IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

First-tier Tribunal No:
PA/50331/2020
LP/00192/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 March 2023

Before

UPPER TRIBUNAL JUDGE LANE

Between

KB
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Responden

Determined without a hearing

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By a decision dated 2 December 2021, I extended the time for the appellant to give notice, pursuant to section 104(4B) of the Nationality, Immigration and Asylum Act 2002, that he wishes to pursue his appeal in so far as it is brought on the ground of humanitarian protection. My reasons for that decision are attached as Annex A. The First-tier Tribunal had not considered the appellant's appeal on humanitarian protection grounds. It had dismissed the appeal on asylum and Article 3 ECHR grounds but allowed it on Article 8 ECHR grounds. I gave the following directions:

> 1. As a judge of the First-tier Tribunal, I extend time for the appellant to give notice, pursuant to section 104(4B) of the Nationality, Immigration and Asylum Act 2002, that he wishes to pursue his appeal in so far as it is brought on the ground of humanitarian protection.
>
> 2. As a judge of the Upper Tribunal, I direct that (i) the appellant shall, within 21 days of the date upon which his respondent receives this decision, file and serve written submissions dealing with the appeal on humanitarian protection grounds only; (ii) I direct that the Secretary of State may, if so advised, file and serve any additional submissions no later than 7 days after she receives the appellant's submissions.

Giving permission to the appellant to proceed with his appeal on humanitarian protection grounds only, I recorded that 'that the findings of the First-tier Tribunal concerning the appellant's mental health have not been disturbed. These include the finding that any risk to the appellant on account of his mental health is 'speculative' [20]; that having left Algeria illegally will not result in the appellant suffering serious harm [23]; that the evidence before the First-tier Tribunal did not show a risk of serious harm to the appellant in Algeria or Morocco [25].'

2. Unfortunately, an administrative error led to several attempts being made to list the appeal for a resumed hearing before a differently constituted panel of the Upper Tribunal notwithstanding my direction that I would determine the appeal on the papers. The file has now been passed back to me and I am able to bring the appeal to a conclusion by remaking the decision on humanitarian protection grounds.

3. As I noted previously, Mr Tan, for the Secretary of State, has already made submissions in respect of humanitarian protection. I have received no additional written submissions from the Secretary of State in response to my directions. Ms Patel filed and served additional submissions dated 4 January 2022.

4. Ms Patel submits that the appeal on humanitarian protection grounds should be allowed 'for the same reasons the First-tier Tribunal Judge allowed the appellant's case under paragraph 276ADE(vi) of the Immigration Rules.' Paragraph 276ADE(vi) requires an applicant to show that there would be 'very significant obstacles to the applicant's

integration into the country where they would have to live if required to leave the UK.'

5. Ms Patel's submission fails to acknowledge the difference between Paragraph 276ADE and humanitarian protection. None of the factors, such as problems with identity documents, isolation as a consequence of PTSD and depression and lack of a support network which Judge Cox identified as cumulatively crossing the paragraph 276ADE threshold, involve 'an actor of persecution or serious harm' as defined in Article 6 of Directive 2004/83. Article 6 defines an 'actor of persecution or serious harm' as:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm …'

In her submissions, the Secretary of State relies on *NM (Art 15(b): intention requirement) Iraq* [2021] UKUT 259 (IAC). The headnote reads:

> *In order for an applicant, who relies upon medical grounds, to meet the requirements for humanitarian protection under Article 15(b) of the Qualification Directive ("QD") s/he must demonstrate that substantial grounds exist for believing there to be a real risk of serious harm by virtue of actors of harm (as defined by Article 6 QD) intentionally depriving that individual of appropriate health care in that country.*
>
> *2. To establish the intentionality requirement the individual will have to show by evidence a sufficiently strong causal link between the conduct of a relevant actor and the deprivation of health care. Reliance on a degradation of health care infrastructure/provision on the basis of the generalised economic and/or security consequences of an armed conflict in the country of origin will not, in general, suffice.*
>
> *3. By contrast, Article 3 ECHR cases based on medical grounds do not require intentionality on the part of a third party.*

