids. The drug treatment is chronic.

3. The Applicants remained in the UK with valid leave until April 2011, when the Second Applicant's application for leave to remain as a student was refused, the First Applicant by that stage being his dependent.

4. On 1 February 2012, the Applicants applied for leave to remain on human rights grounds. That was refused, and that refusal was maintained on an internal reconsideration on 30 September 2015. That decision had an in-country right of appeal to the First-tier Tribunal which was exercised.

5. In a determination promulgated on 18 May 2017, First-tier Tribunal Judge Walters allowed the appeal on several grounds, including the First Applicant's appeal on article 3 medical grounds. The Secretary of State appealed, and in a determination promulgated on 11 August 2017, Deputy Upper Tribunal Judge Woodcraft allowed the appeal from the First-tier Tribunal, and remade the decision dismissing the appeal from the Secretary of State's refusal on all grounds. He concluded that the UK would not breach its obligation under article 3 by removing the First Applicant to Malawi.

6. By the time of the Deputy Judge's determination, the Grand Chamber of the European Court of Human Rights had handed down judgment in Paposhvili v Belgium [2017] Imm AR 867. Until that case, the test in article 3 medical cases was that expounded in N v Secretary of State for the Home Department [2005] UKHL 31; [2005] 2 AC 296, i.e. that, where an individual suffers from a serious medical condition, it would breach article 3 to remove him from the UK only where he would face an early and undignified death. The effect of Paposhvili upon existing jurisprudence was considered by this court in AM (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 64. Sales LJ, with whom Patten LJ and I agreed, said this (at [38]):

> "So far as the [European Court of Human Rights] and the [ECHR] are concerned, the protection of article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where 'substantial grounds have been shown for believing that [the applicant], 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 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' (paragraph 183). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely 'rapid' experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state."

7. It was considered that this represented a "very modest extension" of the article 3 protection in medical cases; but extension it was. However, of course, Paposhvili did not affect domestic jurisprudence in the sense that, until it was changed, N was binding here on all courts below the Supreme Court.

8. In addition, in Paposhvili, the European Court emphasised that, once there are serious doubts about whether the individual if removed might suffer treatment that breached the article 3 threshold, the onus of proof falls upon the state, and the state has a procedural duty to conduct enquiries and/or obtain specific assurances to ensure that there is no risk of such treatment on return.

9. In redetermining the Applicant's appeal, Deputy Judge Woodcraft applied the criteria in N, which he was bound to do; although he in fact appears to have equated the test in Paposhvili with that in N. He also said this (at [33]):

> "It is still unclear what the position is regarding the availability of treatment in Malawi. The [First Applicant] has put forward evidence to suggest that liquid form treatment is not available but clearly some treatment is available. Given the paucity of evidence before the judge, it was in my view a material error of law for the judge to find as he did that to return the [First Applicant] to her country of origin would be to breach her rights under article 3. In my view no such breach of this country's obligations will occur."

10. The Applicant applied to this court for permission to appeal. In particular, it was said that, given the inconclusive nature of the evidence, the Deputy Judge erred in placing the burden of proof where he did; but also that this case would meet the Paposhvili criteria.

11. On 9 February 2018, I gave directions for the parties to make submissions on whether the Applicant's circumstances would satisfy the test in N and/or Paposhvili. The submissions confirmed that it is common ground that the Applicant does not satisfy

the criteria in N. With regard to those in Paposhvili, it was contended on behalf of the Applicant that they were satisfied. The Secretary of State did not concede as much; but accepted that it is arguable that they were so.

12. Furthermore, from those submissions, as presaged in the tribunal's determination, it appeared that there was an issue between the parties as to whether there was sufficient evidence before the First-tier Tribunal to make a determination as to the availability of appropriate treatment in ingestible form in Malawi; and, if there was not, what should be done.

13. The Secretary of State proposed that the matter should be remitted to the tribunal under CPR rule 52.20(2)(b) for further facts to be determined. Under that rule, the court has the power to "refer any claim or issue for determination by the lower court" (which of course includes a tribunal, where the appeal is from such). That power, although rarely used, is not circumscribed by any particular requirements. It was said on behalf of the Secretary of State that those further acts were likely to be crucial with regard to the appropriateness of this case being given permission to appeal so that in due course it would have the opportunity of going to the Supreme Court for consideration of the impact of Paposhvili.

14. On behalf of the Applicant, it was contended that remittal was unnecessary; because the tribunal had made findings of fact with which this court should not interfere and, insofar as the evidence was insufficient to make a relevant finding, the burden of proof lay on the Secretary of State and the Applicant should consequently be given the benefit.

15. On 16 April 2018, I directed that the application be adjourned into open court.

16. Mr Chiroco for the Applicant submits simply that this case should now be given permission to appeal. As I have indicated, he accepts that the test in N is not satisfied; but he submits that it is at least arguable that the test in Paposhvili is met, something which the Secretary of State accepts. The burden is consequently on the Secretary of State to show that appropriate therapy is available; and, far from the evidence showing that, there was firm evidence before the tribunal that appropriate drugs in liquid form are not available in Malawi. He relies upon evidence from a number of witnesses to that effect, including letters dated 31 January and 16 February 2017 from Dr Huw Price (a Consultant Physician at the Fairfield Centre, Mid-Essex Hospital), a statement dated 17 March 2017 from Dr Ade Fakoya (a physician with long international experience of HIV), an email dated 10 October 2016 from Mr Roy Trevellion (HIV I-base), and a letter dated 21 October 2016 from Steven Iphani (Programmes Manager of the Coalition of Women Living with HIV and Aids). Equally, there is clear evidence of the First Applicant's inability to ingest drugs in anything other than liquid form, including a letter dated 5 July 2013 from Dr D D Coelho (consultant in GU Medicine at the Fairfield Centre) and the letter from Dr Huw Price dated 31 January 2017 to which I have already referred. It is unnecessary, he submits, for the matter to be remitted for further facts to be found. The evidence before the tribunal was, and now is, sufficient. Insofar as it is not, then the Secretary of State bears the burden of proof; and, having been given an opportunity to adduce evidence before the tribunal, if and insofar as he failed to do, it is too late now.

