Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00100/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th May 2017	**On 23rd May 2017**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AO
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Withwell, Home Office Presenting Officer
For the Respondent: Ms K McCarthy of Counsel

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals against the decision of First-tier Tribunal Judge Morron promulgated on 6 December 2016, in which AO's appeal against the decision to refuse his protection and human rights claim and to revoke his protection status (following a deportation order signed on 22 October 2015) dated 23 October 2015 was allowed. For ease I continue to refer to the parties as they were

before the First-tier Tribunal, with AO as the Appellant and the Secretary of State for the Home Department as the Respondent.

2. The Appellant is a Russian national, born on [ ] 1991, who first arrived in the United Kingdom in 2004 and was a dependent on his mother's application for asylum made in November 2004. That application was initially refused but the appeal against it was successful and the Appellant and his other family members were granted refugee status with leave to remain to 1 November 2012. The Appellant was granted indefinite leave to remain on 7 February 2013.

3. On 14 March 2014, the Appellant was convicted of false imprisonment and following an appeal, sentenced to 4 years' imprisonment. The Appellant was notified of his liability to deportation on 8 May 2014 and of the application of section 72 of the Nationality, Immigration and Asylum Act 2002 to him on 23 June 2014 as he was presumed to have been convicted of a particularly serious crime and to constitute a danger to the community of the United Kingdom. On 9 March 2015, the Appellant was notified of the Respondent's intention to cease his refugee status and a further letter was sent to the UNHCR notifying them of the same and inviting them to make representations.

4. The Respondent made a Deportation order against the Appellant on 22 October 2015. The decision to revoke his refugee status and to refuse his protection and human rights claim was dated 23 October 2015. The Respondent applied section 72 of the Nationality, Immigration and Asylum Act 2002 on the basis that it was not accepted that the Appellant would not be a danger to the community if he were to remain in the United Kingdom, nor that the crime he committed was not particularly serious. Reference was made to the sentencing remarks following the Appellant's conviction. Pursuant to the certificate under this section, the Appellant's asylum claim was refused.

5. Further, the Appellant's refugee status was ceased under Article 1(C)(5) of the Refugee Convention and paragraph 339A(v) of the Immigration Rules on the basis that there has been a fundamental and non-temporary change in Russia. The Respondent referred to the UNHCR response about the Appellant where doubts were expressed as to the application of Article 1(C)(5) of the Refugee Convention, but did not accept those concerns in light of available background evidence that the incidence of racially motivated attacks has decreased and the Russian authorities had made concerted efforts to introduce laws to convict those accused of committing racially motivated crimes. Overall it was considered that the security landscape of Russia had much improved since the Appellant was granted refugee status in 2007 such that his circumstances on return on the basis of his ethnic affiliation were not such that he would be at real risk of ill-treatment or harm on return. The Respondent did not consider that there would be a breach of Articles 2 or 3 of the European Convention on Human Rights for the same reasons.

6. The Respondent separately considered the Appellant's right to respect for private and family life under Article 8 of the European Convention on Human Rights

through the provisions of paragraph 398 following of the Immigration Rules and sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002. The Respondent accepted that the Appellant would have built up a private life in the United Kingdom during his time here but referred to the fact that he was single and had no children. As he had been sentenced to a period of four years' imprisonment, the public interest required deportation unless there were very compelling circumstances over and above the exceptions set out in the Immigration Rules. No such circumstances were found. Although the Appellant had lived in the United Kingdom for 11 years, he had been convicted of a serious criminal offence involving an act of violence. It was not accepted that there would be very significant obstacles to his reintegration in Russia because he was not estranged from that country and had spent his childhood in formative years there. He was familiar with the lifestyle and culture as well as the language.

7. On 6 December 2016, Judge Morron upheld the section 72 certificate such that the Appellant was excluded from protection status. He allowed the appeal under Articles 2, 3 and 8 of the European Convention on Human Rights. It was found that the Appellant had committed a particularly serious crime and had not rebutted that presumption during the course of his appeal. Notwithstanding that the Appellant had no prior convictions, was a model prisoner and had been making good progress since his release, it was of concern that the Appellant continue to see himself as a victim rather than a perpetrator and did not fully accept responsibility for his actions which led to his conviction. The Appellant had stated he was willing to accept treatment but his mother's clear evidence was that had this had been offered to him on several occasions but refused. Judge Morron found that unless and until the Appellant was prepared to acknowledge and accept the treatment he needs, he would be a danger to the community such that the section 72 certificate remained and he was excluded from the protection of the Refugee Convention and from a grant of humanitarian protection.

