IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003715

First-tier Tribunal No: PA/53654/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 19th of December 2024

Before

UPPER TRIBUNAL JUDGE NEVILLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

U S
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Smith, counsel instructed by Wilson Solicitors LLP
For the Respondent: Ms S Nwachuku, Senior Home Office Presenting Officer

Heard at Field House on 22 November 2024

Order Regarding Anonymity

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

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

DECISION AND REASONS

1. US, to whom I shall refer as the claimant, is a national of Guinea-Bissau. He entered the United Kingdom in May 2008 using a Portuguese passport to which he was not entitled, and was accordingly convicted of using a false identity document and sentenced to 12 months' imprisonment. In response to that conviction, on 3 March 2009 the Secretary of State made

a deportation order. I need not set out everything that has happened since then, but it suffices to say that the claimant has made a number of unsuccessful attempts to obtain a lawful basis of stay in the UK.

2. On 11 June 2019 the claimant made further protection and human rights submissions, which the respondent accepted as amounting to a fresh claim. That claim was refused, but the claimant's appeal subsequently allowed on limited grounds by First-tier Tribunal Judge Conley on 15 July 2024.

3. The Judge dismissed the protection claim, finding that while the claimant had given a credible account in support of his fear of persecution at the hands of the authorities on return to Guinea-Bissau, that fear was not objectively well founded given the change in country conditions since his departure.

4. The claim accepted by the Judge had been phrased as follows in the parties' agreed list of issues:

> Article 3 – Health: Whether [the claimant's] deportation would expose him to a real risk of serious, rapid and irreversible decline in his health due to the unavailability of medical treatment in Guinea-Bissau, such that he would experience intense suffering and/or a significant reduction in life expectancy contrary to Article 3 ECHR.

5. This refers to the threshold that must be met by anyone claiming on medical grounds that removal would be contrary to Article 3 of the European Convention on Human Rights. The Judge summarised the claimant's case as follows:

> 50. The evidence of Dr Patrick French, the [claimant]'s Consultant Physician, in his medical report of 1 March 2023 that "there is a significant risk to [the claimant] that the lack of the availability of his care and monitoring would lead to the development of untreatable HIV infection with disease progression to AIDS and then death" demonstrates that the [claimant] will suffer a serious, rapid and irreversible decline in his health resulting in intense suffering and/or a significant reduction in his life expectancy.
>
> […]
>
> 52. The [claimant] conceded that his Mental Health issues alone could not sustain an application under Article 3, but submits that the effect of a further decline in his psychiatric health if he were to be returned to Guinea-Bissau would have the effect of seriously exacerbating the effects of his HIV infection (because he would inevitably find it much more difficult to engage with what HIV treatment that there is in Guinea- Bissau and his self-care would decline considerably), making it even more likely that his health would decline rapidly.

6. In approaching that issue, the Judge correctly directed himself by the authority of *AM (Article 3, health cases) Zimbabwe* [2022] UKUT 131 (IAC). The headnote of that case is as follows:

> 1. 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"?
>
> 2. The first question is relatively straightforward issue and will generally require clear and cogent medical evidence from treating physicians in the UK.
>
> 3. The second question is multi-layered. In relation to (2)[ii][a] above, it is insufficient for P to merely establish that his or her condition will worsen upon removal or that there would be serious and detrimental effects. What is required is "intense suffering". The nature and extent of the evidence that is necessary will depend on the particular facts of the case. Generally speaking, whilst medical experts based in the UK may be able to assist in this assessment, many cases are likely to turn on the availability of and access to treatment in the receiving state. Such evidence is more likely to be found in reports by reputable organisations and/or clinicians and/or country experts with contemporary knowledge of or expertise in medical treatment and related country conditions in the receiving state. Clinicians directly involved in providing relevant treatment and services in the country of return and with knowledge of treatment options in the public and private sectors, are likely to be particularly helpful.

