Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09235/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 December 2018 and 9 May 2019	**On 23 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer (4 December 2018)
Mr E Tufan, Home Office Presenting Officer (7 May 2019)
For the Respondent: Mr A Gilbert, Counsel

DECISION AND REASONS

An order has been made under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead to the appellant being identified. Failure to comply with this order could lead to a contempt of court.

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the applicant on human rights grounds against the decision of 11 July 2018 refusing his application for international protection. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent

Background.

2. The appellant is a citizen of Algeria born on 12 February 1976. He arrived in the UK as long ago as 15 December 1999 when he claimed asylum. His application was refused in October 2002 and an appeal against that decision dismissed on 28 January 2004. In April 2009 further submissions were lodged, which were refused in December 2013. Further submissions were again made in August 2017 and they were refused in January 2018. In May 2018 they were reconsidered but they were again rejected in July 2018.

3. The appellant appealed to the First-tier Tribunal and relied in particular on medical evidence in the report of a consultant psychiatrist, Dr Battersby, and on the country expert report prepared by Alison Pargeter. It was argued on his behalf that, whilst most article 3 claims on health grounds failed, the appellant was entitled to succeed in the light of the ECtHR decision in Paposhvili v Belgium (41738/2010) [2017] Imm AR 867 as interpreted by the Court of Appeal in AM (Zimbabwe) v Secretary of State [2018] EWCA Civ 64, which had widened the scope of article 3 and would also impact on a claim under article 8. It was further argued that the appellant could, in any event, meet the provisions of para 276ADE(1)(vi) of the Rules as there would be very significant obstacles to his reintegration into Algeria.

4. The judge found that the medical report and country report were well prepared and authoritative and accepted their conclusions [46]. He found that the appellant suffered from grand mal epilepsy and from long term mental health problems. If he did not take the prescribed medication for epilepsy, he was prone to grand mal fits rendering him instantly unconscious such that he would fall from a standing position and this had had severe consequences for him in the past. He had been medicated for years on clonazepam, a high dose of benzodiazepine, which was highly addictive. Were the appellant simply to cease taking it, the withdrawal effect might lead to his death.

5. He accepted that the appellant had made several attempts at suicide through drug overdoses and without his drugs his stress level would rise and, the greater the stress level and the greater the lack of treatment and medication, the greater the risk of him making a suicide attempt that came to fruition. The judge accepted that there was a health system in Algeria but found that it was not such that there could be any confidence that the appellant would receive treatment or medication and,

accordingly, there was a great risk of harm or death from suicide, from falling in a seizure, or from withdrawal of his clonazepam.

6. The judge adopted the analysis in Mr Gilbert's skeleton argument of AM (Zimbabwe) and found that the appellant, therefore, fell within article 3 [53]. The judge added in [54] that there were very significant obstacles to his reintegration into life in Algeria, including societal discrimination, lack of support, connection and illiteracy but mainly his need for a care plan and medication and so he fell within para 276ADE(1)(vi). The judge went on to consider article 8 finding that the contrast between the private life he had in the UK with his medication and what was very likely to be the case in Algeria would mean that removal would be a disproportionate interference with his article 8 private life. Accordingly, the appeal was allowed on human rights grounds under articles 3 and 8, whereas the claims for asylum and humanitarian protection were dismissed.

The Grounds of Appeal and Submissions.

7. In the grounds of appeal, it is argued that the judge erred in law by failing to apply correctly the guidance set out in AM (Zimbabwe) and the threshold outlined in N v Secretary of State [2005] UK HL 31 (endorsed by the Grand Chamber ECtHR at (2008) 47 EHRR 39). The appellant's medical conditions, although serious, did not meet the level of exceptionality outlined in N and he had failed to establish that there would be such a serious and rapid decline in his health or intense suffering on return to Algeria sufficient to engage that high threshold. It is further argued that the judge erred by allowing the appeal on article 8 grounds largely, if not solely, on the basis of his medical condition, so failing to take account of the judgment of the Court of Appeal in GS (India) v Secretary of State [2015] EWCA Civ 40.

