Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04332/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2021	**On 15 December 2021**

Before

UPPER TRIBUNAL JUDGE PITT

Between

RO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Brown, Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

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 his 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.

This is an appeal against the decision issued on 1 March 2021 of First-tier Tribunal Judge Burns which refused the appellant's appeal brought under Articles 3 and 8 of the ECHR in the context of deportation.

Background

The appellant is a national of Guinea and was born in 1969. He is now aged 52 years old.

The appellant maintains he came to the UK in 1995 illegally but there is no record of his entry.

On 17 September 2004 the appellant attempted to rob a shop using an imitation firearm. Between 22 April 2006 and 17 June 2006 he committed further robberies. On 25 October 2006 he was convicted of robbery and having an imitation firearm with intent to commit an indictable offence. He was sentenced on 14 September 2007 to six years' imprisonment.

On 8 February 2007 the appellant was convicted of occasioning actual bodily harm and was sentenced to six months' imprisonment.

On 15 April 2013 the respondent made a deportation order against the appellant under Section 32(5) of the UK Borders Act 2007 (the 2007 Act). The appellant appealed against that decision to the First-tier Tribunal.

In a decision dated 29 October 2014 First-tier Tribunal Judge Moore found that the appellant had shown that deportation would breach his rights under Article 3 ECHR. The First-tier Tribunal concluded in paragraph 43 that the appellant suffered from schizophrenia, needed a high level of support, required in-patient treatment and that there was no reasonable likelihood of him receiving the treatment he required if returned to Guinea. The judge was satisfied that there would be no effective mechanisms in place in Guinea to reduce the risk of suicide or other self-harm. On the basis of that decision the appellant was granted leave to remain on 26 January 2016 until 26 January 2018.

On 21 December 2016 the appellant was convicted of attempted robbery, wounding/inflicting grievous bodily harm for which he was sentenced to six years' imprisonment.

On 21 November 2019 the respondent made a deportation order against the appellant and in a decision dated 22 November 2019 set out why the respondent did not accept that deportation would breach the appellant's rights under Articles 3 or 8 of the ECHR. The appellant appealed that decision to the First-tier Tribunal.

First-tier Tribunal Decision

In the decision dated 2 March 2021 First-tier Tribunal Judge Burns found that the appellant's history of self-harm and suicide was limited, that the appellant's mental state was stable and that the appellant would be able to access sufficient medical treatment in Guinea. These findings underpinned the conclusion that Articles 3 and 8 ECHR were not met.

The First-tier Tribunal judge set out in paragraph 28 of the decision that he accepted the evidence of Dr Hurn, the appellant's Consultant Psychiatrist. In paragraph 29 of the decision the judge set out Dr Hurn's opinion that were the appellant not to receive appropriate medication and mental health support that it was "highly likely" that he would relapse, the likely timing for the relapse occurring being between "several weeks to several months". Dr Hurn described the appellant's presentation when in relapse due to sub-optimal medication:

> "From past experience this has resulted in intense psychotic symptoms, including commanding voices; and chaotic behaviour including highly risky behaviour toward himself and others."

Judge Burns considered this presentation in paragraph 30:

> "The *'highly risky behaviour to himself'* is a reference to self-harming or suicide. There is little evidence in the medical records that the Appellant has ever made a serious suicide attempt, but he has made references to self-harm at various points in the past, especially when he was unmedicated and/or taking illegal drugs (including the drug spice, which he took in prison)."

In paragraph 31 the judge noted that the appellant's current mental state was stable because, according to Dr Hurn, "he is well-maintained on his treatment, has a high level of support, and reports no recreational drug use."

In paragraph 32 the judge considered the information in the respondent's refusal letter on the availability of medication for schizophrenia in Guinea which was taken from a Medical Country of Information (MedCOI) response dated 30 October 2019. The judge set out the appellant's current medication (Zuclopenthixol depot injection, Aripiprazole, Procyclidine and Mirtazapine) and compared it to the information from the MedCOI response on available treatment in Guinea.

In paragraph 33 the judge found:

> "The Respondent has not specifically identified what replacement for Mirtazapine is available in Guinea, but as mental health care is available in Guinea it is obvious that some antidepressants will be available there."

The judge said in paragraph 34:

> "It was submitted on behalf of the Appellant that, as he has treatment-resistant mental illness, this means that he can only take his specific current medication. This is not supported by Dr Hurn's reports or the other medical evidence."

In paragraph 35 the judge set out what Dr Hurn said about the appellant needing to be treated with Zuclopenthixol. Dr Hurn's view was that the Zuclopenthixol depot injection was "the only depot he has been maintained on" and also that:

> "He has had different oral medications in the past, but, in my opinion it is important that he receives a depot preparation to maintain his mental stability. There is some evidence from reviews that Zuclopenthixol may be more effective in preventing relapses than other depot medications … . This said, individual response does vary; however one could not be sure an alternative depot would be as effective without trialling and monitoring Mr [O]'s mental health while on it over a period of at least six months."

