



**Upper Tribunal
(Immigration and Asylum
Chamber)**

Appeal Number: PA/04457/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 27 October 2021**

**Decision & Reasons Promulgated
On 19 November 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**HK (SYRIA)
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Presenting Officer

For the Respondent: Ms M Butler, instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. On 4 May 2021, the First-tier Tribunal (Judge Moore) allowed HK's appeal against the Secretary of State's refusal of his human rights claim. The Secretary of State appeals, with permission granted by the FtT (Judge Andrew) against that decision.
2. In order to avoid confusion, I shall refer to the parties as they were before the FtT: HK as the appellant and the Secretary of State for the Home Department as the respondent.

Background

3. The immigration history given in the respondent's decision states that the appellant was 'encountered in a vessel in the English channel' on 9 May 2020. He was brought to shore and detained, whereupon he claimed asylum. The following day, a Eurodac search revealed that he had claimed asylum in Spain on 20 January 2020.
4. The appellant was released on bail whilst Take Back requests were made under the Dublin Convention. On 23 June 2020, Spain accepted responsibility for considering the appellant's protection claim. On 25 June 2020, the appellant's claim was refused and certified on safe Third Country grounds. On 14 August 2020, he was detained for the purpose of facilitating his removal to Spain. On 23 August 2020, submissions were received from the appellant's former representatives, contending that his removal to Spain would be contrary to the ECHR. It was contended, in broad outline, that the appellant's removal would be unlawful under section 6 because he would be destitute and would encounter conditions contrary to Article 3 ECHR in Spain and that his separation from his family in the UK would be contrary to Article 8 ECHR.
5. On 25 August 2020, the respondent refused the appellant's human rights claim in a letter of 120 paragraphs. It was not accepted that the appellant had rebutted the strong evidential presumption, established by domestic and Strasbourg authority, that Spain would not discharge its obligations to asylum seekers in a Convention-compliant manner. The respondent cited evidence concerning the measures in place in Spain to provide for asylum seekers generally and in relation to the prevention and spread of Covid-19. It was not accepted that the appellant was able to meet the Immigration Rules in any respect. It was not accepted that the appellant enjoyed a protected family life in the UK or that his removal would otherwise be unlawful under section 6 of the Human Rights Act as being in breach of Article 8 ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the FtT. In the notice of appeal, it was made clear that the appellant had been removed from the United Kingdom following an unsuccessful application for injunctive relief in the High Court. Given the certification of the case (which prevented the appellant from appealing before his removal), the file was referred to a Duty Judge to consider whether the Tribunal had jurisdiction to consider the appeal. On 12 January 2021, Judge Kelly (acting in that capacity) ruled that the appellant had been entitled to appeal as he had left the UK. Judge Kelly reminded the parties that the appeal was against the refusal of the appellant's human rights claim and not against his removal to Spain.
7. So it was that the appeal came before Judge Moore ("the judge"), sitting at Taylor House on 21 April 2021. The appeal was heard remotely, by CVP. The appellant was represented by Ms Butler, as he was before me. The respondent was represented by a Presenting Officer. The appellant was able to join the hearing, as were his siblings. They each adopted their witness statements and were

tendered for cross-examination but the Presenting Officer asked no questions of any of them. The judge therefore heard submissions from the advocates before reserving his decision.

8. In his reserved decision, the judge found that the refusal of the appellant's human rights claim was in breach of Article 3 ECHR. He did not go on to consider the alternative claim under Article 8 ECHR. Having summarised the competing submissions before him, he gave reasons for his decision at [22]-[33]. Those reasons may be summarised as follows.
9. The judge took into account the fact that the appellant's claim in the High Court had been unsuccessful but he noted that the court was seemingly unaware of the appellant's mental health problems: [22]. He noted that the appellant had refugee siblings in the UK: [23].
10. The judge considered the extensive medical evidence before him at [24]-[25]. He focused particularly on a report by Dr Nuwan Galappathie, a Forensic Psychiatrist who had been a Consultant since 2009. Dr Galappathie had conducted a video assessment of the appellant when he was in a refugee camp in Germany. He considered that the appellant was suffering from Post-Traumatic Stress Disorder, a severe episode of depression and generalised anxiety disorder. These conditions were caused or fuelled by the appellant's own treatment in Syria and the situation of his wife and children there. Dr Galappathie opined that the appellant needed the support of his siblings in the UK and that he would benefit from a range of psychiatric treatment: [24]. In the event that the appellant had the stability which his siblings in the UK could provide, Dr Galappathie opined that the appellant would steadily improve, whereas his continued presence in Germany would lead to worsening mental health problems and an increased risk of suicide: [25].
11. At [26], the judge described the appellant's travel to the United Kingdom via Lebanon and Spain and at [27], he recalled that the appellant had been removed to Spain on third country grounds on 3 September 2020. He also considered what had been said in a note verbale from the Spanish authorities, who accepted that there had previously been a mistake in the arrangements made for the appellant's care. There had been press coverage about such mistakes being made in Spain and people, including the appellant, being rendered destitute as a result. These circumstances, which predated the note verbale, had caused Ouseley J in a subsequent application for judicial review to issue an injunction preventing the removal of asylum seekers to Spain. It was these circumstances which had caused the appellant to leave Spain and to travel to France, Belgium and Germany. He was street homeless in Germany at the date of the hearing: [28].
12. At [29], the judge reminded himself of what had been said by the House of Lords in N v SSHD [2005] UKHL 31; [2005] Imm AR 353 and the Supreme Court in EM (Eritrea) v SSHD [2014] UKSC 12; [2014] Imm AR 640 and AM (Zimbabwe) v SSHD [2020] UKSC 17; [2020] Imm AR 1167. At [30], the judge concluded that the appellant was at real risk of homelessness and destitution in Spain. In reaching that conclusion,

