



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005258
First-tier Tribunal No:
PA/51500/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 August 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

OL (NIGERIA)
(ANONYMITY ORDER IN FORCE)

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Mackenzie, Counsel, Instructed by South West London
Law Centres

For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 6 June 2024
Post-hearing submissions received on 28 June and 2 July 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant, a national of Nigeria, arrived in the UK in 2002 as a child and subsequently held exceptional leave to remain until November 2006. He was sentenced on 28 October 2011 in the Crown Court to seven years imprisonment for robbery and possession of an imitation firearm. A deportation order was made on 29 April 2014. A human rights appeal by the appellant was refused and dismissed by the First-tier Tribunal (FtT). The appellant became 'appeal rights exhausted' on 13 December 2016.
2. The appellant was recalled on licence on 25 November 2016 and transferred to a secure mental health unit on 25 April 2017. He was convicted of possession with intent to supply class A drugs on 18 January 2018 and was sentenced to a hospital order. A further refusal by the respondent to revoke the deportation order led to the current proceedings.

Anonymity

3. An order for anonymity was made by the First-tier Tribunal and varied by this tribunal by its decision dated 2 February 2024 (as to which, see below). We have kept the need for this order under review. The appellant has a number of complex mental health conditions. His recovery is being managed in the community. There is a volatility to his current presentation which is caused, in part, by stress and anxiety (including that arising in connection with these proceedings), as well as by chronic psychosis. We have real concerns that the publication of the appellant's identity in connection with this decision could cause a deterioration in his mental health such that he may expose himself or others to a real risk of serious harm. See, for example, para. 6.14.2 of Mr Ramjiawon's report dated 11 March 2024. We therefore maintain the order.

In the First-tier Tribunal

4. An appeal to the FtT was heard by Judge Karbani (the Judge) on 30 May 2022. The Judge allowed the appeal, finding in favour of the appellant on all the issues, namely that:
 - a. The appellant did not present a current danger to the community, and while the appellant accepted that his offences were 'particularly serious', he was not excluded from the protection of the Refugee Convention under s72 of the Nationality, Immigration and Asylum Act 2002 (NIAA 02);
 - b. The appellant was a member of a particular social group, namely suffering from severe mental health issues, were he to be returned.
 - c. The appellant was at real risk of inhuman and degrading punishment, were he removed, due to the level of treatment available in Nigeria.
 - d. The appellant met the test in AM (Zimbabwe) [2020] UKSC 17 for protection under art 3 ECHR on medical grounds.
 - e. There were very compelling circumstances, which would make the appellant's removal disproportionate in the sense of art 8 ECHR.

In the Upper Tribunal

5. The Judge's decision was appealed to the Upper Tribunal. Upper Tribunal Judge Stephen Smith found that the Judge's decision to allow the appeal under the Refugee Convention involved the making of an error of law, and directed that the appeal be re-heard in this tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. The Error of Law decision dated 2 February 2024 is annexed to this decision. The FtT finding on art 3 ECHR was retained and the issues for us to determine are:
 - a. **Issue 1.** Whether the appellant presents a current danger to the community within the meaning of s72 NIAA 02;
 - b. **Issue 2.** Whether the appellant is entitled to the protection of the Refugee Convention as a result of a risk of ill-treatment and/or detention in a psychiatric institution in Nigeria;
 - c. **Issue 3.** Whether the appellant's removal would be a proportionate interference with his art 8 ECHR rights.
6. We had the benefit of written and oral submissions from both parties. We have considered the material provided in advance of the hearing and, in addition, what is described as a structured clinical judgment violence risk assessment ('HCR-20v3' or 'HCR-20') by Dr Bisht dated 8 February 2024. This last item was provided after the hearing at the request of the Upper Tribunal, as a result of it being identified in Mr Ramjiawon's report dated 11 March 2024. The HCR-20 was sent to the tribunal on 6 June 2024. Both parties, on invitation, made written submissions on the HCR-20, on 28 June and 2 July 2024 respectively.
7. The appellant did not give oral evidence before us. Prior to the hearing, in response to case management directions dated 1 May 2024, the Secretary of State had shared with the appellant's representatives a set of questions intended for use in cross-examination. Those directions had been given at an earlier case management hearing by way of a reasonable adjustment, in order enable the appellant to respond to the Secretary of State's challenges to his evidence in writing, without having to endure what he perceived (and what Mr Ramjiawon concluded would be) the stress of the proceedings, in light of his medical conditions. While the Secretary of State complied with that direction, in her skeleton argument dated 18 May 2024, Ms Ahmed called into question whether the written 'cross-examination' process was apt to be described in that way, and submitted that the process was less than satisfactory, from the Secretary of State's perspective. That led to a frank and robust exchange of correspondence between the two parties, which was copied to the tribunal, but upon which it has not been necessary to rule.
8. The appellant's representatives subsequently decided not to put the questions to the appellant in advance of the hearing, not to provide any further written evidence from him, and not to call him. The appellant submitted that the matters that would have been put to him in cross-examination are not at the forefront of the case, and that we could properly take all of this into consideration when we assess the appellant's credibility. We consider this to be part of the mosaic of the material we keep it in mind when assessing his witness evidence below.

Issue 1

9. Section 72 in the form it stood prior to the amendments made by the Nationality and Borders Act 2022 is the version that applies to these proceedings: see section 38(13) of that Act.
10. It is not in issue that the appellant was convicted of a ‘particularly serious crime’ within the meaning of section 72(2) NIAA 02. Section 72, as far as is relevant, provides that:
- 72...
- (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from prohibition of expulsion or return).
- ...
- (6) A presumption under subsection (5A) that a person constitutes a danger to the community is rebuttable by that person.
- ...
- (10) The . . . Tribunal or Commission hearing the appeal—
- (a) must begin substantive deliberation on the appeal by considering the certificate, and
- (b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).
- (10A) Subsection (10) also applies in relation to the Upper Tribunal when it acts under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.
11. We were reminded by the appellant that the test for ‘danger’ is ‘quite a high threshold’ in line with SB (cessation and exclusion) Haiti [2005] UKIAT 00036 at [84].
12. The appellant also sought to argue that this appellant’s case is factually analogous to that of SSHD v MM (Zimbabwe) [2017] EWCA Civ 797 in the context of a serious crime by an appellant with significant mental health issues. We decline to draw that direct analogy in our analysis, instead deciding the instant case on the evidence available to us. In our judgment, that aspect of MM (Zimbabwe) is not authority for the proposition that all cases with similar facts must be decided in the same way. It merely decided that the First-tier Tribunal in those proceedings had been entitled to reach its findings concerning section 72, on the evidence before it, for the reasons it gave. Factual assessments of his nature are inherently case-specific and are unlikely to be assisted to any significant extent by referring to examples in different cases, reached on different evidence.
13. The question of danger to the community was considered by Judge Trevaskis of the FtT in an earlier case of this appellant’s. In a decision promulgated 1 September 2015 Judge Trevaskis considered the OASyS report we have in evidence as well as the evidence of the appellant and concluded at [65] that:

'The OASyS report dated 29 August 2014 said that he represented a high risk of serious harm to the public. I have not seen any more favourable professional assessment of risk of serious harm, represented by the appellant. No doubt he and his family all hope that he will not reoffend, by that is not a basis upon which I can arrive at a proper assessment of risk. The fact is that future risk is indicated by past behaviour, and it is difficult to see how the appellant will be able to ensure future rehabilitation... He has yet to demonstrate a prolonged period of law-abiding behaviour in the community, in order to justify a lower assessment of risk of serious harm...'

