Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00608/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2017	**On 23 March 2018**

Before

THE HONOURABLE LADY RAE
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE PERKINS

Between

M T
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie, Counsel instructed by Wilson & Co Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. We make this order

because of the Appellant's mental state. We are concerned that publicity will create a risk to his health.

2. This is an appeal by a national of the DRC against the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent on 4 April 2014 refusing to revoke a deportation order. The appeal to the First-tier Tribunal was against the respondent's decision on 6 November 2013 to refuse to revoke a deportation order made on 6 March 2012 under Section 51 of the Immigration Act 1971.

3. The Upper Tribunal at a hearing on 2 October 2017 found error in the First-tier Tribunal's decision and set it aside and gave directions for a further hearing in the Upper Tribunal.

4. The decision to set aside was the decision of Upper Tribunal Judge Storey who was particularly concerned about the impact of the decision of the European Court of Human Rights in **Paposhvili v Belgium 13 December 2016, ECtHR (application No 41738/10)** and Judge Storey gave directions intended to amplify or consider the relevance of that decision. The decision of this Tribunal in **EA and Ors (Article 3 medical cases – *Paposhvili* not applicable) [2017] UKUT 445 (IAC)** was not reported until 15 November 2017 which was about a fortnight after Judge Storey's decision was promulgated. Understandably Judge Storey's directions had no regard to the decision in **EA and Ors** which sets out this Tribunal's position and which we intend to follow. The decision in **EA and Ors** does not bind us. We will continue to follow **J v SSHD [2005] EWCA Civ 629**. Mr Mackenzie asserted that we should not follow **EA and Ors** but did not develop his arguments.

5. The case was transferred to us but we include Judge Storey's decision and reasons which was promulgated on 26 October 2017.

6. For the purposes of introducing the themes in this decision, and at the risk of over simplification, the appellant is subject to a deportation order because he was sent to prison for four years in 2010 for offences including making threats to kill, possessing a stun gun, assault occasioning actual bodily harm and criminal damage.

7. He was convicted of making threats to kill after a trial and the threats were directed to the mother of his children.

8. Further he was recalled to prison and later sentenced to four weeks' imprisonment in October 2015 for using threatening and abusive words and behaviour and also for possessing a controlled drug. He has other criminal convictions.

9. He says that he should not be the subject of a deportation order in part because of the effective of removal on him and his children and in part because his mental health means it will be wrong to remove him.

10. This appeal has already been dismissed twice by the First-tier Tribunal. Unless expressly stated otherwise when we refer to a decision of the First-tier Tribunal we mean the decision of the Tribunal promulgated on 30 May 2017 that is the subject of the appeal to us.

11. The First-tier Tribunal had unchallenged evidence from a social worker, a Mr P Horrocks. The First-tier Tribunal Judge's decision includes considerable reference to this report. The judge concluded that the appellant does have a "genuine and subsisting relationship with his children", a daughter N who is aged 9 years and a son A who is aged 5 years. His relationship with the daughter is closer than his relationship with the son. The judge was entirely satisfied that their best interests lay in their remaining with their mother in the United Kingdom (something which no-one has doubted) and in continuing to have face-to-face contact with their father the appellant as is presently happening. However the judge found that this is not a case where the best interests of the children can be achieved given the clear public interest in deporting the appellant as a foreign criminal.

12. The judge found that the effects on the children of the appellant's removal would not be unduly harsh. The judge had particular regard to medical reports from Professor Katona and from Professor Kodi. At paragraph 32 the First-tier Tribunal said:

> "In the circumstances it seemed to me that there are mental health facilities and treatment available in the DRC and there is no particular reason why the appellant could not have recourse to it. I do not find on the evidence it is likely that the appellant will be treated, as claimed, as if he were a "sorcerer" or "bewitched". I accept that there are limitations upon the resources in the DRC and the limitations are to a degree presumably directed at what the government assesses the necessary funding should be. Those are judgments made by the government of the DRC and the fact that it is significantly different from that in the UK does not put a burden upon the UK authorities to provide medical treatment at a standard which the appellant will be likely to obtain or has been able to obtain in the UK."

13. It is against this background that Mr Mackenzie argued that the treatment the appellant would face in the DRC from local healers or traditional healers would be so inappropriate and harsh that exposing him to the risk of that would be contrary to the United Kingdom's obligations under Article 3 of the European Convention on Human Rights, and, alternatively the appellant's mental health is such that the effect of deportation combined with the likely available treatment would be contrary to those same obligations and in any event it would be a disproportionate interference with the private and family life of the appellant or, more pertinently, his children to remove him.