8. In his submissions, Mr Whitwell adopted his grounds, arguing that the judge had failed to follow the approach set out in N. The cumulative factors identified by the judge of a risk of suicide, having a seizure and falling, and not being able to receive the same medication in Algeria did not meet that high threshold to show a breach of article 3. So far as article 8 and para 276ADE(1)(vi) were concerned, the judge had failed to indicate what aspect of private life in addition to the appellant's medical condition was engaged.

9. Mr Gilbert accepted that he would have to concede that the appellant could not meet the requirements of N, although it was his submission that he could meet those in Paposhvili. He did not seek to resist the decision being set aside. He submitted that there were further matters which he would wish to raise in support of article 3 and, in the light of the age of the medical reports, there was further medical evidence which he wished to produce. He understood that the appellant had seen a neurologist on 1 October 2018.

The Error of Law.

10. I am satisfied that Mr Gilbert's concession is rightly made and that the judge has erred in law by failing to apply the high threshold set out in N. I also find that when considering article 8, he failed to take account the judgment in GS (India) and also erred in law by failing to give adequate reasons for his finding that the appellant could meet the requirements of para 276ADE(1)(vi). These errors are such that the decision must be set aside and re-made. Both representatives accepted that the better course would be for the appeal to remain in the Upper Tribunal.

11. In accordance with directions made at the conclusion of the error of law hearing, the appellant has filed further evidence about the appellant's medical condition, a medical report dated 27 March 2019 with amendments of 25 April 2019 by Dr William Durward, a consultant neurologist. A letter dated 2 May 2019 from the appellant's solicitors indicated that Dr Durward would be attending the hearing on 9 May 2019 to give evidence as an expert witness. However, permission has not been given for the calling of oral evidence.

12. Mr Gilbert explained that his instructing solicitors had had difficulties in getting everything done in time and sought permission to call oral evidence in the light of the issues raised about the appellant's medical condition and treatment. Mr Tufan indicated that he would not object to Dr Durward giving oral evidence and confirmed that he did not seek an adjournment to consider the further evidence and was in a position to proceed.

The evidence of Dr Durward.

13. Dr Durward adopted his report as amended. It was his opinion that the appellant's epilepsy was not being managed optimally and for this reason he should not be returned to Algeria where he considered it highly improbable that he would receive effective care (diagnosis and treatment) of his epilepsy and psychiatric issues. His report confirms that the appellant has had epilepsy for perhaps 10 years or more and reports having one to three seizures a week. The history he gave was highly suggestive of a type of epilepsy, designated temporal lobe epilepsy (partial complex seizures).

14. Dr Durward says that the appellant has complied poorly with prescribed medication, he has been taking levetiracetam, an anticonvulsant that has not controlled epilepsy satisfactorily and clonazepam, a habit-forming drug which, if withdrawn, should be done so very slowly. In addition to epilepsy the appellant has significant psychiatric problems which include depression, anxiety and post-traumatic stress disorder. He comments that the appellant is said to have attempted suicide on more than one occasion and the risk of future attempts at suicide is considered high.

15. It is his view that the prognosis is poor unless the appellant receives appropriate treatment for both epilepsy and psychiatric issues and his prognosis is better in the UK than in Algeria. He considers that the appellant is fit to give instructions to his solicitor and need not be treated as a vulnerable witness. He gives his views as to how his present treatment could be modified and repeats that treatment of epilepsy must not be withdrawn abruptly. He predicts that the appellant's mental health will deteriorate if he is returned to Algeria but concedes that this comment is not within his specialist field but made on a common sense basis as a trained medical practitioner. He emphasised the need for stability with regard to competent medical care over an extended period. At interview he did not detect any intention by the appellant to attempt suicide or self-harm but notes that he has attempted suicide and says that a further attempt to do so could arise very quickly. He has not determined a history of suicidal self-harming thoughts as that is the business of a psychiatrist rather than a neurologist.