14. Judge Trevaskis determined that the appellant posed a danger to the community. We consider Judge Trevaskis' analysis to be an analysis of the risk posed by the appellant at the time of that hearing. We treat that as our starting point in line with Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702, noting that a number of years have passed since then.
15. We consider it convenient to outline some of that detail in order properly to analyse evidence that post-dates the decision of Judge Trevaskis.
16. The OASyS report of 29 August 2014 notes that the appellant presented a risk of serious harm: "if in the right company, [the appellant] has the potential to commit harmful crimes to meet his needs demonstrating little care or consideration for those he hurts". It concludes that he was a high risk of robbery, violence, dishonesty and group action against vulnerable members of the public. The appellant had sought to distance himself from the offence, maintaining there had been no gun used. The Judge sentencing the appellant for the robbery was of the opinion that, so far as culpability was concerned, he saw no reason to distinguish between the three co-accused. The Judge was clear that a gun was used. The appellant had, says the OASyS report, used his time in custody constructively with education and increasing his employability upon eventual release.
17. We have considered the statements produced by the appellant. They outline an abusive childhood, devoid of the love, care and support that every child is entitled to. The appellant outlines his conviction for robbery in 2005, his marriage, use of drugs to self-medicate the voices he was hearing, and then the robbery of what he calls a brothel, which led to his conviction and sentencing by HHJ Arran.
18. The respondent submitted that the appellant's description of the business which was the subject of the 2011 robbery as a brothel, when the sentencing remarks refer to it as a massage parlour, is in itself indicative of the appellant posing a risk because it is indicative of his attitude to the type of people he poses a risk to.
19. The appellant goes on in his statement to explain that on release from prison he returned to live with his mother, which was far from a supportive environment, and that he turned to using crack cocaine. The appellant progressed to selling crack and living in crack houses. He sought medical assistance with his mental health, undergoing eye movement desensitisation a year before being arrested for possession with intent to supply. It was this arrest that led to him being given a hospital order by the Crown Court.
20. The appellant was released from hospital under a Community Treatment Order (CTO) on 23 January 2024, he tells us. He lives in 24-hour supported accommodation in Hounslow. The appellant tells us that he still hears voices all

the time but now has techniques available to him which help. He has the benefit of weekly therapy sessions and the assistance of the hostel manager. It is the hostel manager who has found him a volunteer job at a food bank. The appellant concludes his second statement by stating "I really want to stay away from crime. I don't want to get into that predicament again... I want to live a normal life".

21. His use of the term 'brothel' for the massage parlour is of little probative value to us. The OASyS report notes that a copy of *Loot* magazine was in his possession and had the details of brothels and sex workers circled. We assess that his use of the term "brothel" by the appellant does not throw any further light on his attitude to his victims at the time of his offending or at the time of the production of the OASyS Report.
22. There is an email from Fabio Alves, the appellant's key worker, dated 14 March 2024. He describes that the appellant attends the gym five to six days a week and volunteers one day a week, where he puts together food packages and ensures the warehouse is clean and free from hazards. The appellant has adhered to his discharge conditions.
23. There are three psychological reports by Dr Marc Desautels in evidence, dated 24 January 2019, 15 July 2021 and 10 May 2023. Dr Desautels is a clinical psychologist, who has experience working in secure services with mentally disordered offenders. Although we have considered carefully the description of the appellant's symptoms, we do not think it necessary to repeat them here in detail, rather we concentrate on the factors which we think most relevant to the issue of whether he represents a current danger to the community.
24. Dr Desautels first assessed the appellant when he was admitted to the secure unit in May 2017. The personal history that the appellant outlined to Dr Desautels is broadly consistent with the personal history outlined in the appellant's witness statements.
25. Dr Desautels opines that the appellant suffers from a trauma-related disorder with psychotic features. He describes how the appellant's mental state stabilised after admission to hospital. In the 2019 report he describes the different therapeutic activities the appellant was undergoing, and the medication the appellant was on.
26. In the 2021 report, Dr Desautels states that the appellant was allowed escorted leave from the hospital.
27. In the 2023 report, Dr Desautels states that the appellant had not self-harmed for over a year, and appeared better able to manage his distress, now tending to ask for help when he needs it. The appellant did, however, struggle with transition to Butler House (a pre-discharge ward functioning like a hostel) which has a less structured environment.
28. The appellant was, at the time of writing the final report, granted leave for two daily one-hour periods in the hospital grounds and three three-hour periods of leave to go into the local area. This is unescorted leave. The appellant had finished sessions on aggression management, which he had to restart on transition to the less structured environment of Butler House. He is compliant with his treatment and takes part in sessions focussing on prevention of relapse to

drug and alcohol use. The route to discharge from hospital treatment is one that the appellant is keen on but feels scared and overwhelmed by.

29. Dr Desautels gives evidence on the potential impact of the appellant being removed from the UK, but does not explicitly address the question of his danger to the community.
30. There is also in evidence the report from Mr Ramjiawon, a Practitioner Psychologist, dated 11 March 2024. He has known the appellant since June 2023 as he was on the staff of Butler House as the ward psychologist. He was involved with the appellant's care until his discharge from hospital in January 2024. He outlines that the appellant now lives in the community, with his care coming from the Specialist Community Forensic Team. He recounts the appellant telling him he has a diagnosis of non-organic psychosis and post-traumatic stress disorder. The appellant still hears voices, which are malevolent, distressing and sometimes command him to hurt himself. He does resist this.
31. The report outlines that The appellant was discharged from hospital in January 2024 and placed in 24-hour supported specialist forensic mental health accommodation. This was to provide him with the support he needs and to reduce the risk of his re-offending. He has regular contact with his forensic psychiatrist and has access to a range of other professionals to assist him.
32. The appellant is currently on a Community Treatment Order (CTO) and intends to comply with the conditions and treatment plan. There have been no recorded incidents of physical aggression to others since January 2019.
33. At 6.13.1 of his report, Mr Ramjiawon notes that the appellant was discharged from hospital on to a CTO because his risks were assessed to be safely managed if so discharged.
34. The appellant submits that it is not clear *how far* the CTO is in place for his protection and how much it is for the public, but the appellant's current behaviour and diagnosis shows he is not a danger to society.
35. The respondent submits that the appellant remains under the possibility of recall in line with the terms of his discharge and CTO. The appellant is in a controlled environment at the moment and remains a threat to himself and to others. The test that the medical authorities have to consider for discharging him from hospital is not the same as the test of rebutting s72 presumptions. The report of Mr Ramjiawon should be given little weight in terms of the risk of reoffending in that it only considers the risk of violence, and goes no further than repeating the views of others. The reference to their being no recorded acts of violence since 2019 mean that there was an act of violence by the appellant in 2019.
36. The HCR-20 was mentioned in Mr Ramjiawon's report and was submitted to us in evidence after the hearing, along with written submissions from both parties. The HCR-20 is dated 8 February 2024 and records an assessment by Dr Bisht. It records no recent evidence of violent ideation, and the continuing presence of a major mental disorder. The appellant was developing his coping skills for anger and stress and his lack of money and his immigration proceedings are a source of stress. The appellant reported no violent ideation for the last 6 months. The HCR-20 considers the risk of physical assault on anyone, including people staring at

the appellant. It considers the risk of instrumental violence to obtain monetary gains. Both of these are assessed to be chronic risks, with the risk of physical assault being expanded on as “low likelihood, well supported whilst on ward in MSU” and there being no expansion on the risk of instrumental violence to obtain monetary gains.

