Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04291/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 26 April 2022	**On 26 May 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RB

(Anonymity direction made)

Respondent

Representation:
For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer.
For the Respondent: Mr Bundock instructed by Duncan Lewis Solicitors (by Microsoft Teams)

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Malik ('the Judge') promulgated on 14 December 2021 in which the Judge allowed RB's appeal.
2. The Secretary of State sought permission to appeal on the grounds the Judge had failed to consider the possibility of support for RB from his brother in the UK or his sister in France in arranging care for him on return, or anything other than the stress of removal leading to his

condition deteriorating, and that the decision of the Upper Tribunal in MY [2021] UKUT 00232 made clear that J (Sri Lanka) and Y (Sri Lanka) are still authorities to consider in suicide cases even following AM (Zimbabwe) in the Supreme Court. The Secretary of State argues the Judge failed to consider these authorities, in particular the sixth question in J which would have had relevance in this appeal.

3. RB is a citizen of Algeria born in 1970. He entered the UK using a false French identity card remained using that assume nationality for over 28 years. His true status and false identity have been confirmed by the French authorities.

4. Expert evidence was provided including a report from a Dr Ali dated the 22 October 2021 which suggests RB has not suffered from schizophrenia, has no symptoms of PTSD, but had an Emotionally Unstable Personality Disorder (EUPD), with significant depression and anxiety which was treated by medication.

5. The Judge noted RB's position is that there is a real risk of suicide on his removal. The Judge made specific reference to this finding when considering Article 3 between [30 – 43] of the determination which is in the following terms:

> 30 The Supreme Court in AM Zimbabwe, approving Paposhvili said that reduction in life expectancy had to be substantial, but what was substantial would depend upon the person and their age. However, it did not mean simply the imminence of death. An applicant had to produce evidence capable of demonstrating that there were substantial grounds for believing that Article 3 would be violated. This was a demanding threshold. The Appellant had to show a crime of facie case of violation of Article 3 of the ECHR. In Pretty v UK 2002 35 EHRR 1 it was said that suicide is self evidently a type of serious harm and if the evidence established that removal would expose a person to a risk of committing suicide on return, then a decision requiring him to return could give rise to violation of Article 3.
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> 31. The appellant's position is that there is a real risk of suicide of his removal. The submissions on his behalf, together with the skeleton argument, set out the pertinent sections of Dr Ali's report of 23/04/20, following on from earlier reports.
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> 32. In response to question one, namely an updated assessment of the appellant's mental health issues, Dr Ali states "… *The appellant has always presented with emotional unstable personality disorder and psychosis. His symptoms are clearly worse than when I previously saw him, as when I saw him in detention at HMP Maidstone. He is experiencing severe emotional dysregulation with anhedonia, disturbed biological functions and being increasingly irritable with a short fuse. He demonstrated suspiciousness, feeling isolative, avoidant as well as experiencing auditory hallucinations and delusions of perpetuation. This is a typical exasperation of symptoms when [the appellant] this stress is due to his environment where he lives in a very isolative part of England having been relocated there the largest urban centre in England."* Dr Ali goes on to say the appellant's condition is lifelong and *"… waxes and wanes".*
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> 33. Dr Ali also says, in response to question five, namely whether the appellant's mental health and prognosis are attributable to his current circumstances, that the appellant had *"a relative period of stability when he was initially moved … [The appellant] has become increasingly stressed which has resulted in an escalation of his depression and EUPD symptoms along with his psychosis which therefore impacts on his ability to function, his ability to interact with people making him quite irritable and volatile at the same time increasing his*

risk to himself tremendously he is therefore a very high risk in his current state due to the external stressors."

