Supreme Court issues game-changing decision on Article 3 ill-health cases (AM (Zimbabwe) v Secretary of State for the Home Department)

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Immigration analysis: Zane Malik, barrister at 39 Essex Chambers, examines the Supreme Court's decision to impose a new test for when deportation or removal would violate Article 3 of the European Convention on Human Rights (ECHR) in ill-health cases.

AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17

What are the practical implications of this case?

The Supreme Court's judgment is a game-changer in four different ways.

First, the Supreme Court has changed the test that domestic court and tribunals apply when they consider claims made by foreign nationals under Art 3 ECHR on the grounds of ill-health. In *N v Secretary of State for the Home Department* [2005] UKHL 31, the House of Lords had held that in order to succeed in a claim under Art 3 ECHR based on ill-health, 'it would need to be shown that the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he is dying' (see para [50]). The Supreme Court has now departed from this very stringent test and replaced it with a new test, as formulated by the European Court of Human Rights (ECtHR) in *Paposhvili v Belgium* (41738/10) [2017] INLR 497. The position now is that a person will succeed in a claim under Art 3 ECHR if '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' (see para [22]). The new test is now binding on the Home Secretary and domestic courts and tribunals. It is by reference to this test that claims under Art 3 ECHR based on ill-health will be judged. This is the test that should be borne in mind by practitioners in advising or representing their clients.

Second, the Supreme Court has clarified that, contrary to the interpretation of *Paposhvili* by the Court of Appeal in this case, the reference in the test to 'a significant reduction in life expectancy' does not mean 'death within a short time' or 'imminence of death' (see para [30]). It simply means a 'substantial' reduction in life expectancy. Giving an example, the Supreme Court explained that if the life expectancy of a person who was 74 years old was reduced to two years, it might not be significant, in comparison with a person aged 24 with an expectancy of normal life. If the latter's life expectancy was reduced to two years, it might well be significant. Accordingly, practitioners should take into consideration the age and circumstances of their clients in mind. A person may succeed even if there is no risk of imminent death.

Third, the Supreme Court has held that, in the new test, 'a significant reduction in life expectancy' is the alternative to 'a serious, rapid and irreversible decline in…health resulting in intense suffering' (see para [31]). It follows that practitioners would wish to keep in mind the fact their clients only need to meet one of these two limbs in order to succeed in their claims.

Fourth, the Supreme Court has given helpful guidance as to the procedural requirements of Art 3 ECHR. It is important for practitioners to remember that their clients, if they are to succeed, must present evidence 'capable of demonstrating that there are substantial grounds for believing' that Art 3 ECHR would be violated (see para [32]). They must 'raise a prima facie case of potential infringement'. However, if they present evidence that meets this standard, 'the returning state is better able to collect evidence about the

availability and accessibility of suitable treatment in the receiving state'. It will be for the returning state to dispel any serious doubts raised by an applicant's evidence. Applicants are not required to prove their case either beyond reasonable doubt or even on a balance of probabilities. This is of particular significance when practitioners are collating or considering evidence of their clients.

What was the background?

The appellant is HIV positive and is facing deportation to Zimbabwe in the light of his criminal conduct. His condition is currently controlled by an anti-retroviral drug, Eviplera. He was placed on Eviplera after first having tried another anti-retroviral drug, which produced significant side-effects. Eviplera is not available in Zimbabwe. Initially, the appellant argued unsuccessfully that deportation would violate his rights under Art 8 ECHR. He subsequently submitted that it would breach his rights under Art 3 ECHR. The Home Secretary decided that the appellant's deportation to Zimbabwe would be compatible with Arts 8 and 3 ECHR. The First-tier Tribunal, the Upper Tribunal and the Court of Appeal all agreed with the Home Secretary's position.

The appellant conceded before the courts below that he was not able to resist his deportation on Art 3 ECHR grounds, given the binding domestic authority of the House of Lords' decision in *N*. By that decision, as elucidated in *GS (India) and others v Secretary of State for the Home Department* [2015] EWCA Civ 40, the House of Lords had held that the only exception to the general principle that a member state was not obliged to allow someone to stay in order to benefit from medical treatment was 'confined to deathbed cases'. The appellant was not on his deathbed. Therefore, on the binding domestic authority, he was not able to argue before the lower courts that his deportation to Zimbabwe would breach his rights under Art 3 ECHR.

The appellant, however, took his case to the Supreme Court and argued that it should depart from the decision of the House of Lords in *N*. He argued that the domestic caselaw was irreconcilable with the ECtHR's latest approach on the subject, as set out in *Paposhvili*. He invited the Supreme Court to review the domestic approach and follow the evolved ECtHR's approach.

What did the Supreme Court decide?

There were three issues before the court. First, whether it should depart from the test set out in *N* and instead adopt the approach taken in *Paposhvili*. Second, whether the Court of Appeal's reading of *Paposhvili* was correct and, if not, how it should be read. Third, whether it should allow the appellant's appeal and remit the case for reconsideration in light of its answers to the first two issues.

The court, at the outset, recognised that it was required to consider 'one of the most controversial questions which the law of human rights can generate' (see para [1]). The court added that 'considerations of public policy on the one hand and of what is said to be private existential need on the other clash like warriors—and upon the courts lies a heavy burden in determining which should, under the law, prevail'. In the end, the court held that the latter should, under the law, prevail.

In addition to the decisions in *N* and *Paposhvili*, the court analysed four other main authorities on the subject: *D v United Kingdom* (30240/96) [1997] 42 BMLR 149, *N v United Kingdom* (26565/05) [2008] 25 BHRC 258, *Mwanje v Belgium* (10486/10) (2013) 56 EHRR 35 and *Savran v Denmark* (57467/15) [2019] ECHR 651 (see paras [13]–[26]).

After analysing these six authorities, the Supreme Court held that the Court of Appeal's reading of *Paposhvili* was 'too much of a leap' (see para [30]). The Supreme Court held that the Court of Appeal's 'unduly narrow interpretation' of the Strasbourg's authority was wrong in law (see para [34]). The Supreme Court gave guidance as to how *Paposhvili* should be read and applied, including guidance on procedural

issues. Ultimately, in the light of *Paposhvili*, the Supreme Court decided to depart from the House of Lords' decision in *N*.

On the facts of the appellant's case, the Supreme Court held that the Court of Appeal's conclusion about the insufficiency of medical reports adduced by him was flawed (see para [37]). The Supreme Court added that it was inappropriate for the Court of Appeal 'to extract the medical reports from the other evidence submitted in furtherance of the claim under Art 8 and to ask whether they cross the threshold now required of an applicant under Art 3'. Accordingly, the Supreme Court allowed the appeal and remitted the matter for re-hearing on up-to-date evidence.

Case details

- Court: Supreme Court
- Judges: Lord Wilson, Lady Hale, Lady Black, Lady Arden and Lord Kitchin
- Date: 29 April 2020

Zane Malik appeared for the appellant in this case.

Interviewed by Robert Matthews.