Neutral Citation Number: [2025] EWCA Civ 144

Case No: CA-2024-000861

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Gleeson and Deputy Upper Tribunal Judge Davidge
UI-2023-003857

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2025

Before :

LORD JUSTICE BAKER
LADY JUSTICE ELISABETH LAING DBE
and
LORD JUSTICE HOLGATE

- -

Between :

AA (MOROCCO)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Graham Denholm and Marisa Cohen (instructed by **Coram Children's Legal Centre**) for the **Appellant**
Tom Brown (instructed by **the Government Legal Department**) for the **Respondent**

Hearing dates : Thursday 23 January 2025

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Approved Judgment

This judgment was handed down remotely at noon on 18 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE HOLGATE :

Introduction

1. The issue in this case is whether the Upper Tribunal (Immigration and Asylum Chamber) ("UT") erred in law in its decision on 4 December 2023 to remit to the First Tier Tribunal (Immigration and Asylum Chamber) ("FTT") the appeal of the appellant AA against the decision of the respondent, the Secretary of State for the Home Department ("SSHD"), refusing his claim for asylum and humanitarian protection and his human rights claim under Articles 3 and 8 of the European Convention of Human Rights ("ECHR") read together with para. 276ADE(1)(vi) of the Immigration Rules.

2. AA was born in Italy on 23 August 1999. He lived there until he was 7. He then moved with his family to live in Morocco. His father died in 2012. His mother, brother and sister remain in Morocco. AA has Moroccan nationality and at the time of the hearings before the FTT and UT was still in contact with his family.

3. In 2015, when AA was about 16, he says that he posted on a Facebook account an image that was insulting to, or critical of, the Moroccan monarchy and Government. As a result he received negative comments and personal threats. He deleted his Facebook account and destroyed his SIM card.

4. AA says that he left Morocco because he feared persecution. In May 2016 he arrived in the UK clandestinely.

5. In August 2016 AA was placed in the care of Merton London Borough Council ("Merton") under s.20 of the Children Act 1989. He became a care leaver.

6. AA claimed asylum on 23 August 2016. It is highly regrettable that over 8 years later the issues arising from that claim still have not been properly determined.

7. In January 2019 the SSHD treated the asylum claim as having been withdrawn. In May 2019 that withdrawal was cancelled and the claim reopened. An asylum interview was carried out in July 2019 and the SSHD refused the claim on 23 August 2019 with an in-country right of appeal.

8. On 29 April 2020 the Supreme Court gave its decision in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17; [2021] AC 633 on the correct legal approach to the application of Art.3 of the ECHR to the removal of a seriously ill foreign national to a state which has a lower standard of medical care.

9. On 1 June 2020 Dr Camilla Day, a psychiatrist in her final year of training as a specialist registrar, stated that in her opinion AA fulfilled the criteria for first episode psychosis. She had one interview with AA for about 3.5 hours. Her view was based upon *inter alia* paranoid and grandiose delusions, auditory hallucinations, disorganisation of speech and thought, social withdrawal and functional impairment. Her differential diagnoses were paranoid schizophrenia and mental and behavioural disorder secondary to the use of LSD. Her opinion was that paranoid schizophrenia, triggered or exacerbated by the use of LSD, was more likely than a purely drug-induced psychosis. However, she added that further assessment was needed before a diagnosis in accordance with the International Classification ICD-10 could be made. She recommended that AA should

be referred urgently by his GP to an Early Intervention in Psychosis Team who could provide regular assessments which would clarify diagnosis and identify the right treatments for him (see pp. 16 and 19-20).

10. AA's appeal was heard by the FTT on 2 November 2020. In summary, AA advanced the following claims before the tribunal:

(1) A claim for asylum and for refugee status on the ground of a well-founded fear of persecution in Morocco because of his political opinions and actions and/or as a member of a particular social group ("PSG"), namely persons living with mental ill health;

(2) A claim for humanitarian protection for the same reasons as those upon which his claim for asylum is based, but without the requirement for a Refugee Convention reason;

(3) A human rights claim under Art.3 that there are substantial grounds for believing that there is a real risk of AA facing inhuman or degrading treatment if returned to Morocco;

(4) A claim under para. 276ADE(1)(vi) of the Immigration Rules that there would be very significant obstacles to the applicant's integration into Morocco;

(5) A human rights claim that AA's removal to Morocco would otherwise breach Art.8.