Real though the appellant's problems may be on return, they do not engage humanitarian protection because those problems do not involve any intentionality on the part of a third party. Referring to *NM* at [25] of her most recent submissions, Ms Patel does no more than cite the shortcomings of the Algerian and Moroccan health systems in providing adequate care for the former of victims of trafficking [26]. However, as the Upper Tribunal in *NM* observed [48] ' … in order to establish the nexus between the serious harm and the conduct of a third party, the individual must show intentionality, i.e. that they would be intentionally deprived of

relevant healthcare by a third party.' [my emphasis] Therefore, it does not follow, as Ms Patel contends, that the appellant's humanitarian protection appeal should succeed because he had been found to satisfy Paragraph 276ADE. In essence, Ms Patel's submissions are an attempt to reiterate the appellant's health claim, which the First-tier Tribunal rejected as capable of crossing the Article 3 ECHR threshold, categorised afresh as a claim for humanitarian protection. That attempt cannot succeed for the reasons I have given.

6. Accordingly, I remake the decision. The First-tier Tribunal's dismissal of the appeal on asylum and Article 3 ECHR grounds shall stand as shall its decision to allow the appeal on Article 8 ECHR grounds. The appeal on humanitarian protection grounds (which the First-tier Tribunal failed to determine) is dismissed.

Notice of Decision

I have remade the decision. The First-tier Tribunal's dismissal of the appeal on asylum and Article 3 ECHR grounds shall stand as shall its decision to allow the appeal on Article 8 ECHR grounds. The appeal on humanitarian protection grounds (which the First-tier Tribunal failed to determine) is dismissed

C. N. Lane

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 2 January 2023

ANNEX A

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA 503312020

THE IMMIGRATION ACTS

Heard at Manchester
Via Teams
On 4 November 2021

Decision & Reasons Promulgated
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Before

UPPER TRIBUNAL JUDGE LANE

Between

KB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Patel
For the Respondent: Mr Tan, Senior Presenting Officer

DECISION AND DIRECTIONS

The initial hearing: error of law

1. By a decision promulgated on 15 September 2021, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

> 1. The appellant is a male citizen of Algeria who was born in 2001. He appealed to the First-tier Tribunal against a decision of the Secretary of State dated 10 June 2020 refusing his claim for

international protection. The First-tier Tribunal, in a decision dated 19 November 2020, dismissed his appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. At the initial hearing, counsel for the appellant, Ms Patel, sought to persuade me that the judge had erred in law by dismissing the appeal on asylum grounds. However, she overlooked that fact that Upper Tribunal Judge Blundell has granted permission to appeal on a limited basis only; he has specifically refused permission on asylum grounds which, as he points out, renders the arguments advanced by the appellant as regards his claimed membership of a particular social group immaterial. Permission has been granted only in respect of humanitarian protection and Article 3 ECHR.

3. The appellant is a young adult with serious mental health problems. At page 3 of the decision, the judge expresses his 'frustration' that Article 3 ECHR (on the basis of health/suicide) had been raised at the hearing only as 'an afterthought.' However, notwithstanding that frustration, the judge has not sought to engage with the submissions that the appellant's problems might expose him to ill-treatment on return to Algeria. Indeed, he failed to do so despite observing at [36], in his analysis of the Article 8 ECHR grounds, that:

> … the appellant's difficulties are likely to compounded by his mental health issues. The appellant has been diagnosed as suffering from PTSD and depression and I have accepted that he is likely to become isolated. In my view, this is likely to lead to him being unwilling or unable to access mental health support. Difficulties in accessing support for his mental health issues are likely to be further compounded by the lack if identity documentation.

