Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17185/2017**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Determination & Reasons Promulgated**
On 17 December 2018	**On 07 January 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

AT
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Nicolaou, of Counsel instructed by Turpin and Miller
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant challenges the decision of First-tier Tribunal Judge Kimnell promulgated on 19 October 2018 dismissing his deportation appeal on human rights grounds.

2. The appellant is a national of Guinea born on 31 December 1986. He claims to have arrived in the UK in September 2006. His subsequent asylum claim was refused, his claim was found to be a complete fabrication by Judge Webb and his appeal was dismissed in February

2007. However, following further submissions, he was granted indefinite leave to remain on 27 September 2010.

3. There followed a number of criminal convictions. The appellant was warned about the possibility of deportation, but he continued to offend and following a conviction for robbery and the breach of a community order, he was, in April 2017, sentenced to imprisonment for two years and five months and notified of an intention to deport. On 30 December 2017 a deportation order was signed. The appellant filed an appeal and that was heard by First-tier Tribunal Judge Kimnell at Harmondsworth on 5 October 2018.

4. Permission to appeal was sought. The application was granted by First-tier Tribunal Judge O'Callaghan on 5 November 2018. It was considered arguable that the judge had applied the wrong test when considering article 3. As to the appellant's complaint about the refusal of an adjournment, the Tribunal found that the appellant's challenge was a disagreement with a decision that had been properly open to the judge on the information before him and disclosed no error.

5. The matter then came before me.

The Hearing

6. His attendance not being necessary, the appellant was not produced for the hearing and the matter proceeded in the basis of submissions.

7. For the appellant, Ms Nicolaou submitted that the judge had used the wrong test to assess whether the appellant's removal would breach his human rights. She submitted that his determination (at paragraphs 48 and 57) demonstrated that he had used the balance of probabilities test and that the extent to which he had relied on the 50-50 possibility of harm suggested in the medical report, reinforced the submission that the civil standard had been used.

8. Ms Nicolaou also made submissions on the first ground which had been rejected by Judge O'Callaghan. She relied on Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC) as authority for her ability to renew ground 1. She submitted that the failure to grant the adjournment meant that the judge had to rely on a medical report that did not provide the full picture. Material from 2012 should have been considered by the doctor writing the current report.

9. Mr Clarke responded. He argued that it was clear from the grant of permission that the judge had rejected the argument that the refusal to adjourn had been an error and the appellant had not sought to appeal that decision to the Upper Tribunal. With respect to the other

matter, to submitted that in recording the 50-50 risk, the judge was referring to what the doctor had said and was not making his own assessment. The judge could not be criticized for taking account of the medical evidence submitted by the appellant himself. Mr Clarke also pointed out that all references to any balancing exercise emanated from the doctor's report and were not assessments made by the judge. Paragraphs 47 and 48 of the detention summarize paragraphs 129-130 of the report. The findings of the judge commence at paragraph 55. It can be clearly seen that the judge correctly refers to the standard of proof and the case law (at 60-61) and that he carefully assesses all the evidence concluding that the appellant would not be at a real risk of being exposed to serious, rapid and irreversible decline resulting in intense suffering. Mr Clarke submitted that the appellant was not pursuing an asylum claim so the reasonable degree of likelihood test suggested in the grounds was not applicable. The decision was not perverse. The judge correctly directed himself and the appeal should be dismissed.

10. In reply, Ms Nicolaou submitted that her arguments on the rejected ground were made following the guidance in Safi (*op cit*). On the matter of the 50-50 assessment, although that was the doctor's view, the judge had relied on it thereby indicating that he had applied the balance of probabilities test.

Findings and Conclusions

11. I have taken account of the submissions made and the evidence before me. I deal first with Ms Nicolaou's first complaint. This was that the judge erred in refusing to grant an adjournment in order for the appellant to try and obtain a medical report from 2012 which, it is maintained, would assist in providing the complete picture of the appellant's health when read with Dr Chisholm's report, which was before the Tribunal. I agreed to hear her submissions on this as following Safi, although Judge O'Callaghan had expressed a view on the merits of this point, he had not restricted the upward appeal to the second ground only.

