Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/21408/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 February 2018	**On 16 April 2018**

Before

RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Clarke, Home Office Presenting Officer
For the Respondent: Ms Akinbolu, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of Judge C M Phillips promulgated on 1 June 2017. Judge Phillips allowed an appeal against a decision of the Secretary of State refusing the appellant asylum and humanitarian protection. The appeal on these grounds was dismissed but Judge Phillips allowed the appeal under article 3 ECHR and paragraph 276ADE of the Immigration Rules. In this decision I will refer to the respondent as the appellant as he was before the First-tier Tribunal.

2. The appellant was born in Kurdistan, Iraq on 1 July 1965. He arrived in the United Kingdom on 23 February 2000 and claimed asylum on arrival. That was refused (see below) but he has remained in this country since then. He suffers from serious physical and mental health problems. In brief these are that he is HIV positive and has insulin dependent diabetes mellitus. He has severe PTSD, a major depressive disorder with psychotic features and is suicidal.

History

3. There is a long and significant history and it is right that I set it out in some detail. What follows is an abridged version of the chronology in the appellant's bundle.

   27 February 2004 – claim refused

   5 March 2004 - appeal lodged

   11 June 2004 – appeal allowed under article 3 ECHR

   4 November 2005

   3 May 2005 application for further LTR (it expired the following day).

   5 October 2007 – conviction (see below)

   20 February 2008 – sentenced to 2 years 6 months imprisonment

   19 March 2008 – Liability to Deportation notice

   11 April 2008 – appellant makes representations against deportation

   26 March 2010- granted LTR for a reason outside IR 395

   10 June 2011 – LTR expires

   15 November 2011 - application for further LTR

   6 July 2016 – application refused

   7 November 2016 – appeal lodged

   28 April 2017 – appeal heard by Judge C M Phillips in FtT

4. On 5 October 2007 the appellant was convicted at Southwark Crown Court of six counts of being knowingly concerned in fraudulently dealing in dutiable goods. On 20 February 2008 he was sentenced to 2 years 6 months imprisonment.

5. In 2008 following the service of the notice of Liability to Deportation the appellant made an application for assisted voluntary removal. That was approved but shortly thereafter the appellant withdrew the application.

6. As will be seen there is a long delay between the application for further LTR made in November 2011 and its subsequent refusal in July 2016. Shortly after the application was made further

representations were made on the appellant's behalf. Thereafter the solicitors for the appellant chronicle six requests for progress made during 2012 and 2013. On 26 March 2013 the Home Office acknowledged receipt of the application but were unable to give a time frame. After further correspondence, including a pre-action protocol a Judicial Review was lodged on 28 April 2016 challenging the delay. That was subsequently settled by consent.

First- tier Tribunal Hearing

7. In preparation for the hearing before the First-tier Tribunal the appellant lodged a voluminous bundle of medical records, correspondence and reports. I note that six of the reports are dated within a year of the date of the hearing (though two are from the general practitioner). I will return to this but it should be noted that one of these reports expresses the opinion that should the appellant be returned to Iraq the writer feels certain that the appellant would end his life before deportation.

8. All of the reports were before the Home Office prior to the hearing on 28 April 2017. In light of the history of this case and the difficult medical issues that the appellant has sought to place before the Secretary of State it is surprising and disappointing that the Secretary of State chose not to be represented at the First-tier Tribunal. Judge Phillips records correspondence that the appellant's solicitors had with the Home Office in January and February 2017 including further representations raised by section 120 notice. It appears that there was no response.

Judge Phillips' decision

9. In allowing the appeal Judge Phillips relied on the case of **Paposhvili v Belgium Application 41738/10, 13 December 2016.** At paragraph 56 he notes that with the decision in **Paposhvili** there has been a change in the legal landscape post **N v United Kingdon {GC} no 26565/05**. At paragraph 66 Judge Phillips says that applying the findings in **Paposhvili** to the facts in this appeal he finds that the appellant has adduced sufficient, satisfactory evidence capable of demonstrating that there are substantial grounds for believing that if the appellant were deemed liable to be removed and steps taken to implement his removal he would be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR. Because the appellant has discharged the evidential burden on him he found it was for the UK authorities to dispel any doubts raised by the evidence. He then noted the long delay in deciding the appellant's application, their failure to respond to the section 120 notice or the additional grounds of appeal and their failure to provide representation at the hearing. He considers paragraphs 183 and 205 of **Paposhvili.** At paragraph 70 of his decision Judge Phillips concludes that from the principles set out in **Paposhvili** "a

finding that the appellant can return, without the relevant factors being properly assessed and answered satisfactorily, violates article 3".

