

2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and OS as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. For the reasons we explain below, we have decided that the First-Tier Tribunal's decision in respect of Article 3 ECHR contained a material error of law and that the appeal should be remitted to the First-tier Tribunal for hearing de novo. For the reasons set out herein that remittal also requires the First-Tier Tribunal to consider the appellant's claim relying upon Article 8 ECHR.

Use of the video platform

4. The hearing was conducted as a remote hearing which we attended from Field House and to which both parties consented. A face-to-face hearing was not held because it was not practicable in the circumstances of the pandemic and all issues could be determined in a remote hearing. We did not experience any difficulties with this form of hearing and neither party expressed any concern with the process.

Immigration History

5. The appellant is a citizen of Jamaica, born on 22 November 1959. His immigration history in the UK is lengthy and complex but we summarise the key elements below.

6. The appellant first arrived in the UK on 26 November 1997 as a visitor and was granted an extension of stay as a student until 30 April 1999. Thereafter he overstayed and next came to the attention of the immigration authorities when caught working illegally on 28 January 2003. He claimed asylum. His claim was refused and his appeal against the refusal decision was dismissed on 30 June 2003. He became appeal rights exhausted on 18 July 2003.

7. Between 2004 and 2010 the appellant was convicted of various relatively minor criminal offences, for which the maximum sentence he received was three-months' imprisonment.

8. In response to a request for information from the Home Office, the appellant provided details of his relationship with his partner and in November 2010 he made an application for leave to remain and human rights representations. He also made protection-based submissions which were rejected under paragraph 353 of the immigration rules. Following judicial review proceedings, the appellant's submissions were eventually considered as a human rights claim which, when refused, gave rise to a right of appeal. His appeal was dismissed on 24 June 2011 and he became appeal rights exhausted on 27 July 2011.

9. The appellant then made various further submissions on Article 3 and 8 grounds which were rejected under paragraph 353, but again, following judicial review proceedings, he was eventually issued with a refusal decision which gave rise to a right of appeal. His appeal was allowed on 26 October 2012 on

Article 8 private life grounds by First-tier Tribunal Judge Herbert and he was granted a period of leave to remain until 25 April 2015.

10. The appellant was subsequently convicted, on 10 September 2013, of seven counts of theft from a person, for which he was sentenced to 12 months' imprisonment. As a result of his conviction the appellant was served with a liability to automatic deportation notice on 11 October 2013 and with a decision to deport him on 24 March 2015. He made an application for leave to remain on the basis of his family life and his ill-health. A deportation order was signed on 8 October 2015 and his application for leave was refused with a right of appeal on 13 October 2015. His appeal against that decision was dismissed on 20 May 2016 by First-tier Tribunal Judge Phillips and he became appeal rights exhausted on 21 December 2016.

11. Judicial review proceedings were commenced to challenge the refusal of permission to appeal this decision to the Upper Tribunal. Upon refusal of that claim permission was sought to appeal to the Court of Appeal. Removal directions which had been set were withdrawn to enable the appellant to await the outcome of that application for permission which was in turn refused by the Court of Appeal on 5 December 2017.

12. The appellant's representations made in the context of the judicial review application were treated by the respondent as an application to revoke the deportation order previously made, together with a human rights claim. It was claimed that the appellant's deportation to Jamaica would breach his Article 3 and 8 human rights. With regard to the former, medical evidence was produced to confirm that the appellant was suffering from severe depression with psychosis, triggered by the death of his partner in 2010, and confirming that he had been hospitalised under the Mental Health Act and was in hospital as recently as June/ July 2016 with depression with psychotic symptoms, triggered on that occasion by the dismissal of his appeal. It was claimed that he was a vulnerable individual with a serious mental health condition and was likely to commit suicide if returned to Jamaica where he had no family or friends or support network. Reliance was placed on the recent case of Paposhvili v Belgium [2017] Imm AR 867. The appellant also relied on Article 8 rights in relation to his claimed relationship with his partner, JH, and his son, JS.

13. The respondent made a decision on 3 October 2018 refusing the appellant's protection and human rights claim, maintaining the decision to deport him and refusing to revoke the deportation order previously made.

14. The appellant appealed against that decision and that is the appeal giving rise to these proceedings. His appeal was heard in the First-tier Tribunal by Judge Clarke ("the judge") on 18 February 2019.

