



THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

29 April 2020

PRESS SUMMARY

AM (Zimbabwe) (Appellant) v Secretary of State for the Home Department (Respondent)
[2020] UKSC 17
On appeal from [2018] EWCA Civ 64

JUSTICES: Lady Hale, Lord Wilson, Lady Black, Lady Arden, Lord Kitchin

BACKGROUND TO THE APPEAL

This appeal relates to the UK’s ability to deport the appellant, a Zimbabwean citizen, who, while lawfully resident here, has committed serious crimes. He seeks to challenge the order for his deportation by reference to article 3 of the European Convention on Human Rights (“**the Convention**”), which provides: “No one shall be subjected to torture or inhuman or degrading treatment or punishment”. He is HIV positive and wishes to argue that if deported to Zimbabwe he would be unable to access the medication which he receives in the UK and which prevents his relapse into full-blown AIDS.

The appellant was born in Zimbabwe in 1987. He came to the UK in 2000 and was later granted indefinite leave to remain. He was convicted of battery and a deportation order was made against him. He was detained pending deportation but was released. He was then convicted of offences including possession of a firearm and ammunition and sentenced to further imprisonment. While in prison, he applied to the Secretary of State to revoke the deportation order. He invoked his right to respect for private and family life under article 8 of the Convention and argued that his medical condition was relevant. His evidence was as follows. He had been diagnosed as HIV positive. He had later undergone antiretroviral therapy (“**ART**”), initially with a drug that caused intolerable side-effects but later with another drug, Eviplera, which had improved his condition without significant side-effects. Whether he could access ART in Zimbabwe was doubtful; without it, he would be prey to infections which could lead to his death. After considering the evidence, the Secretary of State refused to revoke the order.

The appellant appealed to the First-tier Tribunal and then the Upper Tribunal, relying each time on article 8. He conceded that, in the light of the House of Lords’ decision in *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296, his appeal could not succeed by reference to article 3. Before the hearing in his appeal to the Court of Appeal, the Grand Chamber of the European Court of Human Rights (“**the ECtHR**”) delivered its judgment in *Paposhvili v Belgium* [2017] Imm AR 867. The appellant formed the view that the judgment had expanded the scope of application of article 3 in cases like his and decided to seek a rehearing before a tribunal at which he could rely on it instead of article 8. He conceded in the Court of Appeal, however, that it was bound by the *N* case, even if that had become out of step with the ECtHR’s case-law as a result of *Paposhvili*. The Court of Appeal duly dismissed his appeal. He now appeals to the Supreme Court, asking it to depart from the *N* case by reference to *Paposhvili* and to remit his application for rehearing by reference to article 3.

JUDGMENT

The Supreme Court unanimously allows the appeal. It remits the appellant’s claim under article 3 to be heard by the Upper Tribunal (and, if practicable, by a panel including its President) on up-to-date evidence properly directed to the substantive and procedural requirements set out by the Grand Chamber of the ECtHR. Lord Wilson gives the only judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

In *D v United Kingdom* (1997) 24 EHRR 423, the ECtHR held that to remove a man who was on his deathbed to a state where no care was available for him would violate article 3; and it referred to the exceptional circumstances and compelling humanitarian considerations in his case [14]. In the *N* case, the House of Lords considered the ECtHR's decision in this case and others like it concerning article 3. It held that the test in such cases was whether the applicant's illness had reached such a critical stage that it would be inhuman to deprive him of the care he was receiving and to send him to an early death in the receiving state, unless there was care available there to enable him to meet it with dignity [15-17].

In *N v United Kingdom* (2008) 47 EHRR 39, the ECtHR held that, although there might be "other very exceptional cases in which the humanitarian considerations are equally compelling" to those in the *D* case, a high threshold for violation of article 3 should be maintained [18]. In *Paposhvili*, the ECtHR reconsidered what those "other very exceptional cases" were. It held (at para 183) that they should now be taken to include cases in which there were substantial grounds for believing that the applicant, while not at imminent risk of dying, would face a real risk in the receiving country of being exposed either to a serious, rapid and irreversible decline in health resulting in intense suffering, or to "a significant reduction in life expectancy" [22]. According to the Court of Appeal in the present case, the test for violation of article 3 following *Paposhvili* is no longer whether death is imminent in the removing state, but whether intense suffering or death is imminent in the receiving state because treatment is unavailable there [29]. The Court of Appeal was, however, mistaken in taking the ECtHR's phrase, "a significant reduction in life expectancy", to mean "the imminence of death" [30]. But what *does* the phrase mean? "Significant" here means "substantial": only a substantial reduction in life expectancy would reach the level of severity required by article 3. In addition, a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction [31].

In *Paposhvili*, the ECtHR also set out requirements (at paras 186 to 191) for the procedure to be followed in relation to applications under article 3 to resist return by reference to ill-health [23, 32]. One requirement is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, he or she would be exposed to a real risk of being subjected to treatment contrary to article 3. That is a demanding threshold for the applicant. His or her evidence must be capable of demonstrating "substantial" grounds for believing that it is a "very exceptional case" because of a "real" risk of subjection to "inhuman" treatment. He or she must put forward a case which, if not challenged or countered, would establish a violation of the article [32]. If the applicant presents evidence to that standard, the returning state can seek to challenge or counter it. *Paposhvili* states that, in doing so, the returning state must "dispel any doubts raised" by the evidence; but "any doubts" here should be read to mean any *serious* doubts [33].

The court should only refuse to follow a decision of the ECtHR in highly unusual circumstances, and there is no question of the court's refusing to follow *Paposhvili*. In the light of that judgment, the court should now depart from the decision of the House of Lords in the *N* case [34].

The appellant first raised his article 3 claim in the Court of Appeal and, having accepted that it could not succeed at that level, he did not present evidence to support it. It was inappropriate for the Court of Appeal to extract medical reports from the evidence submitted in support of his article 8 claim, which did not address the *Paposhvili* requirements [36]. The court should not now determine whether the reports cross the threshold required of an applicant under article 3 following *Paposhvili*. The proper course is to allow the appeal and to remit the article 3 claim to be heard on up-to-date evidence [37].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>