IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000322

First-tier Tribunal Nos:
PA/51951/2020
PA/01302/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24th April 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

AM
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms A Harvey of Counsel, Wilson Solicitors LLP
For the Respondent: Mr M Parvar, Home Office Presenting Officer

Heard at Field House on 13 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Nightingale, promulgated on 2nd October 2023, dismissing the appellant's appeal on Article 3 and Article 8 grounds against the Secretary of State's decision on the 19th June 2008, to refuse his protection and human rights claims. The claim on asylum grounds was not pursued. It was maintained that the appellant had a subjective fear of the authorities and of his victim's family on return, but it was accepted by the litigation friend that the evidence before the Tribunal did not demonstrate that the fear was well-founded.

Grounds of appeal

2. The grounds of appeal were that the judge erred:

(1) in failing to give reasons for her decision that the appellant had no subjective fear of persecution and breaches his rights under Articles 2 and 3 on return to Kenya.

in coming to the conclusion that the appellant would not attempt suicide on return to Kenya.

(2) in failing to consider the effect of return upon the appellant's rights to private as well as to family life and to make a cumulative assessment as whether return would breach the appellant's rights under Article 8.

3. In relation to ground 1 there was a failure to give reasons for the decision that the appellant had no subjective fear of persecution and a breach of his rights under the Human Rights Act 1998.

4. It was accepted that **Devaseelan v The Secretary of State for the Home Department [2002] UTIAC 00702** applied, as there had been two previous determinations made by a panel in 2007 and a single judge in 2015. The appellant gave evidence in 2007 and there the panel made no findings on the appellant's credibility. In 2015 the judge found that the appellant had not established that he had been tortured in Kenya, as claimed in the written evidence, but made no findings on his subjective fear, whether of the authorities or his said victim's family.

5. The judge held that because there was no objective risk to the appellant, consequently he had no subjective fear [54]. The judge failed to give reasons for this finding which is contrary to the approach endorsed in **YZ (Sri Lanka) [2009] EWCA Civ** at [16]. This is known as the fifth principle and that of equal importance was whether any genuine fear which the

appellant may establish, albeit without an objective foundation, is such to create a risk of suicide if there was enforced return.

6. The judge stated that he did not accept that the appellant had established that the fear previously expressed was subsisting but the only reason given for this is that the appellant did not communicate [55]. Given the appellant's diagnosis of severe depression, which is accepted, at [52] and [59] and consultant psychiatrist Dr Obuaya's comment at [39], of his opinion that mutism was a feature of severe depressive episodes and that he had no reason to suspect that the appellant is trying to falsify or exaggerate his symptoms, that reasoning was circular.

7. The failure to give reasons was an error of law.

8. Ground 2 advanced that the conclusion that the appellant would not attempt suicide on return to Kenya, was vitiated by the error described in ground 1 above. The judge had before her expert medical evidence of the appellant's severe depression, the diagnosis of which and that the appellant is severely ill, which he accepted [52] and [59]. This included evidence from two experts, Dr Shortt and Dr Obuaya. Dr Obuaya identified the appellant's suicidal ideation at [37] of his report. Both experts identified that a common feature of severe depression was suicidal ideation, (Dr Obuaya, page 45 and Dr Shortt page 62).

9. The expert evidence, had the judge accurately and adequately reasoned as to the appellant's subjective fear, taken with the evidence of Dr Obuaya and Dr Shortt, would arguably have led the judge to conclude that there is a real risk of a suicide attempt on return in this case.

10. Ground 3, asserted a failure by the judge to consider the effect of return on the appellant's rights to private, as well as to family life, and make a cumulative assessment of whether return would breach the appellant's rights under Article 8. The judge provided no reasoning as to the rejection of the appellant's Article 8 claim on the basis of private life and thus of his Article 8 claim taken cumulatively with family life and the judge failed to deal with family life.