8. In considering Articles 2 and 3 of the European Convention Human Rights, the starting point was the Appellant's asylum appeal being allowed in 2007. The Appellant's ill-treatment prior to his departure from Russia was not disputed and the issue was only whether the country situation in Russia with regard to the treatment of ethnic minorities, particularly Armenians had improved since the Appellant had left in 2004 and was granted refugee status in 2007. The First-tier Tribunal considered the background evidence relied on by the Respondent, the UNHCR response in this case and the background evidence submitted by the Appellant, including a report from Dr Rano Turaeva-Hoehne dated 17 October 2016 (which itself included reference to further background material). Judge Morron found that the Respondent had not considered the most up-to-date country information which suggested that the level of discriminatory violence against ethnic minorities, including Armenians had begun to increase rather than having significantly decreased since 2007. The Appellant was found to be conspicuous by reason of his non-Slavic appearance.

9. The First-tier Tribunal found that the high threshold for protection under Articles 2 and 3 were met by the Appellant in this case, for the reasons above and also by reference to the psychological report of Lisa Davies, which included the Appellant's tendency to freeze as well as continuing experience of trauma symptoms and suicidal thoughts. It was accepted that the Appellant would be unlikely to access treatment in Russia. In a single paragraph, Judge Morron found that internal relocation within Russia was not considered a viable alternative for the Appellant because of his mental state, his traumatised history and his appearance, all of which made him particularly vulnerable. He would further not be able to rely on the protection of the State.

10. In relation to Article 8 and paragraphs 398 to 399A of the Immigration Rules, Judge Morron found that the Appellant had lived in the United Kingdom since 2004, including his formative years of adolescence and adulthood during which time he was well integrated here. He speaks fluent English and is likely to complete his education and earn a living in the United Kingdom without support of the state. His leave to remain in the United Kingdom has always been lawful and not precarious. These factors were not however considered enough to outweigh the strong public interest in the deportation of foreign criminals sentenced to 4 years' imprisonment. However, the appeal was allowed under Article 8 because of the additional reasons that the Appellant is emotionally and financially dependent on his parents with whom he lives and that he would face a very real risk of suffering serious harm on return to Russia for the reasons already identified above.

The appeal

11. The Respondent appeals the decision of Judge Morron on three main grounds. First, in relation to Articles 2 and 3 of the European Convention on Human Rights, that Judge Morron failed to give due weight to the objective evidence before him of the reduction in incidents of racial attacks and that the authorities had introduced new laws against these. He had also failed to address or give any weight to the evidence that the Appellant's mother had returned to Russia three times since the grant of her refugee status without any incident. Finally, there was no proper consideration of whether there was a sufficiency of protection available to the Appellant in Russia. Secondly, that the errors of law in relation to Articles 2 and 3 in the first ground of appeal led to a misdirection as to the need to identify very compelling circumstances for the purposes of paragraphs 398 to 399A of the Immigration Rules. Thirdly, that Judge Morron did not have any medical evidence of the Appellant's claimed suicidal tendencies nor of any mental health treatment that he was receiving and in the circumstances there had been no proper assessment of the interference with any such treatment of his removal to Russia. In particular, the case of **J v Secretary of State for the Home Department [2005] EWCA Civ 629** had not been followed as to suicide risk.

12. Permission to appeal was granted by Judge Kekic on all grounds on 8 March 2017.

13. On the first ground of appeal, the Home Office Presenting Officer referred to the evidence that was before the First–tier Tribunal as to the current situation in Russia compared to in 2007. There was evidence of a decline in ethnic violence from 2007 to 2012 and although it is accepted that evidence referred to in the UNHCR letter from the Minority Rights Group International 'Protecting the Rights of Minorities and Indigenous Peoples in the Russian Federation: Challenges and Ways Forward' dated 1 December 2014 was to the effect that ethnic violence was no longer declining by 2013, there was no support for Judge Morron's finding that it was increasing and that there had been no significant decrease since 2007/8. There was evidence of a significant Armenian population in Russia including the building of a new church in 2013 at a time when violence was said to be increasing. There was a failure to take into account the Appellant's mothers return to Russia on three occasions without incident. In contrast, the expert report relied upon by the Appellant was very brief, was found by Judge Morron to have been lacking in neutrality and in any event relied primarily on evidence only up until 2012 (save for very broad statements about the human rights position in Russia generally) such that it offered no more up-to-date country information than that relied upon by the Respondent.

14. In response on this ground, Counsel for the Appellant submitted that decision under appeal in paragraphs 102 to 113 provided careful reasoning and analysis of the evidence by the Tribunal. The expert evidence report, as well as the UNHCR response was clearly preferred. If there was any suggestion that the finding that the expert report lacks neutrality will continue to be relied upon, then a late application for permission to cross-appeal would be made. Overall, it was submitted that the Appellant was at risk because he was of Armenian ethnicity, because he had a non-Slavic appearance and because he would be required to do military service on return to Russia. Given that the last two of these risk factors would not apply to his mother, her return to Russia for brief visits staying with a friend were not relevant or material to an assessment of the Appellant's risk on return.

