



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21882/2016

THE IMMIGRATION ACTS

Heard at Field House
On 28 January 2019

Decision & Reasons Promulgated
On 15 March 2019

Before

UPPER TRIBUNAL JUDGE PITT
DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M A K
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer

For the Respondent: No appearance

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of India aged 54. On 5 May 2015 the appellant (hereafter the SSHD) decided to make a deportation order against him in view of his history of offending coupled with his poor immigration history. This was not the first time the SSHD had made a deportation order against him. The SSHD had served him with a deportation order on 21 February 2011. Following a request from his representatives in September 2011 to revoke his deportation order, on 4 October 2011 the

SSHD served a decision refusing to revoke the deportation order. However, his appeal against this decision was allowed by Judge Manuell of the First-tier Tribunal (FtT) on 5 March 2012 and he was granted six months Discretionary Leave. The claimant then made several unsuccessful applications for further leave to remain.

2. The claimant's appeal against the respondent's decision of 5 May 2015 came before Judge Havard of the FtT who, in a decision promulgated on 24 November 2017, allowed his appeal. The SSHD was successful in obtaining permission to appeal.

3. At the hearing before us there was no appearance by or on behalf of the claimant. Mr Whitwell said that his file held a note that the claimant had been staying in a homelessness unit in Swindon in the summer and had had contact with a Probation Officer.

4. Prior to the hearing before us, the Tribunal had contacted the last known contact address for the claimant, the Harbor Project in Swindon, asking them to confirm whether they knew if the claimant had been informed about the adjourned hearing listed for 28 January 2019 and if they could furnish his current address. In an email of 9 January 2019, Giles Matthews, Drop In Manager of the Harbor Project, confirmed that the project is the claimant's c/o address. Mr Matthews stated that the claimant had presented himself drunk on several occasions and that as a result they will no longer be admitting him. Mr Matthews stated that he had serious concerns for the claimant's welfare as he no longer seemed to have the capacity or will to refrain from alcohol. He noted further that the claimant no longer had representation as he had withdrawn his instructions to his solicitors, who were no longer operating anyway. He (Mr Matthews) stated that he had had discussions with the claimant's Probation Officer.

5. Having considered the evidence we decided to exercise our discretion to proceed with the hearing in the absence of the claimant. There was nothing to indicate that the claimant wished to participate at the hearing or be legally represented. We saw nothing to be achieved by further adjournment. Mr Whitwell then submitted that he was content to leave the matter of the appeal to the Tribunal.

6. The day after the hearing Mr Whitwell wrote to the Tribunal stating that it had come to his attention:

"that the [claimant] had been recalled (again) to HMP Bullington ... following his arrest for committing an act outraging public decency and for which he was sentenced for a period of 8 weeks imprisonment ending 11 February 2019".

Mr Whitwell said that these events may explain the claimant's non-attendance at the hearing the day before.

7. Having reviewed matters in light of this information, we have decided it does not cause us to alter our decision to proceed to determine the claimant's appeal on the basis of the materials before us. We continue to discern no reason to consider that the claimant intended to attend or be represented at the hearing before us, irrespective of his arrest and imprisonment.

8. The SSHD's grounds are three-pronged. It is contended that the judge erred in:

- (1) finding that the claimant had "... been lawfully resident in the UK for most of [his] life";
- (2) allowing the appeal on Article 8 grounds due to the claimant's claimed inability to obtain appropriate psychiatric treatment on return to India; and
- (3) in relying on the guidance of the Strasbourg Court in **Paposhvili v Belgium** (no.41738/10 GC) over binding domestic authorities.

Our Analysis

9. It is not in dispute that the claimant is a foreign criminal by virtue of being a persistent offender. His criminal history pre-2012 and post-2012 was set out by the judge at paragraphs 109 and 112:

- "109. At the time of the hearing before Judge Manuell in January 2012, the criminal record amounted to 30 convictions between 27 January 2004 and 11 August 2010 for 43 offences. The sentences imposed were mainly modest fines and short prison terms, the longest of which was for 16 weeks. No individual offence could be regarded as "serious" within the accepted definition of the gravity of criminal offending. The Appellant accepted that the underlying cause was his alcohol dependence. Indeed, on one occasion following sentence being imposed on 30 April 2009 the Appellant was required to undertake an alcohol and anger management course. Judge Manuell described the appellant's behaviour as a nuisance and a burden on the public purse but not so serious that he should now be "cast adrift" at a time the Appellant believed his life was due to improved and he had been in the United Kingdom for 27 years.
110. In his decision of March 2012, Judge Manuell accepted that the Appellant was sincere when he claimed that he had learned his lesson from his offending and was remorseful. Judge Manuell also based his decision on the fact that the Appellant had been free from alcohol for a significant period. The judge assessed the risk of the Appellant reoffending as low.