11. As submitted before the First-tier Tribunal Article 8 encompassed the physical, moral and psychological integrity of the person, **Bensaid v United Kingdom *(Application no. 44599/98)***. The risk the appellant will try to kill himself fails to be evaluated not only as part of the consideration of Article 3, but also of Article 8. That the issue was mental illness brings it within the Article 8 paradigm and this distinguishes the case from **GS (India) v Secretary of State for the Home Department [2015] Civ 40 2015 1 WLR 3312** citing the Secretary of State's refusal of 19th June 2018. In relation to Article 8 that is vitiated by the failure to give reasons. The judge failed to demonstrate and consider the interference with the appellant's private and cumulatively with his family life.

Permission to appeal

12. Permission to appeal was given by Judge Dainty, who concluded that the first ground was arguable in that the judge conflated and subjective objective fear in terms of the reasons given. The second ground stands and falls with the first because subjective fear is considered part of the Article 3 risk and it was arguable that the Article 8 analysis was insufficiently reasoned, in particular in relation to private life but even if, in reality, private life may not have made a difference in view of the severity of the crimes, it arguably ought to have been taken into account in view of the time spent in the UK.

13. Rule 24 response

14. The Secretary of State submitted a Rule 24 response.

15. In relation to ground 1 pointed out that **Devaseelan** applied in this matter and that a fair and impartial reading of the determinations revealed that the First-tier Tribunal comprehensively rejected the appellant's claimed fears on return to Kenya and it was not accurate to suggest there had been no findings in relation to appellant's subjective fear. The decision of the panel in 2007 did make negative findings on the appellant's credibility, such that there was no evidence of any members of the victim's family, whether in Kenya or in the United Kingdom that at any stage threatened to either harm or kill the appellant in the event of his return to Kenya. It was concluded the appellant had failed to discharge the burden on him and it was noted that the panel referred to the appellant's father being invited to a recent wedding in the victim's family and doubt was raised as to why this would happen if the victim's family were hostile to the appellant.

16. Judge Woolf in 2015 also made findings in relation to the appellant's subjective fear, not least the appellant's claims to have been at risk due to the involvement in the IPK but went on to find that the appellant had not previously invited the Tribunal to find he was at risk from the Kenyan authorities. The judge drew adverse inference from the appellant's failure to raise these issues in 2007 and found that no credible evidence had been presented showing the appellant had been tortured in Kenya in the past. These findings clearly had relevance to the appellant's subjective fears. From [64] to [70] of her decision, Judge Woolf in 2015 made a series of damaging findings against the appellant, all of which had implications for the claimed subjective fear. The appellant had not grappled with these points and nor did he properly engaged with Judge Nightingale's reliance on the past settled findings in deciding not to accept the appellant's alleged subjective fear, which can be found at [54] to [55] of the decision. The judge currently noted the appellant had his claims rejected twice by the Tribunal previously and noted that there were comprehensive findings which were tied to the appellant's claimed subjective fear; the judge did not need to repeat those, particularly in the context of the third appeal.

17. Additionally, the judge's reasoning for rejecting the subjective fear was also based on the witnesses giving extremely vague evidence, [54], and the judge found if the appellant is somebody who has not communicated with his family for many years, he cannot establish that he holds any fear of returning to Kenya at [55]. It is not for the judge to assume the appellant is genuinely fearful in the circumstances, especially given the background of this case, it being a third appeal of the appellant never having been found to be credible. The burden is on the appellant and not for the judge or any parties to substantiate the appellant's claimed fears.

18. The appellant's grounds refer to him being somebody who has been diagnosed with severe depression and mutism and the judge had regard to this at [51], and she correctly observed that Dr Obuaya could not say whether the appellant was consciously or unconsciously deciding not to speak. In any event, the appellant's submissions completely overlooked the logic behind the judge's findings on subjective fear. It is difficult to see how a diagnosis of mental disorder could of itself determine the existence of a genuine subjective fear if the judge was ultimately left with a situation where he was bound to apply the two very damaging determinations against the appellant.

