Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000096
On appeal from PA/00001/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 4th August 2022

Decision & Reasons Promulgated
On the 27 October 2022

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

SK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr William Irwin counsel on behalf of the Secretary of State
For the Respondent: Mr R Halim instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but for the purposes of this decision, hereinafter, we will refer to the parties as they were described before the First-tier Tribunal. The Secretary of State appealed against the decision of First-tier Tribunal Judge Haria, ("the judge") who on 14th December 2021, dismissed SK's appeal on

protection grounds but allowed the appeal on Article 3 and on Article 8 grounds.

2. The appellant SK is a Moroccan national born on 4th October 1975 and he appealed against the decision of the Secretary of State dated 28th October 2020 to refuse his protection and human rights claims. He attempted to enter the United Kingdom illegally on 12th June 2020 and was arrested and gave false information to an Immigration Officer and claimed asylum. The appellant travelled through Europe from 1996 and had lived variously in France and Italy and was issued a residence permit as a spouse of an Italian national in 2000. His son ZK was born in 2003 and his daughter in 2007. In 2009 to 2010 his mental health started to deteriorate, and he was accused of domestic violence, arrested and imprisoned, he says for one month in Italy, but released without charge or conviction and continued to live with his wife. The police refused to reissue his residence permit. He was subsequently charged with theft and imprisoned and he maintains that on or around 2014 to 2015 he was sectioned in a psychiatric hospital in Italy and was, in November 2015, deported to Morocco where he claims he was promptly arrested by the police, accused of being an Islamic extremist in Italy and tortured by beatings. He maintained in his witness statement of March 2021 that he was never assessed by a doctor for his mental health issues in Morocco and was never provided with any kind of diagnosis and was not aware of the existence of a medical report from Morocco until his lawyer obtained the documents from his Italian lawyer. His wife believed these documents to be fake. He again entered Europe and was deported to Morocco but departed and travelled through Spain and France and lived in Switzerland, then Belgium and travelled, he says, to the UK on 12th June 2020.

3. The Secretary of State refused his asylum claim owing to the numerous and significant credibility issues. The Secretary of State also considered various medical reports including a report of Dr Malomo, dated 9th September 2020 but considered this to be inconsistent with the medical evidence provided by Dr Patel, Consultant Psychiatrist at Harmondsworth IRC. The appellant was also criticised for his failure to claim asylum or make a human rights claim whilst in a safe country. The appellant's asylum claim that he feared return to Morocco for fear of persecution was denied.

4. First-tier Tribunal Judge Haria conducted a three day hearing and considered inter alia the following:

   (1) Medico legal report of Dr Malomo on scarring dated 9th September 2020.

   (2) A medico legal report of Dr Malomo (Psychiatric) dated 9th September 2020.

   (3) Detention centre Rule 35 report dated 13th August 2020.

   (4) A psychiatric report of Dr Galappathie dated 26th May 2021.

(5) An addendum psychiatric report of Dr Galappathie dated 27th May 2021.

(8) Dr Galappathie second addendum report dated 20th August 2021.

(9) Country expert report of Professor George Joffé date 15 August 2020.

5. Throughout the proceedings Judge Haria treated the appellant as a vulnerable witness in accordance with the Practice Direction and Presidential Guidance Note No 2 of 2010 as set out in **AM (Afghanistan) [2017] EWCA Civ 1123**.

6. Additionally, there were written responses by Dr Galappathie to questions from both representatives.

7. At paragraphs [87] to [89] the judge set out as follows:

> "87. Dr Galappathie has given a provisional diagnosis of paranoid schizophrenia with an alternative diagnosis of personality disorder. This diagnosis is contested by the respondent who relies on the opinion of Dr Patel a consultant psychiatrist [AB: 590, 591, 593, 606] and the Mental Health Nurse (RMN) Nurse Chigoya [AB: 591 and 601] both of whom saw the appellant on multiple occasions whilst he as in detention. Dr Patel having reviewed the appellant on several occasions records on 22 September 2020 *'I have completed Home Office Healthcare Enquiry today regarding the diagnosis of Paranoid Schizophrenia. I have informed them that he is NOT diagnosed with this condition."*
>
> 88. I have no evidence as to the qualifications and experience of Dr Patel or the RMN. I assume that they are experienced and qualified to make an assessment and diagnosis of mental health given that Dr Patel is a Consultant Psychiatrist and the RMN a Mental Health Nurse.
>
> 89. In contrast, Dr Malomo has set out his qualifications and experience at paragraph 1 of his report, he has a degree in Medicine and a certificate in medical education, he completed his postgraduate training in General Adult Psychiatry in February 2020 and has a certificate of completion of training General Adult Psychiatry with an endorsement in rehabilitation psychiatry. He is a member of the Royal College of Psychiatrists and an approved clinician under Section 12 of the Mental Health Act 1983. He has completed several risk assessments reports; participated on the Bromley Magistrates Court Diversion Rota (during postgraduate training) and has given evidence during court proceedings. He has completed several medio-legal psychiatric and scarring reports for use in immigration proceedings. Dr Malomo produced the report after interviewing

the appellant for 3 hours at Harmondsworth IRC on 21 August 2020. Dr Malomo is aware of his duty to the Tribunal which he sets out at paragraph 6 of his report and in preparing the report he also considered relevant documentation set out at paragraph 5 of his report including the appellant's IRC medical records. At paragraph 18 of his report Dr Malomo records his opinion that the appellant's symptoms meet the threshold for a diagnosis of Paranoid Schizophrenia and his illness appears to be chronic and it is relapsing and remitting in nature. At paragraph 19, Dr Malomo states:

> *'In my opinion, [the appellant] is suffering from Paranoid Schizophrenia (F20.0). He is presenting with the following symptoms: 2nd person auditory hallucinations, paranoid over-valued ideas, tangential thinking and circumstantial thinking.*
>
> *These symptoms appear to have been present during the period of detention at the IRC and are likely to have been present prior to his stay at the IRC which has been over 2-month duration. Diagnostic guidelines for Schizophrenia (ICD-10, WHO 1992) require the presence of symptoms for a minimum of 4 weeks.....*
>
> *[The appellant] expressed suicidal ideation during his assessment. In my opinion, this is mainly linked to this frustration about his lack of his access to his wife and children back in Italy. It is likely that being in detention has potentially exacerbated his suicidal ideation. [The appellant denied any intent or plans to act on these ideations during the assessment. It is more likely that [the appellant] would act on his ideations if he feels that his chances of reuniting with family are limited.'"*

8. At paragraphs [90] to [91] the judge set out Dr Galappathie's qualifications and clinical experience which was extensive and at 92 to 95 the judge stated this:

> "92. I gave significant weight to Dr Galappathie's reports and opinion due to his qualification and experience which establish his credentials and also because his evidence has been comprehensively tested by demanding cross examination.
>
> 93. Dr Galappathie has produced a thorough and detailed report following a 2 hour face to face assessment of the appellant at Harmondsworth IRC on 10 October 2020 and a further assessment following a one-hour video call with the appellant on 6 May 2021. Dr Galappathie took into account all relevant documentation as set out at paragraph 10 of his report. Dr Galappathie has given the appellant a <u>provisional</u> diagnosis of

paranoid schizophrenia indicated by his past history and ongoing presentation which suggests that he has suffered from previous acute psychotic relapses and currently suffers from residual psychotic symptoms.

94. Dr Galappathie is also of the opinion that the appellant suffers from recurrent depressive disorder and Post Traumatic stress Disorder (PTSD).

95. The diagnosis provided by Dr Malomo is consistent with that provided by Dr Galappahthie.

96. At paragraph 92 of his report dated 26 May 2021, Dr Galappathie addresses Dr Patel's assessment of the appellant and states as follows:

> *'[The appellant has also been assessed by Dr Patel, Locum Consultant Psychiatrist at Harmondsworth IRC who has assessed him on several occasions and concluded that he does not suffer from paranoid schizophrenia but has proscribed antipsychotic medication in the form of quetiapine 150mg. His IRC health records outline that when assessed by clinicians at the IRC, he has largely been considered not to present with mental disorder or psychosis, however it is notable that on 23 August 2020 when seen by Dr Mumtaz, GP he reported a history of hearing voices and requested to be started on quetiapine. When seen on 25 August 2020 by Dr Patel he reported hearing voices and requested to be started on quetiapine. When seen on 25 August 2020 by Dr Patel he reported hearing voices of his three children, however his presentation was considered to be due to his detention. However, he was prescribed medication to help him manage himself in the IRC, consisting of zopiclone 7.5 mg (sleeping medication) for 7 days only, quetiapine 100 mg (antipsychotic medication) at night for 4 weeks and promethazine 10 mg (antihistamine sedative medication) twice per day for four weeks. His quetiapine was subsequently increased on 15 September 2020 to 150mg per day.*

97. There is no explanation as to why Dr Patel would have prescribed the appellant antipsychotic medication despite concluding that he does not suffer from paranoid schizophrenia."

9. In effect the evidence disclosed a diagnosis of schizophrenia, a diagnosis from a Consultant that the appellant did not have schizophrenia and a further provisional diagnosis of schizophrenia.

10. The judge proceeded to attach some weight to the scarring report recording her findings from paragraph [101] onwards and stated with reference to Dr Malomo's report that it was

"compliant with the requirements of the Istanbul Protocol."

The judge added

> "Dr Malomo has assessed that the scars found upon the appellant's head in the annotation accompanying the photographs AB157 of the scars, it is stated that the scars are "highly consistent" with the appellant's account of ill-treatment at the hands of the Moroccan authorities whereas in the body of the report it was stated that the scars are "consistent"".

11. The judge did note that Dr Malomo recorded that the scars were non-specific and they could be due to other potential causes. That said, SK stated that the scars on his abdomen and right leg were attributable to self-harming and the judge found this in his favour. Nonetheless the judge recorded at [105] that "accordingly I attached some weight to the scarring report produced by Mr Malomo and taken into account in the round with the other evidence".

12. The judge then proceeded to assess the evidence of the appellant and the relevant inconsistencies and omissions, albeit that she kept in mind Dr Galappathie's opinion of the appellant's mental health. The judge noted there were "several inconsistencies in the appellant's account [109] and detailed some but not all of them. Those included the reasons why he wished to remain in the UK. At [115] the judge found "it is not credible that having mentioned one reason for fearing a return to Morocco [his family were unwilling to live in a Muslim country] the appellant would have failed to mention a primary fear, his fear of the Moroccan authorities". The judge indeed noted that in his solicitor's submissions and his witness statement of 30th June 2020 he made no mention of any abuse by the Moroccan authorities", or, suggested "that he is suffering from any mental health problems which may give rise to a breach of Article 3 ECHR if he is returned to Morocco" [116]. Only in July 2020 in his asylum interview did the appellant claim abuse by the Moroccan authorities.

13. The judge proceeded to find that SK had been inconsistent about why he left Italy and further at [119] found that at one point he said he was removed for no good reason but told the doctor author of the Rules 35 report that he had been deported for lack of papers. The judge recorded as follows:

> "119. The appellant has been inconsistent about the treatment he received in Morocco. Dr Malomo records that the appellant said he had received treatment [medical] in Morocco [AB:176 paragraph 9.7]. He said he was reviewed by a psychiatrist in Morocco and was treated for nightmares and commenced on different anti-psychotic medication to that prescribed when he was in Italy. But he did not take the medication as he could not afford it."

14. The judge recorded by contrast at paragraph [120] that there was a medical report in relation to twenty months' psychiatric treatment in Morocco from 10th February 2016, however, the appellant maintained that the documents provided in support of that to the Italian courts for a lifting of his prohibition to return to Italy were in fact fake and he had no idea of their existence. The judge, nonetheless, found that his family in Morocco had produced no witness statement to that effect i.e. the documents were fake. At [121] the judge recorded that the appellant had stated to "Dr Malomo that he is in contact with his solicitor in Italy as he was trying to appeal the decision taken since his deportation from Italy."

15. The judge also found the appellant was inconsistent about his account of his journey to the UK [122 and at [123] that in relation to his release post detention, because the appellant claimed the authorities said they would be monitoring him, but there was no evidence in his witness statement of 6th August 2021 that they did so. The judge concluded:

> "128. I accept that a person fleeing persecution may not remember the exact sequence of events, particularly where they have been through traumatic experiences, which led to them having to flee. I am also mindful of the fact that a person genuinely fleeing persecution may exaggerate an account or lie in order to bolster an account out of fear of return. I also have in mind the effect of the appellant's mental health issues on his ability to recollect. However, even having regard to all of those considerations, I am not satisfied that the appellant has given a credible account of events. It is the cumulative effect of those matters which has brought me to the conclusion.
>
> 129. For the reasons given I do not find that the appellant was detained and tortured by the Moroccan authorities due to his imputed political opinion as claimed. Therefore, I do not consider he would be at risk of indictment as stated by Dr Joffé.
>
> 130. Having considered the whole of the evidence in the round, I find that the core of the appellant's account lacks credibility and is a fabrication designed to enable the appellant to remain in the UK. He has not discharged the burden of proof upon him of having a well-founded fear of persecution for a Refugee Convention reason and nor that there is a real or substantial risk of his suffering torture or ill-treatment on return. "

16. The judge then turned her attention to Article 3 and a consideration of the appellant's mental health difficulties and set out the case law in relation to **AM (Zimbabwe) [2020] UKSC 17**, (which referenced **J v Secretary of State for the Home Department** [2005] EWCA Civ 629), **AXB (Art 3 health: obligations; suicide) Jamaica [2019] UKUT 00397** and relevant case law post **Paposhvili** which including **MY (suicide risk after Paposhvili Occupied Palestinian Authority [2021] UKUT 232**.

17. The judge also considered the country expert report of Dr Joffé and noted at paragraph [127] the following:

> "In his conclusion, Dr Joffé having accepted the appellant's account is of the opinion that the appellant would face indictment in Morocco and possibly significant physical abuse in custody and the danger of a lengthy prison sentence in a prison which would fall far short of acceptable international standards."

18. The judge considered Dr Joffé's report on the health services in Morocco and noted that at paragraph [17] to [20] of his report, that he considered "whether the appellant would be able to access the same level of appropriate treatment in Morocco in the state sector". At [140], the judge summarised his report such that Dr Joffé found it unlikely that SK "could receive the psychological support he needs, and he is therefore an extremely vulnerable potential victim of profound abuse". She noted that Dr Joffé found the appellant would not be eligible for "funded treatment in the state sector" and that "state provision is inadequate with the situation having worsened over the past decade". Overall, the report identified a critical shortage of psychiatrists and mental health workers. The judge then concluded at [143] the following:

> "143. I accept that there are some medical facilities in Morocco which if accessed are capable of offering some treatment. I attach weight to the evidence of Dr Joffé that mental health facilities are likely to be inadequate. I find that private facilities would not be affordable to the appellant."