34. In relation to current risk of self-harm and/or suicide, question six, Dr Ali states *"in his current state he is at high risk of completing suicide due to him hearing constant voices in his head telling him he is worthless and should kill himself and that he is being punished by being isolated."*

35. In relation to question nine and how the appellant's mental health would be affected if deported to Algeria, in relation to his subjective fear, Dr Ali states the appellant *" … Fears incarceration due to his desertion from the Algerian army [the appellant] has a profound fear of retribution at the hands of the Algerian authorities which is not something he has conjured out of the air that is based on real-life experiences who have been reprimanded by the state. Therefore, the threat of removal will result in his anxiety worsening and his inability to function and his depression to worsen to a degree where he would not be able to think rationally, function or even look after himself on a day-to-day basis. If he were to be in the process of being actually removed to Algeria then there will be a complete shutdown of his mental faculties where both his depression would be in such a state of severity that he will be unable to perceive or view a way out, he would be in absolute fear of retribution by the authorities and in this state of fear and psychological meltdown he will see no way out and will seriously contemplate ending his life as the only means of escape from his predicament."*

36. Dr Ali says, if the appellant were unable to have his medication, he would not be able to function at all, *"resulting in either of two outcomes, one where he would self-harm to a degree that he would need hospitalisation, or, too, and up completing suicide.".* In Dr Ali's earlier report, with reference to the effect on the appellant's mental health if you were forcibly deported to Algeria, he says "*these factors will play a significant role in destabilising his mental state. In my professional opinion he will likely suffer a catastrophic breakdown of his mental state where his emotional dysregulation or escalate his negativity and risk of suicide will be greatly increased as well as the worsening of his psychotic symptoms."*

37. Dr Ali also speaks of the effect on the appellant where he unable to access treatment in Algeria and that he requires "… *a stable structured mental health provision, which is what the recommended treatment strategy is for his presentation. I am not aware that Algerian mental health services being on par with the NHS and therefore, I do not believe he will have access to treatment."*

38. Ms Pargeter in her report of 22/10/21, in paragraphs 3.8 – 3.30 sets out the inadequacies of provision of mental health services in Algeria. At paragraph 3.30 Ms Perteger states "*it is clear therefore that while [the appellant] is a eligible to receive treatment for his mental health conditions free of charge, he is going to struggle to access adequate care. Demand far outstripped supply, there are insufficient numbers of trained personnel, and the standards of care are often lacking. Algeria is also under development when it comes to therapies. To the best of my knowledge, therefore, [the appellant] is highly unlikely to be able to access the Bonafede treatment that is recommended in Dr Ali's medicolegal psychiatric report.".*

39. Ms Pargeter also states, since she provided her initial report *"… The healthcare system is overwhelmed, and see Covid 19 pandemic has placed additional strains on service provision. Indeed, there is a real risk that [the appellant] would find himself unable to access adequate care. There is also a real risk that he would not be able to obtain an uninterrupted supply of the medication he requires".*

40. At paragraph 4.2 Ms Pargeter speaks of societal attitudes and that the appellant *"… will be vulnerable to being stigmatised and shunned. This would*

affect his ability to find work and to function within society. Unless he has family who can support him, he could well find himself destitute and living on the streets."

41. Also in the evidence are considerable medical notes and letters regarding the appellant's mental health and whilst he was incarcerated. An entry on 06/03/19 says he was at serious risk of harm to self and had attempted suicide in the past by hanging. There are a number of references to self-harm in the documentation. The appellant's GP records also confirmed the medication the appellant is currently taking, as at May 2021, to include the antipsychotic Olanzapine. There is also an entry on 30/08/18 at the appellant was sectioned under the Mental Health Act having been diagnosed with depression, schizophrenia, was in hospital for 12 months and had a suicide attempt.

42. It was confirmed at the start of the hearing that the appellant was not pursuing a claim regarding desertion from the army in Algeria, given the expert evidence indicated it was not a real risk. Nevertheless the medical evidence before me indicates the appellant perceives it to be a risk and it is that perception, rational or otherwise which also impacts on his mental well-being. The medical evidence also indicates that it is stress that exasperates the appellant's condition.