11. On 20 November 2020 the FTT issued its decision in which it dismissed the appeal on asylum and humanitarian protection grounds but allowed the appeal on human rights grounds under para. 276ADE(1)(vi) of the Immigration Rules.

12. On 25 January 2021 the FTT granted permission to appeal to the UT (a) to the respondent in relation to the decision on the human rights appeal and (b) to the appellant regarding the decision on the asylum and humanitarian protection appeal.

13. On 23 April 2021 the appeals were heard by the UT. On 10 May 2021 UT Judge Stephen Smith allowed the appeals of both the appellant and the respondent in relation to the asylum/humanitarian protection appeal and the human rights appeal. The judge set aside the decision of the FTT without preserving any findings of fact. The appeals were remitted in their entirety to the FTT for redetermination by a different judge.

14. On 21 October 2021 the fresh hearing took place. On 10 June 2022 FTT Judge Davey issued his decision in which he dismissed the asylum/humanitarian protection appeal and allowed the human rights appeal under Arts.3 and 8.

15. The respondent sought permission to appeal against Judge Davey's decision allowing the human rights appeal. It was submitted that the errors identified by UT Judge Smith when he allowed the respondent's previous appeal from the FTT had not been addressed in the redetermination, nor had the principles in *AM* been applied. Surprisingly, on 12 July 2022 a judge of the FTT refused permission, partly on the basis that Judge Davey had found that there would be a risk of suicide and self-harm if removal were to take place. As explained below, his decision did not contain any such finding.

16. On 23 November 2022 UT Judge Perkins granted the respondent permission to appeal against Judge Davey's decision to allow AA's human rights appeal.

17. On 9 January 2023 the appellant submitted his response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008 No. 2698). He sought to raise two grounds of appeal against Judge Davey's dismissal of his asylum/humanitarian protection appeal. He also pursued the same points in parallel applications for permission to appeal and for an extension of time. On 3 October 2023 Judge Perkins granted those applications.

18. On 19 October 2023 the UT (UT Judge Gleeson and Deputy UT Judge Davidge) heard the appeals by both parties. The SSHD conceded AA's appeal, but AA resisted the SSHD's appeal. On 4 December 2023 the Tribunal issued a decision of just over 4 pages. It allowed the appeals of both the appellant and the respondent and remitted the matter to the FTT to be redetermined again, with no findings of fact preserved.

19. AA then applied for permission to appeal against the UT's decision to allow the SSHD's appeal in relation to the FTT's determination of his human rights appeal. The main point raised was that the UT had completely ignored the appellant's grounds for opposing the respondent's appeal and had failed to determine those matters. Judge Gleeson refused permission to appeal on 18 March 2024.

20. On 17 July 2024 Arnold LJ granted AA permission to appeal. He remains entitled to anonymity.

21. On 31 July 2024 the SSHD filed a respondent's notice seeking to uphold the UT's decision to remit both the human rights appeal and the asylum/humanitarian protection appeal to the FTT, on the basis that there were also errors of law in the FTT's determination of the human rights appeal and, even if that were not so, the UT had power to remit the whole matter in any event.

22. It will be necessary to consider the key stages in this procedural history in more detail below.

Legal principles

23. AA's appeal to the FTT advanced the claims summarised in [10] above. Parts of the factual evidence were relevant to more than one claim. But because differing legal principles applied to the protections and rights relied upon by the appellant, it was necessary for the tribunal to consider each aspect separately, applying the relevant principles to that evidence. The analysis set out below shows why it was an error of law for the FTT to consider claims "in the round".

24. In relation to the asylum/humanitarian protection appeal, it was common ground before the UT that in his decision Judge Davey did not have proper regard to the country report relied upon by AA, and failed to make a proper assessment of risk on return. That part of the UT's decision is not the subject of an appeal in this court. I will therefore deal briefly with the legal principles relevant to that aspect.

25. An appellant must show that he has a well-founded fear of being persecuted for reasons of *inter alia* political opinion or membership of a PSG. A well-founded fear is one

which involves a real and substantial risk, or a reasonable degree of likelihood, of persecution. Paragraph 339C of the Immigration Rules addresses claims for humanitarian protection. An appellant must show *inter alia* that there are substantial grounds for believing that he would face a real risk of suffering serious harm if returned to another state. Serious harm includes inhuman or degrading treatment.

26. Article 3 of the ECHR provides;

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

I look first at authorities dealing with cases of ill health.

27. In *N v Secretary of State for the Home Department* [2005] 2 AC 296 the House of Lords held that as a matter of principle aliens cannot claim any entitlement to remain in a state in order to continue to benefit from medical, social, or other forms of assistance from that state. A comparison between the medical and other benefits available in that state with those available in the receiving state does not in itself give rise to an entitlement to remain in a country. As the law then was, Art.3 could only be engaged in very exceptional circumstances relating to a person's terminal and incurable illness which had reached an advanced stage (Lord Hope [33]-[36]). To be exceptional it was necessary to show that a person's medical condition had reached such a critical stage that there were compelling humanitarian reasons for not removing him to a place which lacked the medical and social services needed to prevent acute suffering while he was dying ([50]). Similarly, Baroness Hale held that the test is whether a person's illness had reached such a critical stage, i.e. he is dying, that it would be inhuman to deprive him of the care he is currently receiving and send him to another country to an early death unless there is care available to enable him to meet that fate with dignity [69].

28. In *Paposhvili v Belgium* [2017] Imm AR 867 the Grand Chamber of the European Court of Human Rights ("ECtHR") extended the application of Art.3 to other exceptional cases of serious ill health. In *AM (Zimbabwe)* the Supreme Court followed that decision. These cases involve the removal of a seriously ill person where there are substantial grounds 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 thereto, 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."

Thus, the threshold for establishing a violation of Art.3 remains high (*Paposhvili* at [183] cited in *AM (Zimbabwe)* at [22]).

29. Both the ECtHR and the Supreme Court laid down procedural requirements for dealing with Art.3 claims based on ill health. An applicant has to meet a threshold test, by adducing evidence capable of demonstrating that there are substantial grounds for believing that, if removed, they would be exposed to a real risk of being subjected to treatment contrary to Art.3 ("a prima facie case" of potential infringement of Art.3). Where that test is satisfied, the burden passes to the returning state to dispel any serious doubts raised by the applicant's evidence. It has to verify on a case by case basis

whether "the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure" to such treatment. The returning state must also consider the accessibility of the treatment to the particular applicant, taking into account its cost if any, its location and the existence of any family network ([23] and [32] to [33] of *AM (Zimbabwe)* adopting principles stated in *Paposhvili* at [186]-[191]).

30. As regards the application of Art.3 to other issues, treatment is inhuman or degrading if, to a seriously detrimental extent, it deprives a person of the most basic needs of any human being *(R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396 at [7]). The treatment must reach a minimum level of severity and involve actual bodily injury or intense physical or mental suffering. Treatment which humiliates or debases an individual, showing a lack of respect for, or diminishing his human dignity, or arousing fear, anguish or inferiority capable of breaking down an individual's moral and physical resistance, may also be characterised as degrading [54]. The assessment of severity is a matter of judgment [55].

31. The prohibition in Art.3 of treatment by a state which would be inhuman or degrading is absolute in nature and does not depend upon any proportionality test.

32. Article 8 provides:

> "**Right to respect for private and family life**
>
> **Article 8**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

33. Paragraph 276ADE(1)(vi) provided:

> "**Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> …….
>
> (vi) Subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be *very significant obstacles to the applicant's integration* into

> the country to which he would have to go if required to leave the UK" (emphasis added)

34. Paragraph 276ADE(1)(vi) indicated that it was promulgated in the context of Art.8. As Judge Smith pointed out in his decision at [21], where a person satisfies such a rule that is positively determinative of the proportionality issue raised by Art.8(2), citing *TZ (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1109 at [34].

35. *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813; [2016] 4 WLR 152 addressed the "very significant obstacles" test in s.117C(4)(c) of the Nationality, Asylum and Immigration Act 2002 ("the 2002 Act") in the context of the deportation of a "foreign criminal". Sales LJ (as he then was) said this at [14]:

> " In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

That passage was approved by the Supreme Court in *Sanambar v Secretary of State for the Home Department* [2021] UKSC 30; [2021] 1 WLR 3847.

36. In *NC v Secretary of State for the Home Department* [2023] EWCA Civ 1379 the Court of Appeal applied the same passage to a case decided under para. 276ADE(1)(vi). Whipple LJ summarised the relevant principles at [25]:

> "25. It is not in doubt, based on these authorities, that (i) the decision-maker (or tribunal on appeal) must reach a broad evaluative judgment on the paragraph 276ADE(1)(vi) question (see *Kamara* at [14]), (ii) that judgment must focus on the obstacles to integration and their significance to the appellant (see *Parveen* at [9]) and (iii) the test is not subjective, in the sense of being limited to the appellant's own perception of the obstacles to reintegration, but extends to all aspects of the appellant's likely situation on return including objective evidence, and requires consideration of any reasonable step that could be taken to avoid or mitigate the obstacles (see *Lal* at [36]-[37])."

37. In *NC* the Court of Appeal held that the FTT had failed to consider all of the relevant evidence as part of an overall evaluation. Its focus should have been on the likely reality of the appellant's daily life if returned. If the tribunal had thought that there were likely to be significant obstacles to reintegration, of whatever nature, it should have considered whether there were any steps that NC could reasonably take to avoid or mitigate such problems, for example, by seeking help from family members. The FTT's error was clearly illustrated by its conclusion that the "very significant obstacles" test was met solely on the basis of NC's subjective fear of violent revenge. The tribunal failed to carry out the necessary broad evaluative judgment applying an objective approach which took into account all relevant evidence, including family connections and, in that case, state protection [27] - [28].

38. In so far as the appellant seeks to rely upon Art.8 outside the scope of para. 276ADE(1)(vi) of the Immigration Rules, different tests will fall to be applied. The appellant bears the burden of proving that immigration control would interfere with a right protected by Art.8. The tribunal would need to consider whether there are exceptional circumstances which would render a refusal of leave to remain a breach of Art.8, because such a refusal would result in unjustifiably harsh consequences for the appellant (see GEN 3.2 of Appendix FM to the Immigration Rules). Given that Art.8 confers a qualified rather than an absolute right, the proportionality test would need to be applied, along with s.117B of the 2002 Act.

39. It is also necessary to consider the relationship between Arts. 3 and 8 for a claim resisting removal to another state on health grounds. This was addressed by the Court of Appeal in *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40; [2015] 1 WLR 3312.

40. If such a claim fails under Art.3, it does not follow that an appellant cannot succeed under Art.8. But Art.8 does not provide an easier route for resisting removal on health grounds than Art.3. If an Art.3 claim fails, the appellant cannot succeed under Art.8 without some separate or additional factual element which brings the case within the relevant paradigm for that provision, namely the capacity to form and enjoy relationships, or a state of affairs having some affinity with that paradigm. The only cases where the absence of adequate medical treatment in the country to which a person is to be removed will be relevant to Art.8 are where it is an additional factor to be weighed in the balance with other factors which by themselves are sufficient to engage Art.8. The rigour of the principles applicable to the consideration of ill health cases under Art.3 applies with no less force when a claim is brought under Art.8. Save in the exceptional circumstances recognised in the case law, the UK is under no ECHR obligation to provide medical treatment here because it is not available in the country to which an appellant is to be removed (Laws LJ at [85] to [87]).

41. At [111] of *GS (India)* Underhill LJ said to the same effect:

> "Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle."

In *SL (St. Lucia) v Secretary of State for the Home Department* [2018] EWCA Civ 1894 the Court of Appeal held that, subsequent to the Supreme Court's decision in *AM (Zimbabwe)*, those principles in *GS (India)* still remain good law.

42. In his decision at [30] at [31], Judge Smith stated that in a health-based integration claim under para.276ADE(1)(vi), the tribunal still has to consider the assessment which it will already have carried out under Art.3. That assessment will inform and help to calibrate the evaluation of whether there would be "very significant obstacles" for the purposes of para.276ADE(1)(vi). The appellant has not criticised that part of the decision. It respects the relationship between Art. 3 and Art.8 established in *GS (India).*

43. There is a further reason as to why clear, separate findings were necessary in relation to each of AA's claims. According to whether a tribunal may conclude that he succeeds in his asylum appeal, or in his humanitarian protection appeal, or under Art.3 or under para. 276ADE(1)(vi) or under Art.8, different decisions may follow on the immigration status which he may be granted.

