Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00307/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 26 November 2013	**On 16 December 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

REDHA HAMIDECHE

Respondent

For the Appellant: Mr C H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) This determination refers to parties as they were in the First-tier Tribunal.

2) The appellant is a citizen of Algeria, born on 18 December 1970. No anonymity order has been requested or made.

3) The respondent decided to deport the appellant for reasons explained in her notice of decision served on 6 February 2013.

4) A panel of the First-tier Tribunal comprising Judge Quigley and Ms V S Street JP allowed the appellant's appeal by determination promulgated on 27 September 2013.

5) The following are the SSHD's grounds of appeal to the Upper Tribunal:

1 … the Tribunal has erred in law … the Tribunal has failed to provide adequate reasons why the appellant meets the exceptions to the Immigration Rules … There is no evidence the appellant is still in a relationship with his wife. Whilst they may still have some form of relationship, evidence does not suggest it is one akin to marriage and seems to be one of merely being friends.

2 At paragraph 44-45 the Tribunal has found that it would be in the best interest of the appellant's son for him to remain in the UK as it would disrupt his life having to spend up to 90 days a year in Algeria … the Tribunal has failed to provide adequate reasons for their findings … his son would not need to spend 90 days continuously in Algeria and can visit the appellant during school holidays which would minimise any disruption … he and his child can continue their relationship via modern methods of communication as they have been able to do during the periods the appellant has spent in prison … the appellant and his child can maintain their relationship if the appellant is deported.

3 … the Tribunal misdirected itself in law and has misapplied the appropriate test to this case. **MM (Zimbabwe) v SSHD [2012] EWCA Civ 279** found that the lack of equivalent medical care in a person's country of origin might engage Article 8 but only in cases where it is *'an additional factor to be weighed in the balance, with other factors, which by themselves engage Article 8'.*

4 The approach was expressed as follows: *"Supposing … the appellant had established firm family ties in this country, then the availability of continuing medical treatment here coupled with his dependence on the family here for support: together establish 'private life' under Article 8."* (Paragraph 23).

5 … this test makes clear that medical care is only relevant to Article 8 where an individual's personal ties to the UK have a direct bearing on their prognosis. The question of ongoing support from friends, family or community support or relationships in the UK does not arise in such a case. In **MM** the context was that family support in the UK was a key factor in the prognosis of the appellant, as he was suffering from schizophrenia and he was far more likely to stay well if he had family support. In light of that … this is not the type of case the Court of Appeal had in mind, and this case falls to be considered under Article 3 alone.

6 … the Tribunal has failed to apply correctly the test set out in **GS and EO (Article 3 – health cases) India [2012] UKUT 00397 (IAC)**, namely that "*It may be that although, in principle, the scope of Article 8 is wider than that of Article 3, in practical terms that in a case like this where the claimant has no right to remain it will be a "very rare case" indeed where such a claim could succeed (see **KH (Afghanistan) v SSHD [2012] EWCA Civ 279)**. That reality may lay at the heart of the majority's view of the Strasbourg Court in **N v UK** when, having rejected the individual's claim under Article 23, stated that no "separate issue" arose under Article 8 (compare the dissenting Judge's opinion at 1 to 6). "* (Paragraph 85(8)(c)).

7 At paragraph 40-41 the Tribunal has found on the appellant's medical evidence that he would not receive the necessary care for his mental health problems in Algeria … the Tribunal has failed to provide adequate reasons as to why the medical treatment available in Algeria is not adequate or what evidence the experts have based their assessment that the medical treatment in Alger would be insufficient for his conditions … there is medical treatment available to the appellant in Algeria as a response from MedCOI, (request number: BMA 3778) dated 2 January 2012 stated that, outpatient and inpatient treatment by a psychiatrist is available in Algeria. The request further confirmed that psychotherapy like cognitive behavioural therapy by

psychotherapist or psychiatrist is available in Algeria. These facilities are available at the "Centre Hosptialier Universitaire Mustapha Bacha' (**Project MedCOI 2 January 2012).**

8 **Furthermore**, the World Health Organisation 'Mental Health Atlas 2011, Algeria, published 2011, stated: "An officially approved mental health policy exists and was approved, or most recently revised, in 2009. Mental health is also specifically mentioned in the general health policy'. 'A mental health plan exists and was approved, or most recently revised, in 2009. The mental health plan components include:

i. Timelines for the implementation of the mental health plan.

ii. Funding allocation for the implementation of half or more of the items in the mental health plan.

iii. Shift of services and resources from mental hospitals to community mental health facilities.

iv. Integration of mental health services into primary care.