14. We have no difficulty in accepting that the possible ill treatment identified in the evidence could be sufficiently serious to violate Article 3 but if there is any doubt about it all (we do not have any) it is supported fully by the decision of the Court of Appeal in **NO (Afghanistan) v SSHD [2016]**

EWCA Civ 876 at paragraphs 44 and 45, the important parts of which we set out below:

> "44. ... The appellant does not simply claim that the healthcare available to him in the UK is not available in Afghanistan. Rather he submits that his condition, which generates the need for that care, of itself gives rise to a risk of ill-treatment in Afghanistan. He is not complaining about the consequences of the lack of treatment in Afghanistan but about the consequences to which his condition gives rise in Afghanistan, that is to say the risk of inhuman or degrading treatment.
>
> 45. Whether it is right to regard these consequences as the Deputy Judge seems to have done as "wholly occasioned by his mental health condition" I rather doubt. I would have thought that the consequences are occasioned by a combination of his mental health condition and the societal attitudes thereto prevalent in Afghanistan. But I do not think it matters. It is a complete misreading of the regulatory and statutory materials and indeed the Secretary of State's own policy to think that the risk of inhuman or degrading treatment does not generate an entitlement to humanitarian protection if caused by a medical condition. On the contrary, it is the risk of inhuman or degrading treatment which is capable of lifting those cases out of the category of mere "medical cases" into the category attracting, exceptionally, humanitarian protection."

15. The First-tier Tribunal's findings on the sort of difficulties the appellant might experience in the event of his return are adequate and although we agree with the skeleton argument that it is established in these proceedings that the appellant does suffer from post-traumatic stress disorder it does not follow from that that he would experience difficulties that would invoke the protection of Article 3.

16. There are two export reports from Dr Kodi. The one that is particularly relevant for present purposes is dated 7 May 2017 and is in the supplementary bundle. Dr Kodi describes himself as a British citizen of Congolese origin. His relevant qualifications include his being a former Associate Fellow of Chatham House and his having worked as an Academic of the University of Nairobi and the University of Lubumbashi in the Democratic Republic of Congo. Dr Kodi's report includes an appropriate expert direction and we regard his observations as sincere, honest and helpful.

17. He concludes at paragraph 16 that the appellant:

> "... would likely face deep seated stigma, discrimination and vilification in the DRC on account of his mental health condition. He is likely to be treated more harshly if his condition was to deteriorate on return in the DRC. He would even risk being killed."

18. This is chilling and we reflected on it.

19. He was asked particularly to explain what would be likely to happen in the DRC. The report explains that there is no equivalent in the DRC to the

United Kingdom process of "sectioning" the mentally ill. Dr Kodi says that it is "customary for people with severe mental health problems to be declared witches or possessed by evil spirits". He then quotes a Congolese psychologist saying that in effect, people who suffer from mental disorder risk are accused of sorcery or witchcraft rather than seen as someone in need of medical treatment. He says that such people "Are, therefore, subjected to inhuman treatment."

20. However when that opinion is particularised he says they "Could be chained, beaten and undergo other violent treatment to cast the devil out of them." We are entirely satisfied that being beaten and/or chained is the kind of behaviour that violates Article 3. The difficulty for the appellant is Dr Kodi's use of the phrase "could be". The report explains how people with "Mental health problems continue to be ostracised by their families because of the stigma that is attached to mental problems. They are left to fend for themselves and end up wandering and sleeping in the streets where they are "beaten and chased by the public." We do not doubt that these things happen. Indeed we know that there is an example of a person from the DRC being killed in the United Kingdom because he was perceived as being bewitched. However we are not able to extrapolate from these examples evidence to support a conclusion that there is a real risk of such serious ill-treatment facing this appellant. The report contains no quantitative analysis to help us discern if these examples of highly unacceptable behaviour are so commonplace that they are evidence of a real risk facing this appellant. While we accept that the appellant has no-one to help him we think that there is a likelihood that he will be wandering and sleeping in the streets and we accept there is a likelihood of some ill-treatment. We understand that, regrettably, this kind of ill-treatment tends to happen to people who sleep on the streets in the United Kingdom. Again, this nastiness is not evidence of a real risk of the appellant being exposed to treatment sufficiently severe to come within the scope of Article 3.

21. In short, we find that Dr Kodi's report raises a concern but does not prove the case.

22. We have noted as well the report from Al Jazeera which, as is perfectly permissible, includes some rather shocking and disturbing pictures although we are spared their full unpleasantness because the photocopying is not of the highest quality. That does not matter. We have got the point. This confirms that such mental health facilities as are available tend to come from spiritual healers rather than people with professional qualifications. We regard such treatment as likely to be useless rather than reasonably likely to contravene Article 3.

23. A person is not entitled to international protection against being "prayed over" or subjected to unorthodox treatment unless that treatment is itself sufficiently severe to come within the scope of Article 3 and again there is no evidence before us that establishes that that is a real risk rather than a theoretical possibility for this appellant.

