



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

Appeal Number: HU/07918/2018

**THE IMMIGRATION ACTS**

**On the papers**

**Decision & Reasons  
Promulgated**

**On 24 November 2020**

**On 14 December 2020**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**SAID [M]  
(anonymity direction not made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**ERROR OF LAW FINDING AND REASONS**

- 1.** The appellant appeals with permission a decision of First-tier Tribunal Judge Feeney ('the Judge') promulgated on the 15 March 2019 in which the Judge dismissed the appellant's appeal on human rights grounds.
- 2.** Permission to appeal was granted on a renewed application by the Upper Tribunal on 21 September 2020, the operative part of the grant being in the following terms:
- 3.** I find that the application was made on 3 July 2019, as per the fax confirmation from the solicitors. It is argued that it should be admitted despite

being made 10 days out of time because the applicant had no access to funds to instruct lawyers for the reasons set out in the witness statements from the family explaining their situation. I find that because this application raises potential errors of law in an Article 3 ECHR medical claim on behalf of a person with paranoid schizophrenia that time should be extended so that the application can be admitted as it was reasonable for him to have reliance on solicitors to take this step.

4. The grounds of appeal contend, in summary, as follows. It is argued that firstly that the fact that the First-tier Tribunal accepted that the appellant has severe mental health problems ought to have led to the appeal being allowed under Article 3 ECHR but this did not happen as the First-tier Tribunal unlawfully required a worsening of the appellant's condition for it to meet the required level of severity when that was illogical as it had been severe all along; and because the conclusion that there is treatment in Algeria is contrary to the country of origin evidence, and without appropriate treatment the view of the two psychiatrists is that there would be a significant decline in the appellant's life expectancy even if he had access to his mother and younger brother in his country of origin. Both grounds are arguable.
3. The parties were provided with the opportunity to make observations in relation to the method by which the Upper Tribunal is to determine the question of whether the Judge made an error of law and if such error was material to the decision to dismiss the appeal, and to provide the opportunity for further submissions to be made. Both parties have responded.
4. Having considered the judgment of the High Court in *The Joint Council for The Welfare of Immigrants (Applicant) v The President of the Upper Tribunal (IAC) (Respondent) and The Lord Chancellor (Interested Party)* [2020] EWHC 3103 (Admin), in which neither the Pilot Practice Direction issued by the Senior President of Tribunals on 19 March 2020 nor Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 were declared unlawful, consideration can still be given to the appropriate venue for the next hearing of this matter in light of the overriding objectives.
5. Paragraph 4 of the Practice Direction reads as follows: "Decisions on the papers without a hearing: Where a Chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights and the Chamber's procedure rules about notice and consent."
6. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
7. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.

- 8.** Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

34.—

- (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
- (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
- (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
- (4) Paragraph (3) does not affect the power of the Upper Tribunal to —
  - (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
  - (b) consent to withdrawal, pursuant to rule 17;
  - (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
  - (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.

- 9.** The Secretary of State submits that given this is a deportation case involving significant public interest in the deportation of the appellant, the error of law issue should be determined by way of a remote hearing at which oral submissions could be made and answers given to any questions arising from the Upper Tribunal Judge. Other than this, no further explanation is given as to why an oral hearing is necessary.
- 10.** The appellant's position is that this question can be determined on the papers.
- 11.** It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers as opposed to directing an oral hearing. Nothing on the facts or in law makes consideration of the issues on the papers not in accordance with overriding objectives at this stage, a breach of the parties' ECHR rights, and/or UTIAC's procedure rules about notice and consent.

## **Background**

- 12.** The appellant is a citizen of Algeria born on 7 July 1993 who entered the United Kingdom on 4 June 2011 with his mother and younger brother as visitors, but overstayed. The appellant is the subject of an order for his deportation from the United Kingdom following his conviction of attempted robbery for which he was sentenced to 12 months imprisonment at a Young Offenders Institute on 4 April 2013.
- 13.** On 6 December 2015, the appellant was detained under the Mental Health Act. On 20 June 2016, his first appeal against the making of a

deportation order on 16 October 2015, on human rights grounds, was dismissed by a judge of the First-tier Tribunal. The appellant became appeal rights exhausted on 6 September 2016.

