

Welcome to Landmark Chambers'

**Supreme Court decision in AM (Zimbabwe) v
SSHJ – deportations, medical illnesses and Art
3 ECHR webinar**

The recording may be accessed [here](#).

Your speakers today are...



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Topic: What the
Supreme Court
decided



Philip Nathan
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Topic:
Implications for
future cases

AM (Zimbabwe): What came before



Philip Nathan

Pre-Paposhvili - Article 3

- Key Article 3 Caselaw summarised by Lord Wilson at [13] to [19] of Supreme Court Judgment in [AM \(Zimbabwe\) v SSHD \[2020\] UKSC 17](#)
- Desperately high and virtually unattainable threshold.
 - eg See Lady Hale in [N v SSHD \[2005\] 2 AC 296](#) at [69]
- Small shafts of light in [GS \(India\) v SSHD \[2015\] EWCA Civ 40](#) at [70] but not [65] and [66]. (see also [CA v SSHD \[2004\] EWCA Civ 1165](#) at [26])
- Twisted Irony given the ultimate fates of D and N.

Paposhvili v Belgium [2016] ECHR 1113

- The game changing paragraph 183 of [Paposhvili](#):

“The Court considers that the “other very exceptional cases” within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which 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.”

UT and Court of Appeal Respond to Paposhvili

- December 2016 - Palpable excitement and relief for all involved in these horribly difficult cases though sadly not Mr Paposhvili himself. However, wheels of Justice painfully slow. Why no leapfrog appeal?
- Instead, August 2017, [EA \(Article 3 Medical Cases – Paposhvili not applicable\) \[2017\] UKUT 445](#). No surprises
- Then January 2018, Sales LJ’s Judgment in [AM \(Zimbabwe\) v SSHD \[2018\] EWCA Civ 64](#), explained that the excitement was wrong and that Paposhvili relaxed the Article 3 test “only to a very modest extent”. Big surprise and 2 year wait for the appeal to the UKSC...

AM (Zimbabwe): What the Supreme Court decided



Yaaser Vanderman

AM (Zimbabwe) – Court of Appeal

- Court of Appeal:
 - “Clear” that *Paposhvili* relaxes the test “only to a very modest extent”: para 37. Only “a very modest extension”: para 39;
 - *Paposhvili* “plainly regarded [*N v UK*] as rightly decided”: para 40. Only “clarifying”: para 39(iv);
 - **New test**:
 - Art 3 not confined just to deathbed cases: para 38
 - BUT now includes real risk of being exposed to serious, rapid and irreversible decline in state of health resulting in:
 - Intense suffering; or
 - Significant reduction in life expectancy

AM (Zimbabwe) – Supreme Court

- **Substantive test**
- Accepted Court of Appeal's interpretation was wrong: para 30
- **Actual test** is:
 - Real risk of being exposed to:
 - Serious, rapid and irreversible decline in state of health resulting in intense suffering; or
 - Significant reduction in life expectancy.

AM (Zimbabwe) – Supreme Court

- What is “*significant*” reduction in life? (para 31)
 - Means “*substantial*”;
 - “...*death in the near future is more likely to be significant than any other reduction*”
 - “*near future*”? – reduction to 2 years life expectancy “*might well be significant*” for 24 year old but “*might well...not be*” for 74 year old

AM (Zimbabwe) – Supreme Court

- **Procedural steps**
 - Significant change: “*on no view...mere clarification*”: para 32
 - Previously:
 - Degree of speculation as to impact of removal on health counted against applicant: *N*. Had to prove extent and speed of deterioration as well as amount of treatment in receiving country;
 - Theoretical availability of medical treatment sufficient: *N*.
 - **Now:**
 - Degree of speculation counts in applicant’s favour. No need to show “*clear proof*”;
 - Theoretical availability insufficient. Will applicant actually get treatment?

AM (Zimbabwe) – Supreme Court

- **Procedural steps:**

1. A must raise prima facie case of potential infringement of Art 3: para 32. Evidence “*capable of demonstrating substantial grounds for believing*” breach:
 - Evidence of treatment in receiving country “*not without some credibility*” or there was “*no guarantee*”: *Paposhvili*, para 197;
2. Burden shifts to State: must dispel “*any serious doubts*” as to availability and accessibility of suitable treatment in receiving state: para 33;
 - General and specific situation in receiving country, cost and proximity of treatment, existence of family network: *Paposhvili*, paras 187 and 191
3. If doubts persist, individual and sufficient assurances: *Paposhvili*, paras 187 and 191

AM (Zimbabwe)

- [Savran v Denmark](#) (1 October 2019)
 - Applies *Paposhvili* test;
 - ECtHR finds breach of Art 3
 - S had paranoid schizophrenia
 - Daily ingestion of Clozapine, monitoring with blood tests and fortnightly injection of Risperidone. Both drugs available and free in Turkey;
 - But also needed regular contact person and overall supervision. Otherwise relapse and become dangerous. No evidence about those elements. Also no family network.
 - Strong dissent – pushing Art 3 door wide open. Which element of the test is satisfied?
- Going to Grand Chamber

Implications of AM (Zimbabwe)



Philip Nathan

AM (Zimbabwe) UKSC

- Congratulations to Charlie, Yaaser, HSF and the AIRE Centre for saving the day! Their impeccable and succinct written Case clearly reflected in Lord Wilson’s Judgment. That Judgment records, his now fellow Justice, Lord Sale’s interpretation as ‘unduly narrow’ and in another passage, his words as ‘too extreme’!
- In fairness to Lord Sales, his perceived restriction of Paposhivili does ring true with the flood gates concerns of earlier cases (eg Lord Brown at [89] and [90] of N v SSHD). Concerns rather sidelined by both ECHR and UKSC.
- “It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish “substantial grounds” to have to proceed to consider whether nevertheless it is “capable of demonstrating” them.” [32] Surely that is akin to the well known task under para 353?

Preparing Medical Cases Post AM (Zimbabwe)

- Medical Evidence – clearly critical! Existing Treatment? Consequences of withdrawal of treatment? Likelihood of treatment on return?
- Serious physical or mental illness may meet the threshold (Savran v Denmark [2019] ECHR 651).
- Individual must demonstrate a viable case [32] Once that established...
- Onus on SSHD to (i) “dispel any doubts raised by it”; (ii) “verify on a case-by-case basis”; (iii) consider the accessibility of treatment to the individual by to cost, family network and geographical location; and (iv) that if, following examination of the relevant information, serious doubts continued, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant.

Discretionary Leave or HP

- This longstanding issue settled by the CJEU in [MP v SSHD \[2018\] C-353/16](#)
- CJEU held not ‘serious harm’ within Article 15(b) unless *‘the individual faces a real risk of being **intentionally** deprived, in that country, of appropriate physical and psychological health care’*. Thus SSHD policy to grant DL upheld in most cases
- Note also [NO \(Afghanistan\)\[2016\] EWCA Civ 876](#)

Article 8

- [MM \(Zimbabwe\) \[2012\] EWCA Civ 279](#) at [23]
- [Akhalu \(Health Claim: ECHR Article 8\) v SSHD \[2013\] UKUT 00400](#)
- [Immigration Rule 276 ADE](#) and [Parveen v SSHD \[2018\] EWCA Civ 932](#) at [8] and [9]

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the chat section which can be found along the top or bottom of your screen.

Thank you for listening

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