IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02997/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 February 2022	**On the 22nd April 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

D O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Smith, instructed by Kesar & Co, Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Nigeria, appeals against the decision of the respondent made on 9 November 2015 to deport her and to refuse her human rights claim. The Secretary of State took the decision to deport her as a person to whom Section 32(5) of the UK Borders Act 2007 applies, as she is a foreign criminal given her conviction on 11 April 2013 of being knowingly concerned in the fraudulent evasion of a prohibition of restriction on the importation of a class A controlled drug for which was sentenced to five years and six months' imprisonment.

The Appellant's Case

2. The appellant's case is that she suffers from a number of medical conditions, both physical and psychological, which are such as to make it impossible for her to return to Nigeria as her health would suffer a serious deterioration due to a lack of support and ability to access appropriate treatment such that the circumstances of her removal and the consequences to her would amount to a breach of Article 3 of the Human Rights Convention. It is the appellant's case that she has no support available to her in Nigeria from family.

3. It is also argued the departing the appellant would be in breach of her Article 8 rights as, despite the term of imprisonment to which she was sentenced, there are very serious and compelling reasons why she should not be deported.

4. The appellant was born in November 1969 in Togo to Nigerian parents. She and her family are practising Muslims and the family alternated their place of residence between Togo and Nigeria during her upbringing. It is while she was living in Togo she met her husband, a British citizen, who was visiting his family. She arrived in the United Kingdom with entry clearance in April 2001 as a spouse and was in 2002 granted indefinite leave to remain. The relationship with the husband deteriorated after he suffered a stroke and subsequent personality change. He became verbally and emotionally abusive towards the appellant, controlling her and eventually the marriage broke down and she had to go into a refuge.

5. The appellant believes that her mental health problems arise from this and also from the fact that she was subjected to sexual abuse during her childhood by an older cousin.

6. Although the appellant has a large number of siblings, there was an arson attack on her family in which her father and family friends were killed in 2001; four of her siblings were killed in a car accident in Nigeria in 2008 and, the remainder, are either dead, live in Togo, Ghana or their whereabouts are unknown.

7. The Secretary of State's case, as set out in the submissions and refusal letter that it had not been established that the appellant had no support available to her in Nigeria. It is not accepted that she has no family there or support from them and that in broad terms her mental health is not so serious as to put her in a position such that Article 3 would be engaged. It is submitted the appropriate medication is available to her, the cost is not prohibitive and that, although her situation on return might be precarious, she would be able to adapt and would have access to a reintegration package once her appeal had come to an end. It is submitted further that she would not be exposed to destitution given the availability of family

support, nor was it accepted that there was a risk of suicide on return, having had regard to the factors set out in J v SSHD [2005] EWCA Civ 629

Procedural History

8. The appellant's appeal was first heard on 31 January 2017. It was allowed for the reasons given in the decision of FttJ Grimmett of 1 March 2017. That decision was later set aside following a hearing in the Upper Tribunal before Upper Tribunal Judge King. Judge King did not, however, set aside that part of the decision in which Judge Grimmett refused the appellant's asylum claim. He directed that the appeal be remade in the Upper Tribunal. On 28 September 2018 Upper Tribunal Judge Coker remade the appeal, dismissing it.

9. The appellant's renewed application for permission to appeal to the Court of Appeal was successful, Hickinbottom LJ granting permission on all grounds and maintaining the anonymity order then in place.

10. Subsequent to the grant of permission, the appeal was allowed by consent to the extent that it was remitted to the Upper Tribunal. The matter then came before Upper Tribunal Judge Finch, who on 28 June, 11 September and 25 November 2019 directed that the hearing was to be set down for hearing on the first open date after 30 March 2020. Given the lockdown, as a result of COVID-19, this did not happen.

11. At a case management hearing on 10 December 2020, it was agreed that, given the appellant's mental ill-health, it would be better for the appeal to be heard on a face-to-face basis, directions being given for a consolidated bundle. The hearing listed on 15 July 2021 was not able to take place owing to counsel's illness although the appellant did attend in person. The next hearing on 17 November 2021 was not able to proceed owing to the appellant's ill-health and hospitalisation. I gave directions for there to be a further case management given health difficulties and on 6 January 2022 it was agreed that the appeal would take place on 7 February 2022, with the appellant to be allowed time to accustom herself to the court prior to the hearing, to allow for breaks and that there be a meeting between the representatives prior to the hearing in order to narrow the areas of dispute and focus in cross-examination.

12. Shortly prior to the hearing on 10 February 2022 the appellant's solicitors explained to the Upper Tribunal in writing that the appellant was frightened and distressed about even attending the hearing let alone giving evidence, had struggled to focus on questions and the instructing solicitor had serious concerns as to her mental health. A significant change from previous occasions had been noted and it was decided not to call the appellant to give evidence.

The Hearing

13. Given the decision not to call the appellant to give evidence, the appeal proceeded by way of submissions only. I heard first from Ms Smith, then from Mr Kotas, followed by a short reply from Ms Smith. In addition, I had the following before me:-

    (1) Respondent's bundle.

    (2) Appellant's consolidated bundle.

    (3) Appellant's supplementary bundle.

    (4) Speaking note from Ms Smith.

