Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07669/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Determination Promulgated**
On 27 November 2017	**On 16 January 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[P T]

Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. Although the Secretary of State is the appellant in these proceedings, I continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Côte d'Ivoire, born in 1986. He arrived in the UK on 1 September 1994, being a dependant on his father's asylum application.

3. On 3 March 1998 his stepmother, a French national, made a residence permit application with the appellant's father and him as dependants. His father was

granted indefinite leave to remain ("ILR") on 24 August 1999 and the appellant was granted ILR outside the Rules in line with that of his father, on 24 November 1999.

4. The appellant has been convicted of a number of criminal offences which are set out in the decision of First-tier Tribunal Judge Housego ("the FtJ") in his decision promulgated on 15 September 2017. In summary, they are offences of burglary, possession of weapons, intimidating a witness or juror, drug offences, including supplying class A drugs, failure to comply with various court orders and culminating in a sentence of 16 months' imprisonment imposed in the Crown Court at Leicester on 21 March 2014 for bringing cannabis into prison.

5. A decision to make a deportation order was made on 3 November 2014 pursuant to the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). Prior to that he had been subject to deportation proceedings, having been first notified of liability to deportation on 7 February 2007. In relation to that notice of liability to deportation, the respondent decided not to pursue the matter in the light of the sentence that was imposed for the offences at that time, being a sentence under two years' imprisonment, and taking into account the appellant's EU rights.

6. On 1 June 2009 he was again notified of liability for deportation following conviction for supplying crack cocaine for which he received a sentence of two years' imprisonment. The appellant successfully appealed that decision, his appeal having been allowed by the First-tier Tribunal ("FtT") on 28 April 2010. The appellant was however warned that deportation proceedings might be pursued in the event of further offending.

7. In relation to the decision dated 3 November 2014 to make a deportation order under the EEA Regulations, the appellant lodged notice of appeal out of time on 2 April 2015. The FtT refused to grant an extension of time.

8. A letter dated 26 January 2017 rejected human rights submissions made on behalf of the appellant, that letter being a decision to refuse to accept further submissions as amounting to a fresh claim (para 353 of the Rules). That decision was unsuccessfully challenged by way of judicial review.

9. Further submissions were made and a decision dated 1 August 2017 was made, that being a decision to refuse a protection and human rights claim. Within it was a decision to make a deportation order pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016").

10. After a hearing on 14 September 2017, the FtJ allowed the appeal on human rights grounds, with reference to Article 3.

The FtJ's decision

11. The FtJ applied the decision in *Paposhvili v Belgium*, 13 December 2016, ECtHR (Application No. 41738/10) in relation to evidence that the appellant suffers from

schizoaffective disorder. He found that the appellant came to the UK as a young child (stating that he was aged 6 years when he arrived, whereas he was in fact 8). He said that all the appellant's immediate family are in the UK, as citizens of an EU state or with ILR. He found that the appellant has no connection with Côte d'Ivoire and that he does not speak French. He concluded that given his age, whatever French he had learnt as a child, had faded. He also found that the appellant had two children in the UK with whom he would like to have a relationship, and there is a connection with them.

12. He referred to the appellant's immigration history and his criminal offending. In relation to the appeal in 2010, he said that the factors that were evident at that stage, namely his age when he came to the UK, the length of time he had lived legally in the UK, his complete lack of the language and knowledge of the culture of Côte d'Ivoire, and the apparent absence of any family members there, were all factors still present, and even more so seven years further on. He had been in the UK for 23 years.

13. He referred to the appellant having sought help for his mental health problems for the first time when he was in prison in 2014 serving his last sentence. He referred to his being troubled by voices that are both internal and external and are malevolent. Those voices, he said, had led the appellant to use excess alcohol and illicit drugs to attempt to drown them out, to the extent that he was drinking a litre of rum a day at one point. He found credible the assertion that this downward spiral led to his offending.

14. At [32] he said that whilst in prison the appellant had made two serious attempts at suicide and has self harmed. He referred to prison medical records giving the details of those attempts. There were 74 pages of notes from the prison medical service in relation to his symptoms and the treatment he had received, as well as evidence of suicidal ideation. He referred to prison notes dated 31 January 2017 showing that the appellant had claimed to be abstinent from alcohol after his release in July 2015 until detained under immigration powers in 2017.

15. Referring to the appellant's release from prison in July 2015 at the end of his sentence, he said that he complied with conditions of tagging and reporting until detained on reporting. During those 16 months he said that the appellant was not in trouble with the police and was not charged with any offence.

16. He concluded at [35] that without proper psychiatric support the appellant was likely to regress, and it was plain that strain and stress made his condition worse.

