IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001717

First-tier Tribunal No: PA/51389/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 26th of September 2026

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A S M
BY HIS LITIGATION FRIEND A M
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Susana Cunha, a Senior Home Office Presenting Officer
For the Respondent: Mr Pierre Georget of Counsel, instructed by Duncan Lewis Solicitors

Heard at Field House on 17 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant has been granted anonymity. He is to be referred to in these proceedings as A S M and his litigation friend as A M. No-one shall publish or reveal any information, including the name or address of the claimant or any member of his family, which would be likely to lead members of the public to identify the claimant**. Failure to comply with this order could amount to a contempt of court**.

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 4 April 2022 refusing international protection pursuant to the Refugee Convention or leave to remain on human rights grounds. He is a citizen of India.

2. The claimant appears by his litigation friend (his son), and an anonymity order applies to both of them.

3. For the reasons which we now give, we find that the Secretary of State's appeal cannot succeed, and we uphold the decision of the First-tier Tribunal.

Background

4. The claimant entered the UK in March 2006 as a visitor, but overstayed when his leave expired. He made two unsuccessful asylum claims before the present one. His original claim for international protection was based on his membership of the Congress Party and circumstances around the 1999 elections in India. That is not pursued before us.

5. In January 2018, the claimant was arrested for fraud, convicted, and sentenced to 4 months imprisonment. After completing his sentence he was detained under the Immigration Acts and claimed asylum. His application was refused and certified clearly unfounded pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002 (as amended). He had no in-country right of appeal, but was not removed.

6. On 17 March 2021, the claimant was released from detention and made further human rights submissions, based on his mental health issues, which were accepted as a fresh claim, but refused on the 4 April 2022. That is the decision under challenge.

First-tier Tribunal decision

7. The claimant's appeal against the Secretary of State's decision was allowed by First-tier Tribunal Judge Bird on human rights grounds only, based on what she found to be the claimant's serious and deteriorating mental health issues, as evidenced in the expert psychiatric reports of Professor Abou-Salem and Professor Piyal Sen. Professor Sen gave evidence to the First-tier Tribunal, by video link. At [41]-[79], the First-tier Judge considered the psychiatric evidence before her. At [80]-[99], she considered the adequacy of the Secretary of State's review of the psychiatric evidence, noting that Professor Sen had appeared at hearing and that '[his] evidence and his opinion was not dislodged by thorough and proper cross-examination' on behalf of the Secretary of State.

8. At [100], the First-tier Judge made a positive finding that the evidence showed that this claimant was a seriously ill person and would not be able to access appropriate treatment in the receiving state (India). He had complex mental health problems including PTSD, severe depression,

psychotic symptoms including delusions and hallucinations, nightmares which put him a risk of self-harm and suicide and which leave him very perplexed, confused and cognitively impaired.

9. The reason why the claimant would not be able to seek medical help in India was that he had no capacity to understand his own mental health and could not manage it without his family who are in the UK, as set out at [105] of the decision. These findings of fact stand unchallenged in the grounds of appeal.

10. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

11. The Secretary of State's grounds of appeal argued that the First-tier Judge had failed properly to apply *AM (Zimbabwe)* [2020] UKSC 17, which confirmed that the modest extension of Article 3 ECHR in *Paposhvili v Belgium* applies in the UK.

12. She contended that, the First-tier Tribunal having found that there were serious doubts concerning the impact of removal on the claimant's mental health issues, the Tribunal had erred in not requiring the Secretary of State to obtain an individual assurance the care which would be available in the receiving state and whether it would, in practice, suffice to prevent the claimant's exposure to treatment contrary to Article 3 ECHR.

13. Upper Tribunal Judge Rimington granted permission on the basis that it was, just, arguable in light of the judgment of the Court of Appeal in *THTN v Secretary of State for the Home Department* [2023] EWCA Civ 1222 (20 October 2023), that the First-tier Judge's approach to Article 3 was erroneous.

Rule 24 Reply

14. The claimant filed a Rule 24 Reply. He argued that there was no principle of law, either in *AM (Zimbabwe)* or any other authority, which required the First-tier Tribunal to give the Secretary of State a further opportunity to seek specific assurances from the state to which the claimant was to be returned. The Secretary of State had not sought any such assurances.

15. The procedural obligations at [23(b)-(e)] of *AM (Zimbabwe)* were burdens on the Secretary of State, not on the First-tier Tribunal: see also [33] of the same Supreme Court judgment. It was for the Secretary of State to make a 'strategic litigation decision' whether to seek assurances, when preparing for the hearing of the appeal. She had adduced country evidence but had not sought assurances, despite several adjournments of the substantive First-tier Tribunal hearing.