16. In his oral evidence he confirmed that if the appellant's medication was withdrawn abruptly, it would carry a risk of fatal consequences. The reasons for prescribing his present medication were not clear to him. If clonazepam was withdrawn gradually, there would be no added risk to the current risks from epilepsy. But if it was withdrawn suddenly, there would be a risk of seizures. A gradual withdrawal would be the correct decision. He could not offer a precise prediction of the effect of a sudden withdrawal, but the symptoms generally became clear after 24 hours.

17. In cross-examination, he said that clonazepam was prescribed to damp down anxiety and reduce seizures. Normally treatment in an epilepsy case was initiated by a specialist and there would then be a review. In general, GPs were not confident about dealing with epilepsy and would let a consultant prescribe policy. He had read Alison Pargeter's report and he thought that what she said was very sensible. He had worked in North Africa in Libya and had also been in Morocco. When asked about the availability of treatment in Algeria, he simply replied that he had had Algerian patients who seemed happy to come to the UK for treatment. He was asked about whether the appellant had PTSD but commented that this was more in the province of psychiatry. He said that the appellant had psychological problems whatever label they were given. In his view, the appellant was fit enough to go to hospital in Algeria and the issue of treatment there came down to the quality and availability of resources.

Further submissions.

18. Mr Tufan submitted that the medical evidence provided did not support the claim that the appellant reached the article 3 threshold. The report from Dr Battersby was now over three years old and was equivocal in the diagnosis of PTSD, saying that the appellant would not meet the criteria for such a diagnosis, but he did describe some symptoms of PTSD. His

verbal and non-verbal behaviour were highly consistent with an individual who was heavily intoxicated with benzodiazepines. The doctor also considered the risk of suicide in the UK on return but said that given the evidence for predictors of completed suicide, his risk was moderately low in the UK and moderate if returned. Whilst the report from Alison Pargeter set out concerns about the availability of adequate treatment in Algeria, it did not suggest that no treatment was available or that the appellant would not be able to access it.

19. He submitted that the facts did not meet the test in N and that following the ECtHR decision in Paposhvili, the Court of Appeal in AM (Zimbabwe) had held that the stringency of the N test had only been modified to a very limited extent. The appellant would be able to seek treatment in Algeria and the medical evidence was not sufficient to support a claim under article 3 or article 8.

20. Mr Gilbert submitted that when assessing the appeal, a number of factors had to be considered: the appellant's epilepsy, his addiction to clonazepam, his mental illness and the risk of suicide. Clonazepam was not commonly used for epilepsy and it was unclear why it had been prescribed. In any event, withdrawal needed to be gradual. He submitted that there would be a significant risk of the appellant experiencing a fatal attack of epilepsy if this drug was withdrawn.

21. He referred to the availability of treatment in Algeria and the evidence of long delays, short treatment periods and high costs. He argued that medical care was not available in any meaningful sense in Algeria. There was a large shortfall in available accommodation. He submitted that the appellant's circumstances were very exceptional. The position had been aggravated by the fact that he had been mis-prescribed and would have to be weaned off his present medication. To this extent, so he argued, there was an obligation on the UK to ensure that the appellant received the proper treatment to obviate the likely harm arising from removal. Further, in substance, there was a complete absence of available treatment in Algeria.

22. So far as the risk of suicide was concerned, there was evidence of suicide attempts and, in particular, recent attempts in the period December 2018 to April 2019 as set out the medical notes produced. When the risk was assessed in the context of the appellant being returned to Algeria which he associated with being in fear, there would be a real risk of a completed suicide. He submitted that the appellant could bring himself within article 8. He had been in the UK for a long period of time and there would be no family members in Algeria he could turn to or rely on. He was illiterate and had no history of employment. He argued that article 8 was engaged and when all relevant factors were taken into account, it would be disproportionate for him to be returned and, in any event, there would be significant obstacles to his integration bringing him within the provisions of para 276ADE(1)(vi).

Assessment of the issues.