At paragraph 28 of his decision, Judge Manuell said as follows:

"Taking all of these matters into account as best it can, the tribunal has concluded that the proportionality balance under paragraph 390 and under Article 8 ECHR is in favour of the Appellant on the facts found. The appeal is allowed. That is not to say however, that the Appellant would not become a candidate for a fresh deportation order in the event that he commits further criminal offences. He will no doubt bear in mind that his future is in his own hands".

112. On 28 May 2012 i.e. just under three months from the decision of Judge Manuell being promulgated, the Appellant pleaded guilty at South London Magistrates Court to an offence of being drunk and disorderly. He committed the same offence in August 2012. Indeed, since March 2012, despite the assurances given to the tribunal at the hearing in January 2012, the PNC check shows that the appellant has appeared in various magistrates courts located in the London area on no less than 19 occasions. However, all the offences appear to be alcohol-related, the Appellant pleads guilty on each occasion, and the most significant sentence imposed is a term of imprisonment of 14 weeks. Nevertheless, this related to an appearance before South East London Magistrates on 6 April 2017."

Ground (1)

10. As regards ground (1), we would first of all observe that the judge allowed the claimant's appeal on three separate bases. The principal basis was because it was considered that the claimant fell within paragraph 399A and Exception 1 of s.117C(4) of the NIAA 2002 because he had established the three-fold test these provisions lay down of having been "lawfully resident in the UK for most of his life"; being "socially and culturally integrated in the UK"; and being able to show "there would be very significant obstacles to his integration into the country to which it is proposed he is to be deported (paragraphs 118-125). The second basis, in the alternative, was that even if he had found that the claimant fell within the permitted exceptions to deportation, he was satisfied that there were very compelling circumstances outweighing the public interest in the claimant's deportation (paragraphs 126-129). The third basis was that the deportation decision would be a violation of the claimant's Article 3 right not to be ill-treated and also his Article 8 right to respect for private and family life.

11. Focussing on the judge's treatment of the issue of whether the appellant met the conditions of paragraph 399A and Exception 1 of s.117C(4), we are persuaded that this treatment proceeded on an erroneous basis. At paragraphs 118-121 the judge stated:

"118. I find that the Appellant has been lawfully resident in the UK for most of his adult life. He has been here for 31 years which represents the entirety of his adult life. In 1989, he applied for leave to remain on a basis which Judge Manuell found to have prospects of success and he had made subsequent applications which have been successful and in-time. I repeat the findings of Judge Manuell. Furthermore, in respect of the position post-March 2012, I find that the Appellant has endeavoured to take such steps as are necessary to remain lawfully in the United Kingdom.

119. On 25 March 2013 and 24 May 2013, the Appellant submitted applications for leave to remain but they were rejected due to no fee being submitted but I accept Ms Hooper's submission and find that the Appellant was simply unable to afford the fee.

120. However, following a successful application for Judicial Review, the Appellant submitted a further application for leave to remain on 16 October 2013 which was accepted. With effect from 27 January 2014, the Appellant was granted six months discretionary leave until 27 July 2014.

121. On 23 July 2014, the Appellant submitted an application for further leave to remain but this application remains outstanding."

12. Contrary to what these paragraphs assert, the claimant did not have lawful status for the period from October 1989 - 19 September 2012 (on the latter date, he was granted six months Discretionary Leave until 20 March 2013). The correct particulars of the claimant's immigration history are as follows. Prior to 24 October 1989 he was an illegal entrant. After he had been detained in June 1989 as an illegal entrant, his claim to have been granted leave to enter under a court permit was found to be unsubstantiated. It is not entirely clear how long he had been in the UK prior to June 1989 (as he had been removed from the UK on 22 March 1984 when he attempted to gain entry as a visitor), but it is wholly clear that he had no lawful status when apprehended in June 1987. On 24 October 1984, when his representatives made an application on his behalf for leave to remain on compassionate circumstances based on the fact that his girlfriend was pregnant, the

claimant had no extant leave. Therefore the fact that he subsequently made an application for leave had no impact on the unlawfulness of his immigration status thereafter (we would observe that in any event that the application he made in 1987 appears to have lapsed due to her own failure to respond to Home Office requests for further information and to attend interviews). We do not understand Judge Manuel to have made a finding that the appellant had been lawfully resident prior to September 2012, as all he found was that the appellant's application had prospects of success, but even if he had made such a finding, it would have been an incorrect one. Even in relation to the appellant's short period of lawful stay (comprising a grant of six months Discretionary Leave on 19 September 2012), this expired on 20 March 2013 and he did not submit an application for further leave to remain until 25 March 2013. The only further period of lawful stay was on 27 January 2014 when he was granted six months Discretionary Leave until 27 July 2014. We accept that he then submitted an in time application for further leave to remain on 23 July 2014, which remains outstanding, but that at best helps in covering his status between July 2014 to the present.

