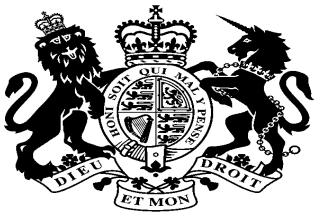

Upper Tribunal
(Immigration and Asylum Chamber) **appeal number:** PA/04607/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On 17 October 2019

Decision & Reasons Promulgated
On 25 October 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

V D P
(anonymity direction made)

Respondent

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Mr E MacKay, of McGlashan MacKay, Solicitors

DETERMINATION

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.

2. By a decision promulgated on 26 April 2019, FtT Judge Farrelly allowed the appellant's appeal on health grounds only, finding that removal "would be a breach of either articles 3 or 8".

3. The SSHD appealed to the UT on the grounds that the FtT did not explain how the high threshold for medical cases was reached, and failed to apply *J v SSHD* [2005] EWCA Civ 629 and *Y and another v SSHD* [2009] EWCA Civ 362.

4. At the first hearing in the UT, Mr MacKay referred to the skeleton argument for the appellant in the FtT, which cites the medical evidence and, at [14 – 15], the six step analysis required by *J*. His "outline argument / rule 24 notice" and oral submissions, were on these lines:

   (i) the decision of the FtT was to be read in context of the evidence and of the submissions to it;

   (ii) the grounds failed to reflect that;

   (iii) the decision showed that the FtT was aware that the appellant advanced health grounds as the strongest aspect of his case;

   (iv) the decision could be sustained by reading the medical reports, which the FtT accepted, and the skeleton argument, along with the decision;

   (v) the necessary analysis could be read, in particular, into the finding at [45] that "the risk is genuine and beyond the appellant's informed choice".

5. Having reserved the issue of error of law, I reached a decision dated 23 September 2019, repeated in the next four paragraphs.

6. The FtT mentioned relevant case law at [41, 43, and 44] but not the obviously pertinent authorities of *J* and *Y*. The choice of which cases to cite, and which not to cite, was surprising.

7. Absence of explicit citation of authority is not an error of law, and parties are taken to be aware of the case put to the Judge. However, a decision must show that the correct legal approach has been adopted.

8. Although neither party made anything of it, the decision of the FtT came almost 6 months after the hearing, and included no explanation for the delay.

9. Mr MacKay's submissions did their best to read into the decision what is not there. Mr Govan was able to show that the several issues posed by *Y* were not resolved.

10. Parties had asked for the opportunity to prepare and advance further submissions, if the decision were to be set aside. Helpfully, they then both provided written submissions, to which on 17 October 2019 they had nothing to add.

11. I remake the decision as follows.

12. It was common ground that the legal framework is to be taken from *J*, where the Court said that the test of real risk was to be amplified thus:

[26] 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 [38-39].

[27] 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…"

[28] 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.*

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

[30] 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.

[31] 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.

13. *Y* adds to the fifth principle:

> [15] There is no necessary tension between the two things. The corollary of the final sentence of §30 of *J* is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it. Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened, especially if the same authorities are in charge, notwithstanding that the objective risk of recurrence has gone.

> [16] One can accordingly add to the fifth principle in *J* that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return.

14. The appellant founds on two psychiatric reports, both based on interviews, previous reports, and medical records.

15. The report of Dr K Idris, specialty doctor, general adult psychiatry, is dated 2 September 2018. In summary, his opinion is as follows:

> [1] The appellant displays mental state elements which might qualify for a diagnosis of paranoid schizophrenia, but with a present diagnosis of persistent delusional disorder.
>
> [2] He is on the recommended antipsychotic therapy, risperidone, the effectiveness of which should be continually monitored.
>
> [3] There may be a tendency of individuals with psychotic disorder to have increased risk of suicide, which may worsen at times of stress, evidenced by previous attempts at suicide when faced with adversity of threats of deportation and coping with the diagnosis of HIV. The risks are monitored [in the UK] …
>
> [4] Without access to mental health services, there may be a likely risk of psychosis and death to suicide. I am unable to comment on availability of services and treatment in Sri Lanka …

16. The report of Dr L Ramsay, consultant forensic psychiatrist, is dated 25 September 2018. To summarise her opinion:

> [1] … [the appellant] … fulfils the clinical criteria for a diagnosis of paranoid schizophrenia … rather than one of persistent delusional disorder.
>
> [2] [the appellant] requires ongoing treatment and monitoring by specialist services. His care is complicated by the co-existing diagnosis of HIV …
>
> [4] … [the appellant] has a chronic and enduring mental illness. He has a psychotic illness and is at increased risk of suicide secondary to this.
>
> [5] … [the appellant] requires input from secondary specialist services … in the long term and … without appropriate care and treatment his mental state is likely to deteriorate rapidly …
>
> [6] [the appellant] can currently continue to be treated as an informal patient. He is entirely compliant with his treatment and has good insight into the nature of his difficulties … if [the appellant], however, became non-compliant … he would fulfil criteria for detention or compulsory treatment …
>
> [7] I am unable to comment on availability of … services and treatment in Sri Lanka.

17. No doubt, the appellant expressed to the psychiatric experts a genuine reluctance to return to Sri Lanka; but that must be qualified by his failure to establish that the reason for his reluctance is a fear of persecution which is either objectively or subjectively genuine.

18. The submission for the appellant relies heavily on the prognosis *if* he were not compliant with treatment; but medical opinion is that he has insight and does comply, so that is not merely speculative, it is contrary to the evidence.

19. The submission for the appellant relies also on the respondent not having provided evidence of removal arrangements, such as escorts, or evidence of treatment and facilities available in Sri Lanka.

20. The tribunal is entitled to take judicial notice of the respondent's duties, and to assume the respondent's compliance, in managing the removal of vulnerable claimants, including those who may present a suicide risk.

21. The appellant cites *J* at [62] as authority to the contrary, but that is a misreading. The Home Office does not have to establish in advance how it will specifically comply in an individual case.

22. The onus of establishing his case remains on the appellant, and he has had the benefit of legal representation during proceedings over the last several years.

23. There remains before the UT a report obtained by the appellant from a country expert, Dr Chris Smith. The report is mainly concerned with the import of matters which the appellant failed to establish, which no doubt is why it was not relied upon in the written submission on his behalf. The original report was written in July 2017, with an addendum dated 5 November 2018. This discloses that there have been some improvements in mental health care provision in recent years, and that a significant range of medications is available, subsidised by the government and mostly cheap.

24. The most recent evidence of the appellant's treatment is that he takes risperidone, an anti-psychotic available in Sri Lanka, on undisputed information provided by the respondent.

25. Mental health facilities and support organisations in Sri Lanka are not the equivalent of those in the UK, but they exist, particularly in Colombo, where the appellant comes from, and where he has family with whom he is in touch, including his parents.

26. The submission for the appellant maintains that he "has no insight into his illness", and that there is "compelling evidence showing a strong causal link between removal and high suicide risk". The evidence is not there to establish those propositions.

27. To summarise in terms of *J* and *Y*:

    (i) The evidence does not support the reality of a risk at the minimum level of severity.

    (ii) The evidence does not support a causal link between removal and self-harm.

(iii) This is a foreign case. The alleged outcome is not an act of the receiving state. It is the result of an illness, with little to show that it would be worsened by removal.

(iv) The claim is available in principle, but not made out on the evidence.

(v) A genuine fear is not established, either objectively or subjectively.

(vi) The removing state has effective mechanisms in place, if these were required. The receiving state does not supply a similar level of care, but that is not a decisive issue, in absence of real risk.

28. The decision of the FtT is set aside.

29. The decision is remade thus: the appeal, as brought to the FtT, is dismissed.

30. An anonymity direction continues to apply.

Dated 21 October 2019

UT Judge Macleman