17. For the Secretary of State, Ms Giovannetti QC submits that the First Applicant does not meet the test in Paposhvili; but she frankly and fairly concedes that the contrary is arguable. In particular, she accepts that it is arguable that return might breach the procedural obligation described in Paposhvili, because the tribunal had inadequate evidence before it as to whether, if removed to Malawi, the First Applicant would be able to access ARV drugs she would be able to take; and, if not, the likely extent and intensity of the adverse effects and her suffering. In the event, she urges this court to remit the matter to the tribunal so that findings of fact can be made to ensure that an informed decision can be made as to whether this is an appropriate case in which to give permission to appeal to the Supreme Court; and, if it is, that the Supreme Court will have a firm factual basis upon which to apply the relevant principles as they conclude them to be.

18. In support of that contention, the Secretary of State has made an application dated 8 June 2018 for an order under CPR rule 52.21(b), that this court receives new evidence in the form of a schedule of antiretroviral drugs that (it is said) can be used in liquid form or crushed in suspension in liquid.

19. As I have described, Deputy Judge Woodcraft concluded that it would not be in breach of article 3 to remove the First Applicant to Malawi. By CPR rule 52.21(3), leaving aside procedural error (which plays no part in this appeal), this court will allow an appeal if the decision of the court or tribunal below is "wrong". Therefore, even if the Deputy Judge's analysis was incorrect, an appeal will only be allowed if his conclusion was wrong.

20. Mr Chirico submits that, on the evidence before the tribunal (and, indeed, even on the evidence now including that recently put forward), only one conclusion can properly be drawn, i.e. that ARV drugs ingestible by the Applicant are not available in Malawi. This court should not entertain fresh evidence, in circumstances in which the evidence was available at the time of the tribunal hearing and it does not satisfy the test in Ladd v Marshall [1954] 1 WLR 1489.

21. However, in considering whether to allow in new evidence, it is important to maintain a realistic view, particularly where, as here, the Applicant's appeal is bound to fail and the issue for this court is whether it is a case in which it might be appropriate for the Supreme Court to consider the divergence between N and Paposhvili. That divergence gives rise to an issue which might well have to be considered by the Supreme Court at some stage – and I accept that it might be helpful for it to be considered sooner rather than later – but I would be reluctant to allow a case to go forward to the Supreme Court for its consideration where that issue is or may be academic. Mr Chirico accepted that, on the basis of any new information as to the availability of ARV treatment in Malawi, it would be open to the Secretary of State now to make a new decision to remove the First Applicant. In the circumstances, it would seem to me that it would be pointless in practical terms to consider this as a case suitable for the Supreme Court if, applying the correct burden of proof and test, the Secretary of State can show that, if he were removed to Malawi now, there would be no breach of article 3.

22. There are two related issues that, at some stage and in some forum, that will need to be determined, namely (i) the ingestible ARV drugs that would be available to the First Applicant if she were removed to Malawi, and (ii) on the basis of the available

ingestible ARV drugs, the likely impact of the First Applicant's removal to Malawi on her health. For the reasons I have given, I consider that those issues should be determined in the context of this appeal, prior to consideration of whether this case might be suitable for the grant of permission to appeal to the Supreme Court.

23. Ms Giovannetti submits that those matters should be remitted for determination by the Upper Tribunal, which is experienced and best placed to make such factual findings. Although it may be that the issues can be determined in the basis of paper evidence alone, it is possible that oral evidence may be required. A remittal should not delay the consideration of this appeal in this court. Mr Chirico takes a neutral view on the forum for any fact-finding that needs to be done.

24. Whilst it would be possible for this court to make the factual findings required, I am persuaded that, in the light of their experience in such matters, the issues should be remitted to the Upper Tribunal for determination. In doing so, I stress that nothing I have said should be taken by the tribunal as any indication of what I consider the proper response should be to those issues: the tribunal will need to consider the issues, on the evidence before it, with an open mind.

25. I would therefore propose that Counsel draft an order, including draft questions for determination by the Upper Tribunal, for my approval. In addition to granting permission to the Secretary of State to rely on the evidence attached to the 8 June 2018 application, the order should give the parties an opportunity to lodge further evidence in relation to those issues. I will initially direct that the matter be referred to Peter Lane J as the President of the Upper Tribunal (Immigration and Asylum Chamber), so that he can give full directions including directions to the constitution that will hear the issues.

26. In the meantime, I shall formally adjourn the application for permission to appeal to this court. In terms of a return date, there are currently three other appeals in which the difference between the criteria in N and those in Paposhvili are in issue, that are listed for Tuesday 30 October 2018 with a time estimate of 2-3 days. I propose that this application for permission to appeal is provisionally listed with those appeals, on a rolled-up basis. The precise time estimate can be considered later, but I am confident that the current estimate of 2-3 days will not be exceeded. Whilst appreciating the enormous workload on the Upper Tribunal, for obvious reasons it would be extremely helpful if the Upper Tribunal were able to determine the question out to them in time for that hearing.

27. If any problems arise, I give permission to the parties to apply to this court. Any applications, unless expressly released, should be referred to me.