the judge took into account the opinion of the appellant's country expert, Dr Garcia, which was that the appellant might well be street homeless in Spain for between four and six months as a result of the significant lack of asylum accommodation there. Having returned to Dr Galappathie's report at [31], the judge reached the following conclusion:

[32] Bearing the above in mind, this appellant would not be able to access effective treatment until he is reunited with his family, and therefore, and protection which Spain might be able to offer would not be effective in reducing the risk of suicide. If the appellant was to return to Spain as a result of this appeal being dismissed it is highly likely [sic] that he would face a protracted period [sic] street homelessness. His very poor mental health would further deteriorate and the appellant would face a real and immediate risk of suicide. In essence, this appellant it would seem from the evidence before me, would not be able to recover from his trauma or integrate into Spanish society, since he would be destitute and street homeless on return and his severe mental health problems would deteriorate in the absence of familial support and safety in the United Kingdom, and in such circumstances there would sadly be a real risk of suicide.

The Appeal to the Upper Tribunal

13. The respondent's grounds of appeal, which were not settled by Mr Lindsay, are spread over two pages. There are two sub-headings, which indicate that the respondent's complaints are that the judge misdirected himself in law and that he failed to provide adequate reasons for his conclusion. The first of those grounds appears to contain two submissions. The first is that the judge failed to apply the high threshold applicable in such cases. The second is that the judge erred in placing weight on the report of Dr Galappathie. The reasons challenge in ground two is that the judge failed adequately to reason his conclusion that the appellant would be at risk of suicide on return to Spain.
14. Before I heard from Mr Lindsay, I expressed the view that the respondent's grounds were somewhat diffuse. He agreed, and indicated that his submissions were only to focus on the judge's treatment of the appellant's risk of suicide.
15. The judge had erred, Mr Lindsay submitted, in accepting the report of Dr Galappathie uncritically, particularly when it was clear from the judge's decision that the Presenting Officer had made submissions undermining the doctor's conclusions. A further error was that the judge had failed to consider the risk of suicide by reference to the principles in J v SSHD [2005] EWCA Civ 629; [2005] Imm AR 409, which made clear that the threshold in such cases was a particularly high one. Mr Lindsay abandoned the remaining points taken in the grounds of appeal.

16. In response, Ms Butler noted that the challenge based on J v SSHD had not been prefigured in the grounds of appeal. In any event, she submitted that the Secretary of State sought to mount what was essentially a credibility challenge, whereas she had not sought to ask the appellant any questions about his mental health before the judge. It was wholly unclear what had been said by the respondent's representative about Dr Galappathie's report and she had not established that the judge had erred in failing to take material matters into account in that respect. The Secretary of State failed, Ms Butler submitted, to appreciate the precise basis upon which the judge had found in the appellant's favour. The judge had drawn on the report from Dr Galappathie and the report from the country expert in coming to the conclusion that the appellant would be exposed to conditions which would be contrary to Article 3 ECHR. Insofar as the respondent sought to submit that the judge had misunderstood the threshold in such cases, it was clear from MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC) that J v SSHD, cited by Mr Lindsay, imposed no additional hurdle beyond that which was clearly understood by the judge. He had proceeded on the basis that there was an exceptionally high threshold but he had found that threshold to be reached on the basis of the evidence before him. He was entitled to do so and the respondent merely sought to disagree with his conclusions.
17. Mr Lindsay did not reply. I reserved my decision.