10. Judge Phillips then goes on to consider in paragraphs 72 and 73 the appeal in terms of article 8 in accordance with paragraph 276ADE (vi) of the Immigration Rules. He considers the issue to be whether or not there would be very significant obstacles to integration on his return. He considers the medical evidence and expert reports along with the appellant's long absence from Iraq. He considers that on the balance of probabilities the test is met. On his return he will be a vulnerable stranger. He is highly likely to be discriminated against as an HIV positive 'foreigner' and highly likely to be ostracised.

Grounds of Appeal

11. The Secretary of State's grounds of appeal submit that Judge Phillips materially erred in law by failing to follow binding precedent; **N v SSHD [2005] UKHL 31; GS (India) and others v SSHD [2015 EWCA Civ 40;** and **KH Afghanistan [2009] EWCA Civ 1354**. He further erred in allowing the appeal under paragraph 276ADE(vi) in failing to apply the significantly high threshold; **Treebhawon and others (NIAA 2002 Part 5A – compelling circumstances test) 2017 UKUT 00013 (IAC),** at head note (iii). The first-tier Tribunal had not provided circumstances above those relied upon for article 3. When taking into account the findings in **GS (India)** the appellant should not succeed on article 8 grounds due to a disparity in health care. The Judge had not taken into account remittances from abroad or family links in considering whether there were very significant obstacles to integration.

12. In a brief submission Mr Clarke said that in the light of the decision in the Court of Appeal in **AM (Zimbabwe) [2018] EWCA Civ 64** it was clear that Judge Phillips was in error in following **Paposhvili.** However he submitted the cases cited in the grounds of appeal were not really in point given that the most significant feature of the medical history was the suicide risk. The cases that were in point were **J v SSHD [2005] EWCA Civ 629** and **Y and Z (Sri Lanka) v SSHD) [2009] EWCA Civ 362.**

Error of law

13. Judge Phillips followed **Paposhvili** in reaching his determination. It is a careful judgement in which he analyses the medical evidence in some detail. Unfortunately in the light of **EA & others (Article 3 medical cases – Paposhvili not applicable; Afghanistan) [2017] UKUT 445 IAC** and **AM**

(Zimbabwe) the legal basis of the decision on article 3 grounds is wrong in law.

14. Mr Clarke submitted that the case should be either remitted to the FtT to be reheard, or a date set for a further hearing in the UT. That option is deeply unattractive. I have already outlined the long delay that this case has suffered. Moreover the Secretary of State has failed to engage with the medical evidence either at the FtT or in the grounds of appeal to the Upper Tribunal. I considered that before I remitted the case I should be clear as to whether the error is material, or whether, applying the correct law to the facts found by Judge Phillips the decision would have been the same.

Judge Phillips' findings

15. Judge Phillips findings in fact are set out in paragraphs 34 to 71. I do not intend to set then narrate them in full but it important to set out the salient facts as found by the FtT Judge.

16. The starting point is the determination of 11 June 2004 in line with **Devaseelan [200] UKIAT 000702.** The Immigration Adjudicator accepted that the appellant had been a victim of torture in Iraq, albeit before the fall of the regime of Saddam Hussein. The appellant had fled Iraq via Iran and Turkey before arriving in the UK. He had been under the care of a consultant psychiatrist, Dr Amin since February 2001. A report from him before the Adjudicator disclosed that he was severely depressed with symptoms of PTSD. His medical opinion was that because of his underlying mental health problems as well as his diabetes the appellant's condition was likely to deteriorate if he was returned to Iraq. The appellant would try to harm himself or commit suicide. He already had a history of self-harm and attempted suicide. The appellant required medication and specialist psychotherapy. He was not at that time well enough to give evidence on his own behalf. The Adjudicator found that there would be insufficient facilities available for him at that time in Iraq and that returning him then would infringe his article 3 rights. The Secretary of State did not appeal that decision; the appellant was granted DLR.

17. Since then the appellant, in addition to his diabetes and mental health issues, had been diagnosed HIV positive and was receiving treatment in this country for that. The appellant relied on an expert report from Ms Pargeter. She set out the history of HIV/AIDS in Iraq. Both the Iraqi and Kurdish governments provide monthly salaries for people living with HIV and the Iraqi government provides certain medical services and housing support. However Ms Pargeter was not able to confirm that the stated policies were being implemented. In November 2016 there was a lack of medicines prompted by the economic crisis. Many

Iraqis still believe that HIV carriers are dogs with rabies who should be excluded from society. There is a high incidence of stigmatisation and openly practiced discrimination against those with AIDS. A positive test result was not a private matter. Patients would be outed by doctors and police would inform neighbours. HIV sufferers experienced social stigma, harassment, threats and in some cases death.

