Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00131/2016

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 30 June 2017	**On : 11 July 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AMADU FOFANAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Gasparro, instructed by Turpin & Miller Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 19 September 2016 refusing his protection and human rights claim further to a decision to deport him pursuant to section 32(5) of the UK Borders Act 2007 and a decision to cease his refugee status.

2. The appellant, born on 1 January 1984, is a citizen of Sierra Leone. He arrived in the UK on 19 July 2002 and claimed asylum. On 26 May 2004 he was granted refugee status and indefinite leave to enter.

3. On 12 November 2015 the appellant was convicted of possession with intent to supply a controlled Class A drug, heroin, and on 15 January 2016 he was sentenced to two years' imprisonment. On 17 March 2016 he was served with a decision to make a deportation order under section 32(5). The respondent also, in a letter of the same date, invited the appellant to seek to rebut the presumption under section 72 of the Nationality, Immigration Act 2002 that he had been convicted of a particularly serious crime and constituted a danger to the community. On 18 March 2016 the appellant stated that he wished to return to Sierra Leone and signed a disclaimer.

4. On 8 June 2016 the appellant was served with a notice of intention to cease his refugee status under Article 1C(5) of the Refugee Convention and paragraph 339A of the immigration rules on the basis that the circumstances in connection with which he had been recognised as a refugee had ceased to exist. On 23 June 2016 the respondent notified the UNHCR of the same and invited a response, which was received in a letter dated 1 September 2016. In a decision dated 19 September 2016 the respondent revoked the appellant's protection refugee status and refused his human rights claim and maintained the decision to deport him. A deportation order was issued the same day pursuant to section 32(5) of the 2007 Act.

5. In her notification of intention to cease (revoke) the appellant's refugee status dated 7 June 2016, the respondent noted that he had been granted refugee status on the basis that, as a young child having been previously captured and held hostage by the Revolutionary United Front (RUF) rebels and government forces and forced to become a child slave, to return him to Sierra Leone would result in his suffering mental anguish and torment as his parents had been killed and there would be no one there who would be able to care for him. The respondent noted that the political situation in Sierra Leone had significantly changed since he was granted refugee status and there was now a new government in place and an improved country situation. The respondent considered the appellant's claim to fear his father's friend on account of the fact that he had stolen a diamond from him and noted that he last saw him when he was 15 years of age whereas he was now an adult of 32 years and that he was based in Guinea. The respondent considered it unlikely, due to the passage of time, that the appellant would be targeted by his father's friend and did not accept that he would be at risk of persecution in Sierra Leone.

6. The respondent, in making her decision of 19 September 2016 to refuse the appellant's protection and human rights claim and to revoke his refugee status, noted that the appellant had amassed 24 convictions in the UK from 6 December 2005 for 32 offences including offences against the person, offences against property, theft and kindred offences, offences relating to police/court/prisons, drugs offences and firearms/shotguns/offensive weapons. The respondent considered the issue of cessation, noting that the appellant had been granted refugee status as an unaccompanied minor on the basis of the poor humanitarian situation in Sierra Leone but concluding that the situation had significantly improved and that he would be able to re-integrate into the country. It was not accepted that he would face the prospect of living

in circumstances falling below that which was acceptable in humanitarian protection terms and it was therefore not accepted that his return to Sierra Leone would lead to treatment contrary to Article 3 of the ECHR. The respondent was satisfied that the appellant could no longer, because the circumstances in connection with which he was recognised as a refugee had ceased to exist, continue to refuse to avail himself of the protection of his country of nationality. His refugee status was therefore revoked. The respondent went on to consider Article 8 of the ECHR, noting that the appellant had failed to respond to the notification of liability to deportation and had provided no details of a partner or children in the UK. The respondent therefore concluded that the appellant could not meet the requirements in paragraph 399(a) and (b) or 399A and that there were no very compelling circumstances outweighing the public interest in his deportation. The respondent found that the appellant could not meet any of the exceptions to automatic deportation in section 33 of the 2007 Act.

7. The appellant appealed against that decision. His appeal was heard by Judge Hodgkinson in the First-tier Tribunal on 9 March 2017 and he gave oral evidence before the judge. The judge recorded that it was the appellant's contention that he continued to be at risk on return to Sierra Leone on account of his fear of the person from whom he stole a diamond and his fear of former members of the RUF and his neighbours in his home area due to him having previously been a recruited RUF child soldier. It was also asserted that the appellant's removal to Sierra Leone would breach his Article 3 and 8 human rights, in relation to his ability to reintegrate into Sierra Leone, his significant mental health problems and alleged suicide risk and his family and private life.