15. The key points to note at this stage from the judge's decision are that:

- a. The judge found that the appellant could not meet the private life exception to deportation because he had not been lawfully resident

in the UK for more than half his life and he was not socially and culturally integrated into life in the UK;

- b. The judge accepted that the appellant and JH had a genuine and subsisting relationship although they did not meet the definition of 'partners';
- c. The judge did not accept that the appellant had a genuine and subsisting relationship with his now two children as he did not accept that there was a parental relationship, albeit that he was involved in their lives. However he also decided that even if there was a genuine and subsisting relationship, it would not be unduly harsh for the appellant's partner and children to remain in the UK without him or for them to accompany him to Jamaica. ;
- d. The judge did not accept that the appellant had no extended family or friends in Jamaica who could help him and his family settle there;
- e. The judge found that the appellant met the test in Paposhvili and AM (Zimbabwe) & Anor v The Secretary of State for the Home Department [2018] EWCA Civ 64 of facing a real risk 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*" on account of his mental health condition and his inability to access medication and support in Jamaica. Accordingly, the appeal was allowed on Article 3 grounds.

16. Both the Secretary of State and the appellant sought to appeal against the judge's decision: the Secretary of State against the decision under Article 3 and the appellant against the Article 8 decision.

17. The Secretary of State's grounds of challenge were that the judge had not applied the correct legal test as set out in N v UK [2008] 47 EHRR 885 and had not given due consideration to the high threshold to be met in establishing an Article 3 case on medical grounds. The grounds asserted that there was no suggestion that treatment would not be available to the appellant and that the medical reports relied upon by the judge did not reach the high threshold set by Article 3. The grounds also challenged the weight given by the judge to one of the expert reports who had no expertise in the provision of mental health services in Jamaica.

18. The appellant's grounds of challenge to the Article 8 decision were that the judge had erred by applying the wrong test to whether the appellant had a genuine and subsisting parental relationship with his children and had irrationally concluded that he did not, and that the judge had failed to take account of the appellant's mental health problems when assessing whether his deportation would be unduly harsh on his children and when concluding that it would not be unduly harsh for the appellant's partner and children to accompany him to Jamaica.

19. The First-tier Tribunal refused permission to appeal to both parties, but permission was granted in the Upper Tribunal on 4 July 2019. That permission was granted by Upper Tribunal Judge Keith on all grounds, but specifically noted that the judge arguably erred in law in his reasoning about the evidence from the country expert. Upper Tribunal Judge Keith commented that on the one hand the judge noted that the expert cannot speak on the issue of mental health provision in Jamaica; on the other hand in making findings the judge quoted extensively from the expert on what is arguably that very issue. It was unclear how the judge had resolved these two potentially contradictory positions.

20. The case then came before Upper Tribunal Judge Dawson and Upper Tribunal Judge Mandalia sitting as a panel on 23 August 2019. The panel concluded that the judge had erred in concluding that the appellant did not have a genuine and subsisting parental relationship with his two children and that, since the judge had also failed to take into account the appellant's mental health when assessing the undue harsh question, the error was material.

21. As for the judge's Article 3 decision, the panel found that he had erred by wrongly taking the Court of Appeal decision in AM (Zimbabwe) to be a shift in the law away from N, following Paposhvili. The panel found further that the judge had erred by failing to give clear consideration to the question of risk of suicide in accordance with the guidance in J v Secretary of State for the Home Department [2005] EWCA Civ 629 and Y & Anor (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362.

22. The appeal was then listed for a resumed hearing before the Upper Tribunal, to re-make the decision in the appellant's appeal. Upper Tribunal Judge O'Callaghan and Upper Tribunal Judge Mandalia, sitting as a panel, heard the appeal on 10 March 2020.

23. The panel found that the judge had made a material error of law in his consideration of Article 8 in finding that the appellant did not have a genuine and subsisting parental relationship with his children. They found that it was in the best interests of the children that they remain in the UK and that they continued to have a good and stable relationship with both their parents. They found further that it would be unduly harsh for the children to live in Jamaica. However the panel found that it would not be unduly harsh for the children to remain in the UK without the appellant and that the family life exception under section 117C(5) of the 2002 Act and paragraph 399(a) of the immigration rules did not apply. They found there to be no very compelling circumstances outweighing the public interest in the appellant's deportation.