19. The Tribunal was again presented with extremely vague evidence from witnesses as well as an uncommunicative appellant and it is unclear what more the appellant's legal representatives could expect in terms of reasoning in these circumstances. The appellant has made no reference to any evidence to support a proposition that it was open to the judge to accept the claimed subjective fear and thus adequate reasoning was given.

20. Ground 2, on the assertion that the judge erred in coming to the conclusion the appellant would not attempt suicide on return to Kenya, there were adequate reasons provided in rejecting the appellant's claim and subjective fear. It reasonably followed that the appellant had not established a real risk of suicide on return to Kenya. The judge's findings on the suicide risk immediately follow from his findings in relation to the alleged subjective fear of return and the judge clearly had regard to the appellant's present condition, as well as the various expert reports referred to.

21. The response referred to **JL (medical reports-credibility) China [2013] UKUT 00145 (IAC)** which is proposition that the more a diagnosis is dependent on assuming the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it, and see **HH (Ethiopia) [2007] EWCA Civ 306** (23). It would be inappropriate for the appellant to seek to rely on a diagnosis when attempting to override extensive judicial findings, all of which severely undermined the appellant's claimed fears and his credibility. The judge made Article 2 and 3 findings aware of the fact that the appellant failed to substantiate the genuine fear. There was a general point as to suicidal ideation being a common feature of severe depression rather than any

detailed evidence and it was a stretch to submit the judge ought to have concluded that there is a real risk of suicide attempt on return. The judge had engaged in extensive analysis of the appellant's individual circumstances and his history in the UK and it is the judge who is the fact-finder, not the expert witness, who had drawn conclusions from unaccepted claims and a false premise of there being potential decline in family support.

22. It did not follow that a poor prognosis and increased medication amounted to a real risk of suicide to somebody on return to their home country. Such disorders were highly common and many people lived safely with conditions of this sort, including the appellant. The judge considered the appellant's prognosis at [57] and found the appellant's family had decided that he should not be assessed or hospitalised for treatment. The following were unchallenged findings:

(1) There was no direct evidence or medical records which indicated any actions of self-harm since 2002 [52] and [55].

(2) A great deal of the related history is from family members who are not impartial [55].

(3) The family have already looked after the appellant at home and the judge did not accept that the appellant would be without basic care from one of his three Kenyan based siblings or without financial support from his siblings in the UK [57].

23. The judge's findings on suicide are cogent and fully supported with adequate and clear reasons.

24. The response in relation to Ground 3 that the judge failed to consider the effect of a return upon the appellant's rights to private as well as family life and make a cumulative assessment submitted that there was no material error and that the decision should be read in its entirety. The Secretary of State relied on the well-settled principles of **AA (Nigeria) [2020] EWCA Civ 1296** that experienced judges in the specialised Tribunal are taken to be aware of the relevant authorities unless it was clear from their language they were not. Secondly, it is for a judge to identify and resolve key conflicts in the evidence. **Budhathoki *(reasons for decisions)* [2014] UKUT 00341**. Thirdly, where a relevant point is not expressly mentioned for the First-tier Tribunal the Upper Tribunal should be slow to infer that it has not been taken into account, **MA (Somalia) [2011] 2 All ER 65** at [45].

25. The judge clearly found that the appellant is not someone who faces a real risk of suicide on return to Kenya, which was comprehensively considered against the appellant's individual circumstances and it was unclear how an unaccepted claim of suicide risk could materially effect the judge's Article 8 assessment. It was found at [58] that the family would likely work together to ensure the appellant is supported on return to Kenya and suitable arrangements for his care could be made for him to

live with his family who would assist him and support him on return. It was also the judge's position that there was nothing in the medical evidence to go behind the previous findings of Judge Woolf.