24. It follows therefore that we are not persuaded that there is a real risk of Article 3 treatment in the event of return and we reject that argument.

25. The leading case on the correct approach for people who are suffering from ill-health and particularly mental ill-health remains **J v SSHD [2005] EWCA Civ 629** which we find Mr Mackenzie has summarised accurately and helpfully at paragraph 39 of the skeleton argument provided for his use in the First-tier Tribunal. This case makes the point that there is a particularly high threshold to cross in "foreign cases" because the difficulty is not the act of the United Kingdom but the poor health facilities in the country of which the appellant happens to be a national. He is just not entitled to remain in the United Kingdom because the health treatment available there is better. We agree that the available healthcare is inadequate. Drugs are going to be very difficult to find. Finding anybody to give the appellant care is going to be a matter of chance and may not happen at all. His prospects are profoundly unattractive and we should not try to salve our consciences by deciding otherwise. It remains our view the difficulties are not the result of some wrongful act by the United Kingdom that contravenes the appellant's human rights. His plight, grim as it is, is not so serious that it meets the very high threshold that is explained in case law.

26. Neither do we accept that this is an appeal that should be allowed under Article 8 under the Rules or statute or at all. We again clearly accept the principle underlying Mr Mackenzie's argument. Circumstances which are not sufficient to attract the protection of Article 3 on their own can be part of an "Article 8 mix" and can theoretically tip the balance. However the appellant's criminal misbehaviour has put him in the category of people that Parliament has decided are people who should be deported in the public interest. It is not sufficient to come within the scope of Exception 1 and Exception 2 under Section 117C of the Nationality, Immigration and Asylum Act 2002. Before an appeal can be allowed under Article 8 there have to be "very compelling circumstances, over and above those described".

27. For what it is worth we are satisfied that the appellant comes within the scope of Exception 1. Clearly he has been lawfully resident in the United Kingdom for most of his life. He has been in the United Kingdom since he was aged 11 and he was born in 1989. Deciding if he is "socially and culturally integrated in the United Kingdom" is more problematic. We do not fall into the trap of saying he cannot be culturally integrated because he is a criminal. We agree that that primitive instruction has been stopped firmly by the Court of Appeal in **SSHD v Kamara [2016] EWCA Civ 813**. The sad truth is that this man's mental illness leaves us to wonder if he can really be described as integrated anywhere but he certainly is not someone who is culturally integrated into another country outside the United Kingdom and in that sense we are satisfied that he is socially and culturally integrated into the United Kingdom. We also accept there would be very significant obstacles to his integration into the country to which it

is proposed that he be deported. This is a result of his mental illness and the difficulties he would find there.

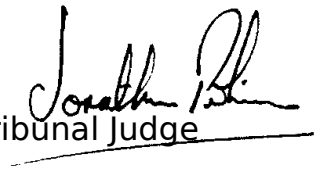
28. We do not agree that he comes within the scope of Exception 2. Clearly he has a genuine and subsisting parental relationship with qualifying children particularly his daughter. We do not agree that the effect of deportation on the children will be unduly harsh. Deportation is a nasty process which breaks up family relationships but Parliament has decided that it is necessary. It is particularly necessary with a person who has been sent to prison for four years and although the behaviour that led to that sentence is the main course of concern in this case it is not the extent of his criminality. He is not living in a nuclear family and his contact with the children is limited. We do not accept that the harshness and harsh is an appropriate word in their relationship with their father being interrupted in this way is undue in the context of deportation proceedings.

29. However we find nothing which would justify finding that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2."

30. We have also had regard to the Rules and particularly the "very compelling circumstances" test. We are not sure that it adds anything to the statute but if it does in theory it does not in this case. The disturbing circumstances are the Appellant's ill-health and the consequences of his having to manage them in the DRC. We have already explained why we do not find that sufficient reason to rule in his favour on the Article 8 point.

31. Putting these things together we dismiss the appeal.

Signed



Jonathan Perkins, Upper Tribunal Judge Dated: 31 January 2018

IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00608/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2017	.....

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

[M T]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr P Deller, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of the DRC has permission to challenge the decision of First-tier Tribunal (FtT) Judge Davey sent on 6 July 2017

dismissing the appellant's appeal against a decision made by the respondent on 4 April 2014 refusing to revoke a deportation order.