23. The appellant firstly seeks to argue that he can meet the high threshold within article 3. In order to do so he must show that he can meet the very high threshold test in N of effectively a "deathbed" case of someone facing imminent death on return. As Lord Hope said at [50] of N, for the circumstances to be very exceptional it would need to be shown that the appellant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services needed to prevent acute suffering when he was dying. In Paposhvili the threshold has been extended to cases where substantial grounds have been shown for believing that an applicant, although not at imminent risk of dying, would face a real risk of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment: per Sales LJ at [28] of AM (Zimbabwe).

24. In AM (Zimbabwe) at [39] Sales LJ held that Paposhvili did not effect any major change in what had been authoritatively laid down in N in the UK. The Court noted that it was significant that, even on the exceptional facts of the Paposhvili case where the applicant faced a likelihood of death within six months if removed to Georgia, the Grand Chamber did not feel able to say that it was clear that a violation of article 3 would have occurred but the applicant had simply raised a sufficiently credible article 3 case that gave rise to a procedural obligation on the Belgian authorities to examine his case with care with reference to all the available evidence.

25. The approach in AM (Zimbabwe) has been confirmed by the Court of Appeal in SL (Saint Lucia) [2018] EWCA Civ 1894 where the Court also considered whether Paposhvili had had any impact on the approach to article 8 claims. The Court confirmed the guidance in GS India and said that article 3 and article 8 claims had a different focus and were based upon entirely different criteria. Article 8 was not article 3 with merely a lower threshold and did not provide some sort of safety net where a medical case failed to satisfy the article 3 criteria. However, if article 8 was otherwise engaged, i.e. not simply in the light of a medical condition, then the fact that a person was receiving treatment in the UK which was not available in the country of return might be a factor in the proportionality balancing exercise: per Hickinbottom LJ at [27].

26. So far as assessing whether a risk of suicide gives rise to a claim under article 3, the approach is set out by the Court of Appeal in J [2005] EWCA Civ 629 as subsequently amended by the Court of Appeal in Y and Z (Sri Lanka) [2009] EWCA Civ 362. An assessment has to be made of the severity of the treatment which an applicant would suffer if removed; a causal link must be shown to exist between the act or threatened act of

removal and the inhuman treatment relied on as violating his article 3 rights; in the context of a foreign case the article 3 threshold is particularly high simply because it was a foreign case; article 3 could in principle succeed in a suicide case; in deciding whether there is a real risk of a breach of article 3 the 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 and whether the removal or receiving state has effective mechanisms to reduce the risk of suicide.

27. These guidelines must be read in the context of the further jurisprudence in Y and Z (Sri Lanka) that in cases where there is no objective foundation for the fear, an independent basis must be established if weight is to be given to it.

28. It is clear that the appellant suffers from epilepsy. Dr Durward has concerns about his treatment and whether he has been prescribed the correct drugs. He was cautious in the way he expressed these concerns and indicated that he was not aware of the reasons why clonazepam was prescribed. Nonetheless, it was his advice that it should be withdrawn but he made it clear that this could be done without additional risk provided it was withdrawn gradually and not suddenly stopped. But there is no reason to believe that if the appellant receives treatment in Algeria, any withdrawal or change of medication will not be properly managed.

29. It is also clear from the medical evidence produced that the appellant suffers from a number of psychological issues. Dr Battersby in her report of February 2016 said at [3] that, although he did display some symptoms, due to his degree of intoxication on examination, she was not able to observe any objective symptoms that were clearly characteristic of PTSD but his intoxication may have masked them, noting that clonazepam was often sought out by substance users. She described the appellant as appearing to use high doses of benzodiazepines as a coping strategy.

30. The report from Alison Pargeter confirms the problems with availability of medicines in Algeria, the cost, the problems caused by corruption and the lack of facilities. She also refers to the stigma associated with mental illness and to hospitals often being regarded as places of last resort. She dealt specifically with the situation facing the appellant on return at 4.i-vii of her report and her conclusion is that if he were to be returned to Algeria, he would struggle to receive the proper standard of treatment and care that his conditions require.

31. Looking at the evidence as a whole, I am not satisfied that the appellant can meet the high threshold of article 3 as set out in N. There is no imminent risk of death or of imminent suffering leading to death arising from a lack of treatment. There is treatment available in Algeria although not to the same standard as in the UK and he is able to seek out treatment in Algeria just as he has done in the UK.