26. The respondent would again repeat and emphasise that this is the appellant's third appeal. There was no requirement for the judge to repeat adverse findings and very considerable weight was given in the balancing exercise to the respondent's lawful aim by way of the public interest given the appellant's very serious criminal offending. The appeal was merely a disagreement with the judge's finding.

The Hearing

27. Ms Harvey expanded on the grounds by use of her skeleton argument and she submitted that the case was clearly put on the basis that the appellant maintained a subjective fear and although the litigation friend accepted that the claim was not well-founded objectively, either from the victim's family or authorities, she did and did not pursue a claim on an asylum basis. It was clear how the case was put. The issue was entirely based on subjective fear and the approach taken by the judge was contrary to the approach in **YZ (Sri Lanka)**. The approach of the judge was entirely contrary to that espoused in **YZ (Sri Lanka)**. The judge moved directly from consideration of objective to subjective and Mr Parvar sought to supply reasons which showed the judgment was deficient.

28. The 2007 Tribunal was the only Tribunal to hear from the appellant, whereby the judge said there was simply no evidence and it was not considered whether the fear was genuinely held or not.

29. The judge did not made findings on subjective fear in 2015 and that was unsurprising as the judge did not hear from the appellant. Judge Woolf was merely stating that the evidence was flimsy. The judge accepted that the appellant was seriously ill and the evidence showed that if someone had a serious, depressive condition and he was afraid that might exaggerate the risks and was likely to exacerbate his state of mind. The only reason given was that the judge found that the appellant did not communicate. Ms Harvey confirmed that Dr Obuaya did not speak with the appellant but concentrated on the substantial amount of medical evidence. A further report was sought because it was considered that Dr Shortt had taken instructions substantively from the sister who had previously found to exaggerate her evidence. The appellant had not expressed anything for years and years.

30. In relation to ground 2 it was accepted the appellant was severely ill and the references to the medical evidence had been set out and had the judge properly considered the medical evidence that would have led her to conclude there was a real risk. Dr Obuaya assessed the appellant on behaviour, demeanour and "speech", presumably lack of. Had the subjective fear been factored in properly by the judge it would not have been possible to reach the conclusion that the judge did reach.

31. In relation to ground 3 on Article 8 the judge only dealt with the position on family life and did not deal with the position on private life. I must take the issue cumulatively, which should have included the risk of suicide and mental health. The credibility points were directed at the family and not the appellant.

Conclusions

32. The appellant was convicted on the 7th February 2003 of six counts of rape at Kingston Crown Court and sentenced to five years in prison subsequently substituted for ten years by the Court of Appeal.

33. The judge made the following findings:

> *"47. I have considered the evidence before me in the round and have taken as my starting point the two previous appeal decisions dismissing this appellant's appeal in accordance with Devaseelan. The panel, dismissing this appellant's appeal in December 2007, an appeal in which he gave oral evidence, to be at no risk in Kenya from the family of his victim or from the Kenyan authorities. The panel did not find that the appellant presented with any real risk of suicide or self-harm although it was accepted that he had some mental health problems. The panel noted that he had three siblings in Kenya with whom he was in regular contact by telephone. It was considered that his family in Kenya could assist him on return. His appeal was dismissed. That decision was not successfully challenged.*
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> *48. The appellant's protection appeal was dismissed in June 2015 and, at that time, his Article 3 claims based on his mental illness and risk of self-harm were considered. Judge Woolf did not find that the appellant was at risk from his victim's family in Kenya or, indeed, from the authorities. From paragraph 66 Judge Woolf found that the appellant's family, including the first witness who also gave evidence at that appeal, were 'less than impartial' with regard to the risk to the appellant. Judge Woolf noted that the first witness continued to protest the appellant's innocence notwithstanding the finding of the jury and the sentencing remarks of the Judge. She found that allegations made by the first witness were to be treated with 'great circumspection' with regard to any risk to the appellant ....*
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> *49. I have considered the findings of the two previous Tribunals and find nothing on the evidence before me which leads me go behind the findings which were made at that time on the evidence which was before the Tribunal at those hearings. I, also, have some concerns with regard to the lack of impartiality on the part of the witnesses who, doubtless, do not wish to see their brother deported to Kenya ...*

