Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16945/2017**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On Thursday 9 December 2021	**On Monday 20 December 2021**

Before

THE HONOURABLE MRS JUSTICE FARBEY
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE SMITH

Between

A P
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. This is an appeal which concerns the Appellant's mental health and includes details of his health condition. It is therefore appropriate to continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr D Chirico, Counsel instructed by Birnberg Peirce and Partners Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Stedman promulgated on 6 August 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 1 December 2017 refusing his human rights claims. That decision was made in the context of deportation proceedings. This is the Appellant's third appeal. Earlier appeals against deportation decisions have been dismissed. The focus of the human rights claim is the Appellant's mental health condition. It is asserted that the Appellant's deportation to Trinidad would breach his Article 3 and/or Article 8 rights.

2. Judge Stedman did not accept that the Appellant's health would decline to the degree claimed. He rejected the Article 3 claim for that reason. The Appellant's offences include one which attracted a six-year term of imprisonment. As a result, in order to succeed on Article 8 grounds, the Appellant would have to show that there are very compelling circumstances over and above the two exceptions (relating respectively to private and family life) set out in the Immigration Rules and in section 117C Nationality, Immigration and Asylum Act 2002. The Judge did not accept that this test was met. Accordingly, the Article 8 ground was also rejected.

3. The Appellant appeals on six grounds as follows:

   Ground 1: the Tribunal Judge acted in a procedurally unfair manner by rejecting the unchallenged evidence of the expert witnesses without indicating that he was minded to do so. As a result, the Appellant did not have the opportunity to address the Judge's concerns. The Appellant has made an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence from one of the experts, Dr Bell, addressing the Judge's concerns. We do not need to refer to that further since Mr Chirico accepted that it could not be relevant to whether there is an error of law; only the materiality of any error.

   Ground 2: the Judge erred by departing from the conclusions of the experts without giving reasons or referring to any evidential basis for so doing.

Ground 3: the Judge speculated and therefore relied on irrelevant considerations for making findings which contradicted the medical evidence.

Ground 4: the Judge misdirected himself in relation to the legal approach to the Article 3 claim following AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17.

Ground 5: The Judge gave weight to irrelevant considerations and/or made inconsistent findings in relation to the presence of family members in the UK and Trinidad and the potential impact of support from those family members on the Appellant's mental health.

Ground 6: The Judge therefore erred in his approach to the harm faced by the Appellant in Trinidad. The errors also impact on the Judge's assessment under Article 8 ECHR.

4. Permission to appeal was granted by First-tier Tribunal Judge Swaney on 2 September 2021 in the following terms so far as relevant:

> "... 3. It is arguable that the judge, who does not claim to have any medical/psychiatric qualifications, has not provided an adequate basis on which to reject the findings of the medical experts.
> 4. The grounds of appeal disclose an arguable error of law. The grant of permission is not limited."

5. The Respondent filed a Rule 24 reply dated 27 September 2021 seeking to uphold the Decision.

6. The matter comes before us to determine whether the Decision contains an error of law. If we conclude that it does, we may set aside the Decision and, if we do so, we may either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

7. We had before us a core bundle of documents relating to the appeal including the Respondent's bundle and the Appellant's bundle which was before the First-tier Tribunal (referred to hereafter as [AB/xx]). Given the nature of the challenge, we do not need to refer to much of the evidence. We also had a skeleton argument from both parties. Having heard oral submissions from Mr Chirico and Mr Whitwell, we indicated that we would reserve our decision and issue that in writing which we now turn to do.

DISCUSSION AND CONCLUSIONS

8. Although Mr Chirico did not abandon any of the grounds, his focus was on the first three grounds. For reasons which follow, we do not need to consider grounds 4 to 6. Mr Chirico pointed out to us that the Grand Chamber of the European Court of Human Rights has just issued its judgment in Savran v Denmark (Application no. 57467/15). Although that

may have some relevance to the Article 3 ground in this appeal, we did not need to deal with it at this hearing.

9. Grounds 1 to 3 substantially overlap as all concern the Judge's approach to the medical expert evidence and his findings in consequence. We therefore take them together.

10. The Judge summarised the evidence of the medical expert, Dr Bell, at [29] to [37] of the Decision. Although that passage contains one or two inferred criticisms of his evidence, the Judge does not provide any reason to doubt Dr Bell's expertise. In particular, at [33] of the Decision, the Judge recognised that Dr Bell's opinion was "evidence to which [he] must accord due weight, because it considers what might be the outcome for the appellant if returned to Trinidad". He there observes that Dr Bell's evidence must be viewed in the context of other evidence about the Appellant's "current state of mind". We do not doubt the correctness of that observation. An expert report has of course to be considered in the context of all the evidence.