9 *"Dedicated mental health legislation exists and was initiated, or most recently revised in 1985. Legal provisions concerning mental health are also covered in other laws (eg welfare, disability, general health legislation etc)."*

10 *The World Health Organisation further noted:"Prescription regulations authorize primary health care doctors to prescribe and/or to continue prescription of psychotherapeutic medicines without restrictions. In contrast, the department of health does not authorize primary health care nurses to prescribe and/or to continue prescription of psychotherapeutic medicines. Similarly, official policy does not permit primary health care nurses to independently diagnose and treat mental disorders within the primary care system.*

11 'The majority of primary health care doctors have received official in-service training on mental health within the last 5 years, whereas the majority of primary health care nurses have not. Officially approved manuals on the management and treatment of mental disorders are not available in the majority of primary health care clinics. Official referral procedures for referring persons from primary care to secondary/tertiary care exist, as do referral procedures from tertiary/secondary care to primary care." **(World Health Organization,** Mental Health Atlas 2011, Algeria, published 2011. http://www.who.int/mental health/evidence/atlas/profiles/dza mh profile/ pdf. Date accessed 5 July 2013).

12 ... the Tribunal has made no findings as to the appellant's risk of re-offending and therefore their proportionality findings are flawed ... the appellant's criminal record shows both a propensity to re-offend and an escalation in seriousness ... there is a lack of evidence the appellant has addressed the behaviour that has lead to his offending and that he continues to remain a risk of re-offending. Furthermore, warnings given by the Secretary of State previously in regards to future deportation action if he continues to re-offend have failed to prevent him from further offending and his wife and child have been unable to influence him to prevent him from offending ... given his continuing risk of re-offending and lack of evidence that he will not do so it is submitted that it is proportionate to deport him.

13 ... had the Tribunal taken these issues into consideration they would have found that his deportation is proportionate.

6) On 18 October 2013 Designated First-tier Tribunal Judge Lewis granted permission to appeal, giving the following reasons:

> 2 … the appellant's mental health weighed heavily in the consideration of the Tribunal, which discussed it at paragraphs 38 to 41, noting in paragraph 41 and again at paragraph 47 the concerns of Dr Quinn in the penultimate paragraph of his report (page 11of the appellant's bundle) that "If Mr Hamideche were to be returned to Algeria, I have concerns whether he would receive the care required for the treatment of such a disorder". Though undoubtedly an expert witness, as a Consultant Forensic Psychiatrist, Dr Quinn does not assert that his expertise extends to the availability of treatment for mental health in Algeria. The decision of the Respondent at V5 of the Respondent's bundle cites background evidence to the effect that mental health services and medication are readily available in Algeria. The determination does not reflect consideration of this evidence. At paragraph 47 the medical opinion that the appellant may not receive the care required for the treatment or schizophrenia in Algeria contributes to "make the appellant's case one where the exceptional circumstances combine to make the public interest in deportation outweighed by other factors".
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> 3 The apparent omission to weigh contrary background evidence, and the expertise attributed to what is perhaps the only non-expert statement within an expert report, are arguable errors of law. The other grounds adduced are less cogent but arguable.
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> 4 Permission to appeal is granted on all grounds.

7) In a written response to the grant of permission the appellant's solicitors submitted as follows:

> 1) The Grounds of Appeal are merely a disagreement with the findings of fact of the Immigration Judge, and do not disclose any material error of law.
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> 2) The Immigration Judge gave detailed reasons for the findings, and applied the guidance in *MM (Zimbabwe) v SSHD [2012] EWCA Civ 279*, in that he considered the appellant's dependency on his family (wife and son) as a factor, and also his continuing medical treatment as a further factor.
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> 3) The medical opinion of the Consultant Forensic Psychiatrist was merely an expression of concern as to whether medical treatment of the nature required by the appellant would be available to him in Algeria. The Immigration Judge's view was that the Consultant Forensic Psychiatrist, who assessed the appellant, has raised his own concerns. This is not conclusive of whether or not medical treatment is available, but rather an expression of concern, which the expert and the Immigration Judge are entitled to give due weight.
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> 4) The Immigration Judge clearly considered the respondent's Country of Origin report, at paragraph 41, on the availability of medical and mental health services in Algeria, and weighed this in the balance. However, the Immigration Judge preferred to consider other factors, including the Dr Quinn's concerns about the availability of the particular treatment needed by the appellant, as well as the significant impact on his fragile mental health if deported. Furthermore, the Immigration Judge considered in great detail the implication for the appellant in being separated from his son, the best interests of the child, etc, in coming to the conclusion.