43. There is no evidence to suggest the respondent has obtained an assurance from the Algerian government that appropriate and necessary treatment will be available/accessible to the appellant. The evidence before me is that he has long-term serious mental health conditions for which he is receiving treatment in the UK and medication. The report of Dr Ali is clear as to the risk of self-harm and/or suicide should the appellant be deported. Whilst I accept the majority of the medication the appellant takes are available in Algeria or alternatives, given the expert reports of Dr Ali and Ms Pargeter, I find if the appellant were to be removed, which is a stressful event, this will impact on his mental well-being, when taken with a real risk that he would be unable to access medication in Algeria given the effective removal on his mental well-being - and this would result in a serious, rapid and irreversible decline in his health, such that it would result in intense suffering and suicide.

The law

6. The J guidance, J v SSHD [2005] EWAC Civ 629, as formulated at paragraphs 26 to 32 states:

"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].

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:

"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).

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…"

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.

29. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of Bensaid).

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.

32. We were shown a number of cases which were declared inadmissible at Strasbourg: A.G v Sweden Appl No 27776/95; Kharsa v Sweden Appl No 28419/95; Nikovic v Sweden Appl No 28285/95; Ammari v Sweden Appl No 60959/00; Nasimi v Sweden Appl No 38865/02. The sixth factor which we have identified above was considered to be relevant in each of these cases. The fifth factor was considered to be an additional relevant factor in Kharsa, Ammari and Nasimi".

7. The fifth point in J was reformulated in Y (Sri Lanka) [2009] EWCA Civ 362 where the Court of Appeal stated: –

"15. … The corollary of the final sentence of §30 of J is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it. Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened, especially if the same authorities are in charge, notwithstanding that the objective risk of recurrence has gone.

16. One can accordingly add to the fifth principle in J that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return."

Discussion

8. A Rule 24 response, opposing the application, was provided by Mr Bundock on the day, dated 28 February 2022, in the following terms:

Introduction

1. The basic factual background is set out in the decision of FTTJ Malik ('the FTTJ') dated 14 December 2021. The SSHD appeals and asks the Tribunal to set aside the FTTJ's decision.

2. RB is a 51-year-old national of Algeria. He arrived in the UK in 1990-1991 and has been here ever since. He has long-standing and well-documented psychiatric illness, which has not been challenged by the SSHD. He was originally diagnosed with schizophrenia, but later diagnosed with Emotionally Unstable Personality Disorder ('EUPD') [1] with psychotic symptoms. His illness is strongly reactive to stress, and results in psychotic disturbance, erratic and volatile behaviour, repeated incidents of 2 self-harm, and protracted suicidal ideation. [2] He is currently prescribed antipsychotic medication (Olanzapine), and anti-depressant and anti-anxiety medication (Venlafaxine, Amitriptyline). He has been on these medications for many years.

   [1] Also known as 'Borderline Personality Disorder'.

   [2] The unchallenged expert psychiatric evidence explains that people with EUPD may improve significantly at times, "but remain at risk of relapse when under stress" [A/72, see also A/59]; and RB's symptoms ("repeated self-harm thoughts and suicidal thinking […] severe emotional dysregulation, not sleeping well, feeling irritated, becoming apprehensive, suspicious and on edge […] Feeling anxious and becoming avoidant and isolated […]experiencing paranoia and hearing voices") are "typical symptoms that people with EUPD experience when they are under severe stress" [A71-71].

3. There was expert evidence before the FTT from Dr Ali, a s12-approved consultant psychiatrist [A/37-98]. This evidence was unchallenged by the SSHD, and was accepted by the FTTJ. It stated inter alia that:

   a. The threat of removal would result in RB's "inability to function and his depression to worsen to a degree where he would not be able to think rationally, function or even look after himself on a day-to-day basis" [FTT §35].

   b. Actual removal would result in "a complete shutdown of his mental faculties where both his depression would be in such a state of severity that he will be unable to perceive or view a way out, he would be in absolute fear of retribution by authorities and in this state of fear and psychological meltdown he will see no way out and will seriously contemplate ending his life as the only means of escape from his predicament" [FTT §35].

