Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06539/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 August 2019	**On 3 September 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SOFAINE [Z]
aka
ALI [K]
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Alex Burrett of Counsel, instructed by Duncan Lewis & Co solicitors
For the respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a foreign criminal who appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to deport him to his country of origin.

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2. The appellant has been in the United Kingdom for about 19 years, on his account, but has never had leave to enter or remain. He is a citizen of Algeria.

Background

3. The appellant's challenge to the respondent's decision to deport him was made on Article 3 and Article 8 ECHR grounds. He was born in Algeria in 1971 and is now 38 years old. He carried out his military service in the 1990s and took part in, and saw, 'very distressing actions'. The appellant is a military deserter.

4. He fled Algeria to Spain, where he worked on a farm for a time. He says he arrived in the United Kingdom in mid-January 2000 by ferry, on a coach, on a false identity card. He stayed at first with friends in London, and later with friends in Lancing in Sussex. He did not claim asylum immediately: his friends told him that he would be sent straight back to Algeria and he was afraid. When the appellant did claim asylum, in the false identity, he was moved from London to bed and breakfast NASS accommodation in West Sussex, away from his friends in Lancing. The appellant was appeal rights exhausted in that name on 6 June 2001.

5. The appellant made a further asylum claim in the name of Sofiane [Z], but the respondent did not accept that this was his identity. The respondent refused to treat the asylum claim in the [Z] identity as a paragraph 353 fresh claim.

6. The appellant began to commit criminal offences. On 12 March 2000, he was cautioned for shoplifting; on 29 June 2000, he was convicted of attempted theft from a person and received a community service order of 120 hours. On 30 July 2002 the appellant was convicted of robbery and sentenced to 15 months' imprisonment. On 2 October 2002 he was notified of liability to deportation and invited to make representations on human rights grounds, which he did, citing his mental health and medical issues under Article 3 ECHR.

7. On 6 September 2003 he was cautioned for possession of cannabis, which was then a Class B drug. On 27 May 2003, he was cautioned again for possession of cannabis, which was now a class C drug. On 5 July 2008, the appellant was again convicted of shoplifting and received a conditional discharge of 12 months.

8. On 18 December 2013, a deportation and refusal decision was made but not served, as the respondent later accepted. On 10 March 2016, the respondent reviewed the file in the light of all information in the respondent's records. On 28 April 2016, a decision to deport was made. It was served on 3 May 2016 and reserved at the appellant's request on 19 May 2016. Further representations were received on 1 June 2017.

9. By a letter dated 28 June 2017, the respondent refused to revoke the deportation order and decided that the appellant’s medical circumstances did not reach the *N v United Kingdom* level and that his private life (no family life being asserted) was not such as to outweigh the public interest in removing him. The respondent was not satisfied that there were any very compelling circumstances which outweighed the significant public interest in deporting him.

10. The respondent’s decision carried an in-country right of appeal and it is against this decision that the appellant appeals today.

First-tier Tribunal decision

11. It was accepted on behalf of the appellant that although he retained a subjective fear of persecution or serious harm by reason of his desertion from the Algerian army, that risk was not objectively well founded.

12. Ms Short, who appeared for the appellant, relied principally on Article 3 ECHR and the harm which return to Algeria would cause the appellant by reason of his mental and physical health problems.

13. The First-tier Tribunal Judge heard oral evidence from the appellant, taking into account his accepted mental health difficulties. The appellant’s evidence was that he had no memory of the details of the robbery for which he went to prison and that he thought that at the time, he was probably living on the streets.

14. Since being moved to Lancing in 2000/2001, he had begun experiencing flashbacks and during his time in prison, he received medication because he was suicidal and hearing voices. When he left hospital, the appellant no longer had access to the medication and began to self-harm. He thought (but could not be sure) that he had been hospitalised on at least four occasions by reason of his behaviour and his mental health difficulties. He told the First-tier Tribunal Judge that he had over 200 stitches on his body from self-harm injuries.

15. The appellant had not committed any criminal offences since 2008. He lived a fairly isolated life, with very few friends. He had learned a little English but had acquired no vocational skills, nor had he been able to attend any classes or develop his education. He still speaks Arabic, the language spoken in Algeria.

16. The appellant was receiving significant medication (Olanzapine) and support, which had been provided for some time. He continued to have a subjective fear of return to Algeria, because he was a deserter. He maintained that he would be detained and tortured.

17. The appellant had asked a friend to check the cost of Olanzapine on the internet. He found that it was very expensive, about Dinar 3000 a box, and said that his brother, a security guard in Algeria, only earned Dinar 5000. He had 5 brothers and 5 sisters in Algeria but said that none of

them could assist him financially or house him on return and he would be destitute. There were statements from two of the appellant's friends in the United Kingdom, both Algerian nationals. One gave evidence. There was also psychiatric evidence from Dr Michael Shortt and a country report from Ms Alison Pargeter.