16. Nothing in either *AM (Zimbabwe)* or *THTN* imposed any procedural obligation on a Tribunal to afford a further opportunity to do so, when the Secretary of State had already had a fair opportunity to do so, and had lost

the appeal. It was contrary to the settled principle of finality in litigation: see e.g. *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16 at [29]-[40] in the joint opinion of Lord Briggs JSC and Lord Sales JSC, with whom the other members of the Court agreed. In addition, it was not clear what timetable would need to be adopted to enable the claimant to respond to any such evidence if obtained, and it was contrary to the overriding objective further to delay an outcome for a claimant whose health was declining and who was vulnerable and seriously unwell.

17. Even if, which was not accepted, such a principle did exist, the basis on which the First-tier Judge allowed the appeal was that the claimant needed support from his UK family members, so the availability of treatment on return was not material to the outcome of the appeal: see [106] in the First-tier Judge's decision.

18. The matter now comes before us to determine whether the First-tier Tribunal erred in law, whether any such error was material and if so, whether the decision of the First-tier Tribunal should be set aside and remade.

The legal framework

19. This case will turn on the scope of the modest Article 3 extension in *Paposhvili,* as considered in *AM (Zimbabwe),* at [23] and [33] in the opinion of Lord Wilson JSC, with whom the other members of the Court agreed:

> "23. Its new focus on the existence and accessibility of appropriate treatment in the receiving state led the Grand Chamber in the *Paposhvili* case to make significant pronouncements about the procedural requirements of article 3 in that regard. It held
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> (a) in para 186 that it was for applicants to adduce before the returning state evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, they would be exposed to a real risk of subjection to treatment contrary to article 3;
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> (b) in para 187 that, where such evidence was adduced in support of an application under article 3, it was for the returning state to "dispel any doubts raised by it"; to subject the alleged risk to close scrutiny; and to address reports of reputable organisations about treatment in the receiving state;
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> (c) in para 189 that the returning state had to "verify on a case-by-case basis" whether the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure to treatment contrary to article 3;
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> (d) in para 190 that the returning state also had to consider the accessibility of the treatment to the particular applicant, including by reference to its cost if any, to the existence of a family network and to its geographical location; and

> (e) in para 191 that if, following examination of the relevant information, serious doubts continued to surround the impact of removal, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant.
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> These *procedural obligations on returning states*, at first sight very onerous, will require study in paras 32 and 33 below. ...
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> 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*]

20. The correct procedural approach was further clarified by the European Court of Human Rights in *Savran v Denmark* at [134]-[136]:

> "...134. Firstly, the Court reiterates that the evidence adduced must be "capable of demonstrating that there are substantial grounds" for believing that as a "seriously ill person", the applicant "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" (ibid., § 183).
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> 135. Secondly, it is only after this threshold test has been met, and thus Article 3 is applicable, that *the returning State's obligations* listed in paragraphs 187-91 of the *Paposhvili* judgment (see paragraph 130 above) become of relevance.
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> 136. Thirdly, the Court emphasises the procedural nature of the Contracting States' obligations under Article 3 of the Convention in cases involving the expulsion of seriously ill aliens. .... By virtue of Article 1 of the Convention, *the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities, who are thus required to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3*. ..."
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> [*Emphasis added*]

21. In *THTN* at [48]-[51], the Court of Appeal set out the correct approach to the *Paposhvili* test, having regard also to the Grand Chamber's *Savran* guidance. Lord Justice William Davis, with whom Lord Justice Peter Jackson and Lady Justice Nicola Davies agreed, expressed the approach thus:

> "48. ...As was explained at [186] of *Paposhvili* "it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment". Rather, the applicant must "adduce

evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3". ...Stage one of the process requires the applicant to provide strong evidence of the seriousness of the illness including the treatment involved and the consequences of removal of treatment. ...

49. In *AM (Zimbabwe)* the Supreme Court anticipated that *Savran* would shed light on the procedural requirements. I am satisfied that Savran confirmed the position. The threshold test set out at [134] clearly requires evidence from the applicant about the position in the receiving state *before there is any obligation on the returning state*. The Strasbourg court does not use the term *prima facie* case since that is not a concept commonly in use at that court. However, it is the term used by Sales LJ (as he then was) in the Court of Appeal in *AM(Zimbabwe)*. It is a concept familiar in this jurisdiction and more than capable of being applied in relation to applications of this kind.