5) The Immigration Judge, in fact, carried out a comprehensive proportionality assessment in coming to the conclusion reached, which she is entitled to do.

8) Further to the grounds of appeal, Mr Matthews submitted that there were only two significant factors by which the appeal succeeded - (a) the appellant's relationship with his son and (b) perceived lack of medical care for the appellant, as a schizophrenic, in Algeria. The case would not have succeeded but for the panel's understanding of that second factor, as was clear from paragraphs 47 and 56. The grounds, particularly at paragraph 7, identified material error on that point. The medical reports disclosed that medical professionals in the UK had concerns over whether the appellant would receive the necessary care in Algeria. As identified in the grounds of appeal and in the grant of permission, the authors of these reports might well raise such concerns but the question whether such concerns were *justified* was not to be answered by reference to the reports, not being within their area of expertise. The respondent did not accept that the panel could instruct itself as to the absence of care in Algeria on the basis of the reports. This was a case where the Article 8 assessment had both foreign and domestic implications. The panel failed to address themselves to the evidence about mental health care provision and availability of medication similar to that taken by the appellant in Algeria. They failed to evaluate what the impact of removal would be. It is within public and judicial knowledge that the Secretary of State arranges removal so as to minimise any adverse impact on mental health. There are relatively well developed mental health facilities and availability of medication in Algeria, which was made part of the respondent's case. The First-tier Tribunal failed to consider whether it was likely that the appellant would access suitable treatment in Algeria, given that background. That was an error such that the determination could not stand.

9) The second point developed by Mr Matthews arose from paragraph 12 of the grounds. The panel made no explicit finding on the appellant's risk of re-offending, but appeared to accept that there was no such risk. He has been convicted on 16 occasions of 36 offences. His offences show an escalating pattern. His last offence was much the most serious, having resulted in a sentence of 31 months' imprisonment. The panel at paragraph 48 accepted that the appellant had been drug free for two years, and found this "a very positive step" in his rehabilitation. However, he was in prison for the later of those two years, and his last offence was committed about one year after he claimed to have become drug free. The panel's conclusion on this point was insupportable. The nearest the determination came to an assessment of risk of re-offending was at paragraph 48, accepting the statement in a social work report obtained in advance of the appellant's sentencing to the effect that there were "no obvious public protection issues." It had not been possible to obtain a transcript of the Sheriff's sentencing remarks, but the report also recommended a "community based disposal". The sentence of imprisonment made it plain that the Sheriff did not agree with the assessment in the report. The assessment went against the appellant's

history, had not commended itself to the Sheriff and should not have been given such credit by the panel. Although it is not recorded in the determination, Mr Matthews had a note that the Presenting Officer in the First-tier Tribunal made a submission on the escalating nature of the appellant's offending and on the risk of re-offending.

10) Mr Matthews finally submitted that there was inadequacy of reasoning on two key matters, such that the determination should be set aside, and the case should be sent for a fresh decision in the First-tier Tribunal, or at a further hearing in the Upper Tribunal.

11) I queried whether the outcome should require any further hearing, given that both parties had placed before the panel all the evidence they thought fit. If a fresh decision was needed, the Upper Tribunal at this hearing was as well placed as any other Tribunal to reach it. Mr Matthews said that there was nothing further to say on the SSHD's side as to the appropriate outcome. For all the reasons put forward, deportation of the appellant was proportionate and justified.