4. It is surprising that, in what is otherwise a characteristically thorough and detailed analysis, the judge has omitted to consider Article 3 ECHR (health) and humanitarian protection. It may be that, having focused in some detail on the reasons why the appellant, although a recognised victim of trafficking, would not be at risk of similar harm on return and having also concluded (as regards Article 8 ECHR and paragraph 276ADE) that the appellant's mental health constituted a very significant obstacle to his integration in Algeria, the judge has simply overlooked those remaining aspects of the appeal. He may not have been assisted by lack of any detailed submissions on that issue from the parties. I note that, at [42], the judge appears to conclude that, having allowed the Article 8 ECHR appeal, he should 'make no finding' on Article 3 ECHR as the appellant will not be removed from the United Kingdom. If that was the judge's approach, it was incorrect; the judge was required to deal with all the grounds of appeal before the Tribunal. He makes no mention of humanitarian protection.

5. I find that the judge did err in law by failing to address humanitarian protection and Article 3 ECHR (health). He has, in effect, produced an incomplete decision; there is no need to set aside any of the judge's findings of fact or his decisions on Article 8 ECHR and asylum. The Upper Tribunal shall remake the decision only in respect of

> humanitarian protection and Article 3 ECHR (health) following a resumed hearing. The parties may adduce new evidence provide copies of any documentary evidence are sent to the Upper Tribunal and to the other party no less than 10 days before the resumed hearing.
>
> Notice of Decision
>
> The decision of the First-tier Tribunal is set aside. The findings of fact shall stand. The appeal against the decision of the respondent dated 19 November 2020 is allowed on Article 8 ECHR grounds and dismissed on asylum grounds. The Upper Tribunal shall remake the decision only in respect of humanitarian protection and Article 3 ECHR (health) following a resumed hearing.

The resumed hearing

2. At the outset of the resumed hearing held remotely at Manchester Civil Justice Centre on 4 November 2021, I was informed by Mr Tan, who appeared for the Secretary of State, that the appellant had been granted 30 months leave to remain on 9 December 2020. Section 104(4A) of the Nationality, Immigration and Asylum Act 2002 provides:

> (4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B)).
>
> (4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection) where the appellant—
>
> (a) …
>
> (b) gives notice, in accordance with the Tribunal Procedure Rules, that he wishes to pursue the appeal in so far as it is brought on that ground.

The appellant did not notice under section 104 (4B) until his representative wrote to the Upper Tribunal on 3 November 2021. That notice is out of time.

3. The Upper Tribunal decision in *MSU (S.104(4b) notices) Bangladesh* [2019] UKUT 412 (IAC) helpfully sets out the procedure rules to section 104 refers:

> 6. The phrase "Tribunal Procedure Rules" is not defined in the 2002 Act, but the Rules made by virtue of s 22 of the Tribunals, Courts and Enforcement Act 2007 are to be called "Tribunal Procedure Rules". It is to those Rules, therefore, that s 104(4B)(b) refers. There are separate Rules for the First-tier Tribunal (Immigration and Asylum Chamber) and for the Upper Tribunal: the latter are nominally the same for all chambers of the Upper Tribunal except the Lands Chamber, but contain numerous provisions specific to individual chambers or different kinds of proceedings.

7. In the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604), rule 16, so far as relevant, is as follows.

> "Appeal treated as abandoned or finally determined
>
> 16.- (1) A party must notify the Tribunal if they are aware that -
>
> (a) the appellant has left the United Kingdom;
>
> (b) the appellant has been granted leave to enter or remain in the United Kingdom;
>
> (c) a deportation order has been made against the appellant; or
>
> (d) a document listed in paragraph 4(2) of Schedule 2 to the 2006 Regulations has been issued to the appellant.
>
> (2) Where an appeal is treated as abandoned pursuant to section 104(4A) of the 2002 Act or paragraph 4(2) of Schedule 2 to 2006 Regulations, the Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined, as the case may be.
>
> (3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the 2002 Act, but the appellant wishes to pursue their appeal, the appellant must provide a notice, which must comply with any relevant practice direction, to the Tribunal and each other party so that it is received within 28 days of the date on which the appellant was sent notice of the grant of leave to enter or remain in the United Kingdom or was sent the document listed in paragraph 4(2) of Schedule 2 to the 2006 Regulations, as the case may be."