15. On the second ground of appeal, the Home Office Presenting Officer submitted that it was unclear what very compelling circumstances were relied upon by Judge Morron to outweigh the public interest in deportation in accordance with paragraph 398 of the Immigration Rules. Some of the factors that were relied upon in paragraphs 124 and 125, that the Appellant speaks fluent English and would be likely to in the future be able to maintain himself without public support were, in accordance with the Court of Appeal's decision in **Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803** at best neutral and not positive factors in the Appellant's favour. In any event, it was submitted that if the appeal under the first ground was successful, the misdirection and unsupported findings on Articles 2 and 3 of the European Convention on Human Rights would render the decision on Article 8 unsafe.

16. Although Counsel for the Appellant did not accept that the outcome of the first ground of appeal was determinative of the appeal on the Article 8 assessment, it was accepted that it was the findings of risk on return and in relation to the Appellant's

mental health which tipped the balance in favour of the Appellant to outweigh the public interest in deportation.

17. Finally, in relation to the third ground of appeal, it was submitted on behalf of the Respondent that the First-tier Tribunal reached conclusions which were not supported by any medical evidence and there was no consideration of the evidence that the Appellant had failed to engage in treatment offered to him to date. In response, Counsel for the Appellant relied on the qualification of the fifth criteria in **J** as set out by Lord Justice Sedley in **Y (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362** that account must be taken of the fact that the Appellant's psychological problems were caused by mistreatment in Russia and that his subjective fear of return is sufficient when considering the suicide risk. There was sufficient medical evidence of the same as well as evidence from the Appellant's family.

Findings and reasons

18. In relation to the first ground of appeal, I find that the First-tier Tribunal materially erred in law in the assessment of risk on return to this Appellant under Articles 2 and 3 of the European Convention on Human Rights. The findings made by Judge Morron in this regard are unclear in a number of respects and not supported by the evidence that was before him. There is a simple conclusion in paragraph 113 that the country information does not show that racial violence and discrimination against ethnic minorities in Russia, including Armenians has significantly decreased since 2007/8. However, the Respondent had submitted evidence that there had been a decrease in racially motivated violence at least until 2012 and although there was later evidence quoted in the UNHCR response that such violence was no longer declining by 2013, there was no evidence that it had since then increased, nor that it had returned to the peak of 2007/8. The Respondent's reliance on this evidence was criticised as lacking consideration of up-to-date country information, however little evidence beyond 2013, specific to the issue of racial abuse and violence, was available to the First-tier Tribunal nor specifically relied upon in the decision under appeal.

19. It is entirely unclear what reliance, if any, was placed on the expert report of Dr Rano Turaeva-Hoehne dated 17 October 2016 given that following a summary of its contents there is an unexplained statement that it is lacking in neutrality. The only part that appears to be expressly relied upon is a quote from the Foreign and Commonwealth Office report of a general deterioration in the human rights situation in Russia in 2014. Although the general human rights situation in Russia may be relevant as part of the fact-finding exercise, it seems that it has been given significant weight in the present appeal in the absence of more specific background country information.

20. Further, although there is a finding that the Appellant would be conspicuous by reason of his non-Slavic appearance, there is no detailed consideration of this as a separate risk factor. The Appellant also put his claim on the basis of risk on return by reason of forced military service but there are no express findings on this either

save for a brief reference to liability to military service in the context of internal relocation.

21. There are no clear findings as to whom the Appellant is at risk from, whether it is from state agents or non-state actors which is highly relevant to the question as to whether there would be a sufficiency of protection for him in Russia. Without any fuller assessment, Judge Morron simply concludes that due to the Appellant's vulnerabilities, he would not be able to rely upon the protection of the state. No reasons are given for that and reliance is not the correct test to apply. The decision does not disclose that there has been any detailed assessment of whether the Appellant would have a sufficiency of protection in Russia or not.

22. The Respondent further complained that the First-tier Tribunal failed to take into account and give weight to the Appellant's mother's return to Russia on three occasions. I do not find that this of itself would have been a material error of law given the brief periods for which she returned, on a British passport and given that there are differences in the claimed risk factors between her and the Appellant. However, in the context of the findings above, it would have been preferable for the First-tier Tribunal to have addressed this issue expressly.

23. For all of these reasons, I find that there has been a material error of law in the assessment of risk on return for this Appellant where the findings are unclear, not rationally based on the available background evidence, fail to consider all of the risk factors relied upon and fail to undertake any meaningful assessment of sufficiency of protection.