12) Mr Ndubuisi dealt firstly with the assessment of the risk of re-offending. He submitted that the panel had considered that, and it was open to them to rely on the social work report. It is to be found at Item 46, pages 105-111 of the appellant's inventory of productions in the First-tier Tribunal. The report reflected that it had come to light that underlying the offending the appellant had serious mental health problems for which he was only quite recently prescribed anti-depressants and anti-psychotic medication. The authors of the social work report wished a fuller assessment of his mental health issues and other aspects to be carried out. The panel had considered the absence of any earlier psychiatric assessment, and had psychiatric reports before them. The appellant having been diagnosed as schizophrenic it was not difficult to see why it followed that there was a very much reduced risk to the public. The psychiatric report showed that he was undergoing treatment and had become drug free. The panel did not overlook the appellant's criminal history or the nature of his convictions, but correctly found that there was no ongoing risk, once it was accepted that there was social work involvement and medical intervention and that the appellant had taken steps while in custody to co-operate in his rehabilitation. Mr Ndubuisi accepted that the Presenting Officer's made a valid point that the appellant's offending appeared to have occurred in the middle of the period during which he claimed to have been drug free. However, it was not only persistent drug abuse but mental health problems which had underlain his offending, and these were now being addressed. Given the whole background, there was no error in the assessment of re-offending.

13) Turning to the mental health aspect of return, Mr Ndubuisi submitted that it was open to the UK medical experts to conclude that deportation would have an adverse effect. There were three reports which all expressed the same concern. The finding that the appellant would not receive necessary

care was reached at paragraphs 41 and 42 of the determination. Mr Ndubuisi accepted that may not correctly have been a question that Dr Quinn could be expected to answer, but the panel also had before it information about mental health provision in Algeria, and referred to it indirectly at paragraph 41. Mr Ndubuisi drew attention to Item Y of the bundle provided by the respondent to the First-tier Tribunal, a Country of Origin Information Service response entitled "Overview of availability of medical treatment and drugs". At Y1 there is reference to occasional "stock outs" of medicines. In further detail within the report at 26.02 onwards there is reference to difficulties and inequalities in accessing health care. At 26.37 there is reference to problems with mental health care (mainly, reluctance of families to consult psychiatrists unless in extreme circumstances). Those materials justified the conclusions reached by the panel. The panel perhaps ought to have based their conclusions on that information rather than on the reports by UK medical professionals, but they would have reached the same result. The indirect allusion to that evidence at paragraph 41 was sufficient to justify the conclusion. The criticisms made by the respondent did not disclose anything so material as to require the determination to be set aside. The outcome in terms of proportionality was open to the panel and was adequately reasoned.

14) Mr Matthews in response said that the panel had not referred in any meaningful way to the background evidence about medical provision in Algeria, but that in any event it did not support the conclusion reached. The appellant has been diagnosed and is in receipt of medication. The background evidence suggests that such medication is readily available and at very low cost. The evidence does not show any shortcomings likely to affect him in any serious way. The conclusion reached should have been that he could access his medication, and that his case had no strong basis on medical grounds.

15) I reserved my determination.

16) As to the evaluation of the mental health aspect of the case, the crucial paragraph of the determination is 41:

> Having studied the full report by Dr Alex Quinn, we are concerned that there is significant evidence … that the appellant has a psychotic mental illness and experiences consistent with a diagnosis of schizophrenia. We have particular concern that Dr Quinn's analysis is that he has concerns whether the appellant would receive the necessary care in Algeria … the reasons for refusal letter does refer to some information in the Country of Origin report on the availability of medication and mental health services in Algeria. However, it is clear to us that the medical professionals who have actually seen the appellant have concerns firstly, that the appellant may not receive the necessary care for the treatment of schizophrenia and, secondly, to deport him from the UK would itself have a significant impact on the appellant's fragile mental health.

17) The panel there does not base its decision on the background evidence indirectly referred to but sets that aside and reaches its conclusion based on the concerns expressed by the medical professionals. It may have been a function of those professionals to raise such concerns, but not to resolve

them. The panel though that the expression of concern provided the answer needed, but that answer was not there.

18) The Presenting Officer's subsidiary point here was that the panel concluded without giving reasons that deportation itself would significantly impact on the appellant's fragile mental health. That is a conclusion which required some further explanation, and it was correctly pointed out that the panel should have taken into account that the Secretary of State has mechanisms for managing sensitive removals and minimising the adverse impact (cf. J v SSHD [2005] EWCA Civ 629 and Y v SSHD [2009] EWCA Civ 362).