37. The respondent submits that the HCR-20 further undermines Mr Ramjiawon’s report as he did not mention various factors listed in the HCR-20 which are indicative (says the respondent) of the appellant’s danger.
38. The appellant submits that the HCR-20 is not an assessment of the his propensity to commit offences, or whether he is a danger to the community. The appellant also submits that the Mr Ramjiawon must have considered everything in the HCR-20 as he had it available to him, but was not required to mention everything in writing his own report.
39. We consider that the appellant’s desire, expressed in his statements, to keep away from criminal activity is of limited weight in assessing whether he is a risk. The weight that it does have goes in his favour. The more persuasive evidence from the appellant himself is that the appellant is currently complying with his treatment. The HCR-20 notes that his engagement has fluctuated in the past, which leads us to attribute slightly less weight to his compliance than if it had been over a more prolonged period. The appellant remains, in our judgment, a seriously ill person.
40. Taking all of the evidence into account, we judge that the most instructive elements of the evidence on whether the appellant is a danger to society are as follows. The appellant is currently complying with his treatment, and there have been no recorded violent events since 2019. However, he is currently in specialist accommodation at least partially to reduce the risk of his re-offending and is suitable for only very limited unsupervised time outside of this setting. The HCR-20 notes that the appellant presents a chronic risk of assault and of violence for monetary gain with the assessed low likelihood of assault being clearly linked to the support available to him whilst in his current accommodation. The appellant reported violent ideation as recently as 6 months before the HCR-20 was drafted. We note also that he has previously been released from a custodial sentence and went on to offend again.
41. On the central issue of the appellant’s propensity to reoffend paragraphs 6.11 and 6.12 of Mr Ramjiawon’s report mainly set out the conditions which attach to his CTO, summarising the core conclusions of Dr Bisht. It appears that Mr Ramjiawon adopts Dr Bisht’s opinion that the likelihood of reoffending is low, without offering his own additional analysis. In our judgment, Dr Bisht’s conclusions must be read alongside the remaining analysis contained in Mr Ramjiawon’s report, and the other materials to which we have been taken. For example, at para. 6.4.1 Mr Ramjiawon’s report states that the appellant continues to experience “very distressing voices, beliefs of thought broadcasting, and difficulties associated with past trauma.” And later, “the current assessment identified significant and on-going difficulties with anxiety, which appear to be linked to his experiences of psychosis, uncertainty about his future, and social situations and settings.”
42. Assessed in the round, the picture that emerges from the medical evidence as a whole, taking into account the appellant’s own written evidence of his resolve to

reform, is of an individual with a fragile mental state who is susceptible to relapse as a result of stress, anxiety and other adverse factors. The appellant lacks social support (Ramjiawon, para. 5.14.2) and he views his general life situation as unstable and unpredictable. Many areas of his life are a concern to him; his employment status, financial status, family and close relationships. We conclude that the appellant's chronic mental health conditions mean that in many aspects of his day to day life he is on something of a knife edge. The appellant is vulnerable to a degree of exploitation in the United Kingdom (Ramjiawon, para. 6.9.2).

43. Bearing in mind the seriousness of the offences the appellant has committed in the past, including by reoffending while on post-custody licence for earlier offences, we conclude that the overall fragility of his mental state, his vulnerability to external negative factors, and the likely consequences of any reoffending of the sort he has previously engaged in, all combine to lead to the conclusion that the appellant has not rebutted the presumption contained in section 72(2). We reach this conclusion to the balance of probabilities standard.
44. Pursuant to section 72(10)(b), since we agree that the subsection (2) presumption applies, we must dismiss the appeal so far as it relies on the ground of appeal in section 84(1)(a) of the NIAA 02.

Issue 2

45. Pursuant to *Essa (Revocation of protection status appeals)* [2018] UKUT 00244 (IAC), we must determine the appellant's ground of appeal under section 84(1)(a), even though we have found that the section 72(2) presumption applies and are bound to dismiss the appeal so far as it relies on the ground of appeal in section 84(1)(c).
46. We were reminded by both parties of the test in DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 00223 (IAC) when considering whether an appellant is a member of a particular social group on the basis of their mental health. We reproduce the relevant parts of the judicial headnote here:

2. Depending on the facts, a 'person living with disability or mental ill health' may qualify as a member of a Particular Social Group ("PSG") either as (i) sharing an innate characteristic or a common background that cannot be changed, or (ii) because they may be perceived as being different by the surrounding society and thus have a distinct identity in their country of origin.

...

4. The assessment of whether a person living with disability or mental illness constitutes a member of a PSG is fact specific to be decided at the date of decision or hearing. The key issue is how an individual is viewed in the eyes of a potential persecutor making it possible that those suffering no, or a lesser degree of, disability or illness may also qualify as a PSG.

47. The respondent submitted that we should take a conjunctive approach to the test in headnote 2. In other words, we should look to see if the appellant is both sharing an innate characteristic or common background *and* may be perceived as being different by the surrounding society and thus have a distinct identity. While

that may be the approach to be taken to cases subject to the Nationality and Borders Act 2022, this case pre-dates the coming in to force of that Act and so we apply the test disjunctively, as it is described in DH.

48. The Country Information Note Nigeria: Medical treatment and healthcare dated December 2021 (the CPIN) offers evidence on the mental health support available in Nigeria at section 22. It provides evidence of a strong societal belief that mental illness is caused by evil spirits or supernatural forces. This is echoed in other documentary evidence provided to us, including a report from Human Rights Watch dated 11 November 2019 (the Human Rights Watch report), a report from a website called Slate dated 29 November 2013, a report by One World Research (an organisation which describes itself as an international research and investigation organisation specialising in human rights research) using research from 2017 and 2018 and a BBC report dated 4 October 2020. Each of these sources corroborate the assertion that mental health issues are seen as being caused by evil spirits or possession.
49. We note the appellant's recurring belief that his mental ill-health is a result of being possessed. We assess that him expressing this belief (when it returns) would increase the likelihood that others will see his illness as being a manifestation of possession.
50. A report prepared by Amnesty International for this appeal, dated 15 April 2019, states that

[I]t is our assessment that on return to Nigeria [the appellant] is likely... to encounter widespread attitudes that confirm and amplify his belief in demonic forces and witchcraft as being at the root of his problems. He is, moreover, at substantial risk of being identified as suffering from demonic forces and faces a resultant risk of being targeted as a result.
51. The appellant submitted that this evidence, taken in the round, shows that the appellant would be a member of a Particular Social Group within the meaning of the Refugee Convention. The respondent, beyond addressing us on whether we should take a conjunctive or disjunctive approach, did not make submissions addressing the question of membership of a Particular Social Group.
52. We find that people suffering with mental ill-health in Nigeria do have a distinct identity due to the innate characteristic or common background of their mental ill-health. We are also satisfied that the country evidence shows the appellant would be perceived as being different by the surrounding society in Nigeria. We find this because the appellant would be perceived as being subject to the control of evil spirits, supernatural forces, or being subject to punishment by God. A potential persecutor would see the appellant as much more of a target than those not suffering with their mental health. We conclude that the appellant is a member of a Particular Social Group in Nigeria.
53. The appellant's case is that he would face a real risk of persecution by reason either of not being able to obtain suitable treatment, or because he would come to the attention of Nigerian police and be mistreated by way of the standards of detention. The respondent submits that there is medical treatment available for mental health that is of sufficient quality not to amount to persecution or serious harm and that it is mere speculation to say that the appellant might come to the attention of police for reasons of his mental health rather than for other reasons.