> *50. … Dr Shortt also drew information largely from the first witness who, from the evidence before me, spoke for this appellant on nearly every occasion and appears to be very much concerned with ensuring that the appellant is not deported. Dr Durrani, who was for a time the appellant's treating physician, stated that the appellant had insight into his illness and notwithstanding his low mood and sleep pattern, presented as a low risk to himself and a low risk to others. Dr Durrani also stated clearly that the appellant's mental capacity could not be assessed as he did not speak. In fact, Dr Durrani did not, initially, diagnose this appellant with any actual condition. Certainly, there was no prognosis for recovery.*
>
> *51. … The appellant has been diagnosed, I accept, with a serious mental illness, which is to say a recurrent depressive disorder, which is said to be severe in nature.*
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> *52. … There is also reference to suicidal ideation although, in fact, there is no direct evidence of self-harm since, it would appear, 2002. The report of Dr Nimmagadda, in September 2014, noted that there were few pages of medical records from the appellant's time in prison. Although it is said that the appellant has been mute since his release in December 2013, in fact he answered Dr Nimmagadda's questions about who he lived with, naming the family members in the household. Whilst the appellant was found to be of no immediate risk to himself or others by Dr Nimmagadda, it was also stated that the appellant required a period of assessment and treatment in a hospital. That did not occur due to the decision of the appellant's family members, in particular the witnesses from whom I heard evidence, that he should not have any such formal mental assessment or hospital treatment. I find that to be a further indication of this family to make less than impartial decisions in order to forward this appellant's case to resist deportation."*

34. The above findings are the background to the judge's decision.

35. Ground 1 was essentially based on a lack of reasoning given by the judge in relation to an assessment under **J [2005] EWCA Civ 629** and **Y and Z (Sri Lanka)** and subjective fear. The judge accepted that the appellant was seriously ill and also noted the submissions made by Ms Harvey at [38] in relation to **J** and **Y and** Z. The submission was that there was a real risk of suicide reaching a minimum level of severity and the appellant's fear might contribute to that and what had to be considered was what the appellant thought would happen to him. It was also recorded, however, from the submissions that the appellant had been in his current state for many years and the oral evidence, and specifically it was recorded that the appellant "had not communicated in recent years and in relation to the second witness had not communicated with him

since before he went to prison" [22]. The significance of that finding is fundamental.

36. The background evidence to the judge's finding is that there had been two previous determinations which had dismissed the appellant's claim on protection grounds and Article 3 grounds. The second had considered the appellant's mental health. The appellant had quite evidently been non-communicative for many years, either from 2003, 2013 or in the last years. It was difficult therefore to deduce a subjective fear from evidence other than the appellant. That is implicit in the judge's findings. The report of Dr Shortt was found to have been overinfluenced by the family and the evidence from the family themselves was also found wanting. As recorded at [48] the family's evidence was found to be less than impartial in relation to the appellant.

37. **JL (medical evidence)** established that it is the judge who is required to make the findings in relation to the risk to the appellant and it was not contended by the litigation friend that there was an objectively well-founded fear for the appellant on return.