Submissions

14. Ms Smith submitted that it had been accepted by the respondent that the appellant's medical conditions are very serious and that she would suffer deterioration on removal to Nigeria. It was submitted that accordingly, the Joint Presidential Guidance Note and Practice Direction with respect to children, vulnerable adult and sensitive witnesses should apply. The focus of the Article 3 and Article 8 case was, in the light of Paposhvili v Belgium [2016] ECHR 41738/10 and AM (Zimbabwe) [2020] UKSC 17 to consider:

    (1) whether there was a prima facie case to answer and how "very exceptional" should be understood;

    (2) how intense suffering was to be defined;

    (3) what a significant reduction in life expectancy means;

    (4) the approach to be taken to conditions that are chronic and lifelong;

    (5) relevant factors where a prima facie case is established;

    (6) Article 8 factors.

15. Ms Smith sought to rely also on the decision of the European Court of Human Rights in Savran v Denmark (Grand Chamber) [2021] ECHR 1025 and Ainte (material deprivation - Art 3 - AM (Zimbabwe)) [2021] UKUT 203 (IAC). She submitted that self-harm and suicide risk did meet the relevant test and on the basis of the extensive medical reports, all of which confirmed extreme vulnerability, the appellant had established a prima facie case. She submitted that there was no "very exceptional" test to be met as neither Paposhvili nor AM (Zimbabwe) had purported to introduce such a test. She submitted that the submission from the respondent that the appellant had not engaged with the Community Mental Health Team

("CMHT") or that any engagement was minimal was not substantiated and her ability to travel on public transport and some independence was not sufficient to show she was independent in daily living given the extensive mental health and housing support she receives. She submitted that there was a real risk of a serious, rapid and irreversible decline in life expectancy given the risk of suicide and that the decline would be irreversible.

16. Ms Smith submitted that the appellant faced poor, if not non-existent, support in Nigeria, relying on a report from Amnesty International particular to her case and that, consistent with the new CPIN, she would have difficulty in accessing treatment. She submitted further that the treatment may in itself be degrading and that the appellant would have difficulties in not just in obtaining accommodation given she may need a deposit to cover two years' rent and that any accommodation she was likely to secure would be insecure and to a risk of street homelessness. She submitted further it was unlikely the appellant would be able to get employment or to be able to pay for the drugs that she requires. It was submitted further that as a combination of the problems she has, mental ill-health, physical problems, that she faces stigma and destitution.

17. It was submitted further that the appellant's evidence is observable, as noted by Dr Das, this was likely to attract police attention and that given the contributory factors relating to mental ill-health it was likely that she would be ill-treated as a result.

18. Ms Smith submitted that the family support would not be sufficient and that the appellant had been consistent about the fact that she had no family in Nigeria.

19. Ms Smith submitted further that, even were I not satisfied on the basis that the appellant's removal would be in breach of Article 3, there were in the facts of this case very compelling circumstances such that she should not be deported.

20. Mr Kotas submitted that the applicable test as to whether article 3 applied should not, following Savran, be fragmented and that the phrase "very exceptional" had been used by the Supreme Court in AM (Zimbabwe) indicating the high threshold to be established.

21. Mr Kotas submitted the appellant's credibility is in issue, which in turn casts doubt on her claim that there is no family support available to her in Nigeria. He submitted an adverse inference should be drawn from the appellant's failure to attend the hearing; and, that there is a constant theme in the appellant's witness statement and statements from medical experts that she had been surprised when her bag had been searched on arrival in the United Kingdom and the drugs were found, thus seeking to minimalise her guilt. He accepted that did not mean she was untruthful on other points but there were matters to be taken into account.

22. Mr Kotas submitted the appellant's accounts of lack of contact with family or anyone in Nigeria or Togo mentioned to Dr Das were to be contrasted with what she said in the OASys Report at page 291 and 297. He submitted also that she would be able to obtain the same medication she has here, both Dr Das and Professor Hale explaining that it would be a relatively minor change. He submitted that the psychiatric medication was available and the cost was not prohibitive although the medication for her physical ill-health, allopurinol and bendroflumethiazide were not available. Further, Mr Kotas submitted the appellant would be able to access a reintegration package once her appeal had come to an end which needed to be taken into account in assessing her circumstances on return. He submitted that she would be able to return voluntarily and avail herself of that and that there would be no destitution given the context of family support that would be available.

23. Relying on MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC), Mr Kotas submitted that the factors set out in J v SSHD still applied and that there is no real risk of suicide on return. He submitted the appellant's case had not been put on the basis that her mental health and mistreatment on return would be sufficient to engage Article 3 and that there was in reality no real risk that she would be street homeless and unable to get support from siblings. He submitted also there was no record of her attempting to end her own life.

24. In response, Ms Smith drew attention to Professor Hale reference to one attempt at suicide (page 205) and fleeting thoughts of that (paragraph 70, page 184). That was not inconsistent with the CMHT stating that there was no record of an attempt. She submitted that although there was no evidence of recent attempts that would be different if she went back to Nigeria.

25. Ms Smith submitted that although the appellant had had support in the past that was no longer the case, that it was evident that both Professor Hale and Dr Das implied that the appellant would be unable to work. Ms Smith submitted that the medication would only be available in certain places, in this case aripiprazole being available only in Abuja. She submitted that in any event it was not just the availability of medication it was that support from the CMHT could not be regulated.

26. Ms Smith submitted that the appellant had not been inconsistent in her lack of contact with Nigeria and that she had lost contact after 2013. She had been consistent with the background of the family moving to and from Togo.