54. With regards to the quality of treatment available in Nigeria, the CPIN quotes sources to the effect that fewer than 10 per cent of mentally ill Nigerians have access to the care they need, that there are fewer than 300 psychiatrists to Nigeria's estimated 180 million people, and that even in state facilities, people are chained up in response to their mental health issues. The Human Rights Watch report also reports on the chaining of mental health patients (both in mental treatment settings and in detention in the criminal justice system), saying there are examples of people being chained to objects or other patients for months and years. One researcher found a ward of people chained by their ankles in a psychiatric hospital. The Amnesty International report produced for this case outlines that there has been 'chronic neglect' of mental healthcare provision in Nigeria for many years.
55. The respondent points to the CPIN which contains an excerpt from a 2017 report that 'the treatment of mental illness is possible in public hospitals. There is no form of mental illness for which treatment is not available in Nigeria. Human resources are not sufficient for the country's needs'. The Amnesty International report states that psychiatric hospitals have adopted modern methods of treatment and that the legal framework is changing from focussing on detention to treatment of those with a mental illness.
56. Although there is a change in legal framework for treatment of those with mental illness, the evidence of the Amnesty International report, and that of Oluwafemi Longe, a barrister practicing in Abuja, is that the new law (the Mental Health Act 2021) has not been effectively funded and implemented yet. We give the evidence of Oluwafemi Longe little weight when it goes beyond an explanation of Nigerian law, but we do give weight to the evidence on the lack of implementation of the Mental Health Act as it seems to us that this is within the expert's area of expertise.
57. Keeping in mind our conclusions on the risk that the appellant currently poses, assessed above when considering whether he poses a current danger to the community, we also consider that it is likely he would come to the attention of the Nigerian police if he was not within the Nigerian public hospital system. The appellant would then likely be detained, either for alleged breaches of the criminal law, or as a 'civil lunatic' (not having committed a crime but detained because of their mental ill-health).
58. The Amnesty International report saw little difference in the treatment of the mentally ill they visited in police cells based on whether they were 'civil lunatics' or 'criminal lunatics'. There was the possibility of periodic visits from psychiatric doctors. 'Civil lunatics' faced the possibility of indefinite detention.
59. We are satisfied that whatever the initial basis for his detention, he would be treated as a 'lunatic' within the criminal justice system. For that reason, we are not persuaded by the respondent's submission that, if the appellant were arrested because he was a criminal threat, any mistreatment the appellant would face would not be because of his membership of a Particular Social Group (those with mental ill-health).
60. We were presented with limited evidence on the treatment of detainees in the Nigerian Criminal Justice System. An excerpt from the US Department of State, 2022 Country Reports on Human Rights Practices: Nigeria, 20 March 2023 describes conditions as harsh and life threatening, with detainees facing gross

overcrowding and inadequate medical care, food and water shortages, and other abuses. The Amnesty International report states that police cells are frequently dirty, unhygienic, with poor sanitation and ventilation. Police cells are normally at double or triple capacity, and some detainees have to rely on family to bring them food.

61. The respondent did not address us in any depth on the standard of detention facilities in Nigeria, concentrating rather on the submission that it is speculative to say that the appellant would go into police detention.
62. Taking all of the evidence on available medical treatment for mental health, we find that there is treatment available in Nigeria that is modern in its methods. However, there is a low level of availability of suitable medical treatment, which we find is not widely available, and there is weighty evidence of widespread ill-treatment of patients. The evidence proves the appellant would face a real risk of persecution if seeking treatment for his mental ill-health.
63. Given the appellant's criminal history, and the risk of criminality that he continues to pose, we conclude that it is not speculative to say that he would come into police detention in Nigeria if he is not in a medical setting. We consider it likely that he would be detained by the police at some point. The evidence on the standards of detention for those with mental illness is sufficient to prove that he faces a real risk of treatment amounting to persecution.
64. We therefore decide this ground of appeal on the basis that the appellant would have been successful under section 84(1)(a), but for our decision to uphold the section 72 certificate.

Issue 3

65. The approach we are to take to the appellant's art 8 rights is set out at s117A-D of the NIAA 02. Because the appellant was sentenced to more than 4 years imprisonment (it was 7 years), in order to show that his art 8 rights are not outweighed by the public interest, he must prove that there are very compelling circumstances in his case in line with s117C(6), over and above any circumstances which would fall within exceptions 1 and 2 (s117C(4) and (5)).
66. The impact on his art 8 rights that removal from the UK to Nigeria would have was subject to brief submissions by both parties. The appellant submitted that it is not solely the difference in healthcare provision between Nigeria and the UK that gives rise to an ECHR breach, but also the societal attitudes The appellant would be exposed to were he to be removed to Nigeria. The appellant's art 8 rights would effectively destroyed by removal to Nigeria because of the very severe impact on his mental health. The appellant further submitted that he would have no family or friends to support him in Nigeria and that there is a high likelihood that he would be entirely isolated, with a likely complete lack of support from statutory or other services. The appellant has spent some 22 years in the UK, since he was 13 years old. The respondent did not include submissions on art 8 in his skeleton argument, but before us noted that the art 3 decision of the Judge (allowing the appeal on that ground) had been preserved. The respondent is of the view that the art 8 appeal stands or falls with the art 3 appeal and made neither concessions, nor further submissions beyond that.

67. We note that the deportation of foreign criminals is in the public interest. The more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal (section 117C(2)). The appellant's sentence of 7 years imprisonment is a clear indicator of the seriousness of his offending.
68. To assess whether the appellant can show there are 'very compelling circumstances' over and above those described in exceptions 1 and 2, we look initially at the level to which the appellant could (or could not) satisfy those exceptions, but for him being sentenced to a period of imprisonment of over 4 years.
69. Exception 2 could not, in our judgment, come in to play because the appellant does not claim to have a genuine and existing relationship with anyone who would satisfy the definition of a 'qualifying partner' or 'qualifying child'.
70. With regards to exception 1, the time that the appellant has spent lawfully in the UK was not subject to submissions and is not easy to determine from the evidence. After arriving in the UK unlawfully, the appellant applied for asylum on 23 July 2002. This was refused, but he was granted Exceptional Leave to Remain (ELR) to 5 November 2006. The appellant applied for further ELR on 2 October 2006 and it appears that, while the respondent's internal file shows this as being marked as "void inappropriate", no decision was communicated to him, and on 7 April 2008 his representatives were notified that his "status and entitlements in this country" would remain unchanged until a decision is made on his case. This notification is relevant as it shows the respondent considered that no decision had yet been made on the application, and leave under s3C of the Immigration Act 1971 continued.
71. The appellant was served with a notice of liability to deportation on 20 February 2012 following his conviction for robbery and possession of an imitation firearm. The appellant's representatives made representations to the respondent on 12 March 2012 (within the deadline for doing so), which led to the appellant's asylum application being refused, the appellant being served a deportation order, and becoming 'appeal rights exhausted' on 13 December 2016. By this point the appellant had been in the UK with leave of one form or another for 14 years, 4 months, 21 days.
72. The appellant made further representations to the respondent on 4 February 2019, followed by other representations, which led to the refusal to revoke the deportation order which leads to the current appeal. S3C provided the appellant with leave lasting a further 5 years 6 months in those circumstances.
73. The appellant has therefore spent over 19 years 10 months lawfully in the UK, being most (ie more than half) of his life.
74. Turning to the question of the appellant's social and cultural integration in the UK, the appellant had arrived in the UK aged 13 and therefore had the majority of his adolescence and associated upbringing in the UK as well as his secondary education. He left school without qualifications but obtained a BTEC, did a cabin crew course and has studied plumbing. We are not told that he has a history of employment. The appellant was first convicted of robbery in 2005, 3 years after arriving in the UK, and has subsequently been convicted of the robbery that triggered his deportation order and (later) possession of cocaine with intent to

supply. The evidence we have of his current life is that he has a limited social circle, interaction with the local community by volunteering in a food bank, attends a gym, and has some contact with his brother. The appellant married in 2009 but in his latest witness statement tells us that the only family he has contact with is his brother.