24. In relation to the appellant's Article 3 claim, the panel relied upon the decision in AXB (Art 3 health: obligations; suicide) Jamaica [2019] UKUT 397 in concluding that the high threshold described in N v UK remained the relevant threshold in considering risk of suicide cases. They did not consider that the medical evidence, taken at its highest, demonstrated a real risk that the appellant would commit suicide in the UK. They considered that the appellant would have access to medical treatment and mental health services in Jamaica

and that the suicide risk was not such that the appellant's removal would be in breach of Article 3. They did not accept that the appellant would be destitute or homeless in Jamaica and did not accept that his deportation would breach Article 3. The panel accordingly dismissed the appellant's appeal on all grounds.

25. The appellant then sought permission to appeal the panel's decision to the Court of Appeal. Permission was refused by the Upper Tribunal, but was granted by Laing LJ in the Court of Appeal.

26. In an Order dated 24 June 2021 the Court of Appeal confirmed that the appeal was allowed by consent to the extent set out in the Statement of Reasons, as follows:

"In granting permission Laing LJ noted it was arguable the FFT had in fact applied the right test when determining whether the appellant's mental health would deteriorate if deported to Jamaica, and that depending on how the Court of Appeal resolved that question, it should also have an opportunity to consider the right approach to a risk of suicide in the light of *AM (Zimbabwe)*.

For the reasons advanced in the appellant's skeleton argument, the decisions of the Upper Tribunal (IAC) to: (a) set aside the First tier Tribunal (IAC)'s decision in respect of Article 3; and (b) re-determine and dismiss the appellant's appeal on Articles 3 and 8, are set aside.

On remittal, the Upper Tribunal (IAC) will need to determine whether the First-tier Tribunal's decision in respect of Article 3 ECHR contained a material error of law. The Upper Tribunal's finding that the First tier Tribunal erred in law in relation to the Article 8 consideration is preserved, as is its finding that that error was material in that it was capable of affecting the outcome of the appeal. The Upper Tribunal will need to decide whether to proceed either to remit the decision or to make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and make such finding of fact as it considers appropriate."

27. Accordingly, the Court of Appeal set aside the entirety of the Upper Tribunal's decision on Article 3, namely the error of law decision and the re-making decision. As for Article 8, the Court of Appeal upheld the Upper Tribunal's decision to set aside the First-tier Tribunal's decision on the appellant's Article 8 claim, but set aside the re-making of the Article 8 decision. The Upper Tribunal's finding that the First-Tier Tribunal made a material error of law in relation to the Article 8 consideration (in wrongly concluding that there was no genuine and subsisting parental relationship between the appellant and his children) was preserved.

28. Thus, the appeal came before us; firstly to determine whether there was a material error of law in the judge's decision about the application of Article 3; and, if so, secondly to decide whether to remit the case to the First-tier Tribunal.

The Grounds of Appeal

29. The context of the matters before us is particularly important in this case. In granting permission to appeal the Court of Appeal identified that the Court should have the opportunity to consider the appellant's ground that the Upper Tribunal's decision involved the misapplication of the law to the facts. Laing LJ identified that the question is the right approach to a risk of suicide in the light of the decision of the Supreme Court in AM (Zimbabwe) [2020] UKSC 17. It was confirmed that the judge had, as it turned out, applied the right test to the risk that the appellant's mental health would deteriorate.

30. With that context set, the respondent's grounds before us can be summarised as follows:

- a. The judge failed to adopt the correct approach in determining whether Article 3 was engaged in the context of the appellant's risk of suicide and in considering his mental health in general;
- b. The judge had materially erred in his approach to the assessment of evidence and, in particular, his approach to the evidence of the country expert;
- c. The judge made inconsistent findings and failed to appropriately take into account relevant findings in making his decision.

The Respondent's Submissions

31. Ms Isherwood submitted that the recent decision of the Grand Chamber in Savran v Denmark 2019 ECHR 57467/15 reaffirmed the standard and principles established in Paposhvili in the context of considering a claim based on a person's mental health. In that case the appellant did not meet the Article 3 threshold which was recognised to be high. In this case it was acknowledged that the judge had stated the Paposhvili test correctly, but it was submitted that the judge had then failed to carry out a full consideration in considering the application of Article 3. The judge made no finding that the appellant was likely to suffer a significant reduction in his life expectancy and this must be taken to mean that he did not consider the risk of suicide to be significant enough to meet the second limb of the Paposhvili test. In any event the judge failed to consider the relevant caselaw for cases relating to suicide risk.