- 14.** The appellant made a series of further submissions resulting in a fresh decision being made refusing the claim in 2018 which was appealed before the Judge.
- 15.** There was no protection claim before the Judge as it had not been raised before the decision maker, was considered to be a new matter, in relation to which the Secretary of State's representative did not give consent for it to be considered on the day.
- 16.** The Judge sets out findings of fact from [36] of the decision under challenge. At [35] it is noted the appellant suffers from paranoid schizophrenia for which he has been treated but that he would benefit from additional treatment.
- 17.** The Judge commenced consideration of the decision of the Court of Appeal in J v SSHD before concluding at [42] that the appellant could not satisfy the test set out in that judgement.
- 18.** Having considered section 399A and section 117C (4) – Exception 1, the Judge did not find significant obstacles to reintegration had been made out.
- 19.** In relation to paragraph 398(c) the Judge concludes there are no exceptional circumstances and no very compelling circumstances warranting a grant of leave to remain outside the Immigration Rules.
- 20.** The appellant refers to the medical evidence from two Consultant Psychiatric Experts, Dr Hussain and Dr Cater which it was accepted by the Judge showed:

“the appellant has substantial mental health difficulties and has a severe and enduring mental health problem” namely paranoid schizophrenia [29].

“If the appellant relapses he will need hospitalisation” [30].

“Paranoid symptoms are present” and “in the absence of appropriate treatment, the appellant will be exposed to the serious rapid and irreversible decline in his state of health resulting suffering. His significant weight loss, appearance, attacks by the is significant others and suicidal ideation point towards this. There will be a significant reduction in his life expectancy”. [30].

- 21.** The grounds assert the Judge was wrong to find the test in J had not been met on the basis the appellant had not been admitted for treatment since 2017, there had been a limited increase in his medication and that any deterioration had not been reported to treating physicians even though the family were fully conversant with those responsible for the appellant's care. It is submitted this is a finding not open to the Judge in light of the findings by the clinicians that the appellant suffers substantial mental health difficulties and has severe and enduring mental health problems. The Grounds assert that

no further deterioration, hospitalisation or increase in medication was required to show that the subsisting mental health condition was serious, severe and endures.

**22.** The appellant also criticises the Judge's finding that treatment is available in Algeria and that if returned to Algeria with his mother and younger brother he would have help and be able to obtain advice and medication from physicians there. The appellant asserts such finding was not open to the Judge in light of it what is recorded at [33] of the decision in which the Judge writes:

33. At this stage I turned to consider the country information regarding the type of treatment that is available in Algeria. The report provided by the Home Office state that the MedCOI database shows there are psychiatric care facilities in Algeria and there are psychiatrists in Algeria who can treat people with psychotic disorders. The report states that Fluoxetine and Olanzapine are available in Algeria. A further report on psychiatric services from BJPsych Int. dated February 2017 looked at the current provision for psychiatric services in Algeria. The report states that the state provides psychiatric care free of charge. Most psychotropic drugs even atypical antipsychotics are available free of charge to the people who have a chronic mental illness. It is further reported that in an agreement between the Ministry of National Solidarity and the public national insurance company, people with chronic mental disorders with insurance coverage receive a disability pension (it is not however known whether this will apply to this particular appellant). There are however limitations to care. I observe the report also states that there is an even distribution of hospitals providing psychiatric care across the country. Outpatient care is limited to providing consultation and no other forms of community care is available for adults. There are no community residential rehabilitation programs. The number of psychiatric beds has dropped even though the population has grown. There is a shortage of medical staff. More efforts are needed to reform the mental health system.

**23.** The evidence of Dr Hussain was that in addition to the chronic ongoing schizophrenia, which has gone on for a long time, the appellant is not responding to his antipsychotic medication. As such the availability of medication in Algeria is said by the appellant to be no answer to his condition.

**24.** The appellant also asserts the Judge erred in failing to consider whether what was available could amount to appropriate treatment, the absence of which would result in a serious rapid and reversible decline causing a significant reduction in the appellant's life expectancy. This is said to be the situation even if the appellant's mother and brother were able to accompany him to Algeria.

**25.** The appellant argues the question of public interest and the proportionality of the decision does not arise in a case where article 3 ECHR is engaged.

**26.** The Secretary of State, in arguing no legal error arises, notes there is no challenge to the Judge's findings made pursuant to article 8 ECHR.

**27.** At [7-9] of the respondent's submissions it is written:

7. [3.1] of the Grounds of Appeal contend that the FTT] erred at [39] in requiring a worsening of the Appellant's mental health for the *J* threshold to be met. The Respondent does not agree. The background is that, on 20 June 2016, FTT] Mitchell dismissed the Appellant's previous appeal, finding that the

deportation of the Appellant to Algeria would not breach his human rights including those based on his mental health [see [7], [30-35] and [58-76] of Annex N of the Respondents bundle]. Correctly applying *Devaseelan* principles, FTTJ Feeney treated the decision of FTTJ Mitchell as his starting point and directed himself to consider whether the new evidence about the Appellant's mental health was such that he could reach different findings on Article 3 and 8 [34]. Before FTTJ Feeney, Counsel advanced the Appellant mental health claim in terms of the risk of suicide or other self-harm for him in Algeria [13] [36]. In the Respondent's submission, the FTTJ properly considered at [37-39] whether the new, post-2016 evidence about the Appellant's mental health met the first test in *J*, that is whether the severity of the treatment faced by the Appellant on removal from the UK attained the minimum level of severity. The FTTJ conducted the required assessment and gave adequate reasons finding that this first test was not met.