11. As to prognosis and what would happen if the Appellant were deported to Trinidad, the Judge summarised Dr Bell's evidence as follows:

> "37. Dr Bell goes on to state that the prognosis, which is clearly directly linked to the issue of future risk, '*is completely dependent upon the results of immigration proceedings.'* If returned to Trinidad, Dr Bell opines, *'it is highly predictable that there will be a precipitate and serious decline in his psychiatric state.'* That is because the appellant is very likely to *'turn to a pattern of drug addiction to manage his deteriorating psychiatric state.'* Dr Bell predicates his opinion on the predictability of history repeating itself. That the appellant would *'become increasingly vulnerable to exploitation by others'* and *'is likely to return to offending as a way of obtaining drugs.'"*

12. Immediately following that passage, the Judge begins his findings. He starts by considering Dr Bell's prognosis and says this:

> "38. It is in relation to these conclusions that I must, despite the regard I must have to the views of an expert, depart from them. I do not agree that the appellant's prognosis, namely that he will suffer a tragic deterioration in his mental health if returned to Trinidad, can be attributed solely or predominantly to his immigration status. I do not accept the evidence demonstrates that at all. What I deduce from the appellant's history is actually quite the reverse. I find that the appellant's psychiatric state is a direct consequence of his involvement in drugs: not that his psychiatric health is the cause of his drug addiction and consequent offending.
> 39. It is axiomatic that the appellant's psychiatric health is a direct result of his addiction to heroine and crack cocaine. To consider otherwise would be to cancel the obvious: while in prison the appellant has become clean of drugs; he has become involved in prison society and formed relationships; he has tried to do some work there; he has put on weight; he has started reading and meditating and even writing poetry.

> These are all very positive steps in his life – a life free from the pernicious influence of his drug addiction – and there has been a marked improvement of his mental health as a result.
> 40. That conclusion is not at odds with an appreciation that this appellant does not want to be returned to Trinidad and that the thought of such a change would involve a significant transition to him personally and, to a degree, adversely impact on his mental health. I accept that the appellant has anxiety and depression and I accept that the move would lead to a possible worsening of his mental health as emphatically stated by Dr Bell: (it is diametrically opposed to his own wishes – why wouldn't it?). But as I have endeavoured to make clear, this appellant's mental health has repeatedly fallen prey to his drug use and his proclivity to return, time and again, to a situation where his offending is prompted by that drug habit. He has not shown that his history of drug use and offending, while out of prison, has abated, or that it is connected solely to his precarious immigration status. He has continued to commit serious crimes."

13. Having referred again to the point that the Appellant's mental health has stabilised when free from drugs (which we repeat he was entitled to take into account), the Judge reached the following conclusion:

> "42. Ultimately, I do not accept that this appellant's mental health will decline to the degree advanced in this appeal by reason of his return to Trinidad. Rather that his mental health is best protected by his own strength of will and desire to make change. He has been at the mercy of both his circumstances in the UK and the choices he has consciously made, and I do not believe that the evidence shows that it has been his family or mental health services that have kept him away from drugs and reoffending: it has been his incarceration. Like any individual, being returned to another country of which they have little experience of, will undoubtedly bring about tangible difficulties, both personal and practical, but they are the ordinary consequences of a deportation order".

14. We consider that the passages from the Decision which we have cited contain the following errors.

15. First, in making the findings he did about the causation of the Appellant's mental health problems and therefore the likely impact of deportation, the Judge departed from the views of the medical expert without providing any reasons or evidential basis for his findings. In effect, as Mr Chirico submitted and we accept, by finding that the Appellant would be "protected by his own strength of will and desire to make change", the Judge stepped into the shoes of the expert and relied on his own opinion. This was not a matter of which the Judge could take judicial notice and the Judge does not have expertise in this area.

16. Second, as we have already observed, the Judge was of course entitled to look at the expert's report in the context of all the evidence. That included evidence that the Appellant's mental health improved while he was in prison and free from drugs. However, that improvement was

taken into account in the assessment of Dr Bell. In his report at [AB/13] he says the following:

> "It is clear to me that [AP] has improved considerably since being detained in prison. Of course the main factor here that he has been able to cooperate with treatment for his drug addiction and has now been 'clean' for a considerable period of time…."

The expert's conclusion that, nevertheless, the Appellant remains "vulnerable and predisposed to psychiatric disorder" whether or not he reverts to substance abuse is simply not engaged with by the Judge.

17. Mr Chirico accepted that a Judge is not bound to follow an expert's prognosis. However, the Judge does have to provide reasons and set out at least some evidence for any alternative findings. Whether the error is put on the basis of procedural fairness, adequacy of reasons or irrelevant considerations, we are satisfied that the Appellant has established an error under grounds 1 to 3.

18. Neither party suggested that any part of the Decision could be preserved. There are only two core issues (Article 3 and 8 ECHR), but both relate to the Appellant's mental health. Having found an error in the Judge's treatment of the medical evidence which goes to the heart of this issue, it is not appropriate to preserve any findings and the appeal will have to be redetermined entirely afresh. For that reason, also, we consider it appropriate to remit the appeal to the First-tier Tribunal for re-making.

CONCLUSION

19. The Appellant's grounds 1 to 3 disclose errors of law in the Decision. We do not need to consider grounds 4 to 6. We set the Decision aside in its entirety. The Appellant's claim will need to be considered afresh. The appeal is remitted for a de novo hearing before the First-tier Tribunal.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Stedman promulgated on 6 August 2021 is set aside in its entirety. No findings are preserved. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Stedman.

Signed L K Smith Dated: 13 December 2021
Upper Tribunal Judge Smith