In paragraphs 36 to 39 of the decision the judge considered the evidence on whether Bromperidol was an appropriate alternative to the Zuclopenthixol depot medication as the MedCOI response indicated that Bromperidol was available in Guinea. The judge noted in paragraph 37 that Dr Hurn had concerns about Bromperidol where it "seems to be less potent than other depot antipsychotics" and that it "has very few data from good quality studies and new trials are needed to fully understand the effects of this preparation". In paragraph 39 the judge stated:

> "Even though Dr Hurn is not familiar with and does not use Bromperidol Decanoate Depot in the UK, I find it must be an efficacious treatment, because if it were not, Guinea would not use it."

The judge went on to conclude in paragraph 40:

> "It is not shown that the Appellant's mental ill-health would not be satisfactorily treated with this and the other alternative medications in Guinea."

The judge found in paragraph 41 that close monitoring of the appellant stopped in March 2020 and that since mid-November 2020 "he has been largely self-medicating – i.e. taking responsibility for his own medication, with very little or no contact or support in this regard from his probation officer".

In paragraphs 42 to 46 of the decision the judge considered the country evidence on health services for people with mental health problems in Guinea. The judge again referred to the MedCOI response which stated that there were some not for profit health centres in Guinea. In paragraphs 45 to 46 Judge Burns set out country evidence showing there was a mental health policy and programme in place in Guinea but that there were:

> "… no budget allocations for mental health. Details about expenditure on mental health are not available. The primary source of mental health financing is out of pocket expenditure by the patient or family. The country does not have disability benefits for persons with mental disorders."

The information that funding for mental health treatment had to come from private funds was repeated in other documents in the materials.

In paragraphs 48 to 49 and 51 of the decision the First-tier Tribunal found that the appellant's state of health and evidence on treatment available in Guinea distinguished the findings of First-tier Tribunal Judge Moore in the earlier allowed appeal. Judge Burns found:

> "48. Matters have moved on since then. The Respondent has now identified that specific mental health care and medication is available in Guinea. The mental health care provision in the country appears to have developed or at least is more apparent and robust than was evident in 2014.
>
> 49. Whereas at the time of the 2014 determination, the Appellant *'needed a high level of support and was on a 'constant watch' and could not live in the community and required treatment as an in-patient'*, he is now and has been for some months living independently in the community and self-medicating successfully with minimum support.
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> ...
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> 51. However, it is equally clear that there are mental health treatment facilities in Guinea including facilities for crisis management and suicide prevention. While most mental health care there is privately funded, not all is, and there are non-profit clinics where mental health care is available."

The judge went on in paragraphs 53 to 60 to find that the appellant would have access to "a reasonable range of medication" if he returned to Guinea, that he was "coping" in the UK where he did not have a family. In paragraph 56 the judge declined to place weight on a section of the OASys report which stated that the appellant would struggle to obtain employment, stating that "his actual employment history is unclear." The judge found that being away from Guinea for many years and the appellant's mental disorder:

> "... would make matters difficult for him on return but financial hardship, which he would probably have in common with many of his countrymen, does in itself trigger Article 3."

The judge concluded that the appellant had not shown that he had met the test from Paposhvili v. Belgium (Application no. 41738/10) as approved by AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17. The judge therefore refused the appeal under Article 3 ECHR and found that the appellant also could not show that deportation would amount to a disproportionate breach of his rights under Article 8 ECHR.

Grounds

The appellant brought three grounds of challenge to the decision of the First-tier Tribunal. The first ground maintained that the judge applied an incorrect standard of proof when referring in paragraph 2 of the decision to the burden of proof being on the appellant "to establish the essential facts on a balance of probabilities." The appellant maintained that the correct standard was not that

of the balance of probabilities but of “substantial grounds for believing” that there was a “real risk” of Article 3 ECHR mistreatment.

The appellant’s second ground argued that the First-tier Tribunal made a material mistake of fact when assessing the seriousness of the risk to the appellant on return to Guinea arising from his mental disorder. The judge accepted that Dr Hurn’s reference to “highly risky behaviour” occurring when the appellant was unwell was to a risk of self-harm or attempted suicide. The judge did not accept that this was a correct statement of the appellant’s past presentation, however, notwithstanding the indication in paragraph 28 that Dr Hurn’s evidence was accepted. The reason for reaching a different view on the appellant’s history was that there was “little evidence” of a “serious suicide attempt”. That was not correct. Other medical evidence, in large part comprising the appellant’s prison medical records, contained numerous references to serous episodes of self-harm and suicide attempts.

Ground two also maintained that the judge failed to take into account adequately Dr Hurn’s opinion that the appellant was relatively stable only because of a period of consistent, optimal medication and a high level of support and that he remained with a diagnosis of a relapsing and remitting treatment resistant illness and would deteriorate rapidly if not medicated and well-supported.