32. In considering access to treatment in Jamaica, Ms Isherwood submitted that the judge had relied on an entirely speculative opinion of the appellant's psychiatrist, Doctor Curwen, which had been based on an assumption that the appellant would receive no medication or treatment in Jamaica, without any basis to make that assumption. The judge's reliance on a country expert's report (of Dr de Noronha) was flawed because:

- a. The judge had erred in his approach to consideration of Dr de Noronha's expertise;
- b. the judge had erred in the weight given to the expert's opinion regarding the provision of mental health treatment in Jamaica when

Dr de Noronha stated that “he cannot speak confidently on mental health provision in Jamaica”;

- c. the judge had relied upon Dr de Noronha’s report to conclude that the appellant was unlikely to be able to afford his medication whilst making inconsistent findings about the extent to which the appellant’s aunt, nephew in the UK and extended family and friends in Jamaica would support him financially and otherwise on return to Jamaica;
- d. the judge had made findings lacking basis (other than the flawed basis of the report of Dr de Noronha) that there would be a lack of appropriate medical treatment in Jamaica;
- e. the judge had taken no account of the fact that the opinions of Dr Curwen and Dr de Noronha were based on the assumption of no family or friends in Jamaica whereas the judge had found that there was no credible evidence that extended family in Jamaica did not exist.

33. Ms Isherwood submitted that Dr Curwen’s opinion that the appellant’s depression was likely to be more severe if he is returned to Jamaica does not reach the Article 3 threshold. He was described as being moderately depressed by Dr Curwen. There is nothing to indicate timescales in which the appellant’s health was likely to deteriorate, or that the decline in his health would be irreversible. There is no evidence to indicate that the appellant was likely to suffer intense suffering.

34. In response to a submission by Mr Sellwood that the respondent had failed to address the availability and accessibility of the appellant’s two mental health medications, Ms Isherwood submitted that account should be taken of the fact that the appellant has not provided any such evidence to address. Dr Curwen identifies the medication given to the appellant, but Dr de Noronha does no more than describe general problems in accessing treatment.

The Appellant’s Submissions

35. Mr Sellwood submitted that the judge properly directed himself in law in respect of the test set out in Paposhvili after making detailed findings of fact on the evidence. The judge had properly directed himself in law. The respondent’s critique of the judge’s conclusions is no more than a disagreement with the outcome.

36. In relation to the application of Savran, Mr Sellwood agreed that the Grand Chamber endorsed the application of Paposhvili in a case concerning a person’s mental health. However, the outcome in that case had no application for this appellant as there was no evidence that the appellant in Savran would experience intense suffering. Instead the evidence showed that he would be violent or aggressive towards others.

37. Dr Curwen's assessment of the likely impact removal would have on the appellant's health was not simply concerned with access to treatment, but also other factors including the impact of separation from his family in the UK. A medical prognosis is by definition speculative and the test in Article 3 cases inherently requires "a certain degree of speculation" as noted by both Paposhvili and AM (Zimbabwe). It is wrong to rely on an assessment made by Dr Curwen of the appellant's health in the UK as being moderate; the question is what his position would be on removal or in Jamaica. In essence, her opinion shows that the appellant's mental health can be managed here, but would reach the threshold for Article 3 to be engaged if he is returned to Jamaica.

38. Furthermore, the judge correctly relied upon her opinion to find that the appellant would be at a high risk of suicide if he was deported. Dr Curwen had noted the panic attacks and deterioration in the appellant's health when he was faced with immigration hearings or major developments in his case to conclude that he may become too unwell to fly to Jamaica. This supported a conclusion that there would be a rapid deterioration in his mental health as the judge specifically concluded.

39. The cases of J and Y do not take matters much further in the context of suicide risk in light of the decision in MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC) which confirms that in cases concerning a person's mental health the correct approach is as set out in AM (Zimbabwe). There is therefore no failure to consider relevant caselaw by the judge.