19) There is also error in relation to the risk of re-offending. The panel accepted uncritically the observations in the social work report that there were no obvious public protection issues and that his case was suitable for community based disposal. The panel did not have the advantage of the sentencing remarks, which might have cast a different light, but was aware of the criminal history, and that the case resulted not in a community based disposal but in a substantial custodial sentence. The panel takes it as a very positive step that the appellant has been drug free for nearly two years, overlooking that his most serious offending took place in the middle of that period. Mr Ndubuisi sought to justify this aspect of the panel's finding by reference to the social work report itself and to the later medical reports. However, such reasoning is not to be found in the determination, and it puts an optimistic gloss on the appellant's situation. It is difficult to see how his history of convictions can be read as "not having caused any harm in the past" and as raising "no obvious public protection issues". The report itself is somewhat self-contradictory. Between these two quotations it analyses risk thus: "There is a likelihood that Mr Hamideche will offend in the future if he is unable to maintain a drug free lifestyle and unable to obtain state benefits." The report opines on a further page that if the appellant were given a custodial sentence that would "… not reduce his drug (*sic*) of returning to the same lifestyle and behaviour patterns upon his eventual release."

20) The Upper Tribunal should be slow to interfere with a conclusion on proportionality which it was within the scope of the First-tier Tribunal to reach, and should not do so simply because an outcome appears surprising or over-generous; but the First-tier Tribunal has to give legally adequate reasons. I am driven to conclude that the First-tier Tribunal gave no such reasons on either of the two significant aspects focussed in the Presenting Officer's submissions. It is revealing that in response Mr Ndubuisi could not find the justification for either conclusion within the determination. It had to be sought elsewhere. A determination does not have to deal with every item of evidence or with every possible point, but in this case the respondent is entitled to complain that there was no sustainable explanation of why the panel concluded as it did. The determination cannot stand.

21) Neither party suggested that there is any further relevant evidence to be brought, so a fresh decision falls to be made now upon the materials available. The relevant considerations have all been rehearsed on both sides.

22) Mr Ndubuisi did not point to any evidence to support the proposition that the deportation process in itself would be significantly adverse to the appellant. No doubt that outcome would be unwelcome and disappointing to him, but there is no evidence that it would lead to significant deterioration in his mental health.

23) The background evidence to which Mr Ndubuisi referred does not disclose that there would be difficulty in the appellant obtaining anti-depressant and anti-psychotic medication at low cost. His treatment is likely to consist mainly of such medication, whether he is in the UK or in Algeria. There is no evidence which would justify the conclusion that deportation will be significantly adverse to his mental health longer term outlook.

24) The appellant is separated from his wife, although they remain on speaking terms. He has a daughter from an earlier relationship, at or nearing adulthood, with whom he has no meaningful relationship. His son is now 15 years of age. He has an ongoing relationship with his son, which would be disrupted through deportation. That would not be in the best interests of the child, and that is the most significant factor against deportation; but such are the outcomes which deportation sometimes carries.

25) The appellant's son could carry on a relationship with him, and could visit him in Algeria. I note that the panel thought the respondent's position on this point to be at odds with the respondent's view that it would be unreasonable to expect the appellant's son to leave the UK. I do not agree. There is a big difference between the proposition that a 15 year old may go to live permanently in another country, and the proposition that he may visit his father there from time to time. His primary carer is his mother, in whose household he can be expected to continue to thrive.

26) The appellant is not in the category of a young offender, many of whom cease offending at an early age. He has been a persistent offender over a number of years, and his offences have escalated. He was warned at least two or three times by the Secretary of State that if his convictions continued he might be considered for deportation – May 2010, February and March 2011. This had no impact on his offending behaviour. I do not find the view expressed in the social work report prepared for the court to be justified, as discussed above. I prefer the Secretary of State's view in the refusal letter that the appellant's behaviour presents a risk of harm to the public and a risk of re-offending.

27) I find there to be a strong public interest in deportation, not counterbalanced to any significant extent by mental health considerations. I

do not find it to be sufficiently outweighed by the appellant's relationship with his son, or by the best interests of his son. On balance, I find that deportation is a justified and proportionate step in the public interest.

28) The determination of the First-tier Tribunal is set aside and the following decision is substituted: the appellant's appeal, as brought to the First-tier Tribunal, is **dismissed**.

28 November 2013
Judge of the Upper Tribunal