32. It was argued on his behalf that there were two exceptional circumstances. Firstly, the fact that he has been mis-prescribed medication in this country and that this raised a positive obligation on the UK. Mr Gilbert referred to [93] of Lord Brown's opinion in N and the issue of whether article 3 gave rise to a negative or positive obligation. Lord Brown identified the issue as whether the State was under a positive obligation to continue treatment on a long-term basis but then referred to the statement in D v UK (1997) 24 EHRR 425 as having particular application, that those subject to removal could not in principle claim any entitlement to remain to continue medical, social or other forms of assistance provided in the expelling state. The fact that the appellant has been receiving treatment in this country which may turn out to have been wrongly prescribed does not add to the obligations of the UK authorities when returning the appellant to Algeria in circumstances where there is treatment available for epilepsy and his other medical issues, even if not to the extent or level of treatment in the UK.

33. Secondly, it is argued that the problems about obtaining treatment were such that it amounted to a complete absence of treatment, but this assertion is not made out on the facts. The evidence is clear that treatment is available. I am, therefore, not satisfied that the appellant's circumstances fall within those envisaged as very exceptional in N. The judgment of the Court of Appeal in KH (Afghanistan) v Secretary of State [2009] EWCA Civ 1354 indicates just how stringent this test is: see [29] – [34] of the judgment of Longmore LJ and in particular [31]-[33].

34. It is submitted that the appellant comes within article 3 in the light of the risk of suicide. There is evidence in the report of Dr Battersby that the appellant had made several impulsive overdose attempts in the previous eight months, the report being dated 20 February 2016. She noted that he had accepted support and found it beneficial. Dr Battersby's opinion was that the risk of suicide was moderately low in the UK and moderate on return. There have been recent suicide attempts but there is also evidence in the large bundle of medical notes which includes the period January to April 2019 showing that the appellant has sought help and has received treatment. Dr Durward's view was that the risk of further attempts at suicide was high but he had not detected any such intention at interview although he added that a further attempt to do so could arise very quickly. Taken as a whole, the evidence does not satisfy me that the high threshold requirements set out in J are met.

35. So far as article 8 is concerned, I accept that article 8 is engaged on the basis of private life in the light of the length of the appellant's residence in the UK. However, his private life has been established at a time when that residence has been both unlawful and precarious and is, therefore, to be given little weight in accordance with s.117B(4) and (5). The appellant's level of English is limited, and he is not able to support himself: (s.117B(2) and (3)).

36. He suffers from epilepsy and a number of related psychiatric problems. However, I am not satisfied that these are sufficiently compelling to make his removal disproportionate to the legitimate aim of maintaining immigration control. Whilst there are problems about the adequacy and availability of treatment for mental health conditions in Algeria and these must be taken into account when assessing proportionality, they do not outweigh the public interest in maintaining effective immigration control in the appellant's case. To give them such weight in the present case would in substance be to elevate article 8 to a safety net where the appellant's medical condition fails to satisfy the article 3 criteria. Accordingly, removal would not be disproportionate to a legitimate aim.

37. So far as para 276ADE(1)(vi) is concerned, for the reasons given in relation to the claims under article 3 and 8 the appellant's medical condition and the lesser standard of treatment in Algeria does not show that there would be very significant obstacles in re-establishing himself there. The concerns set out in Alison Pargeter's report must be read in the light of the country background evidence about mental health services in Algeria set out in the respondent's decision letter at [83] – [99]. Treatment is available in Algeria and there is no reason to believe that he would be denied the care and medication available. The other factors relied on such as illiteracy, discrimination and lack of family support are not such that he can show very significant obstacles in re-establishing himself there.

Decision.

38. The First-tier Tribunal erred in law and the decision has been set aside. I remake the decision by dismissing the appeal on asylum, immigration and human rights grounds.

39. The anonymity order made on 4 January 2019 in the Error of Law decision remains in force until further order.

Signed: H J E Latter Date: 20 May 2019

Deputy Upper Tribunal Judge Latter.