75. The appellant therefore, in our assessment, cannot be said to be socially and culturally integrated in the UK. He has few social ties and is (by necessity) largely isolated from society by reason of his current treatment. His criminal convictions show a manifestly anti-social approach to his fellow citizens and led to social isolation through his imprisonment.
76. On the question of very significant obstacles to the appellant's integration to Nigeria were he to be returned, the retained factual findings of the FtT relevant to the appellant's removal causing an art 3 ECHR breach combine with the evidence that leads us to identify a real risk of mistreatment under issue 2 above. We assess that the result is the appellant would more likely than not face very significant obstacles to integrating into Nigeria. The appellant's medical needs are such that, were he to be removed from the care he currently benefits from, and returned to Nigeria, with the scarcity of suitable treatment available there and the risk of being detained that the appellant would face, he simply would not have a reasonable opportunity to be accepted, to be able to operate in society and develop his art 8 rights.
77. Although the appellant is not able to avail himself of exception 1, the factors of his lawful residence for more than half of his life and the very significant obstacles to integration weigh in the appellant's favour when considering whether there are very compelling circumstances in his case.
78. Although the appellant's current treatment constricts the level of integration into the UK the appellant has we consider that the appellant's mental health treatment, including the relationships with health and care professionals, is a part of his private life, feeding directly into his personal development and being the majority of his social ties.
79. The appellant's private life is, beyond that, somewhat limited. This is not to belittle the effort he has put in to his recovery or the life that he leads. This is simply a reflection that his private life consists, on the evidence, of life in supported accommodation with limited external activity as outlined when considering social and cultural integration into the UK above.
80. The appellant has never held Indefinite Leave to Remain in the UK and so his immigration status has remained precarious throughout. In line with s117B(4) and (5) NIAA 02 we attribute little weight to his private life.
81. The two concepts of art 3 and art 8 rights are distinct but do have some overlap. Similar to the Judge's finding when considering art 3 matters, we are satisfied on the Balance of Probabilities that, without the support of medical professionals that he currently has, the appellant would face a cliff-edge of treatment, and a the near-extinguishing of his private life, with a vanishingly small ability to develop his art 8 rights in Nigeria. We note the factors in his favour that would be relevant to exception 1 were the appellant able to rely on it. We remind ourselves that we must give the appellant's private life little weight.

82. On the other hand, we weigh the public interest, which has increased weight because of the seriousness of his offending. This is a most weighty factor which usually would take – as the primary legislation states – very compelling circumstances over and above the statutory exceptions the deportation.
83. We see some force in the Secretary of State’s neutral position in relation to the article 8 implication of the appellant’s deportation, in light of the preserved article 3 findings. However, it is important for us to determine this issue from first principles. There is, in our judgment, a significant reason militating in favour of allowing the appeal on article 8 grounds, in addition to those outlined above. Pursuant to our analysis under issue 2, we have concluded that the appellant would be at a real risk of being persecuted on account of his mental health conditions, within the meaning of the refugee Convention. Although he is not entitled to the protection of that convention pursuant to article 33 of the convention and section 72, as set out above, we must nevertheless address the prospective circumstances of the appellant’s return to Nigeria. Such return would entail the exposure of the appellant to conduct amounting to persecution. That is a weighty factor, on the basis of the evidence presently available.
84. In our judgment, weighing the factors militating in favour of the appellant’s deportation against those mitigating against it, in the exceptional circumstances of this case we conclude that the outcome is that the impact on his art 8 rights would be such that there are very compelling circumstances in the sense of s117C(6) NIAA 02 and the impact on his art 8 rights would therefore not be proportionate.

NOTICE OF DECISION

The decision of the First-tier Tribunal involved the making of an error of law and is set aside, subject to the findings concerning Article 3 ECHR being preserved.

We remake the decision, acting pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 by:

1. Dismissing the appeal on protection grounds;
2. Allowing the appeal on Article 8 ECHR grounds.

D Cotton

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 August 2024



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005258

First-tier Tribunal No: PA/51500/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Secretary of State for the Home Department

Applicant

and

OL
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A. Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr A. Mackenzie, South West London law Centres

Heard at Field House on 31 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

The order made by Judge Karbani is varied to the above extent.

DECISION AND REASONS

1. By a decision promulgated on 27 June 2023, First-tier Tribunal Judge Karbani (“the judge”) allowed an appeal brought by the appellant, a citizen of Nigeria born in 1988, against the decision of the Secretary of State dated 25 March 2021 to refuse his asylum and human rights claim. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).
2. The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Sills.
3. The judge made an order for anonymity in favour of the appellant and “any member of his family”. I maintain that order insofar as it relates to the appellant. I do so on a precautionary basis, for the time being. The appellant has an outstanding protection claim and experiences a number of serious mental health conditions. However, there is no reason to grant anonymity to “any member of his family”. I vary the existing order to that extent.
4. Although this is an appeal of the Secretary of State, for ease of reference I will refer to the appellant before the First-tier Tribunal as “the appellant”.

Procedural background

5. The appeal against the 25 March 2021 decision was originally heard and allowed by First-tier Tribunal Judge O’Garro by a decision dated 12 November 2021. By a decision promulgated on 29 March 2023, Upper Tribunal Judge Kebede sitting with Deputy Upper Tribunal Judge Davey set the decision of Judge O’Garro aside and remitted the appeal to the First-tier Tribunal to be heard by different judge. It was in those circumstances that the appeal was heard by Judge Karbani on 30 May 2023, and it is against her decision that the Secretary of State now appeals.
6. The appellant’s rule 24 notice dated 12 December 2023 raised a preliminary issue as to whether the Secretary of State’s application for permission to appeal to the Upper Tribunal was in time. I gave directions for an exchange of submissions on this point. The Secretary of State provided evidence to demonstrate that the application had been in time. This issue was abandoned by the appellant before the hearing. I should add that my preliminary view had been that since Judge Sills in granting permission to appeal had concluded that the application was in time, it would not be open to the appellant to challenge the jurisdiction of this tribunal to hear the appeal on the basis of that decision, save by means of an application for judicial review of the permission to appeal decision itself: see *Ndwanyi (Permission to appeal; challenging decision on timeliness)* [2020] UKUT 378 (IAC).

Factual background

7. The appellant arrived in the United Kingdom in 2002 as a child. He was refused asylum but was granted exceptional leave to remain until 5 November 2006. He was convicted of robbery and the possession of an imitation firearm on 28 October 2011 and was sentenced to seven years’ imprisonment. The Secretary of State was minded to deport the appellant. He made protection and human rights claims in response to the decision to deport him. The claims were refused, and the appellant appealed to the First-tier Tribunal. The appeal was dismissed by First-tier Tribunal Judge Trevaskis by a decision dated 1 September 2015. The appellant exhausted all avenues of appeal against that decision on 13 December 2016.

8. On 25 November 2016, having been released on licence, the appellant was recalled to custody. On 25 April 2017 he was transferred to a secure mental health unit under sections 47 and 49 of the Mental Health Act 1983 (“the 1983 Act”). On 18 January 2018, he was convicted of a possession of a Class A drug with intent to supply and sentenced to a hospital order under section 37 of the 1983 Act. He remained in detention pursuant to the section 37 order at the hearing before the judge.
9. The appellant made a series of further submissions to the Secretary of State, culminating in representations dated 22 October 2020. His health conditions rendered him at risk of serious harm and the prospect of exposure to inhumane and degrading treatment in Nigeria. He claimed that his mental health conditions were such that he would be compelled to commit suicide shortly after his arrival in Nigeria, were he to be deported. He was a member of a particular social group on account of his mental health conditions (persons suffering from mental illness in Nigeria) and would be persecuted on that account upon his return.
10. The Secretary of State refused the appellant’s asylum and human rights claims by the decision dated 25 March 2021. The decision concluded that the appellant was excluded from the protection of the Refugee Convention pursuant to section 72 of the 2002 Act. He had failed to rebut the presumption that he had been convicted of a particularly serious crime and so constituted a danger to the community of the United Kingdom.
11. As to the appellant’s health-based claims, the Secretary of State concluded that there was no contemporary medical evidence of his health conditions. He did not meet the revised threshold under *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17; his illness was not life-threatening, and the withdrawal of his treatment would not result in his death, albeit it may result in his psychosis recurring. The Secretary of State did not accept that there was a “complete absence of treatment” in Nigeria, or that the United Kingdom was subject to a positive obligation to provide him with treatment which would not be available in United Kingdom. Any deterioration in the appellant’s health would not engage Article 3.
12. The Secretary of State concluded that there was no evidence the appellant would attempt to commit suicide, and his mental health was improving as he responded to medication. He was not the member of a particular social group on account of his mental health conditions, and in any event would not be persecuted on that account.