Ground two also maintained that the First-tier Tribunal erred when considering the appellant’s access to effective medication in Guinea. Dr Hurn’s view was that the appellant’s history showed that he had only been successfully treated on Zuclopenthixol. The judge was mistaken in concluding otherwise. The judge was not entitled to assume that Bromperidol was a sufficient alternative to Zuclopenthixol merely because it was available in Guinea.

The appellant’s third ground maintained that the First-tier Tribunal had erred in failing to assess properly whether the appellant would, in fact, be able to access any of the treatments that would be available in Guinea. The judge proceeded on the basis of the appellant’s relatively settled presentation. That was not a permanent change. He had stablished only after a sustained period of compliance with medication, a high level of support and avoidance of illicit substances. Even then, the appellant remained under the care of community psychiatric services, had been found to lack capacity to conduct his own litigation and continued to live in supported accommodation. He saw mental health services once a week for his depot medication and received support from his parole officer as well. He remained at risk of relapse if not adequately medicated. He had not been in Guinea for at least 17 years. The country evidence showed that provision for mental health in Guinea was “poor”, as identified in the materials set out by the First-tier Tribunal in paragraphs 45 and 46 of the decision. Even if appropriate anti-psychotic medication was available, this appellant would not have access to it and the judge had erred in finding otherwise.

Discussion

Ground two maintains that the First-tier Tribunal erred in the assessment of the appellant's history and risk of self-harm and suicide attempts on return to Guinea. I found that this ground had merit. The materials that were before the First-tier Tribunal set out numerous incidents of serious self-harm and suicide attempts. There is a reference on page 20 of the appellant's bundle to a suicide attempt when he attempted to hang himself and cut his wrists in 2009. In February 2010 and June 2009 there were numerous episodes of self-harm and suicide attempts including setting fire to his cell; see page 22 of the appellant's bundle. On page 24 of the appellant's bundle there is an entry on 9 May 2017 indicating that the appellant had tried to kill himself by hanging in 2016. An entry dated 28 June 2017 on page 27 of the appellant's bundle described a history of suicide/self-harm and of setting fires and cutting. An entry on 30 June 2017 at page 30 of the bundle referred to the appellant being found with a ligature around his neck and to his being "transported to hospital was unconscious after attempted suicide". Page 88 of the bundle contained entries referring to attempts to commit suicide by taking illicit substances as a result of which the appellant became unconscious. These parts of the evidence from the appellant's bundle show that the judge was not correct to find that the appellant had never "made a serious suicide attempt".

I also found an error in the approach to whether sufficient medication was available to the appellant in Guinea. Dr Hurn identified that the appellant is treatment-resistant, that is, he has been found to be non-responsive to a wide variety of medication that has been tried in the past. She identified specifically that the appellant had stabilised only on Zuclopenthixol. In addition, as set out in the extracts from the decision above, Dr Hurn was concerned that Bromperidol was not an effective replacement for Zuclopenthixol. The judge was in error in stating that Dr Hurn's evidence did not support the appellant's case that he required Zuclopenthixol to remain well. The statement in paragraph 40 of the decision that Bromperidol must be an effective anti-psychotic because otherwise it would not be used in Guinea is speculative and fails to take into account the specific concerns raised by Dr Hurn about its efficacy for this appellant.

For these reasons I found that ground two had merit.

Ground three challenges the conclusion that the appellant would be able to access the medical treatment available in Guinea in practice. That ground is well-founded given that the consideration of whether the appellant could, realistically, manage to live in Guinea and remain sufficiently well was based on what I have found was an erroneous assessment that he did not have a serious history of self-harm and suicide and that appropriate medication existed in Guinea. The judge appears to accept in paragraph 56 that the appellant would face financial hardship on return but fails to take that factor into account when considering whether he could maintain himself and pay for medication where, as set out in paragraphs 45 and 46 of the decision, most mental health treatment had to be paid for privately. Contrary to what paragraph 56 might be thought to suggest, the appellant was not arguing that financial hardship alone could found an Article 3 ECHR claim.

For these reasons I found that ground three also had merit and that the errors identified were such that the decision of the First-tier Tribunal had to be set aside to be remade afresh.

I did not find that it had been shown that the judge applied an incorrect statement of the standard of proof as argued in Ground one. The judge did make an incorrect reference to the balance of probabilities in paragraph 2 but was clearly aware of the case law setting out the correct test and identified that test in paragraph 26. The errors set out above show a failure to take into account material parts of the evidence and incorrect reasoning rather than an application of an incorrect standard.

For the reasons set out above, the decision of the First-tier Tribunal is set aside to be remade. The appellant submitted that remittal to the First-tier Tribunal was appropriate if all aspects of the decision were found to be in error and the appeal had to be remade *de novo*. The respondent was neutral as to disposal. In all the circumstances, where all of the material findings of the First-tier Tribunal have been set aside and the appeal must be made afresh, having referred to the Senior President's Practice Direction, the appeal is remitted to the First-tier Tribunal to be remade.

Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade afresh in the First-tier Tribunal.

Signed: S Pitt Date: 8 December 2021

Upper Tribunal Judge Pitt