Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/09954/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 6 November 2015	**On 18 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

B E B
(Anonymity Order Made)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Ms C Physsas (counsel) instructed by Irving & Co, solicitors

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant and his family. I do so on the basis of the minority of the appellant's children.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Samimi, promulgated on 31 July 2015 which allowed the Appellant's appeal on article 8 ECHR grounds only.

Background

3. The Appellant was born on 11 November 1968 and is a national of Algeria.

4. On 3 July 2014 the Appellant applied for Asylum (his wife and three children were dependent on his application). On 12/11/2014 the Secretary of State refused the Appellant's application.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. The appellant accepted that his case does not engage the Refugee Convention, but argued that the respondent's decision breached articles 3 & 8 of the 1950 Convention. First-tier Tribunal Judge Samimi ("the Judge") allowed the appeal on article 8 ECHR grounds only.

6. Grounds of appeal were lodged and on 24 August 2015 Judge Cox gave permission to appeal stating inter alia

> "*I have carefully considered the decision in relation to the grounds. The grounds in essence contend that the Judge misdirected himself in law by mentioning but not applying the test in section 117B. Dube and Forman are cited. Secondly, it is said that she failed to take into account or address a material issue, namely the availability of psychiatric care in Algeria.*
>
> *"3. On consideration, I find both grounds arguable in the terms in which they are advanced and that the judge may have materially erred in law."*

The Hearing

7. Mr Walker, for the respondent, told me that the grounds of appeal raise two points. The first is that the Judge made material misdirection in consideration of sections 117A to 117D of the 2002 Act. He referred me to the cases of Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) and Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC), and told me that the Judge had failed to carry out an adequate proportionality balancing exercise. The second argument for the respondent is that the Judge failed to consider the availability of psychiatric care for the appellant and his oldest daughter, M, in Algeria. Mr Walker conceded that he did not have copies of the medical evidence that was before the Judge but argued that the Judge did not consider what psychiatric care, if any, is available in Algeria, and whether or not the appellant or any of his family members had access to that psychiatric care prior to coming to the UK. He invited me to allow the appeal and set aside the decision.

8. Ms Physsas, counsel for the appellant told me that the decision is a carefully reasoned and detailed decision which does not contain any material errors of law. She told me that the Judge's detailed findings in relation to credibility and findings of fact are not challenged. She told me that the Judge had correctly directed himself

in law and, when considering article 8 ECHR, had referred to the relevant case law and had manifestly taken account of section 117A to 117D of the 2002 Act (specifically referring to those provisions at [32], and setting out section 117B at length at [33]). She told me that between [26] and [34] a detailed balancing exercise is carried out by the Judge, and that all relevant factors are properly weighed before a conclusion is reached at [34]. Ms Physsas argued that the availability of treatment in Algeria is irrelevant because, in finding that removal is a disproportionate breach of article 8 rights, the Judge assessed the impact of the appellant's oldest daughter of removal from the UK and return to Algeria, and found that on the basis of the medical evidence produced the prospect of return to Algeria have an adverse effect on the mental health of the appellant and his oldest daughter. Ms Physsas took me to the medical reports (produced at first instance of pages 9 onwards of the appellant's bundle). She told me that the decision does not contain a material error of law and urged me to dismiss the appeal.

Analysis

9. Ms Physsas relied on a letter dated 4 June 2015 written jointly by a family and systemic psychotherapist and a consultant clinical psychologist relating to the appellant oldest daughter, who was born on 22 November 2004. That letter is reproduced between documents 9 to 11 of the appellant's bundle (which was before the First-tier Tribunal). That letter narrates that the appellant's oldest daughter was referred to the authors of the letter in June 2014 by her GP. It records that the appellant's oldest daughter is tearful and has expressed suicidal ideation. The letter records that the child has settled remarkably well at school, where she feels safest. The authors of the letter state that the child "…. *Met the threshold for a diagnosis of post traumatic stress disorder and generalised anxiety disorder*." The authors of the letter go on to offer the opinion that "…. *There is a potential risk of suicide for BEB were the family to be forced to return and that M's psychological state would be highly likely to deteriorate*."

10. Documents 18 and 19 of the same bundle is a letter from the same two authors dated 17 April 2015 addressed to a local authority housing officer. In that letter the authors of the report say of the appellant's daughter "*She is no longer experiencing any suicidal ideation or self-harm and is settling at school and making friends*"

11. Document 8 of the appellants bundle is a letter from the primary school that the appellant's children attend. That letter records that the child M was very quiet and lacked confidence when she first went to primary school, and it became clear that M worried about the prospect of kidnap. The author of the letter says "*over the months she has become more confident in herself and has shown a particular interest in helping of the children within the school*" the author of the letter confirms that M still fears kidnap. It is clear from that letter that M attends mainstream schooling but is provided with support at school

12. There is no challenge to the findings of fact made by the Judge. At [17] the Judge clearly found the appellant and his sister to be credible and reliable witnesses. At

[20] the Judge found that there was a viable internal relocation option, and the Judge states

> *"I do not accept that there is a real risk of harm for the appellant and his family on return to Algeria within the meaning of article 3 of ECHR. I do not find that the withdrawal of psychological treatment respectively appellant and his daughter amounts to the highly exceptional case that engages the high threshold in article 3…."*

13. The Judge then goes on to consider article 8 ECHR and takes account of section 55 of the borders citizenship and immigration act 2009. Between [26] and [28] the Judge discusses (and quotes from) the report dated 4 June 2015. At [29] and [30] the Judge specifically states that the medical and psychological reports offer persuasive strands of the evidence placed before her. It is at [33] the Judge sets out the provisions of section 117B of the 2002 Act. The Judge then commences [34] by stating

> "*In the exceptional circumstances of this case, the appellant's daughter M is a psychologically fragile child who has been traumatised by the events in Algeria. The prospect of her removal would cause a detriment to their psychological well-being to the effect that will have a substantially adverse effect (on) her safety and well-being. The appellant himself is at risk of suicide."*

14. There is logic in the Judge's decision, but that logic is frustrated by the provision of section 117B of the 2002 Act. At [31] the Judge specifically states that the case involves consideration of the appellant's private life. Section 117B of the 2002 Act provides at subsections (4 & (5) that little weight should be given to the appellant's private life because the appellant is in the UK unlawfully (and insofar as he ever had any immigration status, it is precarious). No consideration has been given by the Judge to the appellant's financial independence. The evidence before me indicates that the appellant's entire family had benefited from NHS medical treatment and state education. On the facts and circumstances of this case the operation of section 117B of the 2002 Act mitigates against the appellant and in favour of the public interest, as it manifests itself in immigration control.

15. I therefore find that the decision contains material error of law because an inadequate balancing exercise has been carried out in consideration of the proportionality of the respondent's decision. However as there is no challenge to the Judge's fact finding exercise, I find that the Judges findings of fact can stand. I proceed to consider the appeal of new and substitute my own decision.

16. The determinative factors in this case are the fragility of the mental and psychological health of the appellant and his daughter, M. The Judge found as a fact that the appellant is at risk of suicide. The Judge found that M is a psychologically fragile child who has been traumatised by events in Algeria. The Judge found that M is in mainstream education where she is making progress and that there is both psychological treatments for M and a good network of support for M in the UK.

Article 3 ECHR

17. In **N v UK Application 26565/05** the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non-State body. The European court of Human Rights said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin. The fact that the person's circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. Those same principles had to apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost. Notably the court held that no separate issues arose under Article 8(2) in that case and so it was not even necessary to consider the Claimant's submission that removal would engage her right to respect for private life.

18. I take full account of the case of **GS and EO** and **GS (India)**, but in reality, a high threshold is set. Return to Algeria has no impact on the life expectancy of the appellant nor the child, M. The real argument is about the quality of life for appellant and his eldest daughter, and the services which are available to them. The argument, in reality, is a comparison of the psychiatric, psychological and support services available to the appellant and his daughter. The background materials indicate that the quality of such services in the UK is probably better than the services in Algeria, but that is not the test for an Article 3 consideration.

19. In **Nacic and Others v Sweden (Application no. 16567/10) ECtHR (Fifth Section) 2012** it was held that aliens who were subject to expulsion could not, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that an applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State was not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who was suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal were compelling. (As I have already indicated, in **N v UK Application 26565/05** the European court of Human Rights said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin).

20. I have sympathy for the Appellant and his family, but their conditions do not approach the elevated threshold for engagement of Article 3 of the 1950 Convention.

Article 8 ECHR

21. In **MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279** the Court of Appeal noted that the courts had declined to say that Article 8 could never by engaged by the health consequences of removal but they had never found such a breach and had not been able to postulate circumstances in which such a breach was likely to be established. The only cases where the absence of adequate medical treatment in the country to which a person is to be deported would be relevant to Article 8 are those where it is an additional factor to be weighed in the balance with other factors that engaged Article 8 (paras 17 – 23). This approach was endorsed by Laws LJ in **GS(India) and Others 2015 EWCA Civ 40 (para 86).**

22. I consider that this case turns on the question of proportionality. In determining this issue I am bound to give effect to the governing statutory regime, to which I now turn. The Appellant's central argument is that because he and his daughter suffer from mental illness and have the benefit of treatment in the UK, they cannot return to Algeria. I have already found that that argument and the facts of this case do not engage Article 3.

23. Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within **Razgar**.

24. The weight of reliable evidence in this case indicates that return to Algeria would form a period of upheaval for this family but that upheaval is outweighed when balanced against the public interests and the Respondent's interests in maintaining fair and effective immigration control and keeping a watchful eye on the fragile economy of the UK.

25. The effect of the Respondent's decision does not cause separation for this family. The family will remain together. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of ZH (Tanzania) v SSHD [2011] UKSC 4.

26. I remind myself of the cases of Azimi-Moayed and others (decisions affecting children; onward appeals), [2013] UKUT 00197 and PW [2015] CSIH 36**.** It is the intention of the SoS to ensure that the Appellant, his wife and their two children stay together. It has long been established that it is in the interests of children to remain with their parents. The Respondent's decision maintains the unity of this family and does not separate the children from the parents. The interests of the children are served because the integrity of the family unit is not challenged.

27. The impact of the SSHD's decision is that the Appellant, his wife and their two children will return to Algeria. The impact on the appellant's children is that

their education and the help they are receiving from health services, care and treatment in the UK all come to an end - but the background materials indicate that education and healthcare is available (albeit at a lower level) in Algeria. There is nothing before me from which I can draw the conclusion that return to Algeria would result in neglect or destitution for either of the children. Housing, healthcare, education and family support are all available to them in Algeria. Furthermore, it is well settled that the "better v worse" prism is the wrong approach in law.

28. New routines will have to be established for the appellant and his family. It may take the appellant's children some time to adapt to new routines and a change of environment but there is no reliable evidence placed before me to indicate that either of the appellant's children cannot adapt; it is a fact of life that changes occur and individuals have to adapt to those changes. The needs of the appellant's oldest daughter may be different to the needs of many other children but, on the evidence placed before me, she is not deprived of the ability to adapt. She will have the enduring support of her parents and the wider network created by re-establishment her family's former contacts in Algeria.

29. I therefore conclude the SSHD' decision is not a disproportionate breach of the Article 8 rights of the Appellant or the other affected family members. .

Decision

I dismiss the appeal under Articles 3 & 8 ECHR.

Signed:

Deputy Upper Tribunal Judge Doyle
Date: 16 November 2015