The Law

27. It is for the appellant to demonstrate that she is at risk on return to Nigeria of ill-treatment such as would put the United Kingdom in breach of its

obligations under articles 2 and 8 of the Human Rights Convention. The burden is on the appellant but to the lower standard (in the case of article 3) and as is established by case law.

28. In assessing whether the appellant's mental health and/or physical health is sufficiently serious, I have applied AM (Zimbabwe), taking into account also Ainte and MY.

29. In Paposhvili the ECtHR held:

> 183. The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§ 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.

30. In analysing that finding, the Supreme Court in AM (Zimbabwe) held:

> 31. It remains, however, to consider what the Grand Chamber *did* mean by its reference to a "significant" reduction in life expectancy in para 183 of its judgment in the *Paposhvili* case. Like the skin of a chameleon, the adjective takes a different colour so as to suit a different context. Here the general context is inhuman treatment; and the particular context is that the alternative to "a significant reduction in life expectancy" is "a serious, rapid and irreversible decline in … health resulting in intense suffering". From these contexts the adjective takes its colour. The word "significant" often means something less than the word "substantial". In context, however, it must in my view mean substantial. Indeed, were a reduction in life expectancy to be less than substantial, it would not attain the minimum level of severity which article 3 requires. Surely the Court of Appeal was correct to suggest, albeit in words too extreme, that a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction. But even a reduction to death in the near future might be significant for one person but not for another. Take a person aged 74, with an expectancy of life normal for that age. Were that person's expectancy be reduced to, say, two years, the reduction might well - in this context - not be significant. But compare that person with one aged 24 with an expectancy of life normal for that age. Were his or her expectancy to be reduced to two years, the reduction might well be significant.
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> 32. The Grand Chamber's pronouncements in the *Paposhvili* case about the procedural requirements of article 3, summarised in para 23 above, can on no view be regarded as mere clarification

of what the court had previously said; and we may expect that, when it gives judgment in the *Savran* case, the Grand Chamber will shed light on the extent of the requirements. Yet observations on them may even now be made with reasonable confidence. The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But "Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle …": *DH v Czech Republic* (2008) 47 EHRR 3, para 179. It is clear that, in application to claims under article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold, set out in para 23(a) above, is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish "substantial grounds" to have to proceed to consider whether nevertheless it is "capable of demonstrating" them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate "substantial" grounds for believing that it is a "very exceptional" case because of a "real" risk of subjection to "inhuman" treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a "prima facie case" of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement: see para 112 of a useful analysis in the Determination of the President of the Upper Tribunal and two of its senior judges in *AXB v Secretary of State for the Home Department* [2019] UKUT 397 (IAC). Indeed, as the tribunal proceeded to explain in para 123, the arrangements in the UK are such that the decisions whether the applicant has adduced evidence to the requisite standard and, if so, whether it has been successfully countered fall to be taken initially by the Secretary of State and, in the event of an appeal, again by the First-tier Tribunal.

33. In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the *Paposhvili* case at paras 187 to 191 and summarised at para 23(b) to (e) above. **The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state**. [emphasis added]. What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel "any" doubts raised by the applicant's evidence. But, when the reader reaches

> para 191 and notes the reference, in precisely the same context, to "serious doubts", he will realise that "any" doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond *all* doubt is a concept rightly unknown to the Convention.

31. In Savran, the Grand Chamber held:

> 137. The Court has consistently applied the same principles in cases concerning the expulsion of seriously ill applicants, irrespective of what particular type of medical issue - somatic or mental - underlay their health condition. In the *Paposhvili* judgment (cited above), before it proceeded to formulate the new standard, the Court had regard to case-law relating to applicants suffering from both physical and mental illnesses (see paragraph 127 above and the range of authorities cited in *Paposhvili*, cited above, § 179). In the wording of paragraph 183 of the *Paposhvili* judgment, the standard refers to "a seriously ill person", without specifying the type of illness. Thus, it is not limited to any specific category of illness, let alone physical ones, but may extend to any category, including mental illnesses, provided that the situation of the ill person concerned is covered by the *Paposhvili* criteria taken as a whole.
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> 138. In particular, in its relevant part, the threshold test established in paragraph 183 of the *Paposhvili* judgment (cited above), 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.
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> 139. In the light of the foregoing, the Court considers that the standard in question is sufficiently flexible to be applied in all situations involving the removal of a seriously ill person which would constitute treatment proscribed by Article 3 of the Convention, irrespective of the nature of the illness

32. Contrary to Ms Smith's submissions, I do not find the partly-dissenting judgment of Judge Serghides to be of assistance.

33. In assessing the appellant's evidence the starting point must be the reports on her health from Professor Hale, who wrote reports in 2016 and 2018, from Dr Das who wrote a report in 2020, as well as the letters from the community mental health team. These are dated 4 November 2021, 4 December 2021 and 2 February 2022. In addition I have taken into account letters from the CMHT from June 2020 and 5 February 2021. The OASys Report of 1 July 2015 is also relevant in that it sheds some light on the appellant's mental health at the time of assessment.