18. Ms Pargeter's conclusions, in the absence of challenge, were accepted by Judge Phillips (paragraph 45). In summary the appellant would face a plethora of challenges on return to Iraq. Although he would be highly unlikely to face persecution at the hands of either the Kurdish or federal authorities it would be very unlikely that he would be able to find work. He would be highly unlikely to be able to access proper health care and treatment for his symptoms including HIV and his mental health problems. Both his mental health and HIV status could well result in him being ostracised, with the latter also making him vulnerable to harassment, severe stigma and threats.

19. There was also a report from Dr Nicola Mackie from St Mary's Hospital dated 26 January 2017. It confirmed the diagnoses of HIV positive, insulin dependent diabetes mellitus, hypertension and post-traumatic stress disorder. Further detail is given in paragraph 46 of the determination. Dr Mackie is strongly supportive of the appellant's appeal on medical and psychological grounds.

20. A letter from SHP Westminster Support confirms that the appellant is a client of the service which provides floating support to those suffering from debilitating mental illness. It confirms that the appellant requires regular practical and emotional support, including maintaining his tenancy, paying bills and reporting repairs. His mental health had been unstable during the previous year brought on by the uncertainty of his immigration status and severe physical health problems. Without the support that he receives he would not be able to manage his accommodation and health appointments. Without this assistance his overall well-being would be put at risk.

21. The GP reports that in addition to his HIV status, diabetes, PTSD and depression the appellant reported back pain and irritable bowel syndrome. He is currently prescribed 16 items. He is on the waiting list for cognitive behaviour therapy.

22. The appellant was referred to the Westminster Assessment and Brief Treatment Team resulting from his increased fear and despair around the idea of his return to Iraq. In a report dated 19 March 2015 the writer noted that he had developed PTSD subsequent to periods of imprisonment and torture starting in 1985. The writer noted that the appellant is petrified at the idea

of being sent back to Iraq/ Kurdistan. His PTSD makes him feel that his level of danger and potential harm is as high as it was when he was actually in prison and being tortured. He has flash backs which get triggered when he experiences this level of danger/fear. The writer explains that this is thought to be caused by a fault in the memory consolidation process during trauma – the memories of trauma are essentially left without a time tag to place them in the past.

23. Judge Phillips also had before him reports from the Woodfield Trauma Centre. A synopsis of the report dated 7 April 2017 is set out in paragraph 54. It records that the appellant continues to meet the criteria for severe PTSD as well as Major Depressive Disorder with psychotic features. He is significantly impaired by the nature and severity of the symptoms. The writer expresses the opinion that *the appellant would end his life before deportation* (my emphasis).

24. Even if he did not end his life prior to removal the writer was certain that he would not be able to cope on return. He would completely lack the mental or physical fortitude to relocate and strands no chance of being able to care for himself and function well enough to ensure that he is housed or fed. The lack of medication would see him deteriorate mentally and physically. The appellant believed that on his return he will be captured and imprisoned, tortured or killed.

25. Judge Phillips found that the PTSD was not solely caused by the uncertainty over his asylum status. The cause of the trauma was the appellant's experiences in Iraq and a current precipitating factor in his PTSD is his fear of return. While the Secretary of State maintained that there had been a significant improvement in the mental health care services in Iraq the information did not show that these remained available at the time of the hearing or that the treatment included drugs for the treatment of HIV. Judge Phillips accepted that the appellant does not have family in Iraq who could assist or support him on return.

Applicable law

26. The appellant suffers from a complex matrix of physical and mental problems. In the grounds of appeal the Secretary of State has approached the analysis of the article 3 issues that arise from the facts as ascertained by Judge Phillips on the basis of a number of cases set out in paragraph 11 above of which **N v SSHD** is the most significant. However while it is not possible to look at the individual illnesses in isolation for these purposes it is his mental health issues and in particular the risk that he might commit suicide which is most likely to engage article 3. Accordingly while **N v SSHD** sets out the foundation of the law on article 3 which must be followed in suicide cases the

application is somewhat different. For these reasons I agree with Mr Clarke that it is the cases of **J v SSHD** and **Y and Z (Sri Lanka) v SSHD** that are most in point.