18. In his conclusions, the First-tier Tribunal Judge acknowledged that this was in effect a human rights appeal. He directed himself to consider the proportionality of any interference with the appellant's Article 3 ECHR rights and that he should consider the difference between the appellant's circumstances in the United Kingdom and in Algeria. He found that it was 'probably not true' that the appellant had no contact with his vast extended family in Algeria.

19. The psychiatric report contained nothing which would be likely to cause the appellant to be estranged from his family. There was no reason why the appellant could not receive the same medication, olanzapine, as it was available in Algeria. His post-traumatic stress disorder was effectively controlled by that medication. Although mental health provision in Algeria was less good, the Judge was not satisfied that the appellant would be destitute on return. He was not satisfied that the Article 3 ECHR threshold was reached.

20. The Judge applied section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended) and dismissed the appeal. No anonymity direction was made or has been sought.

21. The appellant appealed to the Upper Tribunal.

Permission to appeal

22. First-tier Tribunal Judge Ford granted permission to appeal on the basis that the First-tier Tribunal had arguably failed to approach Article 3 ECHR correctly and that the self-direction at [33] was wrong; and that the Tribunal had failed properly to engage with the expert report and with the evidence of the appellant's mental health difficulties overall; and finally, that the First-tier Tribunal Judge erred in the proportionality assessment made.

Rule 24 Reply

23. There was no Rule 24 Reply.

24. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

25. For the respondent, Mr Tufan relied on *KH (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1354 and *PH (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 1139. On any view, the standard of 'no treatment' in *N* and *D* was not reached.

Even if *Paposhvili* were applicable (which it is not), the evidence was not sufficient to establish a real risk of 'serious rapid irreversible decline'.

26. For the appellant, Mr Burrett relied on his grounds of appeal. The grounds state that the medical evidence is that the appellant has 'major cognitive deficits' and needs a full community care services. He 'presents with a very psychotic depression and symptomatology indicative of a current partial syndrome of post-traumatic stress disorder' and with an 'increased risk of suicide'. The appellant contended that because of his poor mental health, he was at risk of destitution if returned to Algeria. The stigma attached to mental illness there would mean that his family members would be unwilling to support him. Mental health services in Algeria were 'woefully inadequate' and the mentally ill were stigmatised.

27. The appellant challenged the First-tier Tribunal's self-direction at [31] that it was for the respondent to show that interference with his Article 3 ECHR rights was proportionate: while he also claimed under Article 8, to which proportionality did apply, Article 3 was an unqualified right and proportionality was not relevant if it was engaged. At [33], the First-tier Tribunal Judge erroneously directed himself to compare 'whether or not the appellant is better off in this country' with what would be available from his large extended family in Algeria. Article 3 did not require a comparative approach and that had expressly been rejected in *N v the United Kingdom* [2008] ECHR 453.

28. The Judge had also erred in the standard of proof applied to Article 3, finding that it was 'probably not true' that the appellant had no family ties, and that 'it is more likely than not that support would be found for the oldest sibling within the family'.

29. The grounds of appeal contend that no findings at all appear in the decision on the risk of stigmatisation and discrimination in Algeria, which the appellant contends reaches the persecutory threshold and that more weight should have been given to Ms Pargeter's conclusions in this respect. The appellant also argues that his history of torture has not been taken into account and that there are no findings on this question. He says that his evidence that he had not spoken to his family for a year and a half before the First-tier Tribunal hearing has been overlooked.

30. Finally, the grounds argue that Article 8 has not been correctly approached and in particular, that the appellant's contention that there would be serious obstacles to his reintegration on return have not been considered.

31. In oral submissions Mr Burrett observed that *KH* was now a very old decision. The appellant was not an ordinary adult with mental health difficulties and exceptionality was pleaded. There was a real risk of degrading treatment and of stigma, as set out in Ms Pargeter's report. There were no findings of fact regarding the risk on return to Algeria in the

decision. He accepted that this element of the First-tier Tribunal decision was not challenged in the grounds of appeal.

32. The appellant received support in the United Kingdom and the appeal should be allowed.

Analysis

33. It is plain from the First-tier Tribunal decision that the Judge misdirected himself in a number of important ways. There is no question of proportionality in the assessment of an Article 3 risk: Article 3 is unqualified, unlike Article 8 ECHR. In approaching Article 8 ECHR, the Judge was required to look not at section 117B(6), but at section 117C, because this appellant is a foreign criminal.

34. In addition, in finding that the appellant was 'probably' not telling the truth about contact with his family in Algeria, it is arguable that he applied the wrong standard of proof, but having regard to the appellant's own evidence about his brother's job and pay, and the lack of any evidence of estrangement, it seems likely that even applying the lower standard, and directing himself correctly, the Judge would have reached a similar conclusion.

35. Ms Pargeter's country evidence is not disputed to the extent that she finds there to be no real risk of persecutory treatment or serious harm arising from the appellant's desertion (see 3.12 on page 16 of the bundle). As regards mental health services, at section 4 of her report, Ms Pargeter says that Algeria has a serious mental health population, with 1.5 million affected in the population of just under 40 million people. There are two principal causes, the 'devastating effects of the brutal civil war' and deteriorating social condition, including 'rising poverty, unemployment and a severe housing crisis'. However, mental health provision is improving and there are 19 specialised psychiatric hospitals in the country, as well as 27 general hospitals and 6 university hospitals which offer psychiatric services.