34. The OASys Report indicates some health problems owing to back problems and weight issues and it is noticed [10.8] that she had self-harmed in the

past and had considered suicide, this occurring during traumatic periods which evolved from her being the victim of domestic abuse perpetrated by her husband. It is recorded also that she said she is suffering from depression and taking medication and had been assessed by mental health. It is recorded also that she suffers from high blood pressure [13.1] and there is recorded a risk of suicide [R3.1]. The report from Professor Hale is based on an examination of the appellant on 18 May 2018 and refers back to the meeting in 2016 in which the appellant had talked about hearing voices and she showed injuries to her fingers, said to be the results of self-harm, an activity she reported again in 2018. It is noted that she reports a history of self-harm and at least one suicide attempt prior to being in prison [9] but the details of this were vague. It is recorded [17] that it was in prison that she had the first account of seeing, hearing and feeling touched by male prisoners, but appeared to be hallucination, it being reported in 2018 that it was still the man's voice that was still present almost every day. It is noted also [30] she described the voice telling her to end her own life and had alluded that this might happen if attempts were made to deport her rather than stating it outright. It is recorded also she was seen by a psychiatrist in prison in 2013, noted depressive symptoms and a history of uncontrolled migraine and that she was on antidepressants. Her then current medication, as at 2018, was noted at [41], Professor Hale stating:-

> "42. From a current mental health perspective, the combination of mirtazapine and amitriptyline is potentially hazardous, as one week's medication of amitriptyline alone exceeds the commonly fatal dose of 700 milligrams when taking an overdose. It is probable however the GP was merely continuing the medication which was previously prescribed prior to when she was detained, perhaps as much as ten years before the winter 2016.
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> 43. What is clear to me from her mental state in May 2018, reported in detail below, is that this combination of two different antidepressants, together amounting to 170% of the normal maximum combined BNF dose of these two antidepressants has not shown any particular benefit in this case, as [the appellant] is still significantly depressed and psychotic and might benefit from an expert review of her treatment, both her depression and PTSD. "

35. Professor Hale concluded [67] that the appellant fulfils the criteria for a severe major depression, chronic with psychotic symptoms as well as [93] PTSD with a score indicating that she had not improved since her release from prison when the last assessment had been taken in 2016. He did, however, conclude that she did not fulfil the criteria for any non-effective psychotic disorders and that her mental health had not changed significantly since the examination at HMP Peterborough in 2016 [102]. It is recorded that her only support is some form of counselling which is not an effective intervention for severe major depression [103]. He concluded [105] because the consistent accounts of her symptoms on two occasions are separate by almost two years and the understandability of the symptoms in terms of her likelihood is that he did not believe she was

exaggerating or feigning her symptoms. It is noted also that her poor physical health, to which she has been treated with an extensiveness of medication contributes to her current mental ill-health. Professor Hale noted also the high suicide risk [116], recommending that there should therefore be a substitute for amitriptyline as soon as possible. Recommendations were then given for treatment for complex PTSD.

36. Professor Hale indicated that the likely effect of deportation on the appellant's mental health would be that she unable to access the treatment she requires following deportation and the withdrawal of the antidepressant medication is likely to be rapid relapse over several weeks of her worst depressive symptoms, probably exacerbating the suicidal ideas and putting her at increased risk of taking her own life. I did, however, note that her clinical condition would be aggravated by her uncertain deportation prospects [140].

37. In addressing her fitness to give evidence in court Professor Hale indicated she is likely to experience the court setting as threatening, crowded and stressful, adversarial and fear provoking and it is possible it would reactivate her panic attacks, immediate PTSD symptoms and her depression induced impairment, thinking and responding speed may bear on her concentration [145]. It was, however, likely that she would be able to pre-prepare a witness statement and instruct legal representatives.

38. In his report, Dr Das was asked to give his opinion as to whether there had been any changes in diagnosis since the previous assessment of Professor Hale, whether there was a current risk of suicidal harm, whether this would change before, during or after deportation and the immediate, short and midterm impact on her mental health issues in the event of deportation.

39. Dr Das interviewed the appellant on February 2020 for about 45 minutes and took into account over 1,000 pages of medical records including GP notes, inmate medical records and medical notes from the CMHT and Professor Hale's report. Dr Das noted [45] that recent medical notes confirmed the appellant is suffering from some suicidal threats, responding to voices and becoming distressed and that her symptoms fluctuated, but that she has failed to attend some psychology departments on occasions.

40. Turning to the issue of treatment for psychiatry given the issues [66] Dr Das noted the appellant is tied in with the local community mental health team, and she says that she only sees the care co-ordinator regularly and vary rarely sees a nurse or a psychiatrist. It is noted that she is still on mirtazapine and amitriptyline as well as now aripiprazole [67]. He notes also that she has "fleeting suicidal thoughts for many years" although no clear plans or intentions [70]. Having noted general anxiety, hearing voices as well as bad dreams and flashbacks [72 to 73] and having undertaken a mental state examination it is noted [83] that the appellant has a long history of mental health issues attracting numerous diagnoses and has spent some time in Lewisham Mental Health Hospital as well as St Anne's Hospital. He notes that other than the diagnosis offered of schizo-

affective disorder, which had been offered, Dr Das concluding [86] with the appellant's overall mental state as much the same as the assessment by Professor Hale in 2018. It is his opinion that the self-harming behaviour is likely to be chronic and the pattern of harm, reactive to distress in her life is likely to continue [87] and that although the current immediate risk of suicide is relatively low [88] this is likely to increase in response to stressful situations in this scenario including imminent deportation.