7. The claimant relied on medical evidence from his treating Consultant Physician, Dr Patrick French. He had written two letters, one on 1 March 2023 that was addressed in the refusal decision, and a second updating letter dated 8 April 2024. While Dr French's correspondence was not in the form of an expert report, the Judge was plainly entitled to place weight

upon his evidence. Given its importance to the outcome of the appeal, I set it out at some length:

> In 2009 [the claimant] was found to be immunocompromised, at risk of developing AIDS and to be infected with both HIV 1 and HIV 2. Dual infection with HIV 1 and HIV 2 is highly unusual (he is the only patient of the 4,800 attenders of the HIV clinic of the Mortimer Market who has dual infection) and the management of this condition is complex and challenging. His anti-retroviral (anti-HIV) options are limited, the risks and consequences of treatment failure and drug resistance are greater and more serious than is usual and monitoring involves regular testing for two different viruses.
>
> HIV 2 is a rare virus that causes AIDS and is intrinsically resistant to many of the drugs that are usually prescribed for HIV. Good quality care (as detailed in the British HIV Association HIV 2 Guideline - 2022) requires regular viral load testing and prompt therapy switches (guided by resistance testing) if there is treatment failure. Routine HIV 1 and 2 viral load testing is not available in Guinea-Bissau and the range of available anti-retroviral therapy is severely limited. HIV resistance testing to guide prescribing is not available.
>
> There is a significant risk to [the claimant] that the lack of the availability of this care and monitoring would lead to the development of untreatable HIV infection with disease progression to AIDS and then death.
>
> Guinea-Bissau has poor and unreliable access to anti-retrovirals, inadequate access to monitoring, lack of continuity of care, substantially higher risk of dying of HIV after diagnosis than the UK and both poor infrastructure and poor expertise in managing dual HIV 1 and HIV 2 infection. [The claimant] is at substantially higher risk of dying from HIV if he was deported to Guinea Bissau. Details of the inadequacy of HIV care in Guinea Bissau (particularly poor for those with dual infection and HIV 2) are in this publication: *HIV Treatment in Guinea-Bissau: room for improvement and time for new treatment options*. Jesperson et al. AIDS Res Ther 2020.17:3.

8. The Judge held that Dr French was qualified to cite that journal article as supporting a professional opinion on the availability of suitable treatment in Guinea-Bissau. In his 2024 letter, Dr French described the claimant's current condition and treatment regime:

> He commenced anti-retroviral infection treatment in 2009. Since then he has required three treatment changes. On one occasion the change was due to intolerance of one part of the treatment combination and on two occasions it was due to problems caused by poor efficacy of the treatment. Any interruption of this treatment could lead to HIV drug resistance which would further limit his already limited treatment options.
>
> Despite taking therapy for 15 years, he remains profoundly immunocompromised. His CD4 count in March 2024 is 140 (13.1%) showing that he is still at risk of developing an AIDS diagnosis. People

> with CD4 counts below 200 remain at risk of opportunistic AIDS-related infections.
>
> In addition to HIV1 and HIV 2 infection he has a number of other disabling conditions requiring on-going care. He is a victim of torture from which he has post-traumatic stress disorder and he has chronic depression that is managed by his general practitioner and requires antidepressants. He has had a traumatic fracture of the femur requiring internal fixation and he has continuing orthopaedic follow up.

9. The claimant also relied on a country report dated 6 June 2023 by Luisa Acabado, a lawyer and academic who had worked until 2018 as a Human Rights Officer at the 'Human Rights Section of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' with particular responsibilities and achievements relating to healthcare provision in that country. She was plainly qualified to give expert evidence on the availability of HIV treatment in Guinea-Bissau, and the Judge accepted as much. I observe for myself that her report is meticulously compiled. She noted Dr French's report, as well as a MedCOI Information Service response that had been relied upon by the Secretary of State in the refusal decision. Her evidence is detailed, but it is enough to set out the same extract from her summary as appears in the Judge's decision:

> "The treatment mentioned in the medical report by Dr Patrick French on 1 March 2023 is not available in Guinea-Bissau, which means that both the drug currently used (Darunavir) and the need for viral load testing cannot be ensured [...] I conclude that being in Guinea-Bissau would result in the [claimant] lacking access to Darunavir and HIV2 viral load testing and having intermittent access to HIV1 viral load testing"

10. The Judge held that the evidence of Dr French showed the claimant to be a 'seriously ill person', and combined with Ms Acabado's evidence and the journal article demonstrated that the tests posed by the Upper Tribunal in *AM (Zimbabwe)* were satisfied. He accordingly allowed the appeal by reference to Article 3.

The Secretary of State's appeal

11. The Secretary of State's grounds do not challenge the Judge's conclusion that Article 3 would be breached in the absence of suitable treatment, but instead assert that he erred in finding that it would not be available:

> 4. Whilst the medical and country expert evidence has been noted, it is respectfully submitted that Judge Conley has failed to make any reference to the content of the refusal letter at paragraph [74] and [76-78], whereby the country information report also states that there is treatment for HIV in the [claimant]'s home area and specifically for two of the drugs the [claimant] is presently taking, Ritonavir and Lamivudine.
>
> 5. [The] Judge has made no analysis in the findings that the [claimant] would not be able to access anti-retroviral drugs or

> count tests to monitor his condition. Furthermore, there is no conclusive evidence to confirm that the [claimant] would not be able to access alternative treatment which would be effective in managing/stabilising his condition to the substantive test threshold as set out in [*AM (Zimbabwe)*].

12. Of the paragraphs of the refusal decision to which those grounds refer, paragraphs 77-78 of the refusal decision simply assert the Secretary of State's view that there is sufficient treatment available in Guinea-Bissau to avoid any breach of Article 3. I can immediately reject any error by the Judge as regards those paragraphs, he was clearly aware of the relevant test and the Secretary of State's case.

13. Ms Nwachuku instead developed the Secretary of State's case in relation to paragraphs 74 and 76, and I am grateful for her concise yet skilful submissions. Those paragraphs set out the evidence upon which the Secretary of State relied. Paragraph 74 cited a 2012 MedCOI response that listed ritonavir as one of the drugs available in Guinea-Bissau. The much more recent evidence however, as cited in at paragraph 76, was a later MedCOI response. I note that paragraph 76 dates that later response as 17 May 2022 before setting out its entire contents in full, whereas the response in the bundle is dated 26 May 2021. That discrepancy does not matter, as the two are identical.

14. The later MedCOI response states:

> 2.1.1 A study published in 2015 indicated that the following antiretrovirals and NRTI were most commonly in use in Guinea-Bissau: lamivudine, stavudine, abacavir and tenofovir (which had replaced zidovudine for patients with anaemia or hepatitis B co-infection).
>
> 2.1.2 CPIT has been unable to find more recent information on which antiretrovirals are currently prescribed in Guinea-Bissau and, in particular, on the availability of darunavir or ritonavir (prescribed in the UK for this patient, together with tenofovir and lamivudine).

Paragraph 3 then describes how such treatment is provided free of charge in public hospitals and HIV clinics, and that in 2011 mobile clinics had been introduced.

15. The grounds of appeal can be interpreted as first arguing that when the 2012 and 2021/2 MedCOI responses are added together, they evidence that both drugs prescribed to the claimant are available. This is a hopeless argument, as the later response is issued by the same body in response to the same query some 10 years later. It must rationally be taken as superseding the earlier response, not complementing it. The only reason why the 2012 response was before the decision-maker at all was because it had been considered in an earlier refused application by the claimant. If there were evidence supporting the continued availability of ritonavir then the up-to-date response would have said so. In fairness to Ms Nwachuku, she did not pursue this point in her oral submissions.