40. The judge carefully considered Dr de Noronha's evidence in detail and noted his expertise had not been challenged by the respondent. Country experts do not need to be qualified medical professionals to provide expert opinion on the availability and accessibility of healthcare in a given country. The exact weight given to evidence was a matter for the judge to determine and the respondent failed to show that his conclusion that significant weight should be given to Dr Noronha's evidence was irrational, as she is required to do to show that he is wrong in law, applying Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759.

41. The judge had noted the respondent's position that the appellant was likely to have family and friends in Jamaica and could obtain financial support from family as well as her reliance on country information to show that there is treatment available in Jamaica for mental health conditions. Accordingly, the judge reached his conclusions after a holistic assessment of the evidence. The respondent had not addressed whether the appellant's specific medication was available in Jamaica, its cost or its accessibility. Other treatment which he needs, such as the support of a psychiatrist and nurse, have similarly not been addressed by the respondent. The respondent has not countered the conclusions of the experts with weighty country evidence. Although Mr Sellwood recognised that the appellant's evidence does not specifically identify what treatment is needed by the appellant if he moves to Jamaica, Dr Curwen says what she considers likely to happen if he does not access his current treatment.

42. In relation to the findings made about the appellant's family in Jamaica, those findings were made in the context of Article 8 and were very different to finding the family and friends could provide enough money for the appellant to access medication and treatment in Jamaica. The judge took into account the existence of financial support from the appellant's aunt and nephew in the UK but proceeded to conclude that that money was limited to the small amount of bus fares. There is therefore no inconsistency in the judge's findings.

Discussion

43. At the time of the First-tier Tribunal hearing the appellant was diagnosed with major depressive disorder with a history of psychosis. He was prescribed anti-psychotic medication and anti-depressants – Olanzapine and fluoxetine by his GP. His medication was reviewed regularly by psychiatrists and he was under the care of the North Islington Crisis Resolution team. He was also receiving support from a care coordinator, who is a community psychiatric nurse who contacts the appellant every two weeks and more frequently if indicated. He has been detained under mental health legislation on at least two occasions in May 2014 and June 2016. Since 2016 his medication has been increased and he has not been sectioned again.

44. In granting permission to appeal Laing LJ noted that, while the judge purported to cite the decision of the Court of Appeal in AM (Zimbabwe), he in fact directed himself in accordance with the test in Paposhvili, which the Supreme Court in AM (Zimbabwe) subsequently decided was the correct test. It is clear therefore (and accepted by the parties) that the judge correctly described the threshold for engagement of Article 3 generally.

45. The result of the Supreme Court decision was that an applicant is required to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if removed, they would be exposed to a real risk as a result of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to: (i) a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering; or (ii) a significant reduction in life expectancy. These are the core principles which must be applied by us in considering whether the judge erred in law and whether any errors are material.

Ground 1- identification of the correct test to be applied to the risk of suicide

46. Both parties submitted that the approach in AM (Zimbabwe) should be applied to cases involving mental health, but the respondent says that in the case of risk of suicide, additional factors should be addressed in accordance with J and Y.

47. We are satisfied that the AM (Zimbabwe) approach should be applied to the assessment of the risk of suicide, as it would for other mental health risks which may lead to a significant reduction in life expectancy. That conclusion was reached by Upper Tribunal Judge McWilliam in the case of MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC). As said in that decision, there is

nothing in European or domestic law to support any contention that Paposhvili does not apply to suicide cases. The recent decision of the Grand Chamber in December 2021 in Savran confirmed the view that Paposhvili applies to cases involving mental illness and risk of suicide. That approach was endorsed by Sir Duncan Ousely in R (Carlos) v SSHD [2021] EWHC 986 (Admin).

48. Reference has been made by the respondent to consideration of other cases dealing with suicide risk and, in particular, J and Y. The headnote of MY refers to those cases. However, they address situations where an appellant has a subjective fear of return (as the appellant in MY had). The appellant in this case is not claiming a subjective fear of return to Jamaica and we are therefore satisfied that the judge was correct in not considering the application of J and Y.

49. We are therefore satisfied that the respondent's challenge relying on Ground 1 is not successful. The judge identified the correct test to be applied to the risk of suicide.

Grounds 2 and 3 – the assessment of evidence by the judge

50. We consider grounds 2 and 3 together. They concern different elements of the judge's consideration of the evidence but overlap considerably.