41. Dr Das was also of the view that if deported the risk of both self-harm and suicide would be significantly increased [89] and that she is likely to cope worse than the average person both with the stress of the imminent deportation, the process itself and adjusting to life afterwards [92]. He was also of the opinion that if the standard of treatment and access to healthcare in Nigeria was broadly comparable to what she received in the United Kingdom then her deterioration would be relatively minor. She believed that care was poor or even completely unavailable including the lack of access to prescribed medication or support from a community mental health team or the potential to be transferred to a hospital if her state were to deteriorate, then this would "all indicate a significantly poor prognosis: i.e. on balance more intense symptoms, an overall mental ability to function and a high risk of suicide". If medication was stopped suddenly she is likely to suffer from withdrawal symptoms.

42. The more recent material relating to the appellant's mental ill-health comes from the CMHT. It is, however, of note that the letter of 10 June 2020 sets out in "patient context" that the appellant:

> "has served three years in prison for GBH against her husband. She states this was in self-defence after suffering domestic abuse for many years. She suffers from nightmares, difficulty sleeping and persistent low mood, with some suicidal thoughts".

43. Her medication is then listed and it is of note that she is still prescribed amitriptyline and mirtazapine despite the concerns raised two years earlier. And it is stated it would be advisable for the appellant to remain on the same medication as currently to avoid the risk that comes from switching. It is stated also that she has regular contact with an assigned care coordinator, sees a consultant psychiatrist every six months and has received psychological treatment in the past for PTSD. It is noted also that she had suffered from auditory hallucinations resulting in the involvement of the CMHT to prevent her doing significant harm including suicide. Asked as to the impact there would be on her mental health if the CMHT ceased to have this level of involvement it is said that it was likely that she would end up homeless as she is currently being evicted by her landlord. This, it is said, would greatly increase her risk of deterioration in mental stance and increase her risk of suicide. She stated also that she pinches and slaps herself in response to auditory hallucinations in suspected periods of stress, which is consistent with the observations of Dr Das and Professor Hale.

44. In the CMHT's letter of 5 February 2021 it is said that the appellant engages extensively with psychiatric therapy, has been seeing a psychologist every second week for two months, that there is no current record of having missed an appointment with any of these people since March 2020, in which case her engagement is good. They also state it is unlikely that she would be able to work in Nigeria even if she were to engage with psychiatric services there, she is currently unable to work and has been unable to do so for a significant time, being severely disabled by a combination of her underlying mental health condition and the adverse effects of the treatments administered to help her manage this. It stated that she had been diagnosed with treatment for assistance in serious mental illness, indicating a poor prognosis with limited expectation of her returning to her former level of functioning and the ability to hold down employment.

45. It is also said in response to the Home Office's observation that the reference of three years in prison for GBH was a fabrication, the CMHT has reviewed the notes in detail and that the appellant had stated in interview with a psychologist on 19 October 2017 that her conviction was related to a charge of importing drugs on return from a holiday to Barbados with her then boyfriend and that the first mention of GBH against the husband occurred during a crisis assessment on 21 May 2018 when she was presenting with command auditory hallucinations telling her to end her life i.e. during an episode of acute psychosis. This was then repeated in the notes on several occasions during planning meetings but although this had not been repeated by the appellant, it and found its way into a discharge summary. An apology is given for the June 2020 report giving inaccurate information.

46. With regards to medication it is said that the applicant collects medication herself from the local pharmacy and given the complexity of her condition and the impaired intellectual capacities these are placed for her in a blister pack by the pharmacy (as is often used for elderly or demented patients) so she can easily work out which tablets to take at which time.

47. It is observed again that she is on numerous medications associated with dependence and withdrawal and an ability to maintain a regular and reliable supply of them would put her at risk her experiencing withdrawal effects which could be severe including the significant worsening of both her mental state, which in her case could be life-threatening, other withdrawal phenomena including seizures, delirium and cardiovascular changes. It is said also that she continues to be at greatly elevated risk of suicide giving her ongoing symptoms, their inability to be controlled by treatment and the numerous social stress that she is currently experiencing, it being noted she had not responded well to gold standard treatment. The more recent information from a locum consultant psychiatrist on 2 February 2022 confirms more or less the same as before, it being noted also that she has a carer who comes to the house three times a day and helps her climb the stairs, clean and do her shopping, that

she now has diabetes type 2; earlier letters from Dr Horowitz of 4 December 2021 and from Dr Baros of 4 November 2021 add little.

48. Given that the psychiatric evidence is broadly consistent, over a period of nearly six years, I am satisfied that the appellant could not have been feigning the illness claimed and that the diagnoses and observations as to how her mental ill-health manifests itself are accurate and reliable. I accept also the account of what is likely to happen to the appellant if her medication is interrupted or stopped. This effect would be significant and cause significant distress.

49. The evidence of the risk of suicide is less cogent given her lack of suicidal ideation and it is somewhat telling that despite the concerns raised by Professor Hale some four years ago that there had been no change in the medication (amitriptyline) which at even five day's dosage would provide the basis for a fatal overdose.

50. Overall, in the light of these reports, I am satisfied that the appellant is to be treated as a vulnerable witness.

51. I accept that an individual with the appellant's fluctuating mental ill-health, which has included auditory hallucinations and psychotic episodes, may well not be reliable as a witness, particularly in respect of what she said during such episode. I accept the explanation from the CMHT as to how the reference to her having been sent to prison for three years for GBH against her husband arose, but equally I accept that she appears to have given different accounts as to how her conviction arose, it appearing that she had said that she had been in Barbados when the OASys Report showed it was Grenada and there was no mention of a boyfriend. I accept, as Mr Kotas submitted, that the appellant's account of how it was that she came to be in possession of cocaine is less than credible in that it appears she had travelled to Grenada despite not having any real money or it being unclear how she was able to afford this holiday indicative that she had not told the entire truth about how the circumstances of the cocaine being in her luggage.