The decision of the First-tier Tribunal

13. It was common ground before the judge that the Secretary of State would not seek to remove the appellant from the United Kingdom while he remained in secure detention under section 37 of the 1981 Act.
14. Before the judge, the appellant had relied on the written evidence of Dr Desautels, a registered clinical psychologist, Ms Patel, an independent mental health advocate, and internal hospital management reviews. They demonstrated that the appellant had been diagnosed with chronic and relapsing unspecified organic psychosis leading to delusional beliefs and hallucinations. He was receiving psychotropic medication and therapy. Dr Desautels noted that the appellant’s treatment relied heavily on therapeutic interventions, and not only clinical medication. The most effective interventions had been psychological. They

had achieved a measure of success and the secure hospital housing the appellant was looking into ways to discharge him into the community with adequate provision for his treatment in that context.

15. At para. 19, the judge found that the appellant had rebutted the presumption that he presented a “danger to the community” for the purposes of Article 33 of the Refugee Convention, pursuant to section 72 of the 2002 Act. That was because he was being accommodated in a secure hospital, and any risk he represented was being managed and therefore controlled.
16. At para. 20, the judge accepted the appellant’s case to be a member of a particular social group on account of his mental health conditions. In the alternative at para. 20, he was entitled to humanitarian protection.
17. The judge’s Article 3 findings are at paras 22 to 24. She accepted that the appellant had a “serious illness” for the purposes of *AM (Zimbabwe)*. There was a real risk that he would present with a significant deterioration in his health prior to and upon his return to Nigeria. There was no evidence of family or a support network of friends in the country. If he were returned, he would not be in a position to administer his own medication or seek medical assistance. It would not be reasonable to expect him to secure work or to be able to earn money in order to pay for treatment.
18. At para. 22 the judge found that the appellant had demonstrated that he was likely to experience a serious, rapid and irreversible decline in his mental health, and also that he faced a real risk of a significant reduction in his life expectancy. The Secretary of State had not adduced any evidence to demonstrate that arrangements or measures had been adopted to cater for the appellant’s health and his return which would otherwise be capable of dispelling any “serious doubts” concerning the health-based reception awaiting the appellant upon his return. The judge therefore allowed the appeal on Article 3 grounds.
19. At para. 25, the judge said that she had considered Article 8 ECHR in any event. Her reasoning was as follows:

“As a result of his 7 year sentence of imprisonment, the appellant must show there are very compelling circumstances above and beyond [sic] Exceptions 1 and 2 to make his deportation a breach of Article 8. For the reasons detailed above, I find that the appellant is suffering from a serious mental illness and that he will be vulnerable to a breach of Article 3 if he is returned. Based on the medical evidence, I am also satisfied that there is an element of mitigation as a result of his mental health which reduces the culpability of his offending behaviour and in particular note that as a result of his offence in 2016 he was immediately detained under the [1983 Act].”

20. The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

21. As pleaded, there were three grounds of appeal, although as will be seen the scope of the disputed issues narrowed considerably at the hearing in light of Mr Mackenzie’s helpful and fair concessions, which I shall outline below.

- a. Ground 1 is that the judge erred by confining her analysis of the risk posed by the appellant to that posed to the wider community while he was in detention, when addressing section 72 of the 2002 Act.
- b. Ground 2 is that the judge made a material misdirection of law when applying Article 3 ECHR.
- c. Ground 3 is that the judge failed to give adequate reasons for allowing the appeal on the basis of Article 8 ECHR.

22. In relation to ground 1, I raised with the parties whether the decision of this tribunal in *Restivo (EEA – prisoner transfer)* [2016] UKUT 449 (IAC) and *Secretary of State for the Home Department v AA (Poland)* [2024] EWCA Civ 18 were relevant by analogy. In *Restivo*, the issue was whether an EEA citizen who had been sentenced to life imprisonment with a minimum tariff of 37 years for committing a horrific murder in circumstances of utmost depravity could properly be said to represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society” for the purposes of the Immigration (European Economic Area) Regulations 2016 in circumstances when he was serving a lengthy custodial sentence and his risk was managed. At para. 34, this tribunal held that the management of the offender’s risk in custody was irrelevant to the issue of risk:

“Where the personal conduct of a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the fact that such threat is managed while that person serves his or her prison sentence is not itself material to the assessment of the threat he or she poses. The threat exists, whether or not it cannot generate further offending simply because the person concerned, being imprisoned, has significantly less opportunity to commit further criminal offences.”

23. The correctness of *Restivo* was confirmed by the CA in *AA*: see para. 55.
24. Mr Mackenzie confirmed that, having taken instructions in light of *Restivo* and *AA*, he no longer opposed ground 1. I will deal with this concession below.
25. In relation to ground 2, Ms Ahmed submitted that the evidence before the judge demonstrated the appellant’s mental health had improved. The judge had entered the realm of speculation by concluding that insufficient medical treatment would be available or accessible in Nigeria. She submitted that there was no evidence that Dr Desautels or Ms Patel had any expertise concerning the extent of healthcare provision in Nigeria, and it was not open to the judge to conclude that the appellant would experience a serious, rapid and irreversible decline in his mental health, nor that there was a real risk that he would face a significant reduction in his life expectancy. The judge had given insufficient reasons for those findings.
26. As to ground 3, Ms Ahmed submitted that the judge conflated Articles 3 and 8 ECHR. Each involved different questions, yet the judge’s Article 8 analysis merely adopted her earlier Article 3 reasoning, without addressing the separate questions which went to that issue. Ms Ahmed accepted that, if the Secretary of State was not successful in relation to the challenge to the judge’s Article 3 reasoning, any error on this account would be immaterial.

27. In response, Mr Mackenzie submitted that the judge reached findings of fact that were rationally open to her on the basis of the evidence she heard and considered. The Secretary of State’s challenge to the judge’s Article 3 findings did not get remotely close to reaching the threshold to challenge a first instance trial judge’s finding of fact. Properly understood, the judge’s Article 8 analysis did not merely adopt the earlier Article 3 analysis but was based on the findings of fact reached by the judge in that context, with additional Article 8-specific factors considered. Mr Mackenzie accepted that the judge’s findings were expressed in brief terms, but contended that, read as a whole by reference to the evidence and submissions before the First-tier Tribunal, were sufficient.

The law

Section 72

28. Section 72 of the 2002 Act provides, where relevant:

“(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years”.

“(6) A presumption under sub-Section 2 ... that a person constitutes a danger to the community is rebuttable by that person”.

Article 3 ECHR

29. Article 3 ECHR provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

30. In the context of health-based human rights claims, the leading authorities from the European Court of Human Rights are *Paposhvili v Belgium* [2016] ECHR 1113; [2017] Imm AR 867 and *Savran v Denmark* 7 December 2021 (application no. 57467/15). The leading domestic consideration of *Paposhvili* is *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 (“*AM (Zimbabwe) (SC)*”), which remitted the appeal to this tribunal to be reheard: see *AM (Art 3; health cases) Zimbabwe* [2022] UKUT 00131 (IAC) (“*AM (Zimbabwe) (UT)*”). Para. 1 of the headnote to *AM (Zimbabwe) (UT)* summarised the required analysis in the following terms:

“In Article 3 health cases two questions in relation to the initial threshold test emerge from the recent authorities of *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 and *Savran v Denmark* (application no. 57467/15):

(1) Has the person (P) discharged the burden of establishing that he or she is 'a seriously ill person'?

(2) Has P adduced evidence 'capable of demonstrating' that 'substantial grounds have been shown for believing' that as 'a seriously ill person', he or she 'would face a real risk':

[i] 'on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,

[ii] of being exposed

[a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or

[b] to a significant reduction in life expectancy'?"

Findings of fact

31. The grounds of appeal challenge findings of fact reached by a first instance trial judge. Appeals lie to this tribunal on the basis of errors of law, not disagreements of fact. Of course, some findings of fact may feature errors which fall to be categorised as errors of law: see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at para. 9. Appellate courts and tribunals are to exercise restraint when reviewing the findings of first instance judges, for it is trial judges who have had regard to "the whole sea of evidence", whereas an appellate judge will merely be "island hopping" (see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para. 114). As Lady Hale PSC said in *Perry v Raleys Solicitors* [2019] UKSC 5 at para. 52, the constraints to which appellate judges are subject in relation to reviewing first instance judges' findings of fact may be summarised as:

"...requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

32. It is well established that the conclusion that a judge has given insufficient reasons will not readily be drawn: see *South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33, at para. 36. See also *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605 at, for example, para. 118:

"...an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision."