19. The judge at [144] reminded herself that in Y **(Sri Lanka) [2009] EWCA Civ 362** the Court of Appeal clarified that the availability of the mental health services was no answer in an Article 3 suicide claim if the evidence was that an individual would not avail themselves of such services. The judge recorded at [146] the following:

> "146: It is also of note that the appellant expressed to Dr Malomo suicidal ideation during his assessment. Which Dr Malomo considered to be mainly linked to his frustration about his lack of his access to his wife and children back in Italy. Dr Malomo's opinion is that the appellant would act on his ideations if he feels that his chances of reuniting with family are limited. At several points throughout the hearings the appellant held up photographs of his children and pleaded to be allowed to be reunited with them.
>
> 147. I have accepted the opinion of Dr Galappathie that the appellant suffers from recurrent depressive disorder and PTSD for the reason stated above."

The judge addressed the report of Dr Galappathie and noted that he had clarified that the discrepancies regarding the previous self-harm incidents

occurred did not change the appellant's risk factors for self-harm and suicide would affect his risk of self-harm and suicide.

20. The judge then proceeded with the following:

> "151. Considering the evidence as a whole before me, it demonstrates that this appellant is suffering significant mental illness he has a history of mental illness, dating back to 2014 when he was first seen by Mental health services whilst in Italy. He has been admitted to hospital in Italy on at least 2 occasions and was prescribed anti-psychotic medication. When he stopped taking his medication, he started to hear voices became distressed and started to self-harm.
>
> 152. Dr Galappathie is of the opinion that if the appellant is forcibly returned to Morocco *'….this is likely to trigger a significant deterioration in his mental state. He continues to fear being returned to Morocco due to his past experiences of torture within Morocco and fear of accusations being made against him in Morocco. His mental state is likely to worsen if returned to Morocco with worsening depression, anxiety and PTSD symptoms. It is also likely that a return to Morocco may trigger a further psychotic relapse of his paranoid schizophrenia which could become associated with an increased risk of self-harm and suicide. In my opinion, his mental health will deteriorate as a result of his subjective fear, even if that fear is not objectively well founded.*
>
> 153. I take into account the risk of suicide as identified by Dr Galappathie, the evidence of deliberate self-harm as evidence by the scars and identified by Dr Malomo's report, I attach weight to the fact that the appellant hears voices which he finds distressing.
>
> 154. I also attach weight to Dr Malomo's report which establishes that the appellant is at risk of self-harm or suicide which I find would materialise as soon as he arrives in Morocco because he would consider this would be an end to any chance he may have to be reunited with his family and there will be no support to enable him to access the limited mental health facilities available.
>
> 155. I find that the appellant has established a genuine fear, albeit without an objective basis. I find that this genuine subjective fear is such as to create a risk of deliberate self-harm and/or suicide if he is forcibly removed to Morocco."

The Grounds for Permission to Appeal

21. The Secretary of State appealed on three grounds:

22. Ground (i). It was submitted that the judge erred by disregarding Dr Patel and Nurse Chigoya's evidence and preferring that of Dr Malomo and Dr Galappathie based on the latter's academic experience and qualifications only. Dr Patel is a Consultant psychiatrist. He saw and treated SK on multiple occasions and he was in detention throughout a year. In the alternative the judge failed to explain why she preferred Dr Galappathie's evidence after a two-hour face to face assessment at Harmondsworth on 10th October 2020 and a one hour video call on 6th May 2021 to that of an experienced Consultant psychiatric doctor who treated SK for a year with access to daily reports.

23. The judge failed to consider that Dr Galappathie's diagnosis was inconsistent with Dr Cucchiani Fosse's (diagnosis of 14th January 2015). Dr Galappathie did not provide an alternative assessment to SK's conditions, as recommended by **HH (Ethiopia) [2007] EWCA Civ 306**. Further, the assessment of self-harm was infected by the evidence that the judge found not credible.

24. Additionally, by attaching weight to Dr Patel's decision to prescribe SK with an antipsychotic as supporting Dr Galappathie's provisional diagnosis of paranoid schizophrenia the judge overstepped the limit of their function and descended impermissibly into the arena outside their expertise. Indeed, not even Dr Galappathie concluded that the medications were prescribed to treat psychosis.

25. Further, Nurse Chigoya evidence was not considered at all although this supported Dr Patel's diagnosis.

26. Ground (ii) was the failure to consider material evidence and the consideration of Article 3 at paragraph [156] (cited above). The judge found a potential breach of Article 3 on the basis of Dr Malomo's evidence. The judge did not consider SK's evidence of being able to access psychiatric help in Morocco at [22] to [24]. Dr Joffé referred to the availability of the drugs prescribed for SK in Morocco. That was omitted.