52. That said, I have not heard the appellant's account of this nor has it been put to her. But she chose not to attend the hearing or otherwise to explain clear difficulties in her account.

53. There is inconsistency as to the contact the appellant has had with family but it does appear that in the OASys Report that she had said she was sending money to family in West Africa. Those interviews were, however, several years ago and it is therefore not necessarily inconsistent that she should now have lost contact with family in Nigeria and Togo. But, she has not given any detailed evidence about what had happened.

54. I bear in mind, however, in assessing the appellant's evidence, that she may have been untruthful in one aspect of her case but truthful in others.

55. The respondent submits that adverse inferences could be drawn to the appellant from her failure to attend to give evidence. Whilst it is correct that the instructing solicitor is not an expert on mental health, he is entitled to give state that he had observed the appellant becoming more and more agitated over time and less able to focus on the need to give evidence. That is consistent with the medical evidence set out above and that the appellant suffers from anxiety when considering her appeal. Given the unfortunate history of this case and the fact that the appellant did attend on a previous occasion before me, which had to be adjourned, I do not consider, that in this case, adverse inferences can fairly be drawn from a failure to attend this last hearing. She has shown willingness to attend in the past.

56. It does not, however, follow that the appellant's evidence reliable, and her mental ill-health does not mean that I can overlook unexplained inconsistencies or fill in gaps in evidence. I accept the appellant has been consistent about a lack of contact with family, not knowing where they are and whilst there is inherent danger in relying what is omitted from the reports of the CMHT, they make no mention of contact that the appellant might have with family.

57. I accept the explanation given that the friend who previously assisted her is, as he said in his witness statement, no longer in a position to do so. There appears to have been some falling out between them and whilst he did not attend to give evidence, it is understandable why, if what is said is true, this did not occur.

58. I bear in mind also that there are dangers inherent in seeking to draw strong conclusions from inconsistencies in the appellant's accounts given over a number of years and in different circumstances, given her mental ill-health as set out above which clearly fluctuates.

59. Taking all these factors into account and viewing the evidence as a whole, bearing very much in mind the medical evidence, I conclude that the appellant has demonstrated to the necessary standard the following:-

    (1) That she is a citizen of Nigeria.

    (2) That she has significant and serious mental ill-health problems.

    (3) That she has a number of physical problems including type 2 diabetes, hypertension and being overweight.

    (4) That a combination of her physical and mental ill-health problems makes it unlikely that she would ever be able to find gainful employment.

    (5) That she does not have the financial support of anybody resident in the United Kingdom.

60. The background evidence presented to me as to the situation the appellant faces on return to Nigeria focuses primarily on the availability of

the drugs which the appellant has been prescribed and the availability and cost of community mental health as well as hospital care. The Amnesty International Report of 28 January 2021 does touch on the more general situation arising from the impact of COVID-19, which is predicated on an assumption that there is no support from family.

61. Whether the appellant has shown that there is no support from family is a central issue as it affects any evaluation of the level of support she may have with regard to accommodation, financial support and in accessing necessary medication and care. But, I bear in mind that family support may not be able to provide her with the drugs she currently takes, given that one in particular, Aripiprazole, is available only in Abuja. I bear in mind also that the medical evidence is that she needs the input from the specialist CMHT to supervise her treatment and provide support for her depression, psychotic symptoms and panic attacks; and, it is not necessarily the case that, even with money, those would be available in Nigeria.

62. There is, however, little evidence from the appellant about family. In her witness statement she says that four of her siblings were killed in a car crash in 2011. Little or nothing is said in the witness statement of 11 October 2016 and whilst I have no reason to doubt the statement from Mr Inquai of 12 May 2020 that Mr Fanyinka is no longer supporting the appellant, there is nothing in the appellant's statement of 9 July 2021 to set out the circumstances in which she ceased to have contact with family. She does not give the names of those siblings she believes still to be alive, what last contact details she has had or any attempts to get back in contact with them. She said that she had not spoken to any of them since she went to prison. There is simply no detail at all of where they were living and reality, the evidence on this point is vague and unsubstantial. It is for the appellant to prove her case even to the lower standard applicable in the case of Article 3. Further, the witness statements from the appellant simply do not engage with what she is recorded as having said in her OASys interview or what she said to Dr Das and Professor Hale about her family.

63. In assessing the appellant's evidence I bear in mind that she suffers from serious mental ill-health and physical ill-health. As noted above, I accept that is an explanation for the quite clear inconsistency regarding the reason she was in prison. But this does not explain the lack of any relevant detail relating to family and the existence of her mental ill-health is not a basis on which to permit me to make a finding that she has no means of family support in Nigeria on such a poor evidential basis. It is simply not possible to infer a lack of support as is claimed.

64. It was for the appellant to demonstrate that she has no support available to her from family. I find that, even making allowances for her vulnerability and mental ill-health, she has not done so. That is a significant omission.

65. In the light of these findings, I turn to whether the appellant's health, including the risk of suicide is a sufficient basis to engage Article 3. In doing so, I remind myself of what was said in AM (Zimbabwe) at [33] (see above at [30]) and the test set out in J v SSHD, as adapted and set out in MY at [16] – [21]

66. Is a prima facie case made out?

67. It is necessary to look at the appellant's situation on return holistically as she requires support over an above her immediate clinical needs.