Ground 2: Article 3 analysis open to the judge

33. I agree with Mr Mackenzie's submissions that the judge's Article 3 analysis was open to her, on the materials before her, for the reasons she gave. I set out the reasons for reaching this conclusion below.

34. The first question for the judge to consider pursuant to *AM (Zimbabwe) (SC)* was whether appellant had discharged the burden of establishing that he was a

“seriously ill person”. There was ample evidence before the judge meriting that conclusion.

35. It is important to note that at the time of the hearing before the judge, the appellant had been subject to hospital order imposed by the Crown Court at Isleworth on account of his mental health conditions. Being held under such circumstances amounts to an exception to the automatic deportation provisions contained in the UK Borders Act 2007 (which, although not determinative in these proceedings, demonstrates that Parliament considers that an exception to the automatic deportation regime should be engaged in the circumstances which is significant in and of itself). The Secretary of State accepted that he would not take steps to remove the appellant while the hospital remained in force. There was no suggestion before the judge that the hospital order had been improperly imposed, or that it was otherwise to be subject to appeal. Accordingly, there would be an air of unreality to any conclusion reached by the judge in these proceedings that, in those circumstances, the appellant was not a “seriously ill person”. In any event, the judge set out the evidence which legitimately led her independently to reach the same conclusion, which I summarise briefly below.
36. Dr Desautels had been the appellant’s treating clinical psychologist in the NHS Hospital in which he had been detained. Dr Desautels had provided reports in 2019, 2021 and 2023, each having been drafted with the benefit of detailed, practical and applied knowledge of the appellant’s health conditions, as identified by the judge at para. 12.
37. In his first report, dated 24 January 2019, Dr Desautels said at paras 6.16 – 17 that the appellant suffered from a trauma-related disorder with psychotic features. He experienced intrusive memories and nightmares and was preoccupied with demonic forces “playing tricks with his mind”. His sleep was affected in a pathological manner, and he claimed that demons prevented him from moving when he woke up.
38. In the same report at para. 9.1.1, Dr Desautels said if the appellant were told that he was to be detained in immigration detention, his mental state would deteriorate and he would experience delusions of persecution as he had in the past, which could potentially lead to his readmission to hospital.
39. The above diagnosis, which I have necessarily had to summarise selectively, was consistent with the later diagnoses which Dr Desautels gave in his 2021 and 2023 reports. In addition, while the appellant was receiving compulsory treatment, the Hospital Managers’ Panel within the secure hospital conducted regular reviews. In a review dated 20 September 2022, the Panel said that the appellant had a diagnosis of unspecified non-organic psychosis underpinned by PTSD. The condition was chronic in nature and demonstrated no signs of remission. The appellant experienced hearing voices commanding him to self-harm or to harm others which, in the appellant’s opinion, were attributable to black magic and witchcraft initiated by his family in the UK. The appellant expressed grandiose beliefs that he had special powers and continue to experience flashbacks to past traumatic events. The review concluded that “this degree of disorder makes it appropriate that [the appellant] should be detained in hospital for medical treatment.” Such treatment was, stated the review, psychiatric medication, 24-hour skilled nursing care, psychological and occupational, and the graded use of therapeutic leave. The auditory command delusion experienced by the appellant was such that it presented a sufficient risk

to the appellant himself and to others to justify the continued use of compulsory treatment.

40. The final report of Dr Desautels was dated 23 May 2023, following a consultation with the appellant and 4 May 2023, and two subsequent meetings with two members of the appellant's treating clinical team. The hearing before the judge took place on 30 May 2023. This was, accordingly, an up-to-date report drafted with the benefit of contemporary information. At para. 7.4, Dr Desautels said that the opinions he had expressed in his previous reports remained unchanged.
41. As Mr Mackenzie submitted, none of the medical evidence as summarised above had been challenged by the Secretary of State.
42. I reject Ms Ahmed's submissions that the appellant's mental health had improved by the hearing on 30 May 2023 such that the judge either gave insufficient reasons for reaching her conclusion is that the appellant was a "seriously ill person", or that it was irrational for her to reach those conclusions. There had been a degree of improvement in the appellant's mental health. However, the reality was that he remained in secure mental health detention, and the limited improvements that had taken place were not such as to merit his release into the community. For example, in the Hospital Managers' Review dated 20 September 2022, the panel observed that the auditory hallucinations experienced by the appellant were being acted on less frequently. However, the panel concluded that those auditory hallucinations still represented a significant risk, both to the appellant and to others, since there was a significant risk that he could, in future, act upon them.
43. I therefore reject the Secretary of State's submissions that the judge had not been entitled to conclude that the appellant was a "seriously ill person" for the purposes of *AM (Zimbabwe)*.
44. The second limb of Ms Ahmed's submissions was that the expertise of Dr Desautels and Ms Patel, the appellant's independent mental health advocate who had written in his support, did not extend to addressing health care provision in Nigeria. While I accept that, in principle, their expertise did not focus on such matters, their focus on those issues was minimal. Properly understood, the focus of their opinion was the withdrawal of the then current protective environment within which the appellant was able to receive 24-hour treatment and care. Any analysis of the appellant's prospective removal to any other country would necessarily entail a degree of comparison between the highly prescriptive treatment environment currently enjoyed by the appellant with the removal of such provision in the destination country. In any event, to the extent Dr Desautels and Ms Patel addressed the appellant's prospective healthcare in Nigeria those opinions went no further than adopting the Secretary of State's own evidence concerning mental health provision in Nigeria. The Secretary of State's *Country Information Note - Nigeria: Medical treatment and healthcare*, version 4.0, December 2021 set out a range of sources of evidence which the Secretary of State accepts demonstrate that mental health provision in Nigeria is very limited.
45. The *Country Information Note* cited with approval a report from the Australian Department of Foreign Affairs and Trade dated December 2020 which stated that there is a strong societal belief in Nigeria that mental illness is caused by evil spirits or supernatural forces (see para. 22.1.1). The guidance quotes a 2021 Human Rights Watch report that stated that "thousands of people with mental health conditions remain chained and locked up in various facilities, including

state hospitals, rehabilitation centres, traditional healing centres, and both Christian and Islamic faith-based facilities” (see para. 22.1.2). A 2020 US State Department Human Rights Report concluded that mental health care services were “almost non-existent” (para. 22.1.3). The most significant statistic to which Mr Mackenzie drew my attention is that summarised at para 22.2.2 which concluded that, for 180 million people in Nigeria, fewer than 300 treating psychiatrists are available.

46. Against that background, it was open to the judge to ascribe significance to Dr Desautels’ opinion that, in light of the particular health needs of this appellant (namely the combination of intense psychiatric treatment and supervision, and medication) would be unlikely to be met in Nigeria. There seems to have been no attempt by the Secretary of State to have argued otherwise before the First-tier Tribunal.
47. The judge reached her conclusions concerning the appellant’s health at para. 18, and later at paras 22 to 24. The appellant, the judge held at para. 18, was:
- “reasonably likely to experience despair and frustration, psychotic symptoms, self-harming and suicidal behaviour as well as dis-social personality traits if returned, presenting with a significant deterioration in his mental health... I accept that there is a real risk that he will start exhibiting symptoms as soon as he is informed that he is being returned. Even if [he] were to be able to manage to continue taking his medication, given the background evidence as to the lack of availability of psychological treatment, I which [sic] has been integral to managing his condition, I find that there is a real risk that he will not be in a position to access that care himself absent a support network, none of which is known to be present.”
48. At paras 22 to 24 the judge concluded that there was no evidence of a family support network to assist the appellant in Nigeria. He would not be in a position to self-medicate or otherwise seek medical assistance should he require it. It would not be realistic to expect him to access the employment market in order to secure funds to earn income to pay for medication or treatment. Those findings correctly addressed the next stage of the *AM (Zimbabwe)* criteria which concern whether there would be appropriate treatment in the receiving country, or access to such treatment.
49. The final stage in the *AM (Zimbabwe)* analysis addresses the consequences to the appellant of being a seriously ill person unable to access appropriate treatment and the receiving country. The judge concluded at para. 23 in the following terms:
- “I am satisfied that [the appellant] has demonstrated that he is likely to suffer a serious, rapid and irreversible decline in his mental health and that there is also a real risk of facing a significant reduction in life expectancy. The appellant is therefore demonstrated a prima facie case that there will be a breach of Article 3 were he to be returned.”
50. At para. 24, the judge said that the Secretary of State had not provided any evidence to demonstrate that measures had been agreed with the Nigerian authorities to alleviate the risks the appellant would face upon his return.