51. The issue before us is therefore, in essence, how the judge applied the AM (Zimbabwe) test to the evidence before him. In considering his approach we recognise that the Supreme Court has made clear that the evidential burden on the appellant should be understood as requiring him to raise a prima facie case, which means a case which in the absence of challenge would establish infringement. That is a demanding threshold. It is for the appellant to demonstrate that there are substantial grounds for believing such risk exists. After that point the burden falls to the respondent to dispel any serious doubts raised by the appellant's case.

52. With regard to the appellant's Article 3 claim, reliance was placed, in particular, at the hearing before the judge upon a letter dated 8 February 2019 from the appellant's community psychiatric nurse (CPN), a letter dated 1 February 2019 from Dr Joanna Curwen and a 2017 country expert report from Dr Luke de Noronha together with an updated report dated 11 February 2019.

53. The CPN's letter describes the appellant's mental health history and treatment, noting that detaining the appellant for deportation would lead to his mental health deteriorating which could lead to him having suicidal ideation. The CPN notes that the appellant has strong family links in London, living with his aunt and being close to cousins and their families. His current protective factors are said to be his children and his partner.

54. This letter therefore set some background, which we take into account, but the evidence which lies at the heart of the matters before us is contained in the letter from Dr Curwen and Doctor de Noronha's expert reports.

55. Set against that background, we start by considering the judge's approach to the second part of the AM (Zimbabwe) threshold test, i.e. the risk of a significant reduction in life expectancy.

56. The judge said that Dr Curwen was of the view that the appellant is at "high risk of suicide" if he is deported to Jamaica and then proceeded to set out an extract from her letter. However, the judge did not set out a conclusion in his decision that the appellant would face a real risk of a significant reduction in life expectancy. Instead, his conclusion was that the appellant would suffer a serious, rapid and irreversible decline in his mental health resulting in intense suffering [137]. Although the judge quoted from Doctor Curwen's letter in addressing the risk of suicide, he reached no apparent conclusion about that risk for the appellant as a result.

57. We recognise that the absence of such a conclusion may not, in itself, be material if the judge's approach to the application of the first part of the threshold test – namely the risk to the appellant of a serious, rapid and irreversible decline in his state of health resulting in intense suffering – was correct; or if our overall assessment is that considering the evidence overall the judge correctly concluded that Article 3 was engaged.

58. The medical evidence relied upon by the judge to conclude that Article 3 was engaged, applying either the first or second limb of the AM (Zimbabwe) test, was the evidence set out by him in paragraph 115 of his decision from Dr Curwen's letter. We agree that this is the key medical evidence.

59. Ms Isherwood submitted that Dr Curwen's letter was insufficient evidence to engage Article 3 as Dr Curwen had only identified that the appellant's depression would be more severe, he would experience auditory hallucinations and paranoid delusions and be at risk of self-neglect. These consequences are, of course, serious for the appellant, but that is not the yardstick which must be applied by us. We are not satisfied, however, that Dr Curwen's letter was necessarily as limited in its conclusions as Ms Isherwood submits. As Mr Sellwood submitted, consideration also needs to be given to the statement referred to by the judge in paragraph 115 of his decision that "if [OS] were to be deported to Jamaica, I would be very concerned about his mental health deteriorating dramatically. I fear that he would become severely depressed and attempt suicide."

60. However, in considering that statement relied on by Mr Sellwood, we consider that the statements must be assessed in the context of the letter overall from Dr Curwen. While Dr Curwen states that if the appellant were deported to Jamaica, he would be at high risk of suicide, she goes on to explain later that if he was unable to access appropriate treatment and Jamaica his mental health is likely to deteriorate further. She states that without his medication it is likely that his depression will be more severe and he would experience auditory hallucinations and paranoid delusions. He would be at risk of suicide and self-neglect. These comments are therefore conditional on the appellant not being able to access medication and treatment. In addition, they are made in the context of her stating that if the appellant were returned

Jamaica there is no reason to believe that he would not engage with medical services if they were available for him to access.

61. We recognise that Dr Curwen also said in the letter that if the appellant is separated from his family he will feel he has nothing and there will be no reason for him to continue living, so that she would be very concerned that he would commit suicide. However, the letter is based on an assumption stated by Dr Curwen that he would be going somewhere where he has no support at all. The judge did not accept that was the case. He found that there was no credible evidence that the appellant did not have extended family in Jamaica [109]; yet he did not address the implications for the assessment of Dr Curwen's conclusions.