24. As to the second ground of appeal, although an appeal on Article 8 grounds by reference to paragraphs 398 and following of the Immigration Rules does not necessarily stand or fall with a claim under Articles 2 and 3, I find that in the present case it does because of the nature of the findings made by Judge Morron. In paragraph 127, as is accepted by Counsel for the Appellant, it is clear that the tipping point at which the public interest in deportation was outweighed was the real risk of the Appellant suffering serious harm on return to Russia. Given the errors of law in the assessment of evidence and giving of reasons in relation to Articles 2 and 3 of the European Convention on Human Rights set out above, the reliance on these findings for the purposes of finding very compelling circumstances is also rendered unsafe.

25. For completeness, I also find a material error of law in paragraph 124 of the decision which contrary to the Court of Appeal's decision in **Rhuppiah**, attached positive weight in the Appellant's favour to his level of English and ability to support himself in the United Kingdom under sections 117B(2) and (3) of the Nationality, Immigration and Asylum Act 2002. These factors can at best only be neutral.

26. The final ground of appeal relates to the assessment of the Appellant's mental health and finding that his return to Russia would be a breach of Articles 2 and/or 3 of the European Convention on Human Rights for this reason. Judge Morron, in paragraph 117, refers to the psychological report and the conclusions set out there in and goes

on to find that contrary to the Respondent's conclusion that the Appellant would be able to defend or stand up for himself against harassment or discrimination, that there is a reasonable risk or a very real likelihood that when faced with the threat of violence he would be unable to defend himself and that he would be seriously injured or take his own life. There is reference to the likelihood of treatment being available in Russia for the Appellant but that it would take time to arrange it and the Appellant would be unlikely to access it. The high risk of suicide was referred to.

27. It is unclear from this paragraph as to whether the Appellant's mental health, and in particular his risk of suicide, was itself considered sufficient to cross the high threshold to allow his appeal under Articles 2 and/or 3 of the European Convention on Human Rights or whether this was simply an additional factor aggravating the risk on return for the other reasons found. If the former, the First-tier Tribunal has had no regard to the Court of Appeal's decision in **I** which identified the following five stages of the correct test to be considered in such cases.

27. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see Ullah paras [28-39].

28. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in Soering at para [91], the court said:

"In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."(emphasis added).

See also para [108] of Vilvarajah where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka…"

29. Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of D and para [40] of Bensaid.

30. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of Bensaid).

31. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-

founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.

32. *Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights.*

28. The fifth principle was further qualified by the Court of Appeal in **Y (Sri Lanka)** but has not been considered either. The First-tier Tribunal's decision does not show that any of these parts of the test have been substantively considered and there has been no assessment of the limited nature of the evidence available to the Appellant's mental health. There is in particular no assessment of the likely severity of any adverse impact on the Appellant's mental health on return to Russia and what, if anything, this would mean for the possibility of him receiving appropriate treatment.

29. Even if the Appellant's mental health and risk of suicide were taken into account only as an aggravating factor to the other risk factors already identified and used to demonstrate why the consequences for this Appellant may be more severe than for others, there is again a lack of substantive assessment of the Appellant's mental health in light of what medical evidence is available and the likely effects on return to Russia.

30. For these reasons I find that the First-tier Tribunal has also materially erred in law in the assessment of risk on return under Articles 2 and 3 of the European Convention on Human Rights when considering the Appellant's mental health and risk of suicide.

31. For the reasons set out above, I allow the Respondent's appeal on all three rounds and find that the First-tier Tribunal has materially erred in law on all grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of material errors of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal for re-hearing.

Directions to the parties

1. This appeal is remitted to the First-tier Tribunal for complete rehearing. There are no preserved findings of fact although it should be noted that there is no dispute about the Appellant's history and experiences in Russia which were accepted by Judges Carroll and Herbert in a determination promulgated on 16 April 2007.

2. Any further evidence relied upon shall be filed with the First-tier Tribunal and served upon the other party no later than 14 days prior to the hearing of the remitted appeals.

3. The Appellant is to file with the First-tier Tribunal and serve upon the Respondent no later than 14 days prior to the hearing of the remitted appeal a skeleton argument setting out relevant issues, with reference to evidence and case-law.

4. The First-tier Tribunal may issue further directions as required.

Directions to administration

1. The appeal is remitted and shall be heard at the Taylor House hearing centre on a date to be fixed by that centre.

2. The remitted appeal is to be listed before any Judge except Judges Morron, Carroll, Herbert or Brown.

3. There is a time estimate of 3 hours for the hearing.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 19th May 2017

Upper Tribunal Judge Jackson