17. He referred to various European and domestic authorities on health cases, as well as the decision in *Paposhvili.*

18. At [37] he concluded that the appellant would have no personal support in Côte d'Ivoire, and that his family might send money does not alter that fact. He referred to what he described as generic evidence provided by the respondent that there were mental health services in Côte d'Ivoire. He then concluded that having regard to the prison medical records and two serious attempts at suicide in prison, he was satisfied

that without effective medical help, both medication and expert oversight, the appellant was likely to commit suicide.

19. He then stated that that passed responsibility to the Home Office to show that he would receive help, but that had not been done. He found that generic information about the availability of treatment in Côte d'Ivoire was not enough in this case where the death of the appellant was not only possible but likely if he did not receive the help that he gets in the UK.

20. He then referred to the evidence relied on by the respondent in terms of treatment for mental health conditions in Côte d'Ivoire.

21. At [40] he said the following:

> "This is all very well and good as generic observation, but completely inadequate in the case of the appellant. First it is hearsay, and does not give its sources. Given the stakes here, one would expect to know who was saying the treatment and drugs were available. Secondly, is [risperidone] essential for the appellant? Are the other drugs named an adequate substitute for him? How would he access the treatment? How do I know he is going to get any help there? If this appellant is to be deported then any judge hearing such an appeal is going to need to be sure that he – as an individual – is going to have a care plan that will deliver the care he needs to ensure his safety. Without that knowing that such care is available to him [sic] there is an unacceptable risk of suicide."

22. In relation to the asylum ground of appeal (risk of persecution as someone treated as being bewitched) he dismissed the appeal stating that if the appellant was properly treated he would function without being regarded as being bewitched. If he is not so treated, then he succeeded under Article 3, he said. He said that further, there was no evidence that his treatment would be worse than societal discrimination short of persecution.

23. In relation to Article 8, at [43] he said that the respondent's decision considered Article 8, but he said that he noted that the appellant has unsuccessfully challenged the deportation order, when the Article 8 factors will have been considered. He said that he was aware of no significant difference between now and the dismissal of the challenge to the deportation order. Amongst other things, he said that there was insufficient evidence "as to Article 8 reasons for the appellant", and the burden of proof was on him. He found that the Article 8 claim could not succeed on the basis of the evidence before him.

The grounds and submissions

24. The respondent's grounds contend that the FtJ's decision allowing the appeal under Article 3 was in error. The domestic authorities are not such as to indicate that the appellant could meet the high threshold to succeed on Article 3 grounds. The FtJ's reliance on *Paposhvili* was erroneous.

25. Furthermore, it is argued that the FtJ's conclusion that medical treatment was not available, was wrong in that the FtJ was "obliged" to accept the respondent's objective evidence that medical treatment was available, unless expert evidence was produced to rebut this. However, Mr Wilding accepted that that contention in the grounds went too far.

26. In terms of the risk of suicide, it is argued in the grounds that the FtJ ought to have made his decision with reference to *J v Secretary of State for the Home Department* [2005] EWCA Civ 629. The FtJ not having referred to that decision and the approach required in assessing the risk of suicide, the decision was not adequately reasoned.

27. It is also asserted that the FtJ's conclusion at [37] that the appellant would have no personal support on return, appears to contradict [22] of his decision, albeit that the latter paragraph was unclear.

28. In submissions, Mr Wilding relied on the decision in *EA & Ors (Article 3 medical cases – Paposhvili not applicable)* [2017] UKUT 00445 (IAC).

29. It was submitted that the FtJ's decision was not clear in terms of whether he found that there was a suicide risk on return or a breach of Article 3 otherwise. The FtJ had in any event not followed the structured approach set out in *J*. He had asked the wrong question and applied the wrong test, not having assessed whether there was a complete absence of any treatment which would result in an Article 3 breach on return.

30. Furthermore, there was no burden on the Secretary of State to establish that the appellant's return would not breach Article 3.

31. The respondent's decision had referred to evidence of in-patient and out-patient treatment, at least in Abidjan. There was also information in the response to the Country of Origin information request about the availability of anti-psychotics. The FtJ had set out that evidence at [39] and in the following paragraph he had asked a number of questions but not made findings.

32. Up to [38] of his decision it would seem that the FtJ was considering the case as an Article 3 medical case but thereafter he went on to deal with it as an Article 3 suicide case. It was further unclear from the FtJ's decision as to why he concluded that the appellant would not be able to take advantage of the treatment and medication available in Côte d'Ivoire. The questions that the FtJ asked at [40] are questions that could have been asked of the Secretary of State. Some of those questions could be answered.