62. On the face of the judge's decision there is no express engagement with the assumptions and comments made by Dr Curwen. However, the judge did go on to consider the availability of medication and treatment via the evidence from Dr de Noronha. The question is therefore whether he erred in the approach he took in so doing. If the judge did not err in law in his consideration of the availability of medication and treatment, so that his conclusion that they would be unavailable stands, the issues we have identified so far will not be material.

63. Mr Sellwood submitted that the correct approach to the evaluation of the judge's approach to the expert evidence is set out in the Tesco Stores Ltd case. We do not agree. That case turned upon the approach taken by the Secretary of State for the Environment to materials provided in the context of a planning appeal and the extent to which the decision by the Secretary of State could be challenged. It is, in essence, one of the earlier cases considering the scope of challenge to an administrative decision and in line with the development of the jurisprudence at that time expresses the range of reasonable action which we would now regularly see described in judicial review cases. We find it of little assistance in determining the approach to be taken to the assessment by a judge of expert evidence.

64. Instead we refer to MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) where the Tribunal said:

“Thus in the contemporary era the subject of expert evidence and experts' reports is heavily regulated. The principles, rules and criteria highlighted above are of general application. They apply to experts giving evidence at every tier of the legal system. In the specific sphere of the Upper Tribunal (Immigration and Asylum Chamber), these standards apply fully, without any qualification. They are reflected in the Senior President's Practice Direction No 10 (2010) which, in paragraph 10, lays particular emphasis on a series of duties. We summarise these duties thus:

- i. to provide information and express opinions independently, uninfluenced by the litigation;*
- ii. to consider all material facts, including those which might detract from the expert witness' opinion ;*

- iii. *to be objective and unbiased;*
- iv. *to avoid trespass into the prohibited territory of advocacy;*
- v. *to be fully informed;*
- vi. *to act within the confines of the witness's area of expertise;*
and
- vii. *to modify, or abandon one's view, where appropriate."*

65. We note, in particular, item vi, "to act within the confines of the witness's area of expertise". In assessing the evidence of Dr de Noronha, in which he expressly sets out opinions on matters regarding the provision of mental health care in Jamaica whilst saying that he is "not able to speak confidently" on such provision, we are satisfied that the approach adopted by the Upper Tribunal in the case of AAW (expert evidence - weight) Somalia [2015] UKUT 00673 (IAC) should be applied by us. If, and to the extent that, Dr de Noronha strayed outside the confines of his expertise that does not mean that his evidence falls to be disregarded, but any opinion so offered is likely to be afforded little weight by the Tribunal.

66. Dr de Noronha has provided a main (undated) report of 20 pages which is written in general terms addressed to a wide variety of potential appellants. It addresses the impact of a person's length of time in the UK and lack of family support in Jamaica; the ability to connect with family in the UK via modern means of communication; vulnerability of deported persons to crime, violence and extortion; issues concerning reintegration surrounding language, health, housing and employment; as well as matters which have not been raised as relevant in this case concerning the position of women and those from the LGBTI community.

67. The judge refers to a statement in that report (at page 235 of the bundle) in which Dr de Noronha says: "I am not qualified to speak confidently on mental health provision in Jamaica (for more information see link)". The link is to an article written by Georgetown University Law Center, Human Rights Institute in 2011 entitled "Sent Home with Nothing: the Deportation of Jamaicans with Mental Disabilities". Dr de Noronha proceeds to recount occasions on which he has heard of people looking for mental health support and then states: "while this is not an expert opinion, in my experience poor people in Jamaica struggle to access free healthcare, even emergency care, and in this context it is clear that mental health service provision is lacking for ordinary Jamaicans".

68. The judge comments that the fact that Dr de Noronha recognises he can only offer comment and opinion within his realm of expertise only enhances the weight that he attaches to his reports. While this would be understandable in relation to emphasising the weight that should be given to those matters which are within Dr de Noronha's expertise (i.e. matters other than those concerning mental health provision in Jamaica), the judge did not identify any areas of Dr

de Noronha's reports which should be given less weight. We find that the judge has erred in not acknowledging that consideration should be given to reducing the weight accorded to matters outside Dr de Noronha's expertise. If he had done so, and, indeed, if he had proceeded to set out a reasoned and rational basis for giving these matters greater weight, we would have little reason to be concerned with his approach; but he did not do this. Instead, the judge gives equal weight to those matters without such reasoning and to do so is erroneous.