16. Ms Nwachuku instead focused her submissions on the lack of any direct reference by the Judge to the later MedCOI response or the corresponding paragraphs 74 and 76 of the refusal decision that reproduce it. While the claimant's rule 24 Response, drafted by Ms Smith, put forward that the Judge was only obliged to set out the evidence he actually relied upon, fairness still required him to weigh it against the Secretary of State's evidence that pointed the other way. Ms Nwachuku also observed that nowhere does the Judge explicitly reject the Secretary of State's arguments.

Consideration

17. It is trite that a Judge is not required to rehearse each and every piece of evidence relied upon by the parties. An authority commonly cited in support of that proposition is *Volpi v Volpi* [2022] EWCA Civ 464 at [4], where the Court of Appeal sets out a list of principles that apply to appeals against findings of fact. Two are particularly salient:

> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

18. I do, of course, accept Ms Nwachuku's argument that the Judge was required to weigh any materially conflicting evidence in order to resolve the issues between the parties. But here, I cannot see that there was any conflicting evidence. As observed by Ms Smith, the only up-to-date source for the discussion of clinic provision at paragraph 3 of the MedCOI response is the very same journal article relied upon by Dr French and addressed in Ms Acabado's report. They all reach the same conclusions. As to the antiretroviral drugs available, the response states that lamivudine, savudine, abacavir and tenofovir were most commonly in use but that no evidence could be found showing that darunavir or ritonavir (as prescribed to the claimant) was available. This was exactly the same position as taken by the claimant. Nothing in the evidence cited by the respondent addresses Dr French's remarks about the importance of particular antiretrovirals in treating the claimant's (exceptional) HIV infection.

19. The MedCOI response quoted in the relevant part of the refusal decision is mentioned in Ms Acabado's report and was included in the 'Essential Reading' bundle prepared for the appeal hearing, all of which the Judge confirmed that he had read. The refusal decision ran to 123 paragraphs. The main hearing bundle comprised 2091 pages. This was a paradigm

case in which to recognise the principles set out in the *Practice Direction from the Senior President of Tribunals: Reasons for decisions*. To require a Judge to belabour the Secretary of State's evidence where it simply said the same as the claimant's evidence but less comprehensively, simply as a matter of form, would be wholly contrary to those principles, as well as risk the error cautioned against in *Volpi* at [4(iv)].

20. It was likewise unnecessary for the Judge to explicitly state that he rejected the Secretary of State's case. The controversy between the parties was whether the situation disclosed by the evidence met the threshold in *AM (Zimbabwe)*. The claimant said it did, the Secretary of State said it did not. To accept the former is to reject the latter.

21. Ms Nwachuku made no submissions in support of the argument at paragraph 4 of the grounds of appeal. This was sensible. The Judge accepted the evidence of Dr French and Ms Acabado, which was unchallenged in any event, for cogent reasons. As argued by Ms Smith, the submission ignores that the claimant had been tried on multiple other treatment combinations that had proven ineffective. Dr French considered the treatment options in Guinea-Bissau and found that they would not be effective.

22. That disposes of the Secretary of State's challenges to the Judge's decision. No error of law has been established and the Judge's decision to allow the appeal must stand.

23. Like the Judge, I consider it appropriate to make an anonymity order. The starting point is the principle of open justice, the most recent authoritative discussion of which can be found in *Moss v The Upper Tribunal* [2024] EWCA Civ 1414. The claimant has been unlawfully in the UK for many years, is the subject of a deportation order, and has only avoided removal because of his health. It is important that the public are able to understand how this came about, and the claimant's identity is part of that understanding: see in *Guardian News and Media Ltd* [2010] UKSC 1 at [63]. Nonetheless, the claimant made an asylum claim that the Judge found to be credible, but not objectively well-founded due to present conditions in the country. The risk to the claimant should that matter be re-addressed, together with the need to maintain the integrity of the UK asylum system, justifies derogation from the principle of open justice.

Notice of Decision

(i) The Secretary of State's appeal against the First-tier Tribunal's decision is dismissed.
(ii) The decision of the First-tier Tribunal that removal would be contrary to Article 3 ECHR stands.

J Neville
Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 December 2024