Medical Claims after *Paposhvili*

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Topics

- Consider the pre-*Paposhvili* situation

- What did *Paposhvili* decide?

- Post-*Paposhvili* case law

Article 3 Pre-*Paposhvili*

- A high threshold in Article 3
  - At domestic and ECHR level
  - *D v UK* (1997) 24 EHRR 423 an exception
  - *N v SSHD* [2005] 2 AC 296
  - *N v UK* 47 EHRR 885
  - *GS (India)* [2015] 1 WLR 3312

Article 8 Pre-*Paposhvili*

- Medical needs don't fall within scope of Article 8, but can be relevant to balance once other factors take individual within scope:

  – *MM (Zimbabwe)* [2012] EWCA Civ 279

  – *GS (India)* [2015] 1 WLR 3312

Suicide Risk Pre-*Paposhvili*

- Possibility of a claim:
  - *J v SSHD* [2004] EWCA Civ 629
    - Distinguish 'foreign' and 'domestic' risk
  - Criteria slightly adjusted by Sedley LJ in *Y v SSHD* [2009] EWCA Civ 362

Paposhvili: the Facts

- National of Georgia

- Living in Belgium

- Had chronic lymphocytic leukaemia

- Without a particular drug or transplant, he would die on return to Georgia within six months

- He had died by the time of the Grand Chamber hearing

Paposhvili – changing the law

Para 181:

"the application of article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in N v United Kingdom… has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision…"

Paposhvili – the New Test?

- See para. 183
- Applies to a person not at imminent risk of dying, but:

"real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, or 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"

Paposhvili – the New Approach

- Primary responsibility still for the domestic organs

- Consider the effect of removal on health

- The benchmark is not equivalence of treatment

- If serious doubts regarding the impact, returning state must obtain individual and sufficient assurances

- Receiving state being party to ECHR not determinative

- Belgium had failed to comply with procedural duty

Early consideration of *Paposhvili*

- *EA (Article 3 Medical Cases: Paposhvili Not Applicable)* [2017] UKUT 445 (IAC) – UT could not apply *Paposhvili* test; doubts the level of change

- Passing reference in *KE (Nigeria)* [2018] 1 WLR 2610, para. 52

The Court of Appeal Considers: *AM*

- Detailed consideration in *AM (Zimbabwe)* [2018] 1 WLR 2933

- Facts were not strong

- Court of Appeal bound by *N v SSHD*

- Change to Article 3 in ECtHR by *Paposhvili* is "very modest" (para. 37)

- No longer limited to deathbed cases, includes imminent intense suffering

Paposhvili and Article 8

- Considered in (PtA) decision of Court of Appeal in *SL (St Lucia)* [2018] EWCA Civ 1894

- *Paposhvili* was a case about Article 3; it does not take Article 8 any further

- Back on *MM (Zimbabwe)* and *GS (India)*

Paposhvili and Subsidiary Protection

- Decision of CJEU in C-353/16 *MP v SSHD*

- Concerns serious harm under Qualification Directive Art 15(b)

- Past history of torture not sufficient for subsidiary protection

- In MP's case, evidence that after-effects of ill-treatment "would be substantially aggravated", leading to serious risk of MP committing suicide if returned to Sri Lanka

C-353/16 *MP v SSHD*

- Qualification Directive to be interpreted in line with CFR, itself to be interpreted in line with Art 3 ECHR

- CJEU referred to *Paposhvili*, including para. 183

- Regarding subsidiary protection (para. 51):

"The risk of deterioration in the health of a third country national who is suffering from a serious illness, as a result of there being no appropriate treatment in his country of origin, is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection…"

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