13. It can be seen that the great majority of the claimant's stay in the UK has been unlawful. Accordingly the judge erred in law in finding otherwise. The judge should not have allowed the appeal on the basis that the claimant fell within the deportation exceptions set out in paragraph 399A and s.117C(4).

14. However, the judge also allowed the appeal on Article 3 grounds as well as on the basis of very compelling circumstances under Article 8. Unless the SSHD can establish that these latter bases for allowing the appeal were also vitiated by legal error, we cannot conclude that any error of law has been material.

15. It is convenient to deal with the Article 8 issue raised in ground (2) only after dealing with the challenge to the judge's treatment of Article 3.

Ground (3)

16. Ground (3) is drafted in narrow terms. It seeks to identify error on the part of the judge in applying the guidance given by the ECHR in **Paposhvili**. At the time the SSHD's grounds were drafted there was a cogent reason for considering that superimposition of such guidance on UK case law embodied a legal error, as that is what the Tribunal had held in **EA & Ors (Article 3 medical cases - Paposhvili not applicable: Afghanistan)** [2017] UKUT 445 (07 August 2017). However, the reasoning in that reported decision was clearly disapproved by the Court of Appeal in **AM (Zimbabwe)** [2008] EWCA Civ 64.

17. At this point we must advert again to the narrow terms in which this ground is framed. It does not seek to challenge the judge's assessment of the claimant's Article 3 circumstances as such, only their reliance on the guidance given in **Paposhvili**. The upshot is that there is no effective SSHD challenge to the judge's decision to allow the appeal on Article 3 grounds and in particular no challenge to the opinion of Dr Briffa and no challenge to the judge's finding that if returned there is a "real risk of [the claimant] committing suicide". It is appropriate at this stage to set out in more detail the judge's assessment of Article 3 as applied to the claimant's case.

18. The judge set out the medical evidence at paragraphs 100-106 as follows:

- “100. There is now evidence in the form of medical records, medical reports, psychiatric reports, and documents from those involved in arranging for accommodation for the Appellant which post-date his last appeal. They illustrate and confirm that, even though there may not have been evidence produced at the hearing in January 2012, there is a longstanding history of mixed anxiety and depression with a secondary diagnosis of alcohol dependence.
101. The comprehensive psychiatric report of Dr Briffa, outlines in considerable detail the Appellant’s history. I have considered the details of Dr Briffa’s qualifications and experience in providing expert evidence as to the psychiatric condition of the Appellant. I am satisfied that she is an expert qualified to express an opinion with regard to the Appellant’s state of mental health. As stated, Ms Rushforth accepted that she did not take issue with the content of Dr Briffa’s report and the conclusions and opinions expressed within it.
102. I find that the Appellant is taking the following medication in an attempt to treat his condition: Mirtazapine, Olanzapine, Thiamine, and this is confirmed by Dr Briffa as being appropriate.
103. Dr Briffa confirmed that the Appellant, ‘has an existing high risk of completed suicide’. She goes on to say ‘[the claimant’s] unresolved immigration status and fear of removal, is one contributory factor towards his existing risk of suicide. In my opinion, if [the claimant] is faced with certain removal, I agree with [the claimant], that he will be at a high risk of suicide. Mr Kumar expressed that life would not be worth living in a situation of removal, and has a history of serious attempted suicide amongst other risk factors (not exhaustive) for suicide including ongoing suicidal thinking, depression, anxiety, alcohol dependence, unemployment, no fixed abode currently and social isolation.’
104. At paragraph 7.30, Dr Briffa says, ‘it is also important to note that mental health or alcohol treatment cannot remove the risk of suicide if [the claimant] is faced with removal. [The claimant] has particular fears associated with removal based on his reality and not amenable to treatment. [The claimant’s] reality is that he has nothing to return to in India, no home and no family.’
105. At 7.32, Dr Briffa says, ‘it is my opinion that [the claimant] would remain at risk of suicide, accidental death, alcohol dependence and mental ill health, in India also. [The claimant] could not identify any protective factors available in India that would reduce his risks of suicide, accidental death, alcohol dependence or mental ill health. In fact, [the claimant’s last knowledge of Indian mental health services in the 1980s was positively harmful – degrading physical containment and punishment in response to mental distress his father experienced’.
106. Finally, Dr Briffa did not consider that the Appellant was exaggerating his symptoms.”
19. Significantly at paragraph 107 the judge noted that the HOPO “confirmed very fairly that she did not dispute the contents or the opinions [Dr Briffa] expressed.”
20. The medical evidence led the judge to conclude at paragraphs 137-138:
- “137. It is clear from the evidence of the Appellant and also the expert evidence of Dr Briffa that there is a real risk of the Appellant committing suicide if he were to return to India. The assessment of Dr Briffa suggests that the Appellant is seriously ill to the extent that he has chronic anxiety and depression. I take