   c. "[He] will likely suffer a catastrophic breakdown of his mental state where his emotional dysregulation will escalate his negativity and risk of suicide will be greatly increased as well as the worsening of his psychotic symptoms" [FTT §36].

d. The result would be “either of two outcomes, one where he would self-harm to such a degree that he would need hospitalisation, or, two, ends up completing suicide” [FTT §36] 3

Response to SSHD’s grounds of appeal

4. Judges should be assumed to know the law, and to have applied it, unless they have demonstrated the contrary: Piglowska v Piglowski [1999] 1 W.L.R. 1360 (HL), at 1372:

> “[…] reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. […] An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge […]”

Ground 1

5. The SSHD is simply wrong to say that “there was no consideration of […] anything other than the stress of removal leading to his condition deteriorating”. The FTTJ noted and accepted that:

   a. Mental health services in Algeria are inadequate; demand far outstrips supply; standards of care are poor; the healthcare system is overwhelmed, particularly after COVID-19; there is a real risk that RB would not be able to access uninterrupted supply of necessary medication [FTT §§38-39]. [3]

   b. RB would face stigmatisation and exclusion, on account of his mental illness. He could well find himself destitute on the streets [FTT §40].

   c. RB has a genuine fear of the Algerian state [FTT §42].

6. The SSHD’s representative did not make any submission to the FTT [see FTT §§17- 20] that RB’s limited relationships with his brother (in London) or his sister (in France) could have any material bearing on his access to healthcare in Algeria, or that they could have any role in avoiding the intense deterioration in RB’s mental health explained by the unchallenged expert evidence. The FTTJ cannot be criticised for failing to deal with this unrealistic submission, which was not made to her.

7. The suggestion is wholly unrealistic, in the context of (a) the severity of RB’s mental illness; (b) the severity of deterioration that would follow his removal; (c) the inadequacy of mental healthcare in Algeria; (d) RB’s fear of the state; (e) the likely stigma and exclusion he would face; (f) the limited nature of RB’s relationships with his siblings [A/4 §9]; [4] and (g) the fact his siblings are not in Algeria.

8. Appeal in the FTT is ““the first and last night of the show”, not a “dress rehearsal””; and it is not necessary “for the FTT to deal with a case that was not being made by the Respondent”: Lowe v SSHD [2021] EWCA Civ 62.

9. The FTTJ did not err in law in relation to RB’s siblings, because (a) the SSHD never made a case that they could make a difference; (b) the suggestion that they could is wholly unrealistic; and (c) this could not have been material to the FTTJ’s conclusions, on the facts of the case.

10. Alternatively, any error of law in this respect was immaterial.

[3] The country expert evidence outlined “the inadequacies of provision of mental health services in Algeria” [FTT §38], and stated inter alia that “Demand far outstrips supply, there are insufficient numbers of trained

personnel, and the standards of care are often lacking" [FTT §38]; and "the healthcare system is overwhelmed, and the Covid19 pandemic has placed additional strains on service provision", such that "there is a real risk that [RB] would find himself unable to access adequate care [and] There is also a real risk that he would not be able to obtain an uninterrupted supply of the medication he requires" [FTT §39].

Ground 2

11. It is substance that matters, not form.

12. The applicable test in mental health / suicide cases is the one set out in Paposhvili / AM (Zimbabwe): see MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC) §119; Savran v Denmark (Application no. 57467/15). [5]

13. The six points made in J, [6] modified in Y and Z, [7] are not tests - they are guidance which 'amplify' the underlying Art 3 test: see MY §120, 121, 123.

14. The FTTJ's approach was correct, and addressed all material factors.

15. The SSHD's ground is hollow. She points to the fact that the Judge did not refer to J and Y and Z directly, but she does not identify anything of substance that the Judge did wrong, with reference to those cases. The highest the SSHD puts it is that "the 6th question in J would have relevance here", but the FTTJ addressed that consideration (availability of mechanisms to reduce suicide risk) at length in the decision, as explained below.

