Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02367/2013

THE IMMIGRATION ACTS

Heard at : Centre City Tower, Birmingham
On : 16 September 2015

Decision & Reasons Promulgated
On : 23 September 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE HALL

Between

AK
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No Appearance
For the Respondent: Mrs R Petterson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of the Palestinian Authority, born on 1 March 1994. Following a grant of permission to appeal against the decision of the First-tier Tribunal allowing his appeal against the respondent's decision to deport him from the United Kingdom, it was found, at an error of law hearing on 20 July 2015, that the Tribunal had made errors of law in its decision. Directions were made for the decision be set aside and re-made by the Upper Tribunal with respect to Article 8 of the ECHR.

2. The appellant claims to have left the Gaza Strip with his uncle when he was eight years of age and to have travelled to and stayed in Syria for a year and a half before continuing to Libya where he remained until the age of eleven. He claims to have then travelled to Turkey, staying there for two years, then to Italy where he stayed for a year, followed by France where he stayed for two years and finally Belgium where he stayed for two years. He travelled by air from Belgium to the United Kingdom, arriving on 24 August 2012, using a false French passport. He was arrested when seeking entry and claimed asylum.

3. On 15 November 2012 the appellant was convicted of possess/ control identity documents with intent and was sentenced to 12 months detention at a young offender institution. On 7 December 2012 a notice of liability to deportation was faxed to him and re-served on 14 May 2013. He responded the same day. On 20 June 2013 his asylum claim was refused. On 22 July 2013 a deportation order was signed and on 28 July 2013 a decision was made that section 32(5) of the UK Borders Act 2007 applied. He appealed against that decision.

4. On 26 June 2014 the appellant's appeal was heard in the First-tier Tribunal before a panel consisting of First-tier Tribunal Judge Hollingworth and Mr G H Getlevog. The appeal proceeded in the absence of the appellant who had not appeared and had not provided any explanation for his absence. It was noted that a previous appeal hearing had been adjourned owing to his absence but on that occasion he had been represented and there was a question as to whether his failure to attend was due to the respondent failing to provide him with a travel ticket. The panel considered that the appellant had failed to demonstrate that he would be at risk on return to Palestine, either on the basis of the general security situation or on the basis of his claimed sexuality, a matter raised subsequent to the refusal of his claim. Having considered a medical report from Dr Mahomed, a Consultant Psychiatrist, they concluded that his removal would not breach Article 3 of the ECHR, but that there would be a breach of Article 8 in respect to his physical and moral integrity. They allowed his appeal on that basis.

5. Permission was granted to the respondent to appeal that decision to the Upper Tribunal. At an error of law hearing on 20 July 2015 the First-tier Tribunal's determination was found to be materially flawed with respect to its decision on Article 8, for the following reasons:

> "[8] I agreed with Mr Smart that the decision had to be set aside. There was a complete absence of any consideration by the panel of the immigration rules, which recent jurisprudence had confirmed amounted to a complete code with respect to a consideration of Article 8. Whilst the panel plainly put considerable weight upon the psychiatric report of Dr Mahomed, there was no analysis of the report or any reasons given why the conclusions therein amounted to very compelling circumstances over and above those falling within paragraph 399 and 399A. Other than by way of reference to the conclusions of the psychiatric report, the panel failed to undertake any consideration of the appellant's private life in the United Kingdom, which was particularly significant given that he had spent most of his time in the United Kingdom in detention, and thus no reasons were given as to why Article 8 was even engaged. Neither was there any proper or detailed consideration given to the public interest or any explanation provided as to the factors considered to outweigh the public interest.

[9] In the circumstances the panel's decision in relation to Article 8 is materially flawed and the findings and conclusions unsustainable. The decision is set aside in that respect.

[10] I gave consideration as to why the decision could not simply be re-made on the evidence before me and whether or not it was appropriate for the appeal to be adjourned to a resumed hearing, given that the appellant had not attended and given Mr Smart's indication that he had failed to report and that consideration was being given to the taking of absconder action. However, Mr Smart was concerned that he did not have sufficient information before him to enable him to make full submissions on the current availability of medical treatment in Gaza and that the medical evidence was not recent. Whilst it was questionable whether the appellant would respond to any directions made and whether any further information or evidence would be made available, I was nevertheless concerned, given the basis upon which the appeal was previously allowed, that the interests of justice required the appellant to be given a further opportunity to provide such evidence.

[11] Accordingly the appeal will be listed for a resumed hearing for the decision on Article 8 to be re-made. The First-tier Tribunal's decision on the asylum and Article 3 grounds has not been challenged and is therefore preserved."

6. The following directions were made for the resumed hearing:

"Directions

(a) The appellant is directed to produce recent medical evidence addressing his current medical and psychological health.

(b) No later than 14 days before the date of the next hearing, any additional documentary evidence relied upon by either party, including medical reports and evidence about the availability of medical and psychiatric treatment in Palestine, is to be filed with this Tribunal and served on the opposing party.

(c) The appellant is put on notice that should he fail to comply with the directions and fail, without any satisfactory explanation, to attend the hearing, his appeal will be considered on the evidence already before the Tribunal and may well, in the absence of further evidence, fall to be dismissed."

Appeal hearing and submissions

7. The appeal then came before us for a resumed hearing on 16 September 2015, to re-make the decision in regard to Article 8, applying the relevant statutory provisions and immigration rules. There was, again, no appearance by or on behalf of the appellant. Mrs Petterson advised us that the appellant had now been registered as an absconder. In the circumstances, we proceeded to hear submissions from Mrs Petterson in his absence.

8. Mrs Petterson produced a supplementary refusal letter dated 18 June 2014, which addressed the appellant's late claim as regards his sexuality as well as the psychiatric report from Dr Shauki Mahomed, and which she told us should have been before the First-tier Tribunal when the appeal was heard but was not referred to in its decision. She referred us to the decision in Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 which set out the current position in relation to Article 8 and deportation and which

we were now required to follow. In regard to the appellant's mental health, as detailed in the medical report from Dr Mahomed, she submitted that there was no reason why he could not access medical treatment in the Occupied Territories, where he would be returning. She relied upon the UKBA Operational Guidance Note for the Occupied Palestinian Territories dated 19 March 2013 in that regard. Mrs Petterson submitted that the appellant did not meet the requirements in paragraphs 399 and 399A of the immigration rules and accordingly had to demonstrate very compelling circumstances over and above those described in paragraphs 399 and 399A, which he could not do. With regard to the risk of suicide, she referred to J v SSHD [2005] EWCA Civ 629 and submitted that the appellant's circumstances did not meet the test in that case as he would receive any necessary treatment prior to and upon removal and would be escorted during his journey to Gaza. He would have access to treatment in Gaza, as set out in the supplementary refusal letter of 18 June 2014. Accordingly the appellant's removal to Gaza would not breach Article 8 and the appeal should be dismissed.

Legislative framework

9. Part 5A of the Nationality, Immigration and Asylum Act 2002, as inserted by s19 of the Immigration Act 2014, states as follows:

> 117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
> (a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
   (a) are not a burden on taxpayers, and
   (b) are better able to integrate into society.

(4) Little weight should be given to—
   (a) a private life, or
   (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
   (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
   (b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—
   (a) C has been lawfully resident in the United Kingdom for most of C's life,
   (b) C is socially and culturally integrated in the United Kingdom, and
   (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest

requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more; "qualifying partner" means a partner who—

(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and (d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

10. The relevant immigration rules are set out as follows:

"A362.Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

…

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of

compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

Consideration and findings

11. We follow the approach in Chege and note firstly that the appellant is a foreign criminal as defined in s117D(2)(c)(i). He does not have a parental relationship with a child and is not in a relationship with a qualifying partner and so does not meet the criteria in paragraph 399(a) or (b). Neither does he meet the criteria in paragraph 399A since he has not been lawfully resident in the United Kingdom. Exceptions 1 and 2 in paragraph 117C therefore do not apply to him.

12. Accordingly, pursuant to paragraph 398 of the rules, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A (and Exceptions 1 and 2).

13. As far as the factors in s117B are concerned, and on the limited evidence available, the appellant's deportation is plainly in the public interest. There is no evidence before us of an ability to speak English. Neither is there any evidence to suggest financial independence. On the contrary, the evidence suggests that the appellant has had considerable access to the NHS in relation to his physical and mental health problems. The appellant's private life has been established at a time when he has been in the United Kingdom unlawfully. Indeed there is little evidence of private life established in this country and that is limited to his medical treatment. As regards the appellant's criminality, the offence committed was serious in so far as it undermined immigration control, but was not in the same category of seriousness as crimes of violence and drugs.

14. The main factor, however, in the appellant's case, in considering the public interest in deportation, is his vulnerability and mental health and indeed it is on that basis that the First-tier Tribunal initially allowed the appeal. We turn, therefore, to a consideration of that matter.

15. In their skeleton argument produced for the hearing before the First-tier Tribunal, the appellant's former representatives relied on the case of J in submitting that the appellant's return to Palestine would impel him to commit suicide. Reference is made to the appellant

cutting himself with a razor and stopping eating, with the intention of starving to death, when served with deportation papers in May 13 and again in November 2013.

16. The medical evidence relied upon by the representatives consists of the following: a psychiatric report from Dr Mahomed dated 8 April 2014; medical notes from HMP Glen Parva dated from August 2012 until January 2014 (pages 107 to 182 of the main appeal bundle - the relevant extracts are quoted in the appellant's solicitors' representations of 1 February 2014 at page 93 of the bundle); a mental health in-reach team referral form from HMP Glen Parva dated 15 November 2013 concluding that the appellant was at risk of suicide and that there was a risk to his physical and mental health (page 159); and an email dated 23 January 2014 from the offender supervisor at HMP/YOI Glen Parva referring to concerns as to the appellant's ability to cope and his emotional well-being in the face of the threat of deportation (page 63). We also note the photographs of the appellant's scars from cutting, at pages 6 to 11 of the supplementary bundle of documents under cover of the solicitors' letter of 8 April 2014. We note the reference in the medical notes to the appellant refusing to take anti-depressant medication as he feared it would make him "crazy".

17. Turning to Dr Mahomed's psychiatric report, prepared after a meeting with the appellant some two months after his release on bail, we note that his diagnosis, at paragraph 12, was that the appellant was suffering from adjustment disorder and associated anxiety and depression and that he still harboured thoughts of self-harm and suicide. He recommended that the appellant receive immediate care of specialist psychiatric services through his Community Mental Health Team by a referral from his GP and that he should continue with his present antidepressants and, if necessary, other medications to treat his psychological symptoms. He also recommended that the appellant be assessed for a long term course of appropriate psychotherapy and/ or counselling to manage his symptoms (paragraph 14). Dr Mahomed concluded at paragraph 15(III) that "in all probabilities, [he] would consider taking his life when he realises that he cannot be allowed to stay in this country and is being sent to Palestine" and at paragraph 15(V) that he "remained at risk of suicide".

18. The problem with which the appellant is faced in this appeal is that the evidence produced on his behalf in regard to his health is now over a year old, the most recent being the psychiatric report from Dr Mahomed. There is no evidence to show whether Dr Mahomed's recommendations were followed and whether the appellant continued to access his prescribed medication. It is clear from Dr Mahomed's comments that the appellant's anxieties and depression related to his desire not to be returned to Palestine and that he had no history of mental illness or depression. From the medical notes from HMP Glen Parva it appears that his actions in cutting himself and refusing food were related in the main to his frustration at being detained rather than the threat of deportation itself. That is expressed in particular in the notes of 16 May 2013 and again on 8 November 2013 when the appellant refused to eat for a period of time, but on both occasions he subsequently started eating and stated that he did not want to die. We have no evidence before us to show that the appellant's mental health remains the same or has deteriorated, particularly in light of the period of time he has now been out of detention. We have no evidence or information about his activities, his whereabouts, his access to medical

treatment, if any, or his health condition. We do not even know if he remains in the United Kingdom.

19. Taking into consideration all of the medical evidence and the representations made on his behalf by his former solicitors, we do not consider that the appellant's circumstances go anywhere near to meeting the test in J. For the same reasons as given in J, we find that even if the appellant's mental health remains as it was over a year ago, there is no reason why measures would not be put in place by the United Kingdom authorities to protect him from self-harm upon receipt of the removal directions and up until his removal. Mrs Petterson submitted that, as a vulnerable person, he would be accompanied by escorts upon removal and therefore, again, there is no reason to believe that suitable measures would not be in place to protect him against self-harm during that process. We rely on the comments made in J, at [61] and [62] in that regard.

20. We turn to the risk to the appellant of self-harm on arrival in Gaza. We note that it does not appear to be disputed that he left Gaza as a young child and that his close family members were killed in the war. The existence of extended family members remaining in Gaza can be nothing more than speculation and we therefore accept that it may well be the case that he has no remaining family support there. However the appellant is an adult who, in the absence of evidence to the contrary, has managed to live independently in a new country without family support and without medical support for some time. There is no evidence of his current mental health and no evidence to suggest that he is currently a risk of suicide, particularly as the previous incidents of self-harm and refusal of food were, for the most part, a response to his frustration at being detained. The respondent has provided, in the initial refusal letter and the supplementary letter, evidence of facilities and support in Gaza, albeit limited, which the appellant could access for medical treatment should he require it. We refer in particular to the supplementary letter at paragraph 22 with respect to the provision of mental health care by Médecins Sans Frontières. We note that the appellant's claim to be at risk of harm from others in Gaza has not been found to be objectively well-founded and neither has he established a claim based on his sexuality.

21. Accordingly we do not consider that the appellant's deportation would put him at risk of suicide or serious self-harm for the purposes of either Article 3 or Article 8 of the ECHR. Whilst the appellant's case differs from the usual health cases, in that his health concerns were related not to any history of medical problems but to his immigration status, we take account of the observations of the Court of Appeal in GS (India), & Ors v The Secretary of State for the Home Department [2015] EWCA Civ 40 in regard to Article 8 health cases:

> 86. "If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in *MM (Zimbabwe)* [2012] EWCA Civ 279 at paragraph 23:
>
> > "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be

> relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."
>
> 87. With great respect this seems to me to be entirely right. It means that a specific case has to be made under Article 8."

22. The appellant has failed to show any other elements bringing his case within Article 8. We find that he has failed to demonstrate very compelling circumstances over and above those described in paragraphs 399 and 399A, for the purposes of paragraph 398 of the immigration rules. Accordingly, and given the preserved findings of the First-tier Tribunal that his removal would not breach the United Kingdom's obligations under the Refugee Convention and would not be in breach of Article 3 of the ECHR, his circumstances do not outweigh the public interest in his deportation.

23. We find, accordingly, that the appellant has failed to establish that he falls within the exceptions set out at section 33 of the UK Borders Act 2007 and his appeal must be dismissed under the immigration rules and on human rights grounds.

DECISION

24. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside. We re-make the decision by dismissing the appeal on all grounds.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and

Immigration Tribunal (Procedure) Rules 2005. We continue that order, pursuant to pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date
Upper Tribunal Judge Kebede