8. It was noted that the decision of 19 September 2016 did not refer to section 72 and that it did not contain a section 72 certification. However it was accepted that section 72 applied and that the appellant's case had been certified under section 72. In considering the appellant's propensity to re-offend, the judge considered the appellant's mental health problems, as addressed in a psychological report from a Dr Brock Chisholm, dated 12 December 2016, noting the conclusion therein that he suffered from severe mental health repercussions arising from his experiences as a child soldier in Sierra Leone and within the context of a family history of psychosis and that he suffered from PTSD accompanied by psychotic symptoms such as those seen in a diagnosis of schizophrenia. The judge also had regard to the Consideration Minute from the Home Office caseworker who was responsible for the appellant's grant of refugee status. The judge considered that the appellant would probably commit further offences and that he had failed to rebut the presumption in section 72(2) that he posed a danger to the community and concluded that he should be excluded from Refugee Convention protection.

9. The judge then went on to consider risk on return to Sierra Leone. He considered that the appellant had fabricated his claim of a recent and specific adverse interest in him in Sierra Leone, he did not accept that he would be at risk on the basis of the stolen diamond and he did not accept that he would be at risk on account of having been forcibly recruited as a child soldier. He then

went on to consider the appellant's mental health and the relevance of that to an Article 3 and 8 claim. It was argued on behalf of the appellant, and with reference to the European Court judgement of the Grand Chamber in Paposhvili v. Belgium - 41738/10, that his removal would breach Article 3 as a result of his mental health problems. However the judge did not accept that the appellant's mental health problems reached the relevant threshold to engage Article 3. With regard to Article 8 the judge considered a statement from the appellant's former partner and the mother of his two daughters, Alice, and accepted that the children were the appellant's. He accepted that the appellant enjoyed a family life with his children but not with Alice, but he did not accept that it would be unduly harsh for the children to remain in the UK without the appellant. He found that the appellant could not, therefore, meet the requirements of paragraph 399(a) or (b) of the immigration rules. The judge accepted that the appellant had achieved a limited level of social and cultural integration in the UK and that there would be very significant obstacles to his integration in Sierra Leone, but concluded that he could not meet the requirements in paragraph 399A as he had not been resident in the UK for most of his life. The judge concluded further that the public interest in the appellant's deportation was not outweighed by compelling circumstances and that his removal would not be disproportionate or in breach of Article 8. Accordingly he dismissed the appeal on all grounds.

10. The respondent sought permission to appeal to the Upper Tribunal in regard to the judge's decision on Article 3 and 8. Permission to appeal was initially refused but was subsequently granted in the Upper Tribunal on 11 May 2017.

Appeal hearing and submissions

11. The appeal came before me on 30 June 2017. I heard submissions on the error of law.

12. Ms Gasparro submitted that in light of the conclusions of the doctor which the judge had accepted, his findings at [64], that the appellant was "currently reasonably well" and "there is no evidence before me which establishes that his removal to Sierra Leone would result in an irreversible decline in his health" were perverse. She submitted that the judge's Article 3 assessment was therefore wrong. Further, the judge had failed in his proportionality assessment under Article 8, to consider relevant matters including what would happen to the appellant on return to Sierra Leone and the fact that his criminality was a direct result of the actions of non-state actors in Sierra Leone and that his mental health problems did not arise out of a naturally occurring disease but were a result of the same reasons leading to the grant of refugee status. Ms Gasparro also submitted that the judge had misinterpreted the doctor's conclusions in regard to the risk of suicide and that his assessment of suicide risk was erroneous.

13. Mr Tufan submitted that it was not irrational for the judge to conclude that the appellant was currently reasonably well, as there was no evidence that he

had been sectioned and his condition was stable and was being managed by medication. Mr Tufan submitted that the judge was bound by the judgment in N v. Secretary of State for the Home Department [2005] UKHL 31, not Paposhvili, and that he had given proper consideration to the risk of suicide in accordance with the decision in J v Secretary of State for the Home Department [2005] EWCA Civ 629. He relied upon the case of KH (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1354. And submitted that there were no errors of law in the judge's decision.

14. Ms Gasparro, in response, reiterated the submissions previously made, submitting that the appellant's case could be distinguished from the reliance in N on D v United Kingdom (1997) 24 EHRR 425 cases.

Consideration and findings

15. The challenge to the judge's findings on Article 3 is a narrow one and boils down to the question of whether the judge, in light of the accepted conclusions in Dr Chisholm's report as recorded at [47] to [50] of his decision, was entitled to conclude that the appellant did not meet the high threshold so as to engage Article 3. The grounds in particular challenge, in light of the medical report, the judge's findings at [64], that "the appellant is currently reasonably well" and "there is no evidence before me which establishes that his removal to Sierra Leone would result in an *irreversible* decline in his health or…a reduction in his life expectancy".