8. This should be read with rules 4 and 6. Rule 4, "Case Management Powers" gives general powers and, by rule 4(3):

> "In particular, ... the Tribunal may -
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction; "

Finally, rule 6 is as follows:

> "Failure to comply with rules etc.
>
> 6.- (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include -

(a) waiving the requirement;

(b) requiring the failure to be remedied; or

(c) exercising its power under paragraph (3).

(3) The Tribunal may refer to the Upper Tribunal, and ask the Upper Tribunal to exercise its power under section 25 (supplementary powers of Upper Tribunal) of the 2007 Act in relation to, any failure by a person to comply with a requirement imposed by the Tribunal -

(a) to attend at any place for the purpose of giving evidence;

(b) otherwise to make themselves available to give evidence;

(c) to swear an oath in connection with the giving of evidence;

(d) to give evidence as a witness;

(e) to produce a document; or

(f) to facilitate the inspection of a document or any other thing (including any premises)."

9. In rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) there are for present purposes exactly the same case management powers, and rule 5(3)(a) is word for word the same as rule 4(3)(a) of the First-tier Tribunal Rules. Rule 7 has similar functions to those of First-tier Tribunal rule 6, but is a little different:

"Failure to comply with rules etc.

7.- (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include -

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case); or

(d) ..."

Rules 7(3) and (4) prescribe the procedure if a matter is referred to the Upper Tribunal under First-tier tribunal rule 6(3).

10. The specific rules envisaged by s 104(4B) are in Upper Tribunal rule 17A:

"Appeal treated as abandoned or finally determined in an asylum case or an immigration case

17A. (1) A party to an asylum case or an immigration case before the Upper Tribunal must notify the Upper Tribunal if they are aware that-"

(a) the appellant has left the United Kingdom;

(b) the appellant has been granted leave to enter or remain in the United Kingdom;

(c) a deportation order has been made against the appellant; or

(d) a document listed in paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006 has been issued to the appellant.

(2) Where an appeal is treated as abandoned pursuant to section 104(4) or (4A) of the Nationality, Immigration and Asylum Act 2002 or paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006, or as finally determined pursuant to section 104(5) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined.

(3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002, but the appellant wishes to pursue their appeal, the appellant must send or deliver a notice, which must comply with any relevant practice directions, to the Upper Tribunal and the respondent so that it is received within thirty days of the date on which the notice of the grant of leave to enter or remain in the United Kingdom was sent to the appellant.

(4) Where a notice of grant of leave to enter or remain is sent electronically or delivered personally, the time limit in paragraph (3) is twenty-eight days.

> (5) Notwithstanding rule 5(3)(a) (case management powers) and rule 7(2) (failure to comply with rules etc.), the Upper Tribunal must not extend the time limits in paragraph (3) and (4)."

4. I was surprised to learn at the resumed hearing that I may have been the only person at the initial hearing who had been unaware that the appellant had been granted 30 months leave to remain. It is clear that the effect of that grant was that the appeal proceedings were to be treated as abandoned. Consequently, all steps taken in the appeal after 9 December 2020 (including the grant of permission and my decision on error of law) are without any effect unless and until the appellant is granted permission to pursue his appeal. I directed the representatives to file and serve written submissions dealing with the consequences of that abandonment. Submissions from both representatives have now been received.

The asylum appeal

5. Before I address the problems for the appellant arising from the operation of section 104(4)(A), I shall consider those parts of the appeal which, in my opinion, cannot in any event be resurrected, namely the appeal on asylum and human rights (Article 3 ECHR) grounds.

6. Granting permission to appeal to the Upper Tribunal, Upper Tribunal Judge Blundell found that the First-tier Tribunal's conclusion that the appellant was no longer at risk of trafficking was not arguably wrong in law. He noted that, '[the First-tier Tribunal's conclusion] disposed of the claim under the Refugee Convention, as a result of which the second ground (membership of PSG) is immaterial.' At the initial hearing, as I recorded in my error of law decision (see (1) above), 'Ms Patel, sought to persuade me that the judge had erred in law by dismissing the appeal on asylum grounds. However, she overlooked that fact that Upper Tribunal Judge Blundell has granted permission to appeal on a limited basis only; he has specifically refused permission on asylum grounds which, as he points out, renders the arguments advanced by the appellant as regards his claimed membership of a particular social group immaterial. Permission has been granted only in respect of humanitarian protection and Article 3 ECHR.' At the conclusion of my decision, I wrote, 'The appeal against the decision of the respondent dated 19 November 2020 is allowed on Article 8 ECHR grounds **and dismissed on asylum grounds. The Upper Tribunal shall remake the decision only in respect of humanitarian protection and Article 3 ECHR (health) following a resumed hearing.**' [my emphasis]

7. At the resumed hearing, Ms Patel sought again to raise the asylum appeal notwithstanding my decision on error of law. She relied on the Upper Tribunal decision in *EH (PTA: limited grounds; Cart JR) Bangladesh* [2021] UKUT 117 (IAC), part of the headnote of which reads:

> *(2) Rule 22(2)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 has the effect that in the absence of any direction*

> *limiting the grounds which may be argued before the Upper Tribunal, the grounds contained in the application for permission are the grounds of appeal to the Upper Tribunal, even if permission is stated to have been granted on limited grounds.*

She submitted that Upper Tribunal Judge Blundell had not directed that the grounds of appeal before the Upper Tribunal should be limited. Consequently, the entirety of the application for permission, including the asylum grounds, should stand as the appellant's grounds before the Upper Tribunal.

8. Upper Tribunal Judge Blundell's grant of permission pre-dates the decision in *EH* so, unsurprisingly, he has not sought to provide any direction. I note that he has, in accordance with the decision of another Presidential panel in *Safi and others (permission to appeal decisions)* [2018] UKUT 388 (IAC), limited the grant of permission in the decision part of the template rather than the reasons section. However, I find that I do not need to reach any view as the application of *EH* in the current appeal. That is because my error of law decision disposed of the appeal proceedings so far as they related to asylum and none of the conditions described in paragraph 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 are satisfied:

> 43.—(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
>
> (a) the Upper Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings.

Sub-paragraphs 2 (a-c) plainly do not apply whilst failing (arguably) to follow a non-binding decision of the Upper Tribunal (albeit that of a Presidential panel) does not come close to amounting to a 'procedural irregularity.' Moreover, following the Court of Appeal judgment in *Patel*

[2015] EWCA Civ 1175, it is clear that the Upper Tribunal's powers to set aside its own decisions are limited to those in rules 43 and 45-6 of the Upper Tribunal Rules (see *Jan (Upper Tribunal: set-aside powers)* [2016] UKUT 00336 (IAC). Accordingly, I have no alternative but to resist Ms Patel's invitation to revisit the appeal on asylum grounds. I note, however, that the whole of my error of law decision will be void by reason of absence of jurisdiction in the event that I do not extend time for giving a section 104(4B) notice (see below).

The human rights (Article 3 ECHR) appeal

9. Although my error of law decision directed that the decision on human rights (Article 3 ECHR) grounds should be remade at the resumed hearing, the human rights appeal has not survived the operation of section 104(4A). Whilst the abandonment of an asylum or humanitarian protection appeal may be avoided by reason of section 104(4B), a human rights appeal may not be avoided because it is not 'an appeal in … brought on a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection).' Even if the time for the appellant to give of notice of his wish to pursue his appeal is extended, that extension cannot cover an appeal on Article 3 ECHR grounds.

The humanitarian protection appeal; extending time under section 104(4B)

10. The Upper Tribunal considered the power of the Tribunal to provide relief from the sanctions imposed by section 104 in *MSU (S.104(4b) notices) Bangladesh* [2019] UKUT 412 (IAC). The headnote reads:

> *1. Where s.104(4A) applies to an appeal, neither the First-tier Tribunal nor the Upper Tribunal has any jurisdiction unless and until a notice is given in accordance with s.104(4B).*
>
> *2. If such a notice is given, it has the effect of retrospectively causing the appeal to have been pending throughout, and validating any act by either Tribunal that was done without jurisdiction for the reason in (1) above.*
>
> *3. As the matter stands at present, there are no 'relevant practice directions' governing the s.104(4B) notice in either Tribunal.*
>
> *4. The Upper Tribunal has power to extend time for a s.104(4B) notice. Despite the provisions of Upper Tribunal rule 17A(4), such a power can be derived from s.25 of the Tribunals, Courts and Enforcement Act 2007.*

The Tribunal's power to admit an out of time section 104(4B) notice is subject to the familiar principles set out in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, *Denton v T H White Ltd* [2014] EWCA Civ 906 and *Hysaj v SSHD* [2014] EWCA Civ 1633.

11. The appellant should have given notice that he wished to pursue his appeal no later than 9 January 2021, that is no later than 30 days after he was granted leave to remain (The Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 17A(3)). The appellant now seeks to give notice some 10 months out of time.

12. First, I have considered the reasons for the default. I have a witness statement by Caroline Wilson-Brown, the appellant's solicitor. She candidly acknowledges that the default was hers alone and that the appellant himself was blameless. I accept that, as the senior legally-qualified officer of Bradford Law Centre, she works under considerable pressure I also note that she has not encountered the operation of section 104 on many occasions in the course of her work. I accept also that her error is in no way characteristic of her work as a dedicated and competent professional. However, I am aware, as the Court of Appeal found in *Mitchell*, that 'overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason [for granting relief from sanctions]'.

13. Secondly, I have considered all the circumstances of the case. I have noted above my concern that I was not told about the grant of leave at the initial hearing. It appears that Ms Patel, counsel derived her knowledge of the circumstances of the appellant only from the instructions she received from Ms Wilson-Brown. I accept Ms Patel probably knew nothing of the grant when she appeared at the initial hearing; had she known, I am sure that she would have felt obliged to tell me. Mr Diwnycz, the respondent's Senior Presenting Officer, however, had access to the same Home Office database from which Mr Tan extracted details of the grant of leave before the resumed hearing. Although section 104 places the obligation on the appellant to give notice of any grant of leave, I take into account that Mr Diwnycz could and should have been aware of the grant at the time of the initial hearing. Had he known, he too should have told me.

14. I am not satisfied that the respondent will suffer any significant prejudice should time be extended. First, the appellant already has leave to remain until 2023. Secondly, the respondent cannot complain that the appellant has kept her in ignorance of his circumstances; the respondent has been aware throughout that she had granted the appellant leave to remain. Mr Tan complains in his written submissions [14] that there have already been two hearings and there may be more. Certainly, if these proceedings were taking place in a civil court, then the appellant's solicitors may well have faced an order for wasted costs. However, for reasons I shall give below, there will be no further hearings and the respondent's submissions on the only remaining issue in the appeal appear to be made already (see Mr Tan's submissions at [19]).

15. Mr Tan submits that the only aspect of this appeal which remains to be determined (humanitarian protection) is so weak that time should not be extended. He relies on *NM (Art 15(b): intention requirement) Iraq* [2021] UKUT 259 (IAC):

> *In order for an applicant, who relies upon medical grounds, to meet the requirements for humanitarian protection under Article 15(b) of the Qualification Directive ("QD") s/he must demonstrate that substantial grounds exist for believing there to be a real risk of serious harm by virtue of actors of harm (as defined by Article 6 QD) intentionally depriving that individual of appropriate health care in that country.*
>
> *2. To establish the intentionality requirement the individual will have to show by evidence a sufficiently strong causal link between the conduct of a relevant actor and the deprivation of health care. Reliance on a degradation of health care infrastructure/provision on the basis of the generalised economic and/or security consequences of an armed conflict in the country of origin will not, in general, suffice.*
>
> *3. By contrast, Article 3 ECHR cases based on medical grounds do not require intentionality on the part of a third party.*

Mr Tan's submission is compelling. He is correct also to point out that the findings of the First-tier Tribunal concerning the appellant's mental health have not been disturbed. These include the finding that any risk to the appellant on account of his mental health is 'speculative' [20]; that having left Algeria illegally will not result in the appellant suffering serious harm [23]; that the evidence before the First-tier Tribunal did not show a risk of serious harm to the appellant in Algeria or Morocco [25].

16. Finally, I have considered the remarks of the Court of Appeal in *BR (Iran)* [2007] EWCA Civ 198 which Ms Patel cites in her written submissions. At [18] and [21] the Court of Appeal stated:

> The other general issue is that, as the present cases all too graphically show, delay of whatever sort will often have to be laid at the door of legal advisers. In ordinary private litigation, both before and after the introduction of the CPR, a party has attributed to him, and is responsible for, the action or inaction of his lawyers: see per Peter Gibson LJ in Training in Compliance Ltd v Dewse [2001] CP Rep 46[66], cited with approval by Arden LJ in FP(Iran) v SSHD [2007] EWCA Civ 13[80]. But, as Arden LJ went on to urge, considerations in asylum cases are different. And that view was underlined, as a matter of ratio, by Sedley LJ at §45 of the same case, where he adopted the observation of Lord Denning MR in R v IAT ex p Mehta [1976] Imm AR 38 that it is no consolation to tell a person that she can sue her solicitor for his mistake if the mistake is about to lead to her removal from this country; and, a fortiori, if the removal is to a condition of persecution.
>
> … First, the point of departure is said to be the principle of finality of litigation. But enquiries under the Refugee Convention are not ordinary private litigation, and may require to be approached from a different perspective: see §17 above. It is very doubtful whether the Taylor v Lawrence standard is a reliable guide in that enquiry. Second, when the

> concern of the court is not primarily the modalities and efficiency of domestic private litigation, but whether the United Kingdom will fulfil its obligations under the Refugee Convention, any rule of thumb based simply on length of delay would seem to be misplaced. Third, the CPR r 3.9 check-list was formulated in the context of orthodox private litigation, and applications of it to the issues arising in immigration cases tend to be artificial: as may be thought to be illustrated by the exposition in §36 of YD(Turkey). The real question in such cases is the balancing of the two principles set out in §17 above. That the court effectively recognised in YD(Turkey), but the perspective from which it approached that exercise may have caused it to undervalue the need to respect the United Kingdom's international obligations. Fourth, it was accepted in YD(Turkey) that the delay had been caused by the applicant and not by his lawyers, but reliance on the private law-oriented approach of CPR r 3.9 may imply that in other cases an applicant would be fixed with the faults of his representatives. If that is the unacknowledged assumption it will have to be reviewed in the light of the guidance given by Arden LJ in FP(Iran) v SSHD, summarised in §18 above.

17. Having regard to the crucial differences between immigration proceedings and civil litigation identified by the Court of Appeal in *BR* and to which the Tribunal must have regard when considering relief from sanctions, the respondent's own conduct in this matter, and the absence of any obvious prejudice to the respondent I have decided that, notwithstanding the considerable delay, the time for the appellant to give notice of his intention to continue his appeal on humanitarian protection grounds should be extended. In order to make a valid direction to that effect, I do so in my capacity as a judge of the First-tier Tribunal for the reasons given in *MSU*:

> 37. When abandonment under s 104(4A) takes place it will sometimes be perfectly clear which Tribunal has the task of dealing with the validity of a notice of intention to continue, including any question of the extension of time. For example, if the grant of leave takes place before the First-tier Tribunal's decision on the appeal, the Upper Tribunal cannot be involved and any such issues must be for the First-tier Tribunal. On the other hand, if the grant of leave occurs at a time when the appellant's appeal is clearly before the Upper Tribunal, following a decision on the appeal and either a grant of permission or a refusal renewed to the Upper Tribunal, the matter must be for the Upper Tribunal: the First-tier Tribunal is functus. As Judge Grubb pointed out, however, in the present case the matter is not so clear. Given that there was an application for permission made to the First-tier Tribunal, which was refused, and that there was then an application for permission made to the Upper Tribunal before the notice of intention to continue the appeal was given, it appears superficially that questions relating to the notice ought to be considered by the Upper Tribunal.
>
> 38. That, however, in our judgment cannot be right. The grant of leave had the effect (provisionally, it may be said) of causing the appeal to be treated as abandoned; and unless and until a valid notice was given, any act by either Tribunal (other than acts connected with

> acknowledging the abandonment) was made without jurisdiction. In particular, an application for permission to appeal could not be received or determined. It follows from that at the time it received and determined the application for permission in the present case the First-tier Tribunal was acting without jurisdiction, because both events followed the grant of leave. The Upper Tribunal has not been involved. (The correctness of this analysis can be tested by considering the position if no application for permission to appeal to the Upper Tribunal had been made: although the First-tier tribunal appeared to have become functus by incompetently determining an incompetent application, the Upper Tribunal could not be concerned at all. The answer cannot be different if a further incompetent application is made to the Upper Tribunal.)
>
> 39. On the facts of this case it can only be for the First-tier Tribunal to determine the validity of the notice, including deciding whether to extend the time for it to be given. Once there has been a valid notice, however, for the reasons set out at paragraphs [28]-[32] above, it has the effect of retrospectively continuing the appeal as a pending appeal, so that events that took place during the period when it was provisionally abandoned acquire validity. If the First-tier Tribunal does not extend time, the appeal stands as abandoned on 20 June 2019, and the Tribunal has only to send out the requisite notice acknowledging that. If time is extended, that will retrospectively validate (i) the application for permission to appeal to the First-tier Tribunal; (ii) the First-tier Tribunal's decision refusing that application; (iii) the application for permission to appeal to the Upper Tribunal; (iv) Judge Grubb's decision granting permission, and (v) the substantive appeal to the Upper Tribunal against the First-tier Tribunal's dismissal of the refugee grounds of appeal, which will be an appeal pending before the Upper Tribunal.

18. I stress that the only issue which remains to be determined is humanitarian protection. I do not consider, given the settled factual matrix (including the findings of the First-tier Tribunal concerning the appellant's mental health), that it is necessary for there to be a further hearing in the appeal. I direct that the appellant shall, within 21 days of the date upon which his respondent receives this decision, file and serve written submissions dealing with the appeal on humanitarian protection grounds only. The respondent has already made limited submissions on this issue but I direct that she may, if so advised, file and serve any additional submissions no later than 7 days after she receives the appellant's submissions. Thereafter, I shall determine the appeal without a further hearing.

Conclusion : Directions

1. As a judge of the First-tier Tribunal, I extend time for the appellant to give notice, pursuant to section 104(4B) of the Nationality, Immigration and Asylum Act 2002, that he wishes to pursue his appeal in so far as it is brought on the ground of humanitarian protection.

2. As a judge of the Upper Tribunal, I direct that (i) the appellant shall, within 21 days of the date upon which his respondent receives this decision, file and serve written submissions dealing with the appeal on humanitarian protection grounds only; (ii) I direct that the Secretary of State may, if so advised, file and serve any additional submissions no later than 7 days after she receives the appellant's submissions.

Signed Date 2 December 2021

Upper Tribunal Judge Lane

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.