51. Those findings were open to the judge on the evidence before her for the reasons she gave. To the extent the Secretary of State challenges the sufficiency of the reasoning in the judge's decision, that challenge is without merit. It is plain to the reader of the decision why the judge reached those conclusions, especially when they are viewed alongside the evidence that was before her. Properly understood, the Secretary of State's challenge to those findings reached by the judge are a disagreement of fact and weight and do not demonstrate that the judge reached a decision that no reasonable judge could have reached.
52. The appeal Against the judge's article 3 findings is therefore dismissed.

Ground 3: any Article 8 error immaterial

53. The judge concluded her decision by reference to the Article 8 deportation provisions contained in part 5A of the 2002 Act. I accept the Secretary of State's submissions that this aspect of the judge's analysis was insufficiently reasoned and, on the basis of the reasons given, involved the making of an error of law. In fairness to the judge, many aspects of her decision were commendably brief, and she stated that she addressed the Article 8 issues "for the sake of completeness" (para. 25), implying that she thought that full reasoning was not required. It was plain that this part of the judge's analysis was not central to her decision to allow the appeal. Perhaps for similar reasons, it was also common ground at the hearing in this tribunal that if I dismissed the Secretary of State's appeal against the judge's Article 3 findings, any error in the judge's Article 8 analysis would be immaterial.
54. The judge gave two reasons for allowing the appeal under Article 8. The first reason simply incorporated the judge's earlier Article 3 findings ("for the reasons detailed above, I find that the appellant is suffering from a serious mental illness and that he will be vulnerable to a breach of article 3 if he is returned"). The second was that the appellant's culpability was reduced on account of his mental health conditions, and that his offending in 2016 (which must have been the date of the commission of the offence for which he was subject to a hospital order in 2018, since its commission led to his recall to prison to serve his 2011 sentence) led to the imposition of a hospital order.
55. In isolation, the first reason cannot, without more, militate in favour of allowing an appeal on Article 8 grounds. While there may be an overlap between the interests protected by Article 8, including the ability of a returnee to integrate and establish a private life of their own, and article 3, the two concepts are different. Something more is required for an appeal to be allowed on Article 8 grounds.
56. That leads to the second reason given by the judge, namely the appellant's reduced culpability. In the circumstances of these proceedings, the second reason was not rationally capable of leading to the conclusion that the appellant's culpability was diminished such that the public interest in his deportation would be reduced to the extent that his deportation would disproportionate. Even if the medical evidence before the judge demonstrated the appellant's reduced culpability for his 2018 conviction (and if it did, the judge did not say which aspects of it led to that conclusion), the medical evidence before the First-tier Tribunal did not relate to his mental state upon the commission of the armed robbery in 2011. That offence is the most serious of the appellant's antecedents and triggered the ongoing deportation action which he continues to face. There is no suggestion in the sentencing remarks of His Honour Judge Arran in 2011 that the appellant's culpability on that occasion was diminished on account of any

mental health conditions he may have been suffering at the time. The medical evidence before the judge post-dated the appellant's conduct on that occasion by several years.

57. Although not material to the judge's overall decision to allow the appeal on human rights grounds, I find that the judge's Article 8 analysis did involve the making of an error of law. I set those findings aside.

Ground 1: section 72 certificate

58. For the reasons very fairly conceded by Mr Mackenzie, the judge's section 72 analysis was in error. It was a misdirection of law for the judge to conclude that the section 72 presumption had been rebutted for the reasons she gave. That means there has been no proper consideration of the section 72 issue, and the judge's findings concerning the appellant's protection claim involve the making of an error of law.
59. It was also conceded by Mr Mackenzie that the judge's analysis of the substantive asylum claim by the appellant failed to address his risk of being persecuted notwithstanding her findings that he would be a member of a particular social group on account of his mental health conditions. That was an issue identified by Judge Sills when granting permission to appeal. Mr Mackenzie also conceded that the judge's analysis of the appellant's entitlement to humanitarian protection was in error, for it contained no analysis of the appellant's suitability for humanitarian protection.
60. In light of the broader errors in the judge's analysis of the appellant's protection claim, it follows that the entirety of her findings concerning that issue (but not the findings of fact going to the Article 3 issue) must be set aside.

Disposal

61. In conclusion:
- a. The judge's analysis of the appellant's protection claim involved the making of an error of law and is set aside;
 - b. The judge's findings of fact and Article 3 ECHR analysis did not involve the making of an error of law such that they must be set aside;
 - c. The judge's article 8 analysis involve the making of an error of law, and must be set aside.
62. I therefore set aside the decision of the judge to the extent set out above, preserving all findings of fact concerning the Article 3 issue.
63. Paragraph 7.2 of the Practice Statements of the Immigration and Asylum Chambers of the Upper Tribunal and the First-tier Tribunal provides that the Upper Tribunal should normally remake the decision, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. Neither of the exceptions is engaged, and, as Mr Mackenzie notes at para. 29, this matter has already been the subject of two hearings before the First-tier Tribunal. It is appropriate for the matter to be retained in the Upper Tribunal for the decision to be remade, on the basis of the preserved findings of fact set out above.

64. Mr Mackenzie informed me that the appellant has been released from a secure hospital treatment into the community. That development cannot affect the Article 3 findings reached by the judge (although, in due course, may enable the Secretary of State to take a fresh decision on that issue, if so advised), but it does affect the section 72 issue in the appellant's protection appeal. It will therefore necessary for there to be a further hearing in the Upper Tribunal by reference to up to date medical and other evidence.
65. The focus of the resumed hearing will be the protection limb of the appellant's appeal. Although I have set aside the Article 8 findings, my preliminary view is that it will be possible to remake that aspect of the judge's decision by making no findings because, as is common ground, the Article 3 findings reached by the judge render any findings on the Article 8 issue otiose. I invite the submissions of the parties on this issue.

Notice of Decision

The appeal is allowed to the extent set out below. The decision of the First-tier Tribunal is set aside, subject to the preservation of the matters set out below.

The decision of the First-tier Tribunal involved the making of an error of law insofar as it addressed the appellant's asylum and humanitarian protection claims, and his Article 8 human rights claim.

The decision of the First-tier Tribunal did not involve the making of an error of law in relation to the Appellant's Article 3 appeal. The judge's findings relating to Article 3 are retained.

The appeal will be remade in the Upper Tribunal with a time estimate of three hours.

I have the following directions:

1. Within **14 days** of being sent this decision, **the appellant** through his legal team must confirm whether he will attend or give evidence at the resumed hearing, and address any reasonable adjustments that will be necessary to facilitate his attendance and participation, if so required, and confirm whether an interpreter will be necessary.
2. Within **28 days** of being sent this decision, **the appellant** must file and serve (i) any additional evidence upon which he wishes to rely at the resumed hearing, along with an application made under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on it; and (ii) an updated skeleton argument.
3. Within **35 days**, **the Secretary of State** is to file and serve any additional evidence upon which he proposes to reply, and a skeleton argument.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 February 2024