50. ... *Rather than asking whether the appellant had proved the serious risk of a violation of Article 3 were she to be removed to Vietnam, the [First-tier Tribunal] should have asked whether there were substantial grounds for believing that removal to Vietnam would lead to a serious risk of a violation of the appellant's Article 3 rights.* I cannot say that the only answer to that question would have been negative. Had the [First-tier Tribunal] concluded that the evidence of Dr Tran was sufficient to cast doubt on the availability of relevant medical treatment, *it would have been for the SSHD to decide whether to adduce evidence on the topic*.

51. In the real world, the SSHD in a case such as this would be almost certain to adduce country information evidence in anticipation of the [First-Tier Tribunal's] consideration of the issue. In the unlikely event that for some excusable reason such evidence had not been adduced, the [First-tier Tribunal] would be likely to give the SSHD an opportunity to remedy the position. *Where the SSHD is making the primary decision, the position will be the same. It will be for her to assess the strength of the evidence in respect of the medical condition relied on by the applicant. If she concludes that it is strong and the applicant provides evidence which provides substantial grounds for doubting the availability of treatment in the receiving state, she will obtain relevant country information before making her decision. "*

[*Emphasis added*]

Submissions

22. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal.

23. For the Secretary of State, Ms Cunha relied on her grounds of appeal but sought to reopen the finding by the First-tier Judge on the first question. She accepted that this was not argued in the Secretary of State's grounds of appeal and that no application to vary the grounds of appeal had been made. She further accepted that it was not appropriate to make any

application to vary the grounds at the error of law hearing and made no such application.

24. She further relied on Judge Rimington's very brief grant of permission and the reference therein to *THTN*. Ms Cunha asserted, without reference to any legal authority, that there was no burden on the Secretary of State once the primary burden had been discharged.

25. The Secretary of State had ample opportunity to adduce country of origin evidence, and did submit such evidence. The Secretary of State never asked the First-tier Tribunal for time to seek and adduce assurances from the Indian government.

26. Having heard Ms Cunha's submissions, we indicated that we would be dismissing the Secretary of State's appeal and that it was not necessary to hear from Mr Georget for the claimant.

Conclusions

27. The *THTN/Savran* test which the Tribunal is required to apply may be summarised as follows. The First-tier Judge was required to ask:

    (i) whether the claimant had adduced 'evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3'; and if so

    (ii) whether the Secretary of State assessed correctly the strength of the evidence of the medical condition relied upon, and obtained relevant country evidence before making her decision.

28. The First-tier Tribunal summarised Stage 1 of the applicable test correctly at [35]-[39], placing the burden on the claimant. At [40], she stated that:

> "40. Once the threshold test has been met by the [claimant] and Article 3 is engaged, the burden then shifts to the [Secretary of State] to rebut the *prima facie* case raised by the [claimant]. … "

    That is a correct self-direction as to the procedural approach required, noting the shift to an obligation on the Secretary of State to rebut the *prima facie* case once made.

29. The only finding challenged is whether as a matter of procedure the Secretary of State had any responsibility to examine the medical evidence properly and seek appropriate country evidence of the likely impact of return on this claimant, including if appropriate assurances from the Indian government, or whether, if the First-tier Tribunal did not direct such enquiries, she had no duty to do so.

30. It is clear from our review of the authorities at [16]-[18] above that the Secretary of State is wrong about the procedural point on which the grounds rely: it is clear that once the primary burden on the claimant has been discharged, the burden of rebuttal shifts to the Secretary of State and it is open to her to seek assurances or provide relevant evidence, all of which has to be done before the substantive hearing. There was no application for an adjournment, and we are satisfied that there is no duty on the First-tier Judge to offer an adjournment for that purpose, or direct the Secretary of State to seek appropriate assurances if the Secretary of State was not adequately prepared for the hearing.

31. The burden of produce relevant country evidence, and seeking assurances if necessary, lies on the Secretary of State and not on the First-tier or Upper Tribunal. *THTN* does not assist her in this respect: it is equally clear from that decision where the burden lies. The Secretary of State has produced no evidence which could or would rebut the medical evidence that the claimant requires the direct physical support of his family in the UK to access the medical help he needs, and that this would not be available in India.

32. Accordingly, we dismiss the appeal of the Secretary of State and uphold the decision of the First-tier Tribunal.

Decision:

33. For the foregoing reasons, our decision is as follows:

    The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. We do not set aside the decision but order that it shall stand.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 20 September 2024