68. The evidence from the expert report and indeed the CPIN as to the availability of drugs and psychiatric treatment depends, to a significant extent, on the availability of family support in terms of giving her access to the drugs which she requires for her physical and mental health and also support currently provided by the mental health team.

69. I accept that the evidence shows that some of the drugs on which the appellant relies are available only in limited areas, and that there is limited availability of the type of day to day support the appellant receives.

70. I accept, as is submitted, that the appellant needs medical treatment, a safe environment funds for medication and accommodation, as well as social support.

71. I am satisfied that if this current support/treatment were removed, then the appellant's health would, on the basis of the material provided, deteriorate significantly and rapidly, in part due to the effects of the withdrawal of medication. If, as she says, she would have no family support, then she would effectively have no accommodation available to her and even the money that would be available to her as a grant on deportation, would not be sufficient for her to find appropriate rented accommodation as a single women, given the evidence of very large deposits of over a year's rent being required. I accept that she could not work, and accordingly, given the evidence that she would have to pay for care and medication, she is likely to be destitute.

72. It is, on the factual matrix of this case, artificial to separate the effects of lack of medication from lack of support in terms of financial resources/ accommodation as they are inextricably linked given the nature of the appellant's medical conditions which prevent her from working. The circumstances in Paposhvili were different, the issue being primarily the unavailability of specific medication. AM (Zimbabwe) was concerned again with physical illness.

73. The consequences of the withdrawal of medication for depression and psychosis is so not so easy to quantify as, for example, the withdrawal of kidney dialysis or anti-retroviral drugs. In both those cases, it is relatively easy to discern that death will follow, and that there is thus a significant and rapid reduction in life expectancy. Whether that would occur if medication for mental ill-health is withdrawn is less easy to quantify and

the chain of causation less easy to determine. I accept that suicide would clearly fall within the ambit of harm sufficient to engage article 3, but short of that, it is difficult to ascertain whether a decline in mental health would be sufficiently severe so to do, and thus, such cases will in their nature be very exceptional, and rare.

74. An additional complicating factor is that a deterioration in mental health may contribute, as it does here, to ability to work and to function normally in society, which may in turn result in destitution.

75. Drawing these factors together, and viewing the evidence holistically, I am satisfied that the appellant would be in a rapid, downward spiral if the current medication were withdrawn and she were without support, both financial and social, and without accommodation as a result of the cumulative effects of her physical and mental ill health which prevents her from working.

76. Whether or not this would occur turns significantly on the extent to which she has support from family which may mitigate some, most or all of the difficulties she faces.

77. It makes little difference whether the existence of family support is considered in assessing whether there is a prima facie case, or whether the respondent has shown that help would be available.

78. The appellant has not shown, given the absence of a failure to show that there would be no family support, that she could not be accommodated or provided with some support in terms of medication and/or psychiatric health. Her situation would not be as good as it is now, but that is not the test, and I find that she has not demonstrated to the appropriate standard that she has a prima facie case, as she has not shown that the level of help she would receive is such as to expose her to a serious, rapid and irreversible decline in her state of health. There is insufficient material to show that that is the case in respect of her physical health or indeed of ill-health if she had family support to access care and medication. Further, it is difficult to see how it could be shown that a decline in the appellant's mental health would be irreversible absent suicide which is clearly irreversible. Thus I accept that some extreme occurrences of self-harm may be irreversible, it is difficult to see how relatively minor indicators of self-harm, which the appellant has undertaken in terms of pinching and cutting could amount to being serious and irreversible.

79. I accept, however, that she would able to work for a living given her current state of health and on the basis of the evidence of the medical experts who have confirmed that is so. The fact that she is able to travel under her own steam and initiative is not indicative that she would be able to hold down employment particularly given her age and physical ill-health as well as the fact that she has not been in employment for several years. I am satisfied that in any view, she is unable to work which, in the absence of family support would put her in in a difficult position.

80. If, however, I am wrong on whether the appellant has shown a prima facie case, I consider that the respondent has demonstrated that there would be a level of care available for her, albeit with family help, and that the appellant has not shown she would not be able to access it with family help

81. In reaching these conclusions, I have considered also the risk of the appellant committing suicide. In doing so, I have considered the principles set out in MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC), paying particular attention to J v Secretary of State for the Home Department [2005] EWCA Civ 629 as reformulated in Y (Sri Lanka) v SSHD [2009] EWCA Civ 362. I take note also of what was said in MY at [19] to [21]:

> 19. Sir Duncan Ouseley in R (Carlos) v SSHD [2021] EWHC 986 (Admin) stated at [159]:
>
> > "Article 3 and suicide risk: this is another facet to which Paposhvili and AM (Zimbabwe) apply. It is for EC to establish the real risk of a completed act of suicide. Of course, the risk must stem, not from a voluntary act, but from impulses which he is not able to control because of his mental state".
>
> 20. Insofar as the judgment in AXB v SSHD [2019] UKUT 397 relates to the procedural aspects arising from Paposhvili, what is stated at [112] (replicated at paragraph 3 of the headnote) was endorsed by the Supreme Court in AM:-
>
> > "The burden is on the individual appellant to establish that, if he is removed, there is a real risk of a breach of Article 3 ECHR to the standard and threshold which apply. If the appellant provides evidence which is capable of proving his case to the standard which applies, the Secretary of State will be precluded from removing the appellant unless she is able to provide evidence countering the appellant's evidence or dispelling doubts arising from that evidence. Depending on the particular circumstances of the case, such evidence might include general evidence, specific evidence from the Receiving State following enquiries made or assurances from the Receiving State concerning the treatment of the appellant following return."
>
> 21. In respect of the obligations on the Respondent following Paposhvili, the Supreme Court stated at [33] as follows:-
>
> > "In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the Paposhvili case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable

> treatment in the receiving state. What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel "any" doubts raised by the applicant's evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to "serious doubts", he will realise that "any" doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond all doubt is a concept rightly unknown to the Convention. "

82. I consider that, given the lack of recent attempts to kill herself, and the medical evidence as a whole, that there is no real risk of the appellant doing so prior to or during the deportation process. I am not satisfied either, on the evidence, that there is a subjective fear on the part of the appellant of serious ill-treatment, or an objective fear thereof; this appeal can be distinguished from the Sri Lankan cases on its facts.

83. I accept that the infrastructure in Nigeria is poor, compared to that in the United Kingdom, but the extent to which the appellant is or is not able to access support and treatment turns very much on support from her family. And, viewing the evidence as a whole, I cannot be satisfied that the much higher risk that would exist in Nigeria is such that, with support from family, be so high as to engage Article 3.

84. For these reasons I am not satisfied that deporting the appellant to Nigeria would be contrary to Article 3.

85. I would, however add that my decision may well have been otherwise had it been shown that there was no support available from family. The cumulative effects of not being able to obtain a job, the difficulty of renting accommodation (substantially deposits of over a years' rent being the norm), and the appellant's combined mental and physical ill-health are such that there is a real risk of her becoming destitute and unable to access treatment. The evidence demonstrates that withdrawal of that treatment would have severe side effects.

Article 8

86. Section 117C of the 2002 Act provides as follows:

> **117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—

> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Paragraph 398 of the Immigration Rules replicates the framework.

87. In the case of individuals who have been sentenced to a period of imprisonment of four years or more (as is the case here), the test is one of "very compelling circumstances, over and above those described in Exceptions 1 and 2".

88. I accept that "over and above the Exceptions" does not exclude or restrict the analysis to factors relevant to the issues dealt with in the Exceptions and we adopt the approach endorsed by Jackson LJ in NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [37]:

> 37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

89. I observe also the comments made by the Upper Tribunal in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) at [16] and [20]:

> 16. By contrast, the issue of whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise

> is required, in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR.
>
> …
>
> 20. For these reasons, despite Ms Patyna's elegant submissions, we find the effect of section 117C is that a court or tribunal, in determining whether there are very compelling circumstances, as required by subsection (6), must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations. Nothing in KO (Nigeria) demands a contrary conclusion.

90. In determining the public interest, regard is to be had to what is said in Section 117C(2); namely, that the more serious the offence, the greater is the public interest in deportation (MS at [47]); by making the seriousness of the offence the touchstone for determining the strength of the public interest in deportation, parliament, in enacting Section 117C(2), must have intended courts and Tribunals to have regard to more than the mere question of whether the particular foreign criminal, if allowed to remain in the United Kingdom, would pose a risk to United Kingdom society(MS at [50]). Further, an element of the general public interest is the deterrent effect upon foreign citizens “of understanding that a serious offence will normally precipitate their deportation [might] be a more powerful aid to the prevention of crime than the removal from the UK of one foreign criminal judged as likely to reoffend” (MS at [69]).

91. With regards to the extent to which rehabilitation is to be taken into account I have applied the principles set out in HA (Iraq) v SSHD [2020] EWCA Civ 1176 at [132] to [141].

92. I find that the appellant does not meet exception 1. She has not been lawfully resident here for most of her life. She is, to a degree integrated into life in the United Kingdom, given that she has friends here, and relies on a network of support. But she has also clearly shown that she is prepared to engage in serious criminal activity in facilitating the trafficking of drugs which is strongly indicative of a lack of integration. She may well face some difficulty on return (as noted above) owing to her inability to work and the difficulty of accessing adequate medication and care, but the extent of those difficulties turns on the availability of support from family which, for the reasons set out above, she has not shown will not be available. Accordingly, she does not meet the requirements of Exception 1 by a significant margin.

93. It is not arguable that Exception 2 applies as the appellant is not in a family relationship. Her marriage broke down many years ago.

94. I consider that the public interest in deporting this appellant is very strong in the wider terms of deterrence and in the public confidence that somebody given leave here should be deported if they commit a crime of

such gravity. I accept that the appellant has not been convicted of any crimes since the index offence but that is not a sufficient indication that she has become rehabilitated or that anything other than a marginal amount of weight should be attached to that. I therefore attach little weight to the fact that she has not been convicted in the time since the index conviction. We accept that she regrets what she did and some little weight can be attached to that.

95. Taking the effects of deportation of the appellant cumulatively the effects will be harsh in that she will have to adapt again to life in Nigeria after a prolonged absence, and has significant health issues. But in this case the gravity of the offending is significantly higher than the four-year cut-off which increases the public interest in deportation as does the nature of the crime – the importation of significant quantities of illegal drugs.

96. In conclusion, I find that the decision to deport the appellant is proportionate.

Notice of Decision

1 The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

2 I remake the decision by dismission the appeal on all grounds.

Signed Date 20 April 2022

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul