Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: PA/04968/2019 (V)

THE IMMIGRATION ACTS

Heard by skype for Business	**Decision & Reasons Promulgated**
On 13 January 2021	**On 09 February 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S L
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr Greer, Counsel instructed on behalf of the respondent.

DECISION AND REASONS

Introduction:

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Ali) promulgated on 13 March 2020. By its decision, the Tribunal allowed the Appellant's appeal against the Secretary of State's decision, dated 13 May 2019 to refuse his protection and human rights claim in the context of the decision to deport him from the United Kingdom.

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to SL as the appellant, reflecting their positions before the First-tier Tribunal.

3. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a minor. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity in the light of having made a protection and Article 3 claim. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

4. In the light of the COVID-19 pandemic the Upper Tribunal (Judge Sheridan) issued directions , inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face -to- face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

5. The hearing took place on 13 January 2021, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing with the advocates attending remotely via video. There were no substantial issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

6. I am grateful to Ms Pettersen and Mr Greer for their clear oral submissions.

Background:

7. The Appellant is a citizen of the DRC. He claims to have entered the United Kingdom with his aunt in 1999. The respondent in the decision letter set out that there had been no evidence provided by the appellant to support this claim and that his first encounter with UK immigration was on 18 July 2002 at Coquelles UK border control port where it is said that the appellant attempted to enter the UK with a Belgium ID card in the identity of another person. The Home Office records indicated that he wished to claim asylum but as he was in France his claim was not considered by the UK.

8. Further Home Office records were said to show that on 29 June 2007 he made an application for leave to remain in the name of xx xx as a Congolese national.

9. On 18 November 2009 he was convicted of failing to surrender to custody at the appointed time and received one day’s detention.

10. On 15 November 2010 at the Crown Court he was convicted on three counts of robbery and one count of attempted robbery and on 15 April 2011 was sentenced to 18 months imprisonment.

11. The circumstances of the offence set out in the sentencing remarks at [116 RB]. On the date of his sentence he was 22 years of age. The judge referred to the CCTV footage and that the appellant went to the back of a bus where there was no way out for those people at the back. The appellant beckoned others to come on the bus. There was a crowd of people-nine and certainly more than seven- some wearing Halloween masks it being 31st of October 2009. The appellant took mobile phones of three boys. The fourth one had the presence of mind to deny that he had a mobile phone and at that point it is said that the appellant decided to leave the bus and thus the fourth count was one of attempted robbery. The judge stated "there was a gang of you. That is undoubtedly an aggravating feature. This is a public place, but once on the top of the bus escape is very limited and I regard that as an aggravating feature. I do not think that this was planned. I do not know why you beckoned to the others to come onto the bus, but I do not think that you were planning a robbery from the moment you got onto the bus. There was no violence used. All that happened was you made clear by your presence that you wanted the phones to be handed over. It was menace more than violence and in those circumstances it seems to me that whilst there is the aggravation that there was more than one of you and whilst it was on a bus it was a relatively spontaneous low-level street robbery carried out on a bus." The judge noted that it crossed the custody threshold, and it was agreed that it was treated as level I in the sentencing guidelines. The appellant had pleaded guilty on the first occasion the case was listed for trial and therefore the judge gave him some limited reduction on account of his plea. The judge also stated that "the other mitigation that I accept is that you have since shown genuine remorse".

12. On 17 May 2011, the appellant was served notice that he was liable for deportation and invited to make any representations as to why this should not take place. He was interviewed regarding his appeal on 30 August 2012.

13. On 18 September 2012, the appellant made an asylum claim as a Somali national. He was interviewed on 5 October 2012 and further attempts are made to interview him on 9 November 2012 and 4 January 2013, but he did not attend.

14. On 16 May 2013 he withdrew the asylum claim as a Somali national. On 23 May 2013, a further interview was conducted where he confirmed he was a Congolese national.

15. On 19 July 2013, a decision for automatic deportation and a deportation order was served and the appellant's outstanding application for leave to remain was also refused.

16. On 1 September 2014, the appellant made further representations and protection grounds and on 5 November 2015 he made further representations on human rights grounds.

17. On 24th February 2017 he was served with a section 120 notice and on 26 June 2017 further representations were received in response to that notice, confirming that his representations relied on the previous submissions dated 5 November 2015.

18. There followed further representations made on 30 January 2018, 15 June 2018, and 10 January 2019.

19. Whilst the appellant's deportation proceedings were ongoing the appellant was convicted on 20 March 2019 of "battery" and "destroy or damage to property". There are no details of those offences. It is recorded that on 10 April 2019 he received a community order, and unpaid work requirement and also a rehabilitation activity requirement.

20. On 13 May 2019, a decision was made to refuse a protection and human rights claim.

The decision of the FtTJ:

21. The appellant appealed that decision, and the appeal came before the First-tier Tribunal (Judge Ali) on 13 November 2019 and in a decision promulgated on the 13 March 2020 his appeal was allowed.

22. In view of the medical evidence in the report of the consultant psychiatrist Dr Q, the FtTJ treated the appellant as a vulnerable witness and did so in accordance with the joint presidential guidance note No. 2 of 2010 and the decision in *AM (Afghanistan) V SSHD* [2017] EWCA Civ 1123.

23. At paragraphs 25 – 26 the FtTJ considered an application made on behalf of the respondent to adjourn the hearing on the basis that the Home Office had withdrawn the CPIN relating to returns to the DRC and that they were currently reviewing the matter and needed three months to do so. It is recorded that Counsel on behalf of the appellant opposed the adjournment request and reference is made to a previous application for an adjournment made in June 2019 which had been refused by the Tribunal. The judge refused the application for the adjournment on the basis that there had been no change from the previous adjournment request to the current one and that there had been a period of nearly 5 months between the two adjournment requests and that the respondent had five months to review the CPIN if they were unhappy with it and issue a new one but had failed to do so.

24. The FtTJ's assessment of the evidence and his analysis is set out at paragraphs 48 – 57.

25. At paragraphs 48 – 50 the FtTJ began his consideration as to whether the appellant should be excluded from refugee status and humanitarian

protection, on the basis of upholding the section 72 certificate (although no reference is made to S72 in his decision).

26. The FtTJ stated as follows:

> "49. The appellant was sentenced to 18 months imprisonment for three counts of robbery and one count of attempted robbery. I take note of the sentencing judge's remarks he states "a relatively spontaneous low-level street robbery carried out on a bus" falling within level I of the sentencing guidelines (sentencing remarks, page 3, paragraph C, D). I find that as this was not an offence of armed robbery and the fact that the appellant did not commit or threaten violence, that it does not fall within the respondent's policy as being a particularly serious crime therefore this does not fall within paragraph 334 (iii) or(iv) of paragraph 339D of the nationality, immigration, and Asylum act 2002.
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> 50. I find that the appellant has demonstrated that he does not pose a sufficiently serious threat so as to be excluded from refugee status. I find having considered all of the evidence in the round that he is showing considerable remorse and I have again taken into account the sentencing judge's remarks at, page 4, paragraph C. I note that he is a person who was rehabilitated in prison and has not engaged in similar offending since being released. The conviction for which he was sentenced to is rightly submitted by Mr Greer is spent under the terms of the Rehabilitation of offenders Act 1974. This is not a matter which was challenged by Mr Mullarkey. I also find that the respondent has not adduced evidence nor produced the OASY's report to show that the appellant is an individual who is prone to offending again or prone to repeat the offences for which he was sentenced and thus conclude to say that I do not find him to be a person who poses a danger to the community of the United Kingdom."

27. The FtTJ then addressed the asylum/protection claim at [51].

28. The FtTJ stated as follows:

> "51. Mr Mullarkey submitted that the findings in BM should be followed and that there is no cogent evidence before the Tribunal to depart from those findings. I find to the contrary. The respondent withdrew their own CPIN on the DRC in reference to "unsuccessful asylum seeker/foreign national offenders" and in an interim operation instruction it, dated August 2019, stated that their policy is to refrain from pursuing the enforced returns of DRC nationals. I note that reports highlight and record the returns to the DRC are unsafe and reports of those individuals who were returned before 2012 and were detained, tortured, and mistreated were not brought to the attention of the Tribunal in BM, given the seriousness and significance of the evidence. In addition, BM recognises that the authorities in the DRC will question an individual on return. Since the hearing there has been an updated CPIN- DRC -unsuccessful asylum seekers (January 2020). I have taken this into consideration, but I am concerned by the fact that the CPIN does not exclude the possibility that a returnee may still be at risk on return. I note the following, at paragraph 7.2.2 of the CPIN, "there is limited publicly available information about the treatment of unsuccessful asylum seekers or foreign national offenders from the UK(or other Western European states) published since March 2015"

and also at paragraph, 2.4.32, "if a person has family, NGO or other assistance on arrival these are likely to assess their progress through immigration and security control. Conversely, an inability to communicate clearly in French or Lingala, a mental health condition that affects a person's behaviour or being able to pay a bribe may increase the likelihood that they are detained for one day or more and faces a breach of Article 3. However, no single factor is likely to be determinative as to whether a person is delayed or detained." Therefore, I find given the above that I can depart from the case of BM with reference to this appellant. In addition to the above findings I find that the risk to the appellant will be exacerbated by the fact that the appellant has been absence (sic) from the DRC 20 years, the authorities of the DRC are likely to be aware of the individual's criminal records and the detention of individuals with mental health continues to be a concern. For those reasons I find that the appellant will be at risk on return to the DRC."

29. The FtTJ then considered Article 3 at [52]. The FtTJ stated as follows:

"52. In reference to the issue of whether the appellant has a claim under Article 3 of the ECHR in reference to his medical issues. The appellant has submitted a report by Dr Q, a consultant forensic psychiatrist. I have already made reference to this at [24] and so do not intend to repeat my findings in [24]. However, the medical expert report submitted by the appellant's and challenged by the respondent. In any event I would have attached weight to the report and find that the report independently confirms the following, the appellant suffers from a severe mental illness best categorised as a severe depressive episode and psychotic symptoms (paragraph 8.17), should be placed in custody to be deported, he would become severely depressed, psychotic and acutely suicidal (paragraph 8.12) and thus I find that given all of the above there would be a breach of Article 3 of the ECHR."

30. The FtTJ then addressed Article 8 at paragraphs 54 –57 as follows:

"54. The appellant was sentenced to 18 months in November 2010. I find that by virtue of this he falls within the lowest category of offending under section 117C. I find that the weight to be attached to the state's interest in removing him in pursuit of effective immigration control is lessened by the fact that, nine years have passed since his conviction, he has been detained on numerous occasions without attempts being made to remove him, causing him psychiatric issues (as set out in the report of Dr Q), the offences committed took place before the statutory provisions of the Nationality, Immigration and Asylum Act 2002 (as inserted by the Immigration Act 2014) came into effect and but for the delay the appellant by the respondent in considering the appellant's claim, those provisions would not apply.

55. I find that Article 8 is engaged. The appellant left the DRC around the age of 7 and has been residing in the United Kingdom since 1999, when he was aged 10. The appellant is now aged around 13 has been living in the UK for approximately 20 years of his life. I accept that he has no family or friends in the DRC. Mr Mullarkey referred to the biodata form that he submitted at the hearing; however, it has not been signed by the appellant to verify the contents are accurate and true. In the absence of his signature and the fact that he had mental

> health issues I cannot attach weight to the accuracy of the content within the biodata form. I accept that he is not lived independent in the DRC. I accept he has mental health issues and thus accept that it is reasonably likely that he will suffer stigma as a result. Given all of the above I accept that he will not have enough inside information or understanding of how life in the DRC is and thus would not have the capacity to participate in it.
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> 56. I find that the respondent's interference with his and his families right and Article 8 is lawful and for a legitimate aim. I now consider whether his removal is proportionate. Section 117C provides the additional considerations in cases involving foreign criminals. The starting position is that deportation of foreign criminals is in the public interest in the more serious the offence committed by foreign criminal, the greater is the public interest in their deportation. In this instance the appellant was sentenced to 18 months imprisonment and such the consideration of the Exceptions under Section 117C(3) is engaged. The first Exception applies where the appellant has been lawfully resident in the United Kingdom for most of his life, is socially and culturally integrated in the United Kingdom, and there would be very significant obstacles to his integration into Zimbabwe.
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> 57. It is not disputed that the appellant has not been lawfully resident in the United Kingdom for most of his life. I make finding that during this time the appellant is both socially and culturally integrated in the United Kingdom. He has lived here 20 years and has been supported by the leaving care team at X (reference letter at page 40). I find my findings at [56] that there would be very significant obstacles to his integration in the DRC".

31. The FtTJ therefore allowed the appeal on asylum grounds and on Articles to 3 and 8 of the ECHR.

32. The respondent sought permission to appeal and on 21 July 2020 Upper Tribunal Judge Stephen Smith granted permission stating:

> "Grounds 2 and 3 are adopted from those which featured in the permission to appeal application to the First-tier Tribunal. It is arguable that, for the reasons given in the grounds, the judge erred in relation to Articles 3 and 8 of the ECHR.
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> Ground 4; arguably, the judge should have given the parties the opportunity to address the Tribunal concerning the impact of the January 2020 Country Policy and Information Note, which post-dated the hearing, but which predated the promulgation of the judge's decision (which was some five months after the hearing).
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> In turn, the arguability of ground 4 underlines the arguability of ground 1: arguably the judge should have adjourned to enable the respondent to consider her position concerning returns to the DRC. Had he done so, it could have enabled the adjourned hearing to focus on the new CPIN which was subsequently to be published, the prospect of which formed the basis for the adjournment application. Instead, the judge's decision to press ahead with the hearing, combined with the reliance on the CPIN which was subsequently published without giving the parties the opportunity to make submissions in relation to it, was arguably unfair."

<u>The hearing before the Upper Tribunal:</u>

33. Before the Upper Tribunal, the Secretary of State was represented by Ms Pettersen and the appellant represented by Mr Greer of Counsel.

34. Mr Pettersen relied upon the written grounds as drafted and made additional oral submissions.

35. In relation to ground 4, she submitted that as UTJ Smith had stated when granting permission, this was linked to ground 1 and the request made by the presenting officer for an adjournment to produce the CPIN in relation to returns to the DRC. The FtTJ went on to consider this document but did not recall the parties for their submissions on the document and therefore the grounds of procedural fairness are plainly made out.

36. In relation to the Article 3 assessment made by the FtTJ, Ms Pettersen submitted that this was tied in with the asylum risk. There had been evidence before the FtTJ that medical treatment was available for his psychiatric condition, but the judge failed to deal with this evidence in his assessment on risk on return.

37. Mr Greer on behalf of the appellant had prepared a Rule 24 response which he relied upon for the hearing.

38. In his oral submissions Mr Greer submitted that in relation to grounds 1 and 4 he had set out his submissions in the written grounds at paragraph 19 and at paragraph 29 – 32. He submitted that he was not instructed to concede the appeal on the basis of the grounds set out in the Secretary of State's response but that did not seek to take his submissions any further than that set out in the Rule 24 response he had drafted.

39. He submitted that the real issue is that set out at ground 2 which addressed the findings made by the FtTJ in relation to Article 3. He invited the Tribunal to consider paragraph [52] of the FtTJ's decision. He submitted that when considering the adequacy of reasons, what is required in a decision is for the losing party to understand why they had lost. He submitted that the other relevant principle set out in the decision of *OH (Serbia)* is that it is not necessary for a Tribunal judge to set out specific authorities if the judge properly applies the legal principles.

40. Mr Greer submitted that upon reading paragraph 52, the FtTJ had applied the correct legal test and had done so in a way in which it was possible to understand why the appeal had been allowed and that the decision had made explicit reference to the medical evidence. In respect of the psychiatric report, Mr Greer submitted that it was recorded in the decision that the medical evidence contained in that report was not specifically challenged by the respondent's advocate. He submitted that this was important because the contents of the report at paragraph 8.12 was therefore not challenged which concluded that the appellant if placed in custody to be deported, the doctor would anticipate that his "mental health will deteriorate significantly, and he would likely become severely depressed, psychotic and acutely suicidal."

41. Mr Greer referred the Tribunal to paragraph 23 of his rule 24 response which set out the legal test in the decision of *J v SSHD* [2005] Imm AR 409. He submitted that the presenting officer had submitted that the Article 3 was tied in with the asylum claim relying on the fifth stage of the test in J. However, he submitted that this is not a foreign breach case, but it is a domestic case where the risk of Article 3 harm occurs at the point of detention and forced removal and therefore it was not a risk that occurred on return to the DRC and the fear of the DRC authorities and therefore effective mechanisms do not come into play. Mr Greer submitted that the FtTJ recognised it as a domestic breach case and by reason of the unchallenged medical evidence, there was sufficient reasons for the Secretary of State to understand why the judge had allowed the appeal. The Tribunal should not go behind the SSHD's concession.

42. Mr Greer submitted that the decision of *N* was raised in the grounds but that had been superseded by the decision of the Supreme Court in *AM (Zimbabwe)* but that this was not a domestic breach of Article 3 at the point of forced return.

43. Mr Greer submitted that whatever assessment made by this Tribunal in relation to grounds 1 and 4, the FtTJ's assessment of Article 3 should be preserved. If an error of law is found on the basis of grounds 1 and 4 together, he submitted that the findings on asylum would be unsafe and therefore would need to be remade but that the findings made in Article 3 could be preserved. It would then be for the appellant to decide whether he wished to continue with his asylum grounds.

44. In respect of ground 3 which related to Article 8, he submitted that he sought to rely on his rule 24 response at paragraphs 25 – 28. He submitted that if ground 2 is made out it would be largely immaterial.

45. By way of reply, Ms Pettersen submitted that whilst the presenting officer did not specifically challenge the medical report, the judge fell into error because the decision-maker would need to be aware if there are issues relating to those who need protection from themselves it would be taken into account in any arrangements made for removal. She submitted that whilst the doctor had set out that if the scenario should arise, on a proper application of the decision in J, the decision-maker would be aware of any problems and difficulties in relation to the appellant's removal and all relevant precautions would be taken as flagged up in the medical report.

46. Ms Pettersen submitted that at paragraph [52] the FtTJ did not deal with the duty of care placed on the Secretary of State in this regard and whilst the doctor's conclusions were not challenged per se, the conclusion was predicated on the basis of him being put in custody and the judge had failed to take into account the steps that the Secretary of State could take to protect those and to avoid any risks of suicide.

47. Mr Greer observed that this point could have been pursued before the FtT. He also made the point that the conclusion reached by the expert was not made in isolation but based on the history of the appellant having been detained on a number of occasions and attempted suicide in the past.

Even if the Secretary of State put in place mechanisms, they did not work in the past.

48. Ms Pettersen submitted that submissions made by Mr Greer did not detract from the fact that satisfactory safeguards could be put in place particularly in the light of the medical evidence that was now available and could be put in front of the decision-maker to take whatever steps are necessary. Thus she submitted the decision of FtTJ Ali was flawed in law.

49. At the conclusion of the submissions I reserved my decision which I now give.

Discussion:

50. I am grateful for the submissions made by each of the advocates. I confirm that I have taken them into account, including their written submission and have done so in the light of the decision of the FtTJ and the material that was before him.

Grounds 1 and 4:

51. I begin my analysis by considering grounds 1 and 4 together. They concern the FtTJ's assessment of the appellant's asylum claim set out at paragraph [51] of his decision.

52. Having considered the grounds and having done so in the light of the submissions made on behalf of the appellant, I am satisfied that the judge erred materially in law as the grounds contend and as the grant of permission succinctly identifies. I shall set out my reasons for reaching that view.

53. The relevant country guidance decision was that set out in *BM and others (returnees-criminal and non-criminal) DRC* CG [2015] UKUT 00293 and at the time of the hearing on 13 November 2019 remained as a country guidance decision. In order to depart from that decision, the FtTJ was required to identify strong grounds supported by cogent evidence (see *SG (Iraq)*). Whilst the judge identified the correct legal test, the judge fell into error by departing from the decision in such a way that was demonstrably procedurally unfair. In reaching his decision to depart from the country guidance decision the judge relied upon the contents of a document that was not available to the parties at the time of the hearing on 13 November 2019. The document in question was the CPIN entitled "DRC unsuccessful asylum seekers" (January 2020). As a result neither party had the opportunity to make any representations in respect of the contents of that document and importantly in the context of the appellant's asylum claim.

54. In my judgement it was procedurally unfair for the judge to reach a decision on that evidence without affording the parties and in particular

the losing party, the opportunity to make submissions on that evidence which was instrumental in his decision to allow the appeal.

55. Furthermore in the light of the FtTJ's rejection of the application for an adjournment made by the presenting officer in order for this evidence to be considered by the Tribunal inter parties upon its publication, it was then procedurally unfair to then consider that document in the absence of any further representations from the parties.

56. I reject the submission made by Mr Greer (see paragraph 32 of the written submissions) that it was open to the respondent to advance written submissions relying on the CPIN. In my judgement there was no indication to the respondent that the judge intended to consider evidence that was unavailable to the parties at the hearing particularly in the light of his rejection of the adjournment application which related specifically to that evidence.

57. Whilst Mr Greer relied upon the adjudicator guidance note number 4: February 2003 (see paragraph 29 of the written submissions) in my judgement that note is not applicable to the particular factual circumstances in play in this appeal. Neither party had any advance notice that the judge intended to rely on that evidence. Furthermore, as seen above the parties could not have known that in the light of his decision to reject the application adjournment for the document to be available to both parties that the judge would then go on to consider such a document.

58. This was not evidence that was peripheral to his decision as seen from the contents of paragraph [51] and was instrumental to the judge reaching his conclusion that the CG decision in BM should be departed from and that the appellant was therefore at risk on return. That being the case, the judge should have informed the parties that he intended to take this into account and provide the parties the opportunity to make any submissions they considered necessary.

59. The case of *E v SSHD* [2004] EWCA Civ 49 as cited in the written submissions in my judgement have no relevance to the circumstances of this particular appeal as it relates to procedure rules that are no longer in existence and also refers to circumstances relating to when a rehearing might be necessary which is not the position here.

60. The decision of *EG (post – hearing Internet research) Nigeria* [2008] UKAIT 0015 is of some relevance. Whilst the factual circumstances were different from the present appeal (relying on post hearing research), there were some observations made in the decision which are applicable to the present appeal. The underlying point made in this decision is the factual issues should be made on the basis of the evidence presented on behalf of the parties and to base conclusions on evidence post hearing may be procedurally unfair.

61. There was a considerable gap between the hearing inter-partes on 13 November 2019 and the promulgation of the decision on 13 March 2020 (some four-month delay). The CPIN was available in January and therefore

the judge had a period of two months in which he could have sought the submissions from the parties. In my judgement, there was a duty upon the judge to either reconvene the hearing or in the alternative to request written submissions upon the CPIN before reaching his decision. To reach a decision without taking that course in my judgement was procedurally unfair.

62. I am therefore satisfied that the FtTJ erred in law and that the assessment made at paragraph [51] relating to the asylum claim cannot stand and should be set aside.

Ground 2:

63. I now turn to ground 2 which challenges the FtTJ's decision at [52] where the judge allowed the appeal on Article 3 grounds by reference to the medical evidence.

64. The FtTJ stated as follows:

> "52. In reference to the issue of whether the appellant has a claim under Article 3 of the ECHR in reference to his medical issues. The appellant has submitted a report by Dr Q, a consultant forensic psychiatrist. I have already made reference to this at [24] and so do not intend to repeat my findings in [24]. However, the medical expert report submitted by the appellant's and challenged by the respondent. In any event I would have attached weight to the report and find that the report independently confirms the following, the appellant suffers from a severe mental illness best categorised as a severe depressive episode and psychotic symptoms (paragraph 8.17), should be placed in custody to be deported, he would become severely depressed, psychotic and acutely suicidal (paragraph 8.12) and thus I find that given all of the above there would be a breach of Article 3 of the ECHR."

65. Paragraph 24 stated as follows:

> "having taken into account the report of Dr Q a consultant forensic psychiatrist, who notes, "from my review of the records it is my view that L was experiencing a severe mental illness that is best categorised as a severe depressive episode and psychotic symptoms. This is a life-threatening mental illness, as in L's case, due to the increased risk of suicide, depressive cognitions of hopelessness regarding the future, reduced self-esteem, and chronic depressed mood with suicidal ideation (paragraph 8.17). I attach weight to the report of Dr Q and note that the report has not been challenged by the respondent in the refusal letter nor by Mr Mullarkey on the day of the hearing. I therefore found that the appellant is a vulnerable witness as a result of his mental health issues."

66. Mr Greer submits that it is clear from a fair reading of paragraph [52] that the judge reached the decision on Article 3 mistreatment facing the appellant on the point of enforced return and that the assessment made was one that was reasonably open to him based on the unchallenged evidence in the report of Dr Q.

67. In my judgement it is wholly unclear whether the FtTJ allowed the appeal on the basis of Article 3 medical grounds (based on medical evidence and lack of treatment in the DRC) or whether he did so based on the Article 3 risk of suicide.

68. Furthermore, I reject submission made by Mr Greer that the judge had applied the correct legal test set out in the decision of *J v SSHD* [2005] Imm AR 409 ("*J*").

69. Whilst I accept that it is not necessary for a judge to cite case authorities, what is necessary is for the judge to undertake an analysis of the evidence based on the relevant legal principles. The decision in *J* sets out the analysis applicable if indeed the judge was in fact considering Article 3 in the context of the risk of suicide.

70. The relevant jurisprudence is found in the Court of Appeal decisions in *J* and *Y (Sri Lanka)* and consider a discrete area of assessment under Article 3 relating to the risk of suicide. The respondent's grounds refer to the decision in "*N*".

71. The decisions in *J* and *N* were heard at around the same time in May 2005. By the time, the Court of Appeal in *J* handed down its decision, it had the benefit of the House of Lords decision in *N*. The Court of Appeal conducted a detailed review of the European and domestic case law. The six points it drew from these authorities for the purpose of assessing Article 3 in the context of suicide risk were:

> "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].
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> 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:
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> > "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).
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> 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..."
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> 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."

72. The first three points set out the basic requirements to show a breach of Article 3. The third point made clear that there is an enhanced threshold in cases that come within the *N* paradigm. The last three points went beyond the decision in *N* to consider the context in cases involving the assessment of suicide risk. The Court of Appeal in the *Y (Sri Lanka)* modified the fifth point as follows:

"15. ... The corollary of the final sentence of Â§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."

73. The assessment of suicide risk is a discrete aspect of the extension to Article 3 considered in *D* and *N* (see *MM (Malawi) v SSHD* [2018] EWCA Civ 2482 at [63]). The Court of Appeal in *J* made clear that there was a high threshold in 'foreign cases', and acknowledging the decisions in *D* and *N*, made clear that the threshold was even higher in cases where " the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state".

74. There can be no dispute that the nature of the potential harm in a suicide risk case is sufficiently serious to engage the operation of Article 3 within the meaning of the *N*, i.e. if a person can show that there is a real risk that they will commit suicide on return to the receiving state, the feared harm clearly meets the minimum level of severity required i.e. intense mental suffering leading to their imminent death.

75. The fifth and sixth points highlighted in *J,* modified in *Y (Sri Lanka)*, simply focus the assessment on issues specific to the circumstances relating to suicide risk. First, an initial assessment of whether there is a real risk that the person is likely to commit suicide if returned to the receiving state. This would normally be assessed with reference to expert psychiatric evidence. Second, whether effective measures can be put in place before, during and after removal to reduce the risk of suicide below a real risk. This would normally be assessed with reference to evidence relating to the circumstances in the receiving state.

76. The advocates did not refer me to any other relevant decisions. In *AXB (Art 3 health: obligations; suicide) Jamaica* [2019] UKUT 397 the Upper Tribunal concluded that the *N* paradigm is the threshold that must be met in a case involving the assessment of suicide risk, but the decision does not alter the approach taken by the Court of Appeal in *J*. In that case, the Court of Appeal incorporated the high threshold into the six-point approach to the assessment of suicide risk. The focus of the assessment in a case involving potential suicide risk is not usually the threshold but whether the evidence shows that there is a real risk of suicide happening before, during or after removal of the person to their country of origin.

77. Whilst in his oral submissions Mr Greer made a brief refence to the Supreme Court's decision in *AM (Zimbabwe) v SSHD* [2019] UKSC 17 he did not make any reference to any particular pargraphs or how it applied to the circumstances of this appeal.

78. That decision contains an analysis of the ECtHR decision in *Paposhvili v Belgium* [2017] Imm AR 867. In particular, the Supreme Court clarified what was meant by the modest extension of the *N* test at [183] of the ECtHR decision with reference to:

> "... situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy."

79. The Supreme Court did not make specific findings relating to the effect of *Paposhvili* on the assessment of suicide risk. In my assessment, the substantive Article 3 issues discussed in *AM (Zimbabwe)* do not alter the position relating to the six-point approach outlined in *J*. The nature of the risk of suicide is likely to meet the *N* paradigm or the *Paposhvili* extension.

80. Whilst Mr Greer submitted that the medical evidence was unchallenged that did not mean that the FtTJ was not required to undertake an analysis of the medical evidence in the context of the correct legal principles set out in *J* and the jurisprudence I have set out above and in the context of the evidence as a whole. Paragraph [52] of the decision does nothing more than cite a concluding paragraph of Dr Q's report and fails to make any

analysis of the issues beyond that citation. In my judgement the FtTJ materially erred in law in his consideration of Article 3.

81. I also accept the submission made by Ms Pettersen that the judge made no assessment of the duty of care and safeguards the Secretary of State were likely to have in place in the context of enforced returns and that the respondent having the requisite evidence in the form of report of Dr Q would have a proper basis upon which safeguards could be applied to ameliorate any risk of harm as identified at paragraph 8.12 of Dr Q's report.

82. In my judgement there was a lack of analysis consistent with the decision in J and consequentially the FtTJ materially erred in law in his consideration of Article 3.

Ground 3:

83. I now turn to the FtTJ's assessment of Article 8. It is submitted on behalf of the respondent that the assessment of Article 8 was flawed in a number of respects including his consideration of Exception 1 (private life), whether the judge applied the correct test of "very compelling circumstances over and above" the Exceptions, the characterisation of the Secretary of State's delay at [54] and that in determining the public interest the judge failed to take into account further offending of the appellant in 2019 at a time when the deportation proceedings were on going.

84. At paragraph 10 of the grounds, it is also submitted the judge failed to give reasons as to why no weight was attached to the biodata form which was relevant to family support available to the appellant in the DRC.

85. Mr Greer relies upon his written submissions set out at paragraphs 25 – 28. It is submitted that that the FtTJ correctly identified that the appellant had not been lawfully resident in the United Kingdom for over half his life. However, it was not on that basis that the judge allowed the appeal. Contrary to the submissions made by the respondent, the FtTJ carried out a broad evaluative judgement paraphrasing the test in Kamara at [55]. At paragraph 27, it is submitted that the issue of delay was a consideration that the judge was able to take into account and that it was referred to in the decision letter at paragraph 89 and was consistent with the principles set out in EB (Kosovo) [2008] UKHL 41. It is further submitted that it was wrong to state that the judge did not take into account the full extent of the appellant's offending. The 2019 conviction is specifically addressed at [10). As the offending did not fall within section 117D it did not go towards the assessment that the Tribunal was required to perform under section 117C.

86. Having considered the submissions advanced on behalf of the parties, I am satisfied that the decision of the FtTJ discloses the making of a material error of law when addressing the Article 8 assessment. I shall set out my reasons for reaching that decision.

87. There is no dispute on the factual circumstances of the appellant that he fell within the category of a "foreign criminal" who fell within section 117C(3) because he had been sentenced to a period of imprisonment of at least 12 months, but less than four years and was therefore a "medium offender".

88. The focus of the FtTJ was upon Exception 1 relating to the appellant's private life, despite the FtTJ's reference to "family life" at [56].

89. I am satisfied that the FtTJ's assessment of whether the appellant could meet Exception 1 was flawed. There was a factual dispute as to whether the appellant had entered the UK in 1999 or in 2002 (as set out in the decision letter) and whether the appellant had entered the UK using false details. Those matters were referred to in the appellant's witness statement. The factual issues do not appear to have been resolved in the fact-finding undertaken by the judge nor is reflected at paragraph [55]. Nonetheless, it was accepted by the Tribunal that he had not been lawfully resident in the UK for most of his life (at [57]). The judge found that he was socially and culturally integrated in the UK based on his length of residence and because this was supported by the leaving care team as evidenced in the appellant's bundle. The judge also found that there were "very significant obstacles to his reintegration" to the DRC.

90. The judge stated at [57] that in reaching his conclusions they were based on his findings at [56]. That must be an error and the judge must have been referring to [55]. At this paragraph, the judge set out that he accepted that the appellant had not lived independently in the DRC, and that he accepted he had mental health issues and that it was reasonably likely that he would "suffer stigma" as a result. Pausing there, I can find no reference or assessment of any country materials relating to the DRC in the decision of the FtTJ or the basis upon which that finding was made.

91. It is also plain that he attached no weight to the biodata form in reaching his conclusions at [55]. In my judgement, the FtTJ was in error in his consideration of the issue of whether there were significant obstacles to his reintegration by the failure to refer to any country materials relating to medical treatment available in the DRC or the circumstances of return. Furthermore in relation to the evidence in the biodata form, the judge refused to attach weight to the document based on the document not having been signed and because of the appellant's mental health. However as the grounds set out, no reasons were provided as to why the appellant's mental health condition rendered the information supplied in that document to be unreliable. The document was of relevance as it set out family relatives the appellant had in the DRC which included his mother who was said to be still living at the family address. This was evidence of relevance to the establishment or otherwise of Exception 1.

92. Even if it was open to the FtTJ to reach those conclusions, I am satisfied that the grounds are made out and that the judge failed to apply the correct test. The judge proceeded on the basis that the appellant could not meet Exception 1 (at [57]) but failed to recognise that being the case the

appellant would have to satisfy the enhanced test of whether there were "very compelling circumstances" over and above the Exceptions (at S117C (6)).

93. I begin with some general observations concerning the test of "very compelling circumstances". It has been described as a demanding one involving a high threshold (see *NA (Pakistan), KO (Nigeria) v SSHD* UKSC 53). "Compelling" mean circumstances which have a "powerful, irresistible and convincing effect." (See *SSHD v Garzon [*2018] EWCA Civ 1275.

94. When undertaking such an assessment it includes a holistic evaluation of all the relevant factors as identified at paragraph [33] of *HA (Iraq);* it is an extremely demanding test but nonetheless requires "a wide-ranging exercise" so as to ensure Part 5A produces a result comparable with Article 8 (see *NA (Pakistan)* "and includes the principles in the Strasbourg authorities.

95. When applying the statutory test of "very compelling circumstances" the Tribunal has an obligation to be more than usually clear as to why a conclusion was justified (see *OH (Algeria) v SSHD* [2019] EWCA Civ 1763. I have given careful consideration to the grounds advanced on behalf of the respondent. In doing so I have reached the conclusion that the FtTJ did not conduct the necessary evaluative exercise. The FtTJ failed to recognise the enhanced test which the appellant would have to satisfy of whether there were "very compelling circumstances" over and above the Exceptions.

96. Furthermore I am satisfied that the judge failed to take into account considerations relevant to the balancing exercise, in particular relevant to the public interest. Whilst the judge took into account the circumstances of his offending in the context of the date those offences were committed and the length of time that had elapsed, there was no consideration of the appellant's commission of further offences in 2019 at the time when the deportation proceedings were ongoing. I do not accept the submission made by Mr Greer that the reference to this at paragraph 10 when recounting the history was sufficient. There was no reference made to that offending in the judge's assessment of the public interest and that was a material omission.

97. Insofar as the issue of delay played a part in the decision of the FtTJ in my judgement it was not considered in the context of the relevant factual background which included the appellant's immigration history which set out that the appellant made a number of further submissions and representations which the respondent was required to consider and also there had been delay on the appellant's part during the asylum process firstly by failing to attend interviews but then pursuing a claim on the basis of his nationality as a citizen of Somalia.

98. I would accept that the issue of delay can be a potentially relevant factor in the proportionality balancing exercise (see *EB(Kosovo) v SSHD* [2008] UKHL 41) where the House of Lords held that delay may reduce the weight otherwise to be accorded to firm and fair immigration control if the delay is a result of a dysfunctional system which creates unpredictable,

inconsistent, and unfair outcomes. The likely effect of a period of delay is that an applicant may develop closer personal and social ties, thereby strengthening a family and private life claim to remain in the UK. In *MN-T (Colombia) v SSHD* [2013] EWCA Civ 893, the Court of Appeal held that delay may lessen the weight of public interest considerations of deterrence and societal revulsion. Further, during lengthy delay a foreign criminal may be able to demonstrate he has rehabilitated.

99. They are all relevant considerations however whilst some points were identified in favour of the appellant, not all of the relevant factual issues were addressed in the FtTJ's decision. Therefore whilst I would accept that there were some valid points raised in the context of delay, as not all of the factual considerations were considered, the balancing exercise was flawed. I do not consider that the respondent's submissions on this point would be sufficient to set aside the decision but when seen in the context of the other issues identified above, I am satisfied that when taken cumulatively the balancing exercise under Article 8 was not properly undertaken.

100. I remind myself that the question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself as to the relevant law and assessing the evidence on a rational and lawful basis.

101. For the reasons set out I am satisfied that it has been demonstrated by the grounds as argued by the respondent that the decision of the FtTJ involved the making of an error on a point of law and should be set aside.

102. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> > (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
> >
> > (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

103. In light of the grounds which proceed on the basis of procedural unfairness and on the basis that further fact finding and analysis is necessary I am satisfied that the appeal should be remitted to the FtTJ for

a rehearing as the appeal falls within paragraphs (a) and (b) as set out above.

104. Mr Greer submitted that the conclusions reached on the issue of the section 72 certification should be preserved as set out at paragraphs 49 – 50. He submitted that the grounds did not challenge the assessment made by the FtTJ. Ms Pettersen agreed that in the event of an error of law being found and the appeal being remitted to the FtT, those paragraphs should be preserved findings. It is the position that the grounds did not seek to challenge the FtTJ's assessment of the section 72 certification I therefore preserve those findings.

105. The decision of the First-tier Tribunal did involve the making of an error on a point of law. The decision of the First-tier Tribunal to allow the appeal shall be set aside and remitted to the FtT with the findings preserved at paragraphs 49-50.

Signed Upper Tribunal Judge Reeds
Dated: 19 January 2021

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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.