38. The judge at [54] recorded that:

> *"The evidence, even taken at its highest, which I do not accept, does not indicate that the appellant is at any risk, and, in any event, he has family members living in Nairobi. I therefore do not find that he would be at risk and, consequently, I do not find that he has any fear which would exacerbate his mental health condition if returned to Kenya."*

39. Had that been the sum of the reasoning, that may have been inadequate reasoning however, the judge goes on at [55] to state the following:

> *"55. There is a reference to attempting suicide in prison. However, there no medical records before me which indicate any such actions of self-harm subsequently. Again, a great deal of the related history here is from family members who are not impartial. Judge Woolf noted that the claims that the family members watch the appellant's actions in order to prevent him from self-harming but rejected those claims. I, too, find no evidence which indicates that this appellant has engaged in any serious action of self-harm in the past decade. If, as is claimed on the evidence before me, this appellant has not communicated with his family for many years, I find that it is not established that he holds any fear of returning to Kenya. Certainly, it cannot be argued that he has expressed any such fear whilst maintaining that the appellant is mute and uncommunicative by any other means. I reject the claim that he holds any subjective fear of return."*

Here the judge clearly stated that the appellant had not communicated with his family for many years and the judge found that there were no

medical records before her which indicated any actions of self-harm subsequent to the appellant being in prison and it would appear that the appellant was released in approximately 2009 and 2010. It is for the appellant to put forward evidence of his subjective fear and I consider it to be open to the judge to find that as the appellant had not communicated with his family for many years, (mostly since 2013), their evidence was found not to be impartial [50], and clearly he had not communicated with Dr Obuaya, that it was not established that he held any subjective fear of returning to Kenya. The burden of proof still remains with the appellant. Whether or not there were previous adverse credibility findings made against the appellant it is still the case that the evidence in support of the claim of subjective fear was simply not present.

40. The judge is not obliged to deduce suicidal ideation merely from the expert report particularly bearing in mind Dr Shortt relied on relative's evidence found to be partial and Dr Obuaya had not communicated in person with the appellant. Despite the assertion that depression and severe depression would assist in generating a subjective fear on return to Kenya, it was entirely rational for the judge to conclude that there was no subjective fear without the appellant's evidence; surmise by a doctor on subjective fear cannot be a substitute. I was not taken to evidence which it was submitted the judge had missed and indeed that is not the ground of appeal. **Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC)** confirms reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge and is authority for the principle that the judge does not have to make copious findings, if a key finding on a key fact is made.

41. In relation to ground 2, since there were adequate reasons provided for rejecting the appellant's claimed subjective fear, it does not reasonably follow that the judge's conclusions that the appellant would not attempt suicide on return to Kenya, particularly bearing in mind he was found to have the support of his family there and the background medical reports. As the Court of Appeal said at para 18 of **Herrera v SSHD** [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence, **Durueke** (PTA: AZ applied, proper approach) [2019] UKUT 197 (IAC). Again the judge found at [58] that the letters from the three siblings based in Kenya were self-serving and lacking in impartiality. Specifically and importantly at [57] she found that there was no evidence to indicate that his present medication was not available in Kenya.

42. In sum, the judge found that there was no direct evidence or medical records indicating any actions of self-harm since 2002, [52] and [55] and in the light of the factors identified, including that the judge found that much of the related history is derived from the family members who are not impartial [55] and there was medication available the reasoning on suicide (or not) was open to the judge.

43. I therefore find that the judge did not err in the conclusion that the appellant would not be at risk of suicide in Kenya.

44. In relation to ground 3, it is the case that the judge relied on the previous determinations, which had, in turn, considered both family and private life and at [58] considered that the appellant's health, mental or physical, had not deteriorated in the intervening years to the extent that his mental health would deteriorate in a manner envisaged in **AM (Zimbabwe)**. Although the considerations in relation to Article 8 family life were condensed into [60] it is clear that the judge must have factored in the previous findings in the determinations which had addressed his private life and the judge was fully aware of the extent of time the appellant had remained in the United Kingdom.

45. Those previous decisions had set out at length the appellant's circumstances. The judge found the weight to be attached to the public interest was entirely proportionate, bearing in mind the circumstances of the offence and having noted that the appellant's health had not significantly deteriorated since the previous decision and thus his circumstances had not significantly altered, it was entirely open to the judge to make the findings that she did on Article 8.

46. I found no material error of law in the First-tier Tribunal decision and the decision will stand.

H Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber
10th April 2024