33. In reply, the appellant told me that he does not know anyone in Côte d'Ivoire. His stepmother had come back from there a couple of months ago, whilst he was in detention. She is an NHS nurse and she told his father that he would struggle to get treatment there. Because his illness means that he talks to himself, and it is a very spiritual country, they would do rituals on him as if he were possessed. That would put him at risk of harm.

34. He also said that he does not speak the language and does not know where he would live. His stepmother had gone just to see or research the facilities there.

35. The medication he is receiving is venlafaxine and aripiprazole. He sees his GP, but he was given that medication on release from prison.

36. He has two children, aged 5 and 1, and a partner who is a British citizen.

37. He also said that if he relapses he has thoughts of doing harm to himself which he is unable to control. That is what he needs medication for. He could not get it back home. Right now he is content because he can focus on his children.

38. Mr Wilding said that neither Article 8 nor the EEA decision had been considered by the FtJ (although actually Article 8 was considered-up to a point). It was submitted that if an error of law was found requiring the decision to be set aside, it was appropriate for the appeal to be remitted to the First-tier Tribunal.

Assessment

39. It is not necessary to deal with all the arguments advanced on behalf of the Secretary of State because in relation to the main aspects of the complaints in relation to the decision of the FtJ, I am satisfied that there is merit in them.

40. The FtJ decided the appeal with an emphasis on the decision in *Paposhvili,* as is clear from various paragraphs of his decision beyond the extensive citation of extracts of the decision at [11], with emphasis indicated in relation to various aspects of it. However, as is clear from *EA & Ors* the ECtHR departed from the clear and consistent case law that it identified in its own decision, in stating at [181] that:

> "The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N. v. the United Kingdom*, has deprived aliens who are seriously ill but whose condition is less critical, of the benefit of that provision".

41. It was decided in *EA & Ors* that the decision in *Paposhvili,* is not consistent with United Kingdom domestic law. The Tribunal concluded at [31] that it was not permissible for the Tribunal to depart from the domestic authorities it cited. Thus, in that paragraph, the Tribunal said that:

> "It is not permissible for the Tribunal to depart from this authority and, in particular, cannot do so by reliance upon the *Paposhvili* enlargement set out in paragraph 183 of the ECtHR's judgment (see paragraph 6 above). Hence, the recasting of Article 3 to include '*situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy*' is not part of United Kingdom domestic law."

42. Having considered the decision in *EA & Ors* with care, I agree with its reasoning and adopt it.

43. In these circumstances, whilst it is understandable that the FtJ relied on the decision in *Paposhvili* in the way that he did, I am satisfied that in doing so he erred in law.

44. In addition, in concluding that the appellant's return would result in "an unacceptable risk of suicide", I am also satisfied that he erred in law. This is because he did not make that assessment with reference to the approach indicated in the decision in *J*. In that case, the Court of Appeal identified how the risk of suicide was to be assessed. It said 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.
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> 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."

45. The failure of the FtJ to apply the approach set out in *J* is a further error of law which requires the decision to be set aside.

46. Furthermore, although the FtJ said at [40] that the information about the availability of treatment in Côte d'Ivoire in the Country of Origin information request is hearsay and does not give its sources, that conclusion fails to take into account the footnote to the COI request which explains the sources of the information. Secondly, it is not clear as to whether the FtJ was concluding that because the information was not first-hand, it was not admissible, or whether it simply affected the weight to be attributed to that evidence. Likewise, in posing the several questions that he did at [40], it appears that the FtJ was suggesting that it was for the Secretary of State to establish that there would not be a breach of Article 3 on the appellant's return, whereas it is for the appellant to establish that there would.

47. It does also seem to me that at [37], where the FtJ said that the appellant would have no personal support in Côte d'Ivoire, he failed to take into account the evidence recorded at [22] to the effect that the appellant's partner had said, according to the appellant, that should would join him in Côte d'Ivoire. Having said that, that alone would not have led me to conclude that the FtJ had erred in law such as to require the decision to be set aside.

48. In the light of the matters I have referred to which in my judgement reveal errors of law in the FtJ's decision, and having concluded that his decision must be set aside, I consider that the appropriate course is for the appeal to be remitted to the First-tier Tribunal for a hearing *de novo*. That is in accordance with the Senior President's Practice Statement at paragraph 7.2, given the extent of the fact-finding exercise which needs to be undertaken.

49. As Mr Wilding quite properly suggested, the fresh hearing will have to consider the deportation decision under the EEA Regulations as well as Article 8.

Decision

50. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Housego, with no findings of fact preserved except as agreed between the parties.

Upper Tribunal Judge Kopieczek 15/01/18