27. The judge's credibility findings in respect of SK's general account of being detained in Morocco were perverse when then proceeding to conclude that:

> "based on Dr Malomo's unquestioning evidence of those same facts, that SK would be likely to suffer from heightened suicidal ideation as a result of subjective of inhuman degrading treatment on return [Dr Malomo's report in RB/64-74 at 7.9, 9.1, 13.3].

28. Ground (iii). There was a material misdirection in law by concluding that SK had established a genuine subjective fear without an objective basis, creating a real risk of deliberate harm, self-harm and or suicide. The judge materially erred in-law by misunderstanding the fifth prong of **J**, specifically requiring the fear of ill-treatment to be objectively well founded and that if it was not; '…. that will tend to weigh against there being a real risk that removal would breach Article 3'."

29. Mr Irwin in his skeleton argument and oral submissions advanced that the Article 3 assessment contained errors of law and in relation to ground (iii) referred to **MY (Suicide risk after Paposhvili)** and **HA (expert evidence; mental health) Sri Lanka** [[2022] UKUT 111 (IAC)

30. Taking ground (iii) first, Mr Irwin submitted that the judge found that SK was dishonest in his account of his history and that finding of dishonesty was well-founded (see paragraphs [124], [128] to [130]). SK admitted lying on several occasions about material matters such as his name on removal from Switzerland and entry to the UK.

31. Notwithstanding unequivocal adverse findings regarding SK's credibility the judge accepted, apparently without real question Dr Galappathie's evidence regarding the extent of SK's psychiatric condition and the risks associated with the risk of return to Morocco. The central point, as confirmed by **Y (Sri Lanka)**, is that the judge was obliged to ask whether any genuine fear which SK may establish, albeit subjective, even without an objective foundation, was such to create a risk of suicide if there was an enforced return. The test required an assessment of whether the claimed fear was really held or not. The Secretary of State submitted that for a subjective fear to fall on the basis of a finding that removal to a third country would be unlawful interference of Article 3 the courts must be satisfied that the asserted fear was genuine. Whereas here the applicant was dishonest about their history, it was especially important for a judge to satisfy themselves that an asserted fear was genuinely held by the subject and failing to do so would leave scope for abuse.

32. At the heart of the question then was whether any claimed fear was a genuine one and whether it was honestly held and whether the fear was such to create a risk of suicide. The judge had not properly approached that question.

33. In relation to ground (ii), the judge placed great weight upon the reports of Dr Galappathie and the reports and another psychiatric expert, instructed by SK (Dr Malomo) but erred in placing such weight upon those reports without considering the extent to which the conclusions of those reports were affected by her finding that SK was dishonest. **Mbanga v Secretary of State 2005] EWCA Civ 367** demonstrated that credibility findings and the findings on medical evidence were inextricably linked. In **HA v Secretary of State for the Home Department [2022]** the Tribunal had criticised the psychiatrist for reaching a clinical opinion by reference to what he was told by the claimant irrespective of whether it was objectively true [122], and criticised the psychiatrist for failing to make reference in his report to the fact that a psychiatric symptom, which he recorded as being present, was not recorded as being present by treating doctors. The Tribunal further criticised the psychiatrist for making a reference to SD in the report while falling short of diagnosing the Claimant with that condition [126]. The Tribunal concluded at [148] that the psychiatrist had in various respects taken the appellant's word at face value without cross-

referencing to accessible medical records and had in reality become an advocate for the Claimant.

34. The judge had failed to give sufficient weight to the fact that Dr Galappathie's opinion was reliant to a great extent upon the account given to him by SK. His diagnoses were reliant on SK's account of his past mistreatment in Morocco by the authorities.

35. In relation to both of Dr Malomo's reports, they too were reliant on the truth of what SK had told Dr Malomo.

36. In relation to Ground (i) the provisional diagnosis of Dr Galappathie that SK was suffering from paranoid schizophrenia was contested by Dr Patel who saw him on multiple occasions. Dr Patel was specifically asked whether SK was suffering from that condition and decided he was not. Nurse Chigoya, a registered mental health nurse, also saw him on multiple occasions and did not accept that he was suffering from that condition. The judge materially erred by disregarding Dr Patel and Nurse Chigoya's evidence regarding SK's medical condition.

37. It was not in dispute between the parties that Dr Patel was a Consultant psychiatrist. He saw and treated him on multiple occasions and the judge failed to explain why she preferred Dr Galappathie's evidence following a two-hour face to face assessment and a one hour video call.

38. SK's representatives made both written and oral submissions. It was submitted that ground 1 was misconceived because the judge was entitled to attach greater weight to Dr Galappathie's and Dr Malomo's evidence, which complied with the Immigration and Asylum Chamber Practice Direction. Dr Patel's evidence did not. His report did not set out Dr Patel's qualifications and it was not verified by a statement of truth and **AAW (expert evidence – weight) [2015] UKUT 673 IAC** confirmed that an expert witness report will not be treated as such if he does not meet the requirements demanded by the senior president's Practice Direction.