27. In **J v SSHD** Dyson LJ giving the judgement of the court adopts the test set out by Lord Bingham in **Ullah v SSHD [2004] UKHL 26** as whether there are strong grounds for believing that the person, if returned, faces a real risk of torture, inhuman or degrading treatment or punishment. But he goes on to amplify the test as follows:

> "26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see Ullah paras [38–39].
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> 27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in Soering at para [91], the court said:
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> > "In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."(emphasis added).
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> See also para [108] of Vilvarajah where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka …"
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> 28. Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of D and para [40] of Bensaid.
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> 29. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of Bensaid).
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> 30. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.

> 31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights."

28. In **Y and Z (Sri Lanka)** the appellants were a brother and sister who arrived from Sri Lanka and claimed asylum. It was accepted that they had been tortured by the Sri Lankan security forces as suspected members of the Tamil Tigers. Y had become increasingly suicidal and was terrified at the prospect of return. He had no family in Sri Lanka and the chances of finding a secure base from which to seek palliative and therapeutic care were remote. Although the evidence showed that psychiatric care was available in Sri Lanka the uncontradicted expert evidence was that if return was enforced the likely effect of the psychological trauma would be suicide. Sedley LJ described the fear that both Y and Z exhibited as subjective, immediate and acute.

The present case

29. Applying the test in **J v SSHD**, first, the harm that is likely to befall the appellant in this case is suicide, either before his return or on his return. If he did return he would be unable to access housing and medical care and generally look after himself. There is no support for him in Iraq. His condition would deteriorate physically and mentally. He would be the subject of discrimination and not have access to drugs. I am satisfied that this attains the minimum of level of severity to engage article 3. This is not challenged. Secondly it is a foreseeable consequence of removal from the UK to Iraq. Thirdly, although the regime has changed the inhuman treatment which has given rise to his present mental difficulties arises from the state authorities in the receiving state. It is significant that his flash backs are thought to be due to memories of trauma which he is unable to appropriately tag in time.

30. Turning to the fifth test it might be argued that the appellant's fear of ill treatment on return was not objectively based. That is not entirely correct as his lack of support on return, his ability to access assistance and the discrimination that he may face from his HIV/AIDS diagnosis are undisputed facts. However there is no doubt that he is unlikely to face capture, torture and death at state hands as he fears. Nevertheless the fear that he exhibits is real and tangible. It is a very significant contribution to his illness. It is that fear which gives rise to the very real risk of suicide. This is the real and subjective fear of the sort described in **Y and Z (Sri Lanka) v SSHD**. Indeed there are parallels with the factual position in **Y and Z**. Finally it is clear that the receiving state does not have the full range of available facilities to support the appellant on return. And the appellant does not

have the physical and mental ability or the family support to access appropriate facilities in Iraq, even if available.

31. It is not necessary for me to deal with the appeal in respect of IR 276ADE(vi). Nevertheless the complaint that appears to be made in respect of this ground is a failure to consider remittances from abroad or family links in considering whether there were very significant obstacles to the appellant's reintegration. It is true that there is no mention of the possibility of remittances from abroad but these would only be of utility to him if he was able to utilise the money to access housing and other support or there were family members who could use the money to support him. The evidence is clear that the appellant struggles to cope with the basics of life, including accessing supportive facilities. There are no family support members in Iraq. Accordingly this ground of appeal looks more like a quibble with the outcome than pointing to an error of law.

32. For these reasons I am satisfied that the appeal falls to be dismissed. So far as Article 3 is concerned Judge Phillips reached the right decision albeit by the wrong route. Had he applied the law correctly he would have been bound to dismiss the Secretary of State's appeal.

Footnote

33. Ms Akinbolu asked that I should make a recommendation that the Secretary of State should now give the appellant unlimited leave to remain rather than a further period of discretionary leave. In my opinion a tribunal should be slow to trespass on the executive function. All I can say is that on the evidence it appears unlikely that the appellant will recover sufficiently in the near to mid-term to make return to Iraq a realistic possibility. It is also clear that the uncertainty over his status has contributed to his present state of ill health. In determining his present status the Secretary of State will also no doubt wish to reflect on the long, unexplained and frankly unconscionable delay in dealing with his application and her failure to challenge or engage with the medical evidence in this case.

Notice of Decision

The appeal is dismissed.

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

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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: 13 April 2018

Lord Boyd of Duncansby