account of Paposhvili where it says that it is not the lack of medical infrastructure in India nor any obligation for the United Kingdom to alleviate the disparities between its healthcare system and the level of treatment existing in India which is material. The responsibility that is engaged under the Convention in cases such as the Appellant's is that of the United Kingdom on account of an act, which in this instance would be the Appellant's deportation, which would result in an individual being exposed to a risk of treatment prohibited by Article 3.

138. In exercising my judgment, I find that the act of deporting the Appellant, taking account of his mental illness and the real risk of him committing suicide, would amount to exposing him to a risk of treatment prohibited by Article 3."

21. It can be seen, therefore, that as regards this assessment of the claimant's Article 3 circumstances SSHD's grounds makes no substantive challenge.

22. Further, even if we had considered there was an effective ongoing issue raised by the SSHD's grounds concerning the precise application of Paposhvili to the facts of the claimant's case (for example on the possible basis that that the real risk he faced was still not imminent) , on the accepted medical evidence and unchallenged findings of the judge the claimant was at real risk of committing suicide. For the judge to conclude that such a risk meant that the decision was contrary to Article 3 was entirely consistent with the principles set out at I v SSHD [2005] EWCA Civ 629; indeed, to have decided otherwise, would have been contrary to authority.

23. Before returning specifically to Ground (2), we have also considered whether, although framed in the context of an Article 8 challenge, the key point raised in Ground (2) (namely that it was wrong of the judge to allow the appeal under Article 8 on the footing that the claimant would be unable to obtain appropriate psychiatric treatment on return to India) is capable of being read as meaning to make the same point in relation to the judge's Article 3 assessment. We have concluded that the ground cannot be read in this way; it very specifically identifies itself as an Article 8 challenge. In any event, as already noted, the SSHD's grounds do not challenge the medical evidence and on the basis of the opinion of Dr Briffa, there were clearly sound reasons for concluding that the claimant would not be able to benefit from mental health services in India, namely his own previous adverse experience of them: see our paragraph 18 above. At paragraph 128 the judge found both that there was a "high risk of suicide" and that there was "inability [on the part of] the claimant to seek the necessary support and treatment..."

24. Certainly we are not prepared to deviate from our conclusions regarding Ground (3) on the basis of what could at best be described as a collateral challenge making no criticism of the medical evidence regarding the claimant's likely situation on return to India.

Ground (2)

25. We now revert to ground (2). In light of what we have just concluded, this ground clearly cannot succeed on its own, since, having allowed the appeal on Article 3 grounds, the fact that the judge also allowed it on Article 8 grounds was of academic significance, but in any event, was clearly justified on the basis that a real risk of ill-treatment clearly constitutes a disproportionate interference with the right to respect for private life.

26. We would also observe that even if we had found that the judge's treatment of Article 3 was legally flawed because of some misunderstanding of the legal guidance to be applied in Article 3 health cases, we would still have had to recognise that the judge's assessment of the claimant's Article 8 circumstances was clearly and properly heavily influenced by the state of the claimant's mental health, on the basis of unchallenged medical evidence. Indeed, even if we had found a material error of law and so being tasked, *inter alia*, with assessing the claimant's Article 8 circumstances on their merits, we would have found ourselves having to address the same difficulty as did Judge Havard, namely that the opinion of the medical expert in this case had not been challenged. As noted immediately above, the evaluation of Dr Briffa also addressed the issue of whether the claimant would be able to access mental health treatment on return to India and this evaluation stands unchallenged. As paragraph 128 the judge's conclusions were that "the high risk of suicide and the inability of the claimant to seek the necessary support and treatment represent very compelling circumstances which outweigh the public interest in the [claimant's] deportation".

27. The conclusion of our foregoing analysis is that we cannot conclude that the judge's error regarding the claimant's history of lawful residence was material because in light of the accepted medical evidence and opinion that the claimant was at real risk of committing suicide if returned, the judge would still have been obliged to allow the appeal on human rights grounds.

28. For the above reasons we conclude that although the judge erred in evaluating the claimant's history of lawful stay, the decision of the FtT judge to allow the appeal on Article 3 and 8 grounds has not been shown to disclose a material error of law. Accordingly, the decision of the judge must stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 28 February 2019



Dr H H Storey
Judge of the Upper Tribunal