69. We are satisfied that there are other matters which should also be addressed by us in the context of the evaluation of Dr de Noronha's reports.

70. We assume that the additional report from Dr de Noronha of 11 February 2019 was obtained in order to seek something more directly targeted to the appellant's own circumstances than the first generic report, but we feel bound to note that it does not comply with the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal for the provision of expert evidence and, in particular, paragraph 10.9 of those Directions which state that:

An expert's report must:...

... (b) give details of any literature or other material which the expert has relied on in making the report;

(c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

71. Dr de Noronha states that it is clear with regard to the specifics of the appellant's case that the appellant "would be profoundly vulnerable on return to Jamaica" and he refers to having read several documents sent to him. The materials provided to him have not been identified however, and the basis for his assertion that the appellant would be profoundly vulnerable is unclear.

72. Dr de Noronha proceeds to rely on the Georgetown University article to which he had referred in his previous report. That article was some eight years old at the time of the hearing and Dr de Noronha provides only a short extract which he had previously included in his full report. There was no consideration of the reliability of the article, 8 years later, by Dr de Noronha or comment as to whether it remained in his opinion a fair reflection of the circumstances in Jamaica. No doubt that was because Dr de Noronha felt unable to make such a comment. The judge does not address this issue with the evidence, despite effectively relying upon the article for significant findings as we now explain.

73. The judge gives particular weight to Dr de Noronha's statement that the cost of medication is "beyond the reach of most Jamaicans even when subsidised, running up to US\$300-400 per month" and that there were only 25 psychiatrists in the whole of Jamaica [133 and 136]. However, the judge does not recognise that these statements made by Dr de Noronha were no more than copies by him from the Georgetown University article to which he has

referred and which was from 2011. In addition, close inspection of Dr de Noronha's 2019 letter shows that the report to which he refers in fact says "many medications" are beyond the reach of most Jamaicans. Those two important words are not taken into account by the judge. Even taken at its highest, that is some way from showing that the actual medications required by the appellant would be beyond his reach or otherwise inaccessible by him.

Conclusions

74. The judge failed to reach any conclusion as to whether the second part of the (AM Zimbabwe) threshold test for engagement of Article 3 was met. His errors in his approach to the evidence from Dr de Noronha are central to the judge's conclusion that the first part of the threshold test is met. The evidence of Dr de Noronha on the matters concerning mental health provision in Jamaica should have been given reduced weight for the reasons we have explained. Having made the errors regarding the assessment of cost of the appellant's medication, the judge relies on those errors to conclude that the appellant would be unable to afford medication. He then finds in paragraph 135 of his decision that this conclusion leads to the result that the appellant's mental health will deteriorate rapidly; on the basis that Dr Curwen's assessment of the risk of deterioration was made assuming that the appellant would not be able to access the medication and treatment he needs.

75. We are not satisfied that the evidence provided to the judge leads to the conclusion that applying AM (Zimbabwe) Article 3 is engaged, given the issues we have identified concerning the assumptions made by Dr Curwen regarding availability of medication and family support and the reduced weight we consider should be given to Dr de Noronha's evidence regarding mental health treatment in Jamaica; even though we recognise that the appellant's family in the UK are significant protective factors for him. We are therefore satisfied that the errors of law are material.

76. As a result of our conclusions the judge's decision cannot stand. The parties agreed that if we concluded that there was a material error of law the appeal should be remitted to the First-tier Tribunal for a hearing de novo. We agree that this is the correct decision in this case. We are aware that the appellant's circumstances have changed (for example, he has more children); and in a case such as this it is particularly important for a full and up to date fact finding exercise to take place, addressing not only the appellant's family life but also his health.

DECISION

77. The First-tier Tribunal decision involved the making of an error on a point of law.

78. The case is remitted to the First-tier Tribunal (Hatton Cross/Harmondsworth) for a substantive rehearing of the appeal. Judge Clarke is excluded.

79. The hearing shall be de novo and shall therefore address the appellant's claim based on Article 3 and Article 8.

Anonymity

80. The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014. We continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed: T. Bowler

Deputy Upper Tribunal Judge Bowler

Dated: 31 January 2022