The Tribunals' decisions and the grounds of appeal

The first decision of the FTT

44. In the first decision of the FTT, which was issued on 20 November 2020, the judge rejected the asylum claim because he found that the appellant had not proved that he had blogged on any matter critical of the monarchy or government of Morocco, nor that he had attracted adverse attention from that country's authorities. The judge referred to the implausibility of the appellant's account and lack of supporting evidence. The judge found that the appellant had been untruthful about both his blogging activity and how he was able to travel to the UK.

45. The judge then went on to allow AA's human rights appeal, solely under para.276ADE(1)(vi) of the Immigration Rules. He expressly rejected the claim under Art.8 (see [66]) and did not consider Art.3. He accepted that there would be very significant obstacles to the appellant's integration in Morocco.

46. The judge accepted that the appellant could be suffering from psychosis, requiring further assessment and treatment. He noted that the appellant had not been engaging with the mental health service, preferring to self-medicate by using illegal drugs such as LSD. Reports from Merton stated that the appellant was unable to function independently, in terms of being able to work and to access health services. Without the support of others he could not function properly. The appellant's mental health would be under severe strain if he were to be returned to Morocco. His psychotic symptoms could become worse, resulting in a psychotic breakdown. His illness would make it very difficult for AA to integrate in Morocco. He would be unlikely to seek help for his mental health problems. In the UK AA needs the assistance of three support workers to help care for him. The country report indicates that there is "an extremely inadequate mental health system" in Morocco.

47. The judge referred to the approach laid down by Sales LJ in *Kamara* and then considered the position of the appellant's mother and siblings in Morocco. He concluded:

> "Given his complex needs, that support structure, including the support he receives in the United Kingdom, I conclude that support structure which his mother and two younger siblings alone cannot provide, the appellant would not be able to integrate into Moroccan society in the sense explained by the court in the passage cited above."

48. I note that in the order dated 25 January 2021 granting both parties permission to appeal, UT Judge Martin pointed out that the judge in the FTT had failed to consider at all AA's claim to be a member of a PSG by reason of his mental disorder. The appellant's application for permission to appeal identified the paragraphs in counsel's skeleton before the FTT which had dealt with that claim.

49. In summary, AA advanced the following grounds of appeal in the UT in relation to his asylum/humanitarian protection appeal:

    (1) The judge in the FTT relied upon his own opinion of the inherent implausibility of the appellant's asylum claim. He failed to consider in that regard the appellant's age and vulnerability together with relevant expert evidence;

    (2) The judge failed to make findings on issues between the parties, namely whether returning AA to Morocco would violate Art.3 on health grounds and whether he would face persecution through belonging to a PSG, namely persons living with mental ill-health in Morocco;

    (3) The judge relied on matters adverse to the appellant which had not been raised by the respondent and which were not put to him.

50. In summary, the SSHD relied upon the following grounds of appeal in relation to AA's human rights appeal:

    (1) There was no basis upon which the judge was entitled to find that removal to Morocco would breach AA's human rights;

    (2) The judge failed to identify under which article or articles of the ECHR he had allowed AA's human rights appeal.

The first decision of the Upper Tribunal

51. In a careful and detailed judgment issued on 10 May 2021, UT Judge Stephen Smith allowed the appeals of both AA and the SSHD against the first decision of the FTT.

52. Judge Smith accepted the SSHD's concession that AA's appeal on the asylum and humanitarian protection claim should be allowed, because the FTT judge had failed to consider the effect of AA's vulnerability on the assessment of his evidence and so the judge's conclusions on credibility were flawed. The UT also accepted the respondent's concession that the FTT had erred in law by failing to address the appellant's Art.3 claim in relation to his mental health. Because of these concessions the UT did not find it necessary to go into any detail on the law applicable to AA's asylum/protection appeal.

53. Judge Smith also noted that there was an issue between the parties about whether AA's claim to be a member of a PSG on mental health grounds was a "new matter" for the purposes of s.85(5) of the 2002 Act. If it were, then the FTT lacked jurisdiction to consider the point unless the SSHD gave her consent to the matter being dealt with. Given that AA's asylum/protection appeal would have to be completely redetermined, Judge Smith decided that the question of whether the PSG point was a new matter should also be decided by the FTT in that redetermination.