8. In response to [3.2.1] of the Grounds of Appeal, Dr Hussain wrote this report some five months before the hearing. The FTTJ was aware of Dr Hussain's statement that the Appellant had not responded to anti-psychotic medication [30]. The evidence before the FTTJ was that, since this antipsychotic medication did not seem to have the beneficial effect on the Appellant's well-being that it previously had, an increase in the dosage of the medication had been recommended, although Dr Hussain was unclear as to why the increase had not happened [37]. Therefore, using the terminology of this Ground, the answer to the Appellants condition was an increase in the dosage of his current medication. The Respondent notes that the Grounds do not challenge the FTTJ's finding that antipsychotic medication would be freely available to the Appellant in Algeria [46] [47] [50] [52].
9. In response to [3.2.2-5] of the Grounds of Appeal, the FTTJ considered the evidence before him about the availability of medication and treatment for mental health issues in Algeria [33]. He noted evidence about the availability of drugs and psychiatric care which was free of charge; and other evidence that there was some "limitations to care". The FTTJ applied to the evidence at [41] when - addressing the sixth test in *J* - he considered whether Algeria had effective mechanisms to reduce the risk of suicide. It was open to the FTTJ to conclude that "treatment is available in Algeria" and that "if return (sic) Algeria with his mother and younger brother [the Appellant] would have helped and he will be able to obtain advice and medication from physicians in Algeria".

### **Error of law**

- 28.** It is not disputed that article 3 ECHR provides absolute protection and that if engaged it is not subject to an assessment of the proportionality of the decision.
- 29.** The Judge, having considered the evidence was not satisfied that it had been made out that article 3 was engaged on the basis of the appellant's mental health.
- 30.** The Court of Appeal has recently reminded all those considering whether another judge has made an error of law to only make such a finding if such a claim is made out on the basis of the material before the Judge. Another judge may disagree with the findings being considered but that, per se, does not warrant a grant of permission to appeal.
- 31.** The Judge took as his starting point in this case the decision of the earlier judge of the First-tier Tribunal noted in the decision and

pleadings. Relevant findings had been made by the other judge of the First-tier Tribunal that there was no bar to the appellant's return to Algeria at the date of the hearing of the first appeal in 2016.

32. The Judge does not treat the earlier decision as determinative and clearly goes on to consider whether the evidence provided in support of this appeal warrants a departure from the earlier findings.
33. The Judge assesses this question by reference to the decision of the Court of Appeal in J v SSHD [2005] EWCA Civ 629 in which it was found that in a foreign case the Article 3 threshold would be particularly high and even higher where the alleged inhuman treatment was not the direct or indirect responsibility of the public authorities in the receiving state and resulted from some naturally occurring illness whether physical or mental. That is the situation in this appeal.
34. The more recent decision of AXB (Art 3 health: obligations: suicide) Jamaica [2019] UKUT 397 considered the case of Savran and held that (i) In a case where an individual, asserts that his removal from the Returning State would violate his Article 3 ECHR rights because of the consequences to his health, the obligation on the authorities of a Returning State dealing with a health case is primarily one of examining the fears of an applicant as to what will occur following return and assessing the evidence. In order to fulfil its obligations, a Returning State must provide "appropriate procedures" to allow that examination and assessment to be carried out. In the UK, that is met in the first place by an examination of the case by the Secretary of State and then by an examination on appeal by the Tribunal and an assessment of the evidence before it; (ii) There is no free-standing procedural obligation on a Returning State to make enquiries of the Receiving State concerning treatment in that State or obtain assurances in that regard. Properly understood, what is referred to at [185] to [187] of the Grand Chamber's judgment in Paposhvili concerns the discharge of respective burdens of proof; (iii) The burden is on the individual appellant to establish that, if he is removed, there is a real risk of a breach of Article 3 ECHR to the standard and threshold which apply. If the appellant provides evidence which is capable of proving his case to the standard which applies, the Secretary of State will be precluded from removing the appellant unless she is able to provide evidence countering the appellant's evidence or dispelling doubts arising from that evidence. Depending on the particular circumstances of the case, such evidence might include general evidence, specific evidence from the Receiving State following enquiries made or assurances from the Receiving State concerning the treatment of the appellant following return.
35. There was no evidence of any enquiries having been made of the Algerian authorities seeking assurances concerning treatment the appellant will be able to access following return or to show that the treatment referred to in the country material was either not available or insufficient despite this having been an issue in the 2016 decision

and the refusal of the human right claim dated 19 March 2018, which is the decision being appealed against.