16. As the UT noted in MY, "there is nothing controversial about points 1-4" of J (§119). Indeed, points 1 to 4 are now trite law, which underlie all of the authorities in this area, and which were obviously followed by the Judge. [8]

17. The fifth point in J (§30) is that "whether a person's fear of ill-treatment […] is objectively well-founded" is "a question of importance". In Y and Z (§16) the Court of Appeal added that what may be of "equal importance" is whether any unfounded but genuine fear of return is such as to create a risk of suicide. The FTTJ found that RB's fear of return is not objectively well-founded, but that it is real and genuine, and impacts on his mental health [FTT §42, see also §§20, 27, 35]. The FTTJ took this into account. There was no error of law in her approach. [9]

18. The sixth point in J (§31) is that it will be relevant to consider whether the removing and receiving state have effective mechanisms to reduce the risk of suicide; and if there are effective mechanisms, that will weigh against the applicant's claim. [10]

19. The FTTJ gave careful consideration to the availability and accessibility of effective mental healthcare in Algeria, and concluded that there was "a real risk that [RB] would be unable to access medication and treatment in Algeria", which in combination with the impact of removal itself "would result in a serious, rapid and irreversible decline in [RB's] health, such that it would result in intense suffering and suicide" [FTT §§38- 40, 43].

20. The FTTJ based this inter alia on the expert evidence which outlined "the inadequacies of provision of mental health services in Algeria" [FTT §38], and which stated that "the healthcare system is overwhelmed […] there is a real risk that [RB] would find himself unable to access adequate care [and] There is also a real risk that he would not be able to obtain an uninterrupted supply of the medication he requires" [FTT §39].

21. So, the FTTJ considered whether Algeria has effective mechanisms to reduce the risk of RB committing suicide, and she concluded that it does not. The FTTJ addressed the consideration highlighted as relevant by the 'sixth point' in J. There is no error of law in this respect.

22. The FTTJ did not base her decision on the risk of suicide before or during removal, so the effectiveness of any measures adopted by the UK, to manage the risk of suicide before or during removal, were not material to her decision.

23. In any event, the SSHD did not advance any case about this before the FTT. She did not put forward any information, evidence or even submissions about the measures that the UK would put in place to manage the risk of suicide during RB's removal. The decision letter contains no information about any such measures. The Judge did not err in law by failing to make findings on matters that were not advanced to her, and which could not have made a difference to her conclusions. [11]

[4] This evidence was not challenged by the SSHD before the FTT.

[5] Where the ECtHR Grand Chamber confirmed (§§125-139) that the effect of Paposhvili extends to mental illness: "In particular […] the threshold test established in paragraph 183 of the Paposhvili judgment […], rather than mentioning any particular disease, broadly refers to the "irreversibility" of the "decline in [a person's] state of health", a wider concept that is capable of encompassing a multitude of factors, including the direct effects of an illness as well as its more remote consequences. Moreover, it would be wrong to dissociate the various fragments of the test from each other, given that, as noted in paragraph 134 above, a "decline in health" is linked to "intense suffering". It is on the basis of all those elements taken together and viewed as a whole that the assessment of a particular case should be made".

[6] [2005] EWCA Civ 629.

[7] [2009] EWCA Civ 362.

[8] J §26: the Tribunal must make an assessment of the severity of the treatment that would follow removal, and it must reach a minimum level of severity. For any judge of the Tribunal, this is absolutely trite. The Judge recognised the demanding Art 3 threshold, and held that suicide meets it in principle [FTT §30]. The Judge went on to note the unchallenged medical evidence, which established the intense severity of the treatment that would follow removal [FTT §§35-36, see above].

J §27: there must be a causal link between the act of removal and the 'treatment' relied on. This is trite. The Judge considered this at §§35-36, and the unchallenged medical evidence established a causal link, beyond question. J §28: the threshold is particularly high in a 'foreign case', and where the risk arises from naturally occurring illness. Again this is trite, and underlies all of the authorities in this area. The Judge cited AM (Zimbabwe) and recognised the high threshold [FTT §30]. There cannot be any sensible suggestion that the Judge misunderstood or failed to apply the law in this respect.