16. It cannot be disputed that the judge conducted a thorough and careful assessment of the medical evidence. It is relevant to consider the findings that he made.

17. At [61] the judge considered the evidence of medical care available to the appellant in Sierra Leone, making the following finding:

> "The material satisfies me that, whilst there is *some*, extremely limited, psychiatric care in Sierra Leone, such care is so limited in scope and availability that, in real terms, I entirely accept that the appellant, bearing in mind his mental health problems and the content of Dr Chisholm's report, would neither seek to access, nor would he in reality be able to access any effective treatment. Consequently, I accept that his health would deteriorate in Sierra Leone, as described by Dr Chisholm, whose report, I reiterate, is not the subject of any challenge."

18. When considering paragraph 399A(c), at [82], the judge made the following finding:

> "I accept that he would be destitute if removed to Sierra Leone, with no ability to work, no work prospects and nobody realistically to whom he might turn. I also accept that such would involve at least a gradual deterioration in the appellant's well-being, as indicated by Dr Chisholm."

19. The judge also accepted in its entirety the conclusions and opinion of Dr Chisholm, which included the following:

> At [47]: "Reference is made to a well-documented history of persecutory delusions and other psychotic and post-traumatic stress disorder (PTSD) symptoms, with documented hallucinations. Reference is also made to there being a history of suicidal thoughts but no history of suicidal intent or behaviour…Dr Chisholm indicates that there is consistent opinion that he is not capable of taking care of his own mental health and that he requires medication and monitoring, with a history of poor diet and poor self-care skills…"
>
> At [48}: "the appellant suffers from severe mental health repercussions arising from his experiences as a child soldier in Sierra Leone…the appellant suffers from PTSD, accompanied by psychotic symptoms such as those seen in the diagnosis of schizophrenia."
>
> At [49]: "the appellant's medical records "*clearly indicate that there is little doubt that he will relapse without medication and monitoring*." Dr Chisholm proceeds, in 48-49 of his report, as follows:
>
> > "48. If he relapses he will present a clear danger to himself, others and is likely to become severely mentally ill. He will be completely unable to care for himself, including neglecting his physical needs such as epilepsy medication, which could well be life-threatening."
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> At [50]: "In 50-58 of his report, Dr Chisholm concludes as follows:…
>
> > "52. Even if there were good mental health services in Sierra Leone, which there are not, it is likely that he would relapse. Without medication, and people to help him to regularly take his medication and monitor and change it according to need, it is extremely likely that he will have a relapse of severe paranoia, delusions and hallucinations.
> >
> > 53. If he relapses in Sierra Leone, it seems almost inconceivable that he will be able to care for himself. In my opinion this man is at very great risk of harm to himself through epilepsy, drug use, poor diet and an inability to find work or even accommodation…
> >
> > 54. … the chances of his relapse in Sierra Leone are enormous. In this case they will be prolonged dangerous and severe …
> >
> > 58. Because of his poor self care, he is likely to have some relapse in the UK, but this can be easily managed. He will have a severe psychotic relapse if he was sent to Sierra Leone, where he has no social support and there are very poor mental health services. He will present a very severe risk to himself and others."

20. The judge also referred, at [52], to the Consideration Minute from the Home Office caseworker responsible for the grant of refugee status, who accepted at that time, in May 2004, that if the appellant returned to Sierra Leone "*his fragile mental state would be stretched to the limit*" and that "*this young man would suffer mental anguish and torment if he was to return to Sierra Leone*".

21. There can no criticism of the judge's consideration of the evidence, which was particularly thorough and detailed. In such circumstances, I have given considerable thought as to whether or not the appellant's challenge to the judge's conclusion at [64] is little more than a disagreement with his decision. I am also conscious that I must not simply be substituting my own decision for that of another judge. I note that the respondent, in her rule 24 response acknowledged at [2] that this was a finely balanced case but considered that the judge had given adequate reasons for his findings. However, after careful deliberation I find myself in agreement with Ms Gasparro that, in applying the above findings on the medical evidence to the test in Paposhvili, which is what the judge did at [64], he reached conclusions that were simply unsustainable. Whilst the judge's conclusion, that the appellant was "currently reasonably well", was plainly a reflection of the fact that his condition was currently stable, it is clear from the medical evidence that that would not be the case if he were not being monitored in taking his medication and if he was not taking his medication. Furthermore, there clearly *was* evidence before the judge that established that the appellant's removal to Sierra Leone would result in a rapid and irreversible decline in his state of health. The judge's conclusion at [64] was not, therefore, in my view, open to him on the evidence before him and it seems to me that the evidence before the judge established that the appellant was able to meet the test in Paposhvili for establishing an Article 3 claim.