2. The principal target of the grounds is what Judge Davey stated at paragraph 35:

> "Reliance was placed on *Paposhvili v Belgium* [2016] Grand Chamber of the European Court. It seems to me that that case principally starts from the point of a failure by Belgium to properly address its ECHR obligations. The comments made by the Grand Chamber, on UK caselaw (sic) are essentially obiter to that issue: The ratio of the case was the failings by Belgium. The Grand Chambers decision is case fact specific and is not a precedent. I note that the United Kingdom was not a party to that litigation nor was it making representations on the issues arising. I note the remarks the Grand Chamber made about the cases of N and D but I apply UK case law as to the application of Article 3 ECHR in the domestic circumstances of the UK. N and D remain the relevant authorities to consider the Article 3 issues. For these reasons, either in respect of Article 3 ECHR or as a consideration in relation to compliance with Article 8 and proportionality, in neither situation it seems to me has the Appellant discharged the burden of showing that there is a breach of those respective Articles."

The reasons the judge gave for disregarding **Paposhvili** are said to be flawed in more than one respect.

3. The grounds also take issue with what is said to be the judge's failure to explain why there was no risk of inhuman or degrading treatment to the appellant from destitution and/or harmful traditional treatment. Connected with this contention, it was argued that the judge failed to give adequate reasons for not accepting the contents of the expert report by Dr Kodi, consultant on African affairs and former Associate Fellow of the RIIA (Chatham House).

4. The third ground contended that the judge's findings on the availability of healthcare in the DRC were not reasonably open to him.

5. I heard submissions from Mr MacKenzie and Mr Deller, the latter stating that he found it difficult to disagree with the thrust of the former's submissions given that both the Court of Appeal and the Upper Tribunal have identified a range of issues requiring further examination regarding the impact of the **Paposhvili** judgment on previous domestic case law.

6. I have concluded that the judge fell into legal error for several interrelated reasons. First, he was clearly incorrect to dismiss the significance of **Paposhvili** for the reasons he gave in paragraph 35. The judgment was from the Grand Chamber and its main conclusions clearly went further than a finding regarding a specific failure by Belgium to observe its Article 3 obligations in the applicant's case. It was not solely fact-specific. The

fact that the UK was not a party to the proceedings and did not make representations on the issue arising did not alter the fact that as a Grand Chamber judgment it was intended to clarify the Court's position on Article 3 'health cases' relating to expulsion. The effect of the judge's incorrect analysis of the significance of the judgment was that he failed to take it into account, contrary to s. 2 of the Human Rights Act 1993. The judge's misdirection as regard the relevance of **Paposhvili** was compounded by a failure to give reasons for disagreeing with the expert report of Professor Kodi. To summarise the purport of this report was "show[ing] the limitations on medicines and treatment available in the DRC" is quite simply a mischaracterisation, as that report is highly critical of the ability of the DRC to afford even basic medical care and includes a specific assessment of the risks to mentally ill people from societal neglect, destitution and/or traditional treatment. It was also wrong of the judge to consider the issue of the numbers of health professionals as irrelevant: See **Y & Z (Sri Lanka) [2009] EWCA Civ 362** at [41] and [46]. The judge's dismissal at paragraph 34 of such concerns as not relevant to the Article 3 obligation was erroneous. Whilst it may have been open to the judge to assess that the appellant would not on return face serious, rapid and irreversible decline in his health resulting in intense suffering or a significant reduction in life expectancy, it was not open to him to do so without engaging with the expert report and medical COI (or "Med COI" as it is sometimes termed) to the contrary.

7. Nor does it seem to me that the judge properly considered the relevance of the appellant's account of having no family ties in the DRC, having come to the UK at the age of 11 in September 2000. That was potentially a relevant consideration when assessing whether the appellant would be able to survive in the DRC given his mental health problems.

8. The judge did consider the issue of destitution, but it is not clear that he understood the need for a distinct consideration of the appellant's likely living circumstances in terms of the consequences for his mental health condition: see **NO (Afghanistan) [2016] EWCA Civ 876**.

9. As regards the appellant's Article 8 circumstances, the judge's flawed assessment of the expert report also clearly affected his analysis of whether on return the appellant would face very significant obstacles to integration. Linked to this the judge also failed to make any clear appraisal of the social worker evidence of Peter Horrocks (who considered that the children would suffer great distress and trauma and harm to their emotional development upon the removal of the appellant).

10. In light of the above I set aside the decision of the judge for material error of law. There is no dispute with regard to the judge's primary findings of fact and hence these shall stand. The task of re-making the decision by applying clear and correct legal principles to those findings is complicated by the pending litigation on **Paposhvili**. In these circumstances I will

instruct that the file be placed before the Principal Judge for review in 6 weeks time as to whether it should be stayed to await the outcome of these pending cases. With Mr Mackenzie's consent, Mr Deller undertook to provide the Upper Tribunal with details of the pending cases in the near future. At the time of concluding this decision this has not happened.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 26 October 2017

Dr H H Storey
Judge of the Upper Tribunal