36. The provision is not adequate in Ms Pargeter's opinion, but it exists. Indeed, patients remain in mental hospitals for years, further blocking beds, with family regarding the hospital as 'a home for the patient to settle in for life'. About 10% of those who recover are brought back to hospital because their families give up on them. At 4.24 Ms Pargeter records that many families refuse to accept their relative's illness and patients may not be able to access specialist care at home. At 4.25 she says there is almost no community support to assist in rehabilitation when patients are discharged. In section 5, Ms Pargeter deals with the social stigma of mental illness. At 5.6, she notes that 'many families simply abandon their relatives who are suffering from psychiatric problems once they have been admitted to a mental health facility' and at 5.7 she says that:

"5.7 It is clear therefore that despite efforts to raise awareness about mental health by the government, including through its latest mental health plan, mental illness remains a taboo subject that often brings shame and social disgrace, with families preferring to conceal mental health problems or deal with them religiously rather than seek professional help. ..."

37. Ms Pargeter considers the availability of the medication which the appellant takes (Olanzapine and Citalopram). Another version of Citalopram, Escitalopram, is available in Algeria. Ms Pargeter says frankly that she does not know whether it would be an appropriate substitute if Citalopram were not available. The rest of her opinion is tainted by her assumption, on instructions, that the appellant would receive no support from any of his 10 brothers and sisters still living in Algeria.

38. The respondent's Country Policy and Information Note entitled *Algeria: Background information, including actors of protection and internal relocation*, on which Mr Tufan relied, has not been updated since August 2017. In relation to mental health issues in Algeria, it says this:

"18.2.1 The UN Special Rapporteur on physical and mental health noted:

'Mental health conditions account for 6 per cent of the causes of disabilities in Algeria. For the population as a whole, the incidence of mental health conditions has been estimated at 0.5 per cent for both sexes… An epidemiological study carried out by the Ministry of Health in 2004 showed that chronic mental disorders were diagnosed in 0.7 per cent to 1.9 per cent of subjects in different age groups. Those below 40 years of age and women were particularly affected.

'In 2011, public expenditure on mental health accounted for 7.3 per cent of the total health budget, of which expenditure on inpatient hospitalization represented 81.44 per cent of the total mental health budget. Algeria has an urgent need for qualified human resources in the mental health sector. For a number of years now, different programmes have been set up to strengthen the training of mental health professionals (psychiatrists, nurses, psychologists) and increase the number of mental-health positions.'

18.2.2 The same source stated:

'The updated Mental Health Policy 2016-2020 covers prevention, treatment and rehabilitation with an intersectoral and a life course approach, in line with WHO Mental Health Action Plan (2013-2020) […] Previous mental health policies reportedly faced challenges in their implementation […]

'The mental health sector in Algeria is excessively reliant on psychiatric hospitals and inpatient care. Instead of building new psychiatric hospitals, each general hospital should have an inpatient psychiatric unit to make mental health care more accessible to all and avoid stigmatization. Although the availability of mental health

services in primary-care centres has increased in recent years, with 129 centres providing such services, additional steps should be taken to reinforce outpatient services within general hospitals and reduce dependency on hospital care. There should be a shift in mental health services and public investments in the community, with initiatives grounded in human rights and modern principles of mental health policy and based on quality services and the empowerment of users.'"

39. It is clear from that report that there are mental and psychiatric services available in Algeria for persons with difficulties such as this appellant has, including but not limited to in-patient treatment, which the appellant thinks he has used a number of times in the past.

40. I must consider therefore whether the errors of law in the First-tier Tribunal's decision are likely to be material, that is to say, whether the outcome would be the same. I must ask myself the question set out in *Soering v United Kingdom* 14038/88 [1989] ECHR 14, [1989] 11 EHRR 439:

> "91. [Article 3 ECHR may be engaged] … and hence engage the responsibility of the [Contracting State] under that Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."

41. Any Judge considering the Article 3 risk to this appellant on return must do so in relation to the test in *N,* that is to say, the 'deathbed' test. The Article 8 ECHR appeal cannot succeed if the Article 3 claim fails. I remind myself that the slightly more relaxed test in *Paposhvili* is not applicable in the United Kingdom (*EA & Ors* (Article 3 medical cases - *Paposhvili* not applicable: Afghanistan) [2017] UKUT 445).

42. On any view, and even taking into account Ms Pargeter's evidence, there is some treatment for mental health problems in Algeria and the very high standard in *D* and *N* is not reached.

43. I therefore set aside the decision of the First-tier Tribunal. I dismiss the appeal.

DECISION

44. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.

    I set aside the previous decision. I remake the decision by dismissing the appeal.

Signed Judith AJC Gleeson Date: 16 August 2019
Upper Tribunal Judge Gleeson