J §29: an Art 3 claim can in principle succeed in a suicide case. This is uncontroversial and does not take matters anywhere.

[9] Alternatively, the test / approach required by Paposhvili is premised on the basis that the receiving country bears no responsibility for the person's illness, and that it is 'naturally occurring'. Well-founded fear of return due to the adverse conduct of the home country is something that would take a case out of the D / Paposhvili paradigm; and illness deriving from the previous mistreatment of the receiving state would likewise be an additional factor tending to show that removal would breach Article 3, taking a case beyond the category addressed by Paposhvili. After AM (Zimbabwe), there is no basis in law for imposing an additional requirement in suicide cases, that the person's mental illness and the risk of suicide must be traceable back to the actions of the receiving state.

> [10] Paposhvili / AM (Zimbabwe) require consideration of "whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3" and "the extent to which the individual in question will actually have access to this care and these facilities in the receiving State" (Paposhvili §§189-190).
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> [11] Alternatively, the existence of effective mechanisms to manage suicide risk on the part of the removing state are not relevant when applying Paposhvili / AM (Zimbabwe). Paposhvili addresses the circumstances in which Article 3 will be breached on account of a deterioration in health in the receiving state, on account of a lack of protective measures in the receiving state. It pre-supposes that the removing state has effective mechanisms to keep the applicant healthy prior to and during removal. Any risk of suicide or serious harm prior to or during removal, resulting from the inadequacy of measures adopted by the removing state, is a consideration taking a case outside of the category addressed by Paposhvili.
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> 24. The FTTJ did not err in law; alternatively any error was not material.
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> …
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> Conclusion
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> 28. The Tribunal is asked to reject the SSHD's appeal, and to find that there was no material error of law.
>
> Ben Bundock
> One Pump Court Chambers
> 28 February 2022.

9. On behalf of the Secretary of State Mr Diwnycz submitted he could see why the grounds had been drafted as they were, and permission granted, although he was slightly handicapped by not having had the benefit of seeing the appellant's bundle. He maintained the Secretary of State's position in the appeal that there was legal error in the determination for the reasons set out in the grounds of application for permission to appeal and grant of permission.
10. In relation to Ground 1, Mr Bundock had the advantage in that he has been RB's advocate both before the Judge and at earlier hearings, and therefore has a detailed working knowledge of what occurred during the litigation.
11. Ground 1 as pleaded is very specific. It does not challenge the Judge's finding the medical system in Algeria will be inaccessible to RB but rather asserts that the finding this was due to the stress of removal is inadequately reasoned in light of their being no consideration of the possibility of family support. It is important to note [6] of the Rule 24 response in which is noted that no submissions were made by the Secretary of State's representatives before the Judge that RB's brother in London or sister in France could have any material bearing on his right or ability to access healthcare in Algeria. In relation to the extent of any support they might have been able to provide, that is likely to be limited as a result the fact they are living in different countries and there was no evidence that it would have sufficient

impact upon the intense deterioration in RB's mental health as outlined in the unchallenged expert evidence.

12. It cannot be legal error for the Judge not to consider something that tribunal was not asked to consider, and which is not 'Robinson' obvious on the facts. It has also not been made out that, in reality, the presence of the brother and sister would make any difference on the evidence; especially in light of the limited nature of RB's relationship with them.
13. No material legal error is made out in Ground 1.
14. In relation to Ground 2, that substance matters rather than form was discussed at the hearing before sight of the Rule 24 response. The claim is that the Judge fails to consider relevant published decisions with specific reference to a claim the Judge may have made a different decision if the sixth question in J had been properly considered.
15. In AA (Nigeria) v Secretary of State [2020] EWCA Civ 1296 [at 9] the Court of Appeal write:

> 9. There has been a proliferation of case law on the application of the "unduly harsh" test in section 117C(5) of the 2002 Act, and the "very compelling circumstances" test in section 117C(6). That is the result of the many different factual circumstances in which they regularly have to be applied by first instance judges of the Immigration and Asylum Chamber. That does not mean, however, that there is a need to refer extensively to authority for the meaning or application of these two statutory tests. It should usually be unnecessary to refer to anything outside the four authorities identified below, namely *KO (Nigeria) v Secretary of State for the Home Department* [2018] 1 WLR 5273; *R (on the application of Byndloss) v Secretary of State for the Home Department* [2017] 1 WLR 2380; *NA (Pakistan) v Secretary of State for the Home Department* [2017] 1WLR 207; *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 117. It will usually be unhelpful to refer first instance judges to other examples of their application to the particular facts of other cases and seek to draw factual comparisons by way of similarities or differences. Decisions in this area will involve an examination of the many circumstances making up private or family life, which are infinitely variable, and will require a close focus on the particular individual private and family lives in question, judged cumulatively on their own terms. Nor will it be necessary for first instance judges to cite extensively from these or other authorities, provided that they identify that they are seeking to apply the relevant principles. I would associate myself with what Coulson LJ said at paragraph [37] of *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095, that it is an impediment to the efficient working of the tribunal system in this area for judges to have numerous cases cited to them or to feel the need to set out extensive quotation from them, rather than focussing primarily on their application to the factual circumstances of the particular case before them. Judges who are experienced in these specialised courts should be assumed by any appellate court or tribunal to be well familiar with the principles, and to be applying them, without the need for extensive citation, unless it is clear from what they say that they have not done so.

16. There is a difference between failing to make a specific reference to relevant case law and a failure to apply the principles decided in such cases. Whilst it may have assisted the author of the grounds if the Judge had set out reference to J and Y and the six questions to be considered in a case of this nature, the real question is whether having identified the required guidance and having applied the facts

as found to that guidance any material legal error has been made out or not.

17. The Tribunal has been assisted by the Rule 24 response prepared by Mr Bundock which sets out the difficulties for the Secretary of State in maintaining the Judge has erred in law for the reasons set out in the grounds of challenge. It is clear the Judge was aware of the need to consider the issues highlighted in J (as amended in Y) and the developments in the law following the decision of the Supreme Court in AM (Zimbabwe).

18. It is not made out the Judges conclusion at [49] is outside the range of those reasonably open to the Judge on the evidence. In that paragraph the Judge states:

> 49. Yet, where the exemptions do not apply, I am required to consider if there are any very compelling circumstances which outweigh the strong public interest. Having made my findings on Article 3 and that there is a real risk of a serious, rapid and irreversible decline in the appellant's health, I find that there would be a disproportionate interference in his Article 8 private life also given the impact of his removal on his mental health. The appellant suffers from serious mental health conditions; the evidence indicates his removal would have a catastrophic impact on him. The evidence of Ms Pargeter also speaks of stigma and discrimination in Algeria for individuals with mental health conditions. Given the appellant has no family in Algeria, when taken with his serious mental health, I also find he would be seriously disadvantaged in attempting to for a private life there - and for reasons already set out in this decision, his ability to access mental health treatment. Consequently, I find there are very compelling circumstances to outweigh the strong public interest in this case and that the respondent's decision would be a disproportionate interference in the appellant's Article 8 private life.

19. It is accepted that one consequence of RB remaining in the United Kingdom will be his continued access to the NHS to receive necessary treatment. Whilst that may be at considerable cost, Article 3 is not a conditional provision and is absolute in nature with no proportionality aspect permitted when assessing whether a person is entitled to remain on the basis of the same.

20. I find the Secretary of State has failed to establish arguable legal error material to the decision to allow the appeal as a result of the failure to identify what aspect of the principles derived form the case law relied upon was not applied by the Judge in the assessment of the evidence, even if the guidance was not set out in full. It has not been established that this is an appeal in which there is a likelihood of an alternative decision being made.

Decision

21. **I dismiss the appeal.**

Anonymity.

22. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court.

Signed……
Upper Tribunal Judge Hanson

Dated 10 May 2022