- 36.** In J v SSHD, which should now be read in light of ABX, the Court of Appeal set out the test in Article 3 cases as follows. (i) the feared ill treatment must be of a minimum level of severity; (ii) a causal link must be shown between the act of removal and the inhuman treatment relied on; (iii) in a foreign case the Article 3 threshold will be particularly high. (iv) in principle it was possible for an Article 3 case to succeed on the basis of a risk of suicide and (v) in a foreign case of suicide risk it would be relevant to consider whether the fear of ill treatment in the receiving state was objectively well founded; if not, this would weigh against there being a real risk of there being a breach; and (vi) it would also be relevant to consider whether the removing and/or the receiving state had effective mechanisms to reduce the risk; if there were, this would also weigh against there being a real risk of a breach. The Court of Appeal went on to say that the Tribunal was correct to consider separately the risk of treatment contrary to Article 3 in the UK, in transit and in Sri Lanka. In relation to the risk in the UK it was open to the Tribunal to conclude that the risk of suicide in the UK would be adequately managed by the UK authorities and that in combination with the support of the appellant's family they could bring the risk of suicide to below the Article 3 threshold when the decision to remove was taken. In relation to the risk of suicide on route the Tribunal was entitled to infer that the Secretary of State would take all reasonable steps to discharge his obligations under section 6 of the Human Rights Act and take judicial notice of the arrangements that the Secretary of State made to escort vulnerable persons on return. In relation to the risk of suicide in Sri Lanka the Tribunal was entitled to take into account the evidence that there would be family support on return, that the claimant would have access to medical treatment, and that his fears of persecution were not objectively justified.
- 37.** Even if the nature or range of medical treatment available to the appellant in Algeria is not the same as that in the UK, in GS (India) and Others [2015] EWCA Civ 40 at paragraph 67 Lord Justice Laws endorsed the views in N v UK that "aliens who are subject to expulsion order cannot in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State".
- 38.** See also - AS v Switzerland (Application No 39350/13) ECtHR (Second Section) (2015) in which the asylum seeker from Syria sought to argue that a Dublin Convention removal back to Italy breached Articles 3 and 8 because he had severe post-traumatic stress disorder and back problems following torture in Syria, because he was emotionally reliant on two sisters who resided in Switzerland and because of systematic deficiencies in the Italian reception system which meant he would not benefit from adequate



medical treatment there. It was held that the decision to remove an applicant suffering from a serious physical or mental illness to a country where treatment facilities were inferior to those in the Contracting State could raise an issue under Article 3 only in very exceptional cases where humanitarian grounds against removal were compelling. It did not do so in this case.

- 39.** The Judge clearly considered the availability of medical treatment, recognising not only the evidence setting out what was available but also limitations upon the same. The Judge clearly took into account with the required degree of care the medical evidence provided in the case and the finding that the first test set out in J had not been met has not been shown to be a finding outside the range of those available to the Judge on the evidence.
- 40.** The Judge went on, however, to consider the remaining elements of the test, in the alternative, in [40] and it is not made out the Judge's assessment that there was in existence effective mechanisms to reduce the risk of suicide as a result of the availability of medical treatment and presence of the appellant's family members in Algeria, is outside the range of findings reasonably open to the Judge on the evidence.
- 41.** Expert evidence clearly refers to the need for medical intervention at an appropriate degree of prescription. The Judge notes that the evidence relied upon was historic rather than having been provided shortly before the date of the appeal hearing, and even though noting limitations in the provision of care for those with mental health needs in Algeria at [33], it was not made out that this appellant could not access the nature of the assistance and help that he himself required. There is no finding by the Judge, made or warranted on the evidence, that the appellant would not be able to access treatment
- 42.** The Judge's finding that the high threshold of Article 3 had not been found to be crossed and that the decision was proportionate pursuant to article 8 ECHR has not been shown to be a finding that is either perverse, irrational, or outside the range of those available to the Judge on the evidence. While the appellant disagrees with this outcome and suggests through his lawyers preferred possible alternative findings, they do not establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

### **Decision**

- 43. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

- 44.** The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure  
(Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 24 November 2020