12. I am not of the view that the submissions added anything to the arguments already made and rejected by two judges. I note that the appeal had been adjourned on two previous occasions to enable the appellant to obtain a medical report and a country expert report. In the written request from Ms Nicolaou of 21 August 2018, there was no reference to a need for the elusive 2012 report. If it had been of such importance, I would have expected a reference to it in the four pages of representations made. In any event, it was not forthcoming by the date of the hearing before Judge Kimnell and nor was there any indication as to when or if it could be obtained either at that stage or before the Upper Tribunal. As Judge Kimnell noted, there was not even any certainty as to how the report could be found or from whom it could be obtained. Judge Kimnell had before him a currently

prepared medical report and there was no reason at all why he could not reliably look to that expert's opinion to assess the claim. On the information before Judge Kimnell, it was entirely open to him to conclude that he would be able to fairly and justly dispose of the appeal and to, accordingly, refuse the adjournment. I note further, that contrary to the submission that Dr Chisholm did not have the first report before him when preparing his own report, he certainly had knowledge of its contents as he refers to it several times as well as to other earlier medical reports of the appellant. There is no merit in the first ground.

13. The second ground takes issue with the standard of proof applied by the judge in assessing the article 3 and 8 claim on medical grounds. I would state at the outset, that Judge Kimnell is an extremely experienced judge of many years' standing and it is difficult to accept that he would make been so careless as to apply the wrong standard to a human rights appeal, the likes of which, he would have come across very many times before. Indeed, even putting aside the fact of his long years of experience, there is nothing in the determination which supports the appellant's complaint on this score.

14. As pointed out by Mr Clarke, the judge's findings commence at paragraph 55: *"...I begin with the findings of Dr Chisholm..."* Those findings were summarized in the preceding paragraphs (48-49) along with a summary of the other evidence adduced (the appellant's criminal offending at 40-43, the OASys report at 44-45 and 47, the skeleton argument at 46, a 2012 report prepared by Dr Woerkom at 47 and the previous determination of the appellant's asylum appeal at 52-53). The reference to *"on the balance of probability"* at paragraph 48 is a direct quote from paragraph 110 of the medical report as is the reference to being split 50-50 on whether the appellant would require antipsychotic medication or anti- depressants if he did not take drugs. A further reference to *"on balance"* (at paragraph 57 is taken from paragraph 130 of the medical report.

15. I find that the appellant has therefore cherry-picked phrases from the determination and put them forward as examples of the standard of proof being wrong applied, completely misrepresenting what the judge said, when, in fact, it is plainly the case that the judge was well aware of the correct standard and indeed applied it throughout his assessment. It is wholly unfair to criticise him for citing extracts from the appellant's own evidence and I do not accept that in so doing the judge adopted the standard used by Dr Chisholm.

16. The judge considered N [2005] UKHL 31 and AM (Zimbabwe) [2018] EWCA Civ 64 and confirmed that the test was whether there was an imminence of intense suffering or death in the receiving state. Relying upon Counsel's own skeleton argument, the judge cites the issue for determination as *"whether substantial grounds have been*

shown for believing the appellant although not at imminent risk of dying, would face a real risk of being exposed to serious, rapid and irreversible decline resulting in intense suffering" (at 60). Based on the medical evidence, the judge then found that *"he would not be exposed to* ***such a risk****"* (at 61; my emphasis). He further concludes at the end of that paragraph that: *"I am unable to find that a lack of access to treatment will lead to a serious, rapid and irreversible decline resulting in intense suffering"*. I am satisfied that there has been no error of law as is suggested in the grounds and in submissions and that the judge was aware of and applied the correct standard of proof.

17. No challenge is made to the article 8 findings which stand. Nor has any issue been taken with the judge's finding that the asylum claim was disposed of by the previous appeal and that following Devaseelan principles, there was no basis on which to depart from those findings.

18. No errors of law have been established. The determination is wholly sustainable.

Decision

19. The appeal is dismissed.

Anonymity

20. I make an order for anonymity.

Signed

Upper Tribunal Judge
Date: 17 December 2018