22. Of course that would be immaterial in the long-run, if the appellant was nevertheless unable to meet the more stringent test in N. As the judge properly found at [64], N was the authoritative judgment and Paposhvili was not binding on him. I therefore turn to the question of whether the appellant was able to meet the very high test in N.

23. In N, Baroness Hale, in agreeing that the appropriate test in Article 3 health cases had to be the same stringent test in D v United Kingdom (1997) 24 EHRR 425, said the following:

> "69. In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity. This is to the same effect as the text prepared by my noble and learned friend, Lord Hope of Craighead. It sums up the facts in *D*. It is not met on the facts of this case.
>
> 70. There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them."

24. At [70], Baroness Hale therefore contemplated there being other exceptional cases with other extreme facts where the humanitarian considerations were equally compelling. It seems to me that the appellant's case is one of the very rare cases which could be said to fall within this category. Whilst reliance was placed on the case of Bensaid v United Kingdom (2001) 33 EHRR 205 which involved an appellant with severe mental health

problems but who nevertheless was not considered to qualify for Article 3 protection, this appellant's case is, in my view, clearly distinguishable on the basis that his mental health problems have arisen as a direct consequence of the very issues which led the respondent to recognise him as a refugee in the first place. In addition, the criminal offending leading to the revocation of the appellant's refugee status was plainly linked to his mental health problems and drug addiction which, in turn, and as stated, arose as a result of his experiences in Sierra Leone. The Consideration Minute from the Home Office caseworker made it clear that it was accepted at that time that the appellant was traumatised by his experiences and that he would *suffer mental anguish and torment if he was to return to Sierra Leone*. Although the appellant is now a man of 33 years of age, and several years have passed, the medical evidence is clear in that the appellant remains traumatised by his experiences in Sierra Leone. There is therefore also the additional consideration of the effect on the appellant of having to return to the country where he experienced the source of his trauma and which he left as a child after escaping captivity.

25. With regard to the test set out in N, I have also had regard to the recent judgement of the Court of Appeal in The Secretary of State for the Home Department v MM (Zimbabwe) [2017] EWCA Civ 797, where Lord Justice Sales commented at [16]:

> "I think it would be desirable for the Upper Tribunal to look again at whether MM has a good basis for resisting deportation under Article 3 of the ECHR on the grounds of the likely radical deterioration in his mental health if he is returned to Zimbabwe. Although we did not have the benefit of argument on this point, I have some doubt whether the principle to be applied under Article 3 in this case is necessarily as restrictive as the FTT thought it was. It seems to me to be arguable that to return someone to a country where they are likely to suffer a profound mental collapse, possibly amounting in effect to a destruction of their personality, might infringe the right under Article 3 to protection against torture and inhuman treatment and might qualify as one of those very exceptional cases in which lack of medical services in the home country might constitute a bar to deportation (see *D v United Kingdom* (1997) 24 EHRR 423 and *N v United Kingdom* (2008) 47 EHRR 885, GC). It may be that MM will face an uphill struggle to make out such a claim, but I consider that this issue should be open for fresh consideration by the Upper Tribunal when the case is remitted to it. Thus, although I consider that the FTT erred in treating this factor as decisive under Article 8 in circumstances in which there was no violation of Article 3, it is possible on a fresh assessment under Article 3 that MM could succeed under that article."

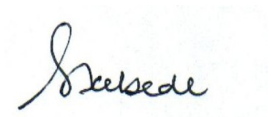
26. On the medical evidence before the judge, namely the report from Dr Chisholm, it seems to me that it could be said of the appellant that he is "*likely to suffer a profound mental collapse, possibly amounting in effect to a destruction of their personality*", in the terms suggested by Lord Justice Sale.

27. Accordingly, for all of these reasons, I consider that the judge's conclusion on Article 3 risk on return is not sustainable and must be set aside and substituted by a finding that the appellant's removal to Sierra Leone would be in breach of Article 3 of the ECHR. The appellant's Article 8 claim stands and falls with the decision on Article 3 and could not have succeeded independently

of a successful outcome under Article 3, but must succeed on the basis of “very compelling circumstances” in light of the decision in Article 3.

DECISION

28. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and is re-made by allowing the appellant’s appeal on Article 3 and 8 human rights grounds.

Signed 

Upper Tribunal Judge Kebede Dated: 7 July 2017