39. It was not the case that Dr Galappathie's and Dr Malomo's evidence was given greater weight solely because of their academic credentials. Rather the judge noted that Dr Galappathie's evidence "has been comprehensively tested by demanding cross-examination" and that his report was "thorough and detailed", and he had taken into account "all relevant documentation". Those were legitimate reasons to prefer Dr Galappathie's evidence over Dr Patel's. If the Secretary of State wished Dr Patel's evidence to be given equal weight that was open to her to file a report from Dr Patel in the form required by the practice in the direction or to call Dr Patel to give oral evidence and tender him for cross-examination, which she did not do.

40. As regard the previous Italian diagnosis, Dr Galappathie took this fully into account in his first report and it is not clear why the Secretary of State thought this was inconsistent, given that the Italian diagnosis was of "personality disorder not otherwise specified" and Dr Galappathie

specifically considered personality disorder with pseudo psychotic symptoms as a possible alternative diagnosis. This answered the allegation that Dr Galappathie did not consider the alternative hypothesis.

41. In relation to ground (ii), it was submitted by Mr Halim that this too was misconceived. The Secretary of State referred to paragraphs [22] to [24] of the determination as evidencing that the appellant received mental health treatment in Morocco but the appellant's account was simply that he attended two free sessions with a counsellor and that he was never seen by a doctor and was not provided with any kind of diagnosis, medication or other form of treatment. That was wholly consistent with the judge's findings.

42. The point about availability of drugs was likewise weak and Dr Joffé made clear that the state-provided medical service was "rudimentary by British standards" and the prospects of the appellant receiving adequate medical treatment were "extremely unlikely". The judge accepted this evidence [143]. The judge's finding was not based on the premise that no medication of treatment was available in Morocco rather that Dr Joffé's evidence that the treatment available in the state health system would be inadequate.

43. Nor could the Secretary of State show that the judge's findings as to the existence of a subjective fear were perverse. The judge was entitled to conclude on the basis of the medical evidence that the appellant had a subjective fear of return notwithstanding that the judge's credibility finding in respect of SK's general account of being detained in Morocco. Perversity was a high threshold, and the judge must show that no reasonable judge could have reached this finding. There was no error in the judge's approach via less perversity.

44. Ground (iii) was also misconceived, as set out in **MY (Suicide risk after Paposhvili)** point 5 of **Y** did not establish a test or impose an additional burden on the appellant. There was no threshold requirement that a subjective fear must be objectively well-founded before a suicide case can succeed on Article 3 grounds.

45. As the Tribunal made clear at [117]:

> "The test to be applied in Article 3 cases is that found at [183] in **Paposhvili** as explained by the Supreme Court in AM at [29] to [31], namely whether the appellant would face a real risk on account of the absence of the appropriate treatment in the receiving state or the lack of access to such treatment or being exposed to
>
> '(1) a serious, rapid and irreversible decline in his state of health, resulting in intense suffering, or
>
> (2) a significant meaning, substantial, a reduction in life expectancy'."

That is the test the judge correctly directed herself to at 136 and correct applied at 156.

46. In his oral submissions, Mr Halim submitted that the evidence from Dr Patel is merely two lines at page 606 of the first bundle and there were very good reasons for preferring the evidence of the other medical professionals. There was no basis to gainsay the diagnosis reached by Dr Galappathie, but the diagnosis was not based purely on the evidence of SK but also on the IRC records and the clinical assessment, as undertaken by Dr Galappathie and Dr Malomo. The point was what the assessment was based on. SK presented symptoms during his period of detention although Mr Halim accepted that the reports after August 2020 were not seen. The genuine fear of the applicant was that he would fail to see his family again and that would precipitate a decline in his mental health.

47. The judge's findings of the appellant's account related to his fear of the authorities as opposed to the actual reasons for his risk of suicide, which were not to do with the authorities but in connection with his reunification with his wife and children and we were referred to paragraphs [146] and [149] of the judge's decision. The Secretary of State maintains the judge made unimpeachable findings in relation to the asylum claim yet when it came to the Article 3 analysis the judge's tools are asserted to have become blunted. There was no **Mbanga** error. It was important to look at the quality of the reasons and in effect the Secretary of State had mounted a perversity challenge.

48. Paragraph 154 clearly set out that the judge relied on Dr Malomo's report that established the appellant was at risk of self-harm because he would consider this to be an end of any chance he may have to be reunited with his family. It was not that the judge was adopting Dr Galappathie's analysis and concluding that SK's subjective fear related to the authorities in Morocco. The Secretary of State's approach amounted to a disagreement which was not an error of law and the Malomo report provided solid ground as to why the judge gave significant weight to the appellant's medical condition. In effect the Secretary of State had argued that because SK had been found to have lied and that tainted his desire to be with his family, that the medical evidence had showed to the contrary. The judge had given reasons, which were perfectly rational and not perverse. The fear of severance from his family ties was untouched by persecution and Dr Malomo's report was not reliant on the appellant's account. The judge was entitled to allow the appeal.

49. Paragraph [146] of the judgment showed quite clearly that Dr Malomo found that SK's suicidal ideation was mainly linked to his frustration about his lack of access to his wife and children back in Italy and that he would act on his ideations if he felt his chances of reuniting with his family were limited.

Analysis

50. The grounds are intertwined, and we address them as a whole.

51. As highlighted by Mr Irwin, **Savran v Denmark (Application no 57467/15)** (7th December 2021) confirmed that there, was a requirement to adduce evidence to show real risk of being exposed to a serious, rapid and irreversible decline in his health, resulting in intense suffering or to a significant reduction in life expectancy. With reference to **Savran**, **HA** sets out the law on mental ill-health and suicide risk in the context of Articles 3 and 8 of the ECHR and we cite the relevant passage from paragraph [171].

"171. The current articulation of the threshold is to be found in paragraph 183 of the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in Paposhvili v Belgium (Application no.41738/10)(13 December 2016); [2017] Imm AR 867:

> "183. The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (Â§ 43) which may raise an issue under Article 3 should be understood to refer to 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. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.""[our underlining]

52. **HA** clarified with reference to **MY**, (which made clear that **Paposhvili** applied to suicide cases), that it was axiomatic that the relevant individual must be a "seriously ill person", as required by the ECtHR and underlined above.

53. As Mr Irwin submitted, just showing that the applicant suffered from schizophrenia was insufficient to engage Article 3 in the context of **Savran**.

54. Further, it was clear from the fifth principle in **J** when considered with **Y (Sri Lanka)** there was no need for an objective fear if the subjective fear was genuine. There was no obligation to enquire into the objective fear. However, the fear must be genuinely held, albeit it is subjective. We acknowledge that a genuine fear may incorporate many different aspects and is a broad category, but we agree the fear should be genuine and if the appellant is not telling the truth, which undermines the contention that the fear is indeed genuine. We also acknowledge that any assessment will be highly fact-sensitive and simply because someone is found not credible on one part of their account does not mean that they are lying on another part of their account. In this case, it was asserted, and we agree that the facts were that the appellant's claim was comprehensively rejected by the First-tier Tribunal.

55. At the core of this appeal of the Secretary of State is the apparent dichotomy between the judge rejecting the appellant's credibility for the reasons which we have outlined above whilst at the same time accepting the reports of Dr Galappathie in preference to that Dr Patel, when it is clear that that same account was relied upon by Dr Galappathie in relation to the appellant's mental health diagnosis, albeit that account was rejected by the judge. The assessment of whether the appellant's fear was genuine was for the judge to decide, but here the judge had wholly dismissed SK's account of torture in Morocco and, bearing in mind the nature of the psychiatric reports and, that they were based on the dishonest (as found) claims of SK, and, based in part on assuming and accepting the truth of the history that SK had given, it is difficult to see how the judge had relied without any reflection of that nature on those reports.

56. It is apparent that the claim about being unable to see his family came about as a suggestion after the close of the proceedings and was not part of the primary case initially advanced by SK. The speaking note, which advanced the claim as to the appellant being separated from his family was dated 22nd November 2022 and it should be noted that the hearing was conducted on 13th August 2021 and 8th October 2021 and 12th November 2021. The submissions regarding the family were made out for the first time in November. It was not being submitted that there was no genuine fear of SK not seeing his family again but on the facts of this case, and bearing in mind the global findings on credibility, and his overwhelming dishonesty, it was incumbent on the judge to address the contradiction in relation to the return to Morocco and she failed to address the fundamental point that the medical report of Dr Galappathie rested on the appellant's account in that regard.

57. This was a point that, as per **Mbanga [2005] EWCA Civ 367** the judge did not take into account holistically. The psychiatrist (medical expert) was criticised in **HA** for reaching a clinical opinion by reference to what he was told by the claimant irrespective of whether it was objectively true, and the judge did not consider this aspect. There appears to be an error of law in severing an analysis of credibility from an assessment of the medical reports.

58. Part of the test, as set out in **Paposhvilli** and **Savran** is that the appellant must provide cogent evidence. It was important to note that there were a variety of diagnoses from the doctors with Dr Malomo agreeing that ofof schizophrenia, Dr Patel denying it and Dr Galappathie suggesting that the provisional diagnosis was schizophrenia, but then there other options available. The acceptance of schizophrenia did not appear to be adequately reasoned.

59. We agree that dishonesty was relevant when analysing the medical reports. Part of Dr Galappathie's report was that SK was diagnosed with PTSD because of the trauma that had occurred to him. If that account were rejected, then that undermined his diagnosis. It is clear from Dr

Galappathie's report dated 26th May 2021 that he based his report in part on the history and difficulties as outlined by SK and that there was limited evidence before him save for the Italian psychiatric evidence. At paragraph [32] of Dr Galappathie's report, and at paragraph [100] the PTSD diagnosis was based on the appellant's account, which was rejected by the judge. It is clear throughout the report that Dr Galappathie relies on the account given by the appellant and at paragraph [124] of the report, he specifically stated that the appellant continued to fear being returned to Morocco due to his past experience of torture there. At no point did this report refer to any anxiety or fear of the appellant in relation to him being separated from his family. That is not addressed by the judge either. It is also clear that the second report of Dr Galappathie concluded that there was no final diagnosis of paranoid schizophrenia and a proper assessment needed to be made; this again referenced flashbacks of torture in Morocco. Thus the final diagnosis was yet to be made.

60. Further the reports of Dr Galappathie rely significantly on the account given by SK about his psychiatric condition and his treatment between 2015 and 2020. The report of Dr Galappathie dated 31st October 2021 postdated the first two hearings conducted by Judge Haria and also reflects the reliance of Dr Galappathie on SK's account. The report agrees that the author is wholly reliant on the appellant's account for his clinical history whilst in Morocco. Curiously, he also notes that the appellant recorded a history of deliberate self-harm in Italy but not Morocco. Specifically Dr Galappathie records at paragraph [93] that SK reported a significant past history of self-harm and attempted suicide and SK "after being tortured in Morocco he became distressed and started to self-harm".

61. Again, the report of Dr Malomo at paragraph [7.9] recorded allegations of torture in Morocco and thereafter gave an extensive record of what SK stated about his past history.

62. We also note specifically at paragraph [17.4] on page 180 that SK "reported that self-harming is considered forbidden in Islam and as such he could never take his own life". This does not appear to have been addressed although not a point taken by the representatives.

63. We would not go as far as saying that the judge had reached perversity in finding SK had a genuine fear but would find that in view of SK's credibility generally being wholly compromised, we find the judge's failed to adequately reason why she placed such reliance on the reports of Dr Galappathie, and additionally to the exclusion of Dr Patel.

64. We do not accept that her conclusions were saved by reliance on Dr Malomo's report alone because, for example, at paragraph [151] the judge states "considering the evidence as a whole before me it demonstrates that this appellant is suffering significant mental illness. He has a history of mental illness dating back to 2014 when he was first seen by mental health services in Italy".

65. The evidence in relation to his clinical treatment in Italy was sparse to say the least and as demonstrated above, reliance on Dr Galappathie's reports was compromised.

66. As the judge at paragraph [154] stated:

> "I also attach weight to Dr Malomo's report which establishes that the appellant is at risk of self-harm or suicide which I find would materialise as soon as he arrives in Morocco because he would consider this to be an end to any chance he may have to be reunited with his family".

67. Clearly, the judge placed reliance on Dr Galappathie's report as well as Dr Malomo's report when arriving at this conclusion. She further failed to analyse the reference in Dr Malomo's report that SK would not take his own life.

68. When placing reliance on Dr Galappathie's provisional diagnosis, regarding the progress of SK's mental health were he returned to Morocco, she was again reliant on his account of his past mistreatment by the Moroccan authorities.

69. Although the judge did give reasons for explaining why she preferred the evidence of Dr Galappathie and Dr Malomo over that of Dr Patel, in the light of the criticisms of her reliance on those reports, she materially erred in law in failing to give reasons why the evidence, of Dr Patel treating Consultant Psychiatrist, was rejected when it was supported by that of the treating nurse, whose evidence was entirely omitted from consideration. We find the treatment of Dr Galappathie's evidence was flawed. Dr Galappathie's evidence was not preferred over Dr Patel's evidence because it did not comply with the Senior Presidents' direct Practice Direction. No consideration was given to the treating nurse's evidence and no consideration was afforded to the fact that Dr Patel was a treating doctor over a considerable length of time and a consultant psychiatrist. As a result, the apparent contradictions in the diagnoses were not adequately resolved.

70. Ultimately, the judge failed to take into account that SK was dishonest when considering whether he had a genuine subjective fear, and this was an error of law. It is thus sustainable that the judge erred in her approach when applying the law in respect of suicide. It is not the case that there is an extra burden on the appellant in the threshold test in either **J** or **Y** and we agree there is no threshold requirement that a subjective fear must be objectively well-founded before a suicide case can succeed under Article 3, but there must, as explained in paragraph [117] of **AM (Zimbabwe)** be a "real risk" on account of the absence of appropriate treatment in the receiving state or the lack of access to such treatment of being exposed to:

> "(1) a serious, rapid and irreversible decline in his state of health resulting in intense suffering, or

(2) a significant meaning substantial reduction in life expectancy."

71. As a result of a failure properly to analyse the evidence overall, the question of whether the fear was genuine or not was not considered and thus whether that fear could be constituted as real. That was an error of law.

72. Overall, we find material errors of law and thus the decision will be set aside. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the fundamental nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

73. We preserve the findings in paragraphs 108-125 (**except** paragraph 114) and paragraphs 128-130.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Helen Rimington Date 26th September 2022

Upper Tribunal Judge Rimington