Analysis

18. For the reasons which follow, I come to the clear conclusion that Ms Butler's submissions are to be preferred and that the respondent's appeal should be dismissed.
19. Insofar as Mr Lindsay submitted, rather faintly, that the judge erred in failing to evaluate criticisms of Dr Galappathie's report which were made by the Presenting Officer, that point falls at the first hurdle. Mr Lindsay was unable to shed any light whatsoever on the submissions which might or might not have been made by the Presenting Officer. He speculated that the submission might have been that there was no evidence before the Secretary of State of any mental health problems and that the appellant had subsequently hoodwinked Dr Galappathie.
20. There is simply no evidence that this point (or any specific point, for that matter) was taken by the respondent's representative. In any event, as Ms Butler pointed out in her excellent submissions, the point taken amounts to a challenge to the appellant's credibility. If it was to be submitted that the appellant was a malingerer who had fraudulently persuaded an eminent Consultant that he was suffering from a range of mental health problems, that was a point which the respondent was bound to put to him. It is quite clear, however, that the respondent's representative chose to put no questions to the appellant.
21. In the absence of any witness statement or even a note from the Presenting Officer, Mr Lindsay relied on the fact that the judge had noted a submission at [15] of his decision that there was 'no reliable evidence' as to the appellant's mental health condition and that the

judge had also noted that the Presenting Officer had made 'further submissions' which were not rehearsed or considered in his decision.

22. The first of these submissions amounts to nothing, in the absence of any specific criticism of Dr Galappathie's report. Mr Lindsay's reliance on the 'further submissions' which were apparently made by the Presenting Officer assumes too much. It assumes, in particular, that these additional submissions were directed to the weight which could properly be attached to Dr Galappathie's report. There is, in reality, no proper basis upon which I could conclude that the judge failed to evaluate any submissions made by the respondent about that report. In the absence of a good and objective reason for discounting the evaluation of a properly qualified expert, the appropriate course was for the judge to accept what was said: Y & Z (Sri Lanka) v SSHD [2009] EWCA Civ 362; [2009] HRLR 22, at [12]. That is what he did, and he did not err in law in doing so.
23. Mr Lindsay's second point, also made rather tentatively, was that the judge had applied a lower threshold than that required by the authorities in such a case. He submitted that the judge should have considered what was said in J v SSHD about the risk of suicide. He noted, in particular, that the court had stated at [28] that the threshold in such a case is particularly high and even higher where the alleged ill treatment is not the direct or indirect responsibility of the public authorities of the receiving state.
24. I accept Ms Butler's submission that this point is not made squarely in the grounds. Given the rather vague references to the threshold which is made in the grounds, however, it is better to resolve the submission on its merits rather than dismissing it on procedural grounds.
25. The point, with respect to Mr Lindsay, is misconceived. The judge was plainly well aware of the N v SSHD threshold, since he cited that authority in his decision, alongside what had subsequently been said in AM (Zimbabwe). As the Upper Tribunal has recently explained at [120] of MY (Palestine), the Court of Appeal did not seek to suggest in J v SSHD that there was a higher threshold in a suicide case as compared to a case concerning physical ill-health. What was said by Sir John Dyson, in giving the judgment of the court in that case, instead represented an amplification of the test stated by the House of Lords in N v SSHD. Since the judge clearly had that threshold well in mind, it cannot properly be suggested that he misdirected himself in law.
26. In any event, as Ms Butler submitted, this is not a case in which the judge allowed the appeal solely on account of the risk of suicide. The reasoning process which led to his decision rested on several more planks. He was concerned about the likelihood, supported by the country expert, that the appellant would find himself homeless and destitute in Spain for a second time. He was concerned that the appellant would be deprived of the familial support which Dr Galappathie stated (unchallenged) that he required. And he was concerned, also in light of the country expert's opinion, that the appellant would not be able to receive the treatment that he requires in Spain.

27. The core test applied by the judge was therefore demonstrably loyal to the decision of the House of Lords in N v SSHD and the approach that he adopted in relation to the likelihood of the appellant receiving appropriate treatment or support was demonstrably loyal to the decision of the Supreme Court in AM (Zimbabwe). If anything, the only real challenge which might properly be made to the judge's decision is his reference to N v SSHD, given that the threshold in that decision has been reduced or modified by the Supreme Court to reflect what was said in Paposhvili v Belgium [2017] Imm AR 867. Of course, if the judge did err in that respect, it is an error which could only have benefited the respondent.
28. In the circumstances, I do not accept that the judge erred in law in reaching the decision he did. He was entitled to attach weight to the expert evidence before him and his decision does not indicate that he applied too low a threshold to his consideration of the appellant's likely situation upon removal to Spain.

Notice of Decision

The Secretary of State's appeal to the Upper Tribunal is dismissed. The FtT's decision to allow the appeal on Article 3 ECHR grounds therefore stands.

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 his 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. I make this direction because the appellant is an asylum seeker.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 November 2021