54. In the human rights appeal the UT decided that the FTT judge had been entitled to decide the Art.8 claim initially under para.276ADE(1)(vi) of the Immigration Rules, because if the appellant satisfied that provision that would be positively determinative of that claim, including the proportionality issue under Art.8(2), and there would be no need to make an Art.8 assessment outside the rules [19]-[21].

55. But Judge Smith then went on to accept the SSHD's main criticisms of the FTT's determination of the human rights appeal.

56. First, on the "very significant obstacles to integration" test, despite the FTT's finding that the appellant had lived most of his formative years with his mother and siblings with their support and they remained in contact, the tribunal had concluded that he would not receive from them the help that he needs. But there was no reasoning on why the appellant's family would be unable to help him re-establish his family and private life in Morocco. Their role was plainly central to the appellant's prospects of reintegrating in that country. Although a support worker had said that AA would not want to speak to his family about his mental health conditions, that did not address the broader factors involved in the concept of integration, as explained in *Kamara*. Even if that difficulty existed, that did not address the appellant's wider ability to rely upon his family in Morocco for their support in other aspects of his life. Furthermore, despite the support and encouragement given to AA in the UK, he had engaged with mental health services in this country only to a limited extent. Therefore, it was not explained in the decision of the FTT why AA's unwillingness to engage with his family regarding his mental health condition could place his "broader integration" at risk, given the minimal medical assistance he receives in this country for his mental health condition, even with the benefit of his current support networks ([23] and [26]-[29]). Judge Smith did not accept the submission of Ms Marisa Cohen on behalf of the appellant that passages in the evidence of a support worker and of Dr. Day indicated that the FTT's reasoning in relation to para.276ADE(1)(vi) had been legally adequate.

57. Second, Judge Smith accepted the SSHD's criticism [24] that the FTT had approached the application of para.276ADE(1)(vi) as if it were a proxy for an Art.3 health claim, without appreciating the clear distinctions between the two. In considering a health-based integration claim, it had been incumbent on the judge to direct himself on, and apply the tests for, an Art.3 health-based claim. As Ms. Cohen had correctly submitted on behalf of the appellant, the FTT judge had failed to address Art.3 at all. But an Art.3 assessment was a relevant consideration when addressing the Art.8 claim through the lens of para.276ADE(1)(vi) and the "very significant obstacles to integration" test [30]. Judge Smith referred at [31] to the extensive case law on the relationship between Art.3 and Art.8 for health-based claims and said:

> "Health-based Article 8 claims are not lesser form of Article 3 claims, pursuant to a lower threshold. Accordingly, an

> assessment of what amounts to "very significant obstacles" based on a health claim should take place in the context of the health claim having also been assessed within the Article 3 paradigm. That assessment will inform and calibrate the assessment of what amounts to "very significant obstacles" for the purposes of paragraph 276ADE(1)(vi), as it will guide the decision maker to focus on the integration aspect of the "very significant obstacles" test, over and above health and treatment difficulties."

By failing to conduct a free-standing Art.3 assessment, the FTT judge failed to have regard to considerations material to the assessment of the "very serious obstacles to integration" claim which was, in part, health-based [32].

58. The UT added that although the FTT judge had addressed *some* aspects relevant to Art.3 in the context of his assessment under para.276ADE(1)(vi), he did not consider all relevant Art.3 matters in accordance with the case law on that provision. He said that "extensive findings of fact are yet to be made", some of which might overlap with the health-based para.276ADE findings already reached. But the latter findings were not sufficiently distinct from those issues which the judge had failed to address to enable those findings to be preserved. In the absence of an overall assessment of AA's health from an Art.3 (and possibly PSG) perspective, to preserve those findings would improperly tie the hands of the tribunal redetermining the appeals. "A full reappraisal of the case is required" [34].

59. Accordingly, Judge Smith set aside the decision of the FTT in its entirety, with no findings preserved and remitted the case to that tribunal to be heard afresh by a different judge [37].

The second decision of the FTT

60. The fresh hearing took place on 21 October 2021 and the FTT issued its redetermination of the appeals on 10 June 2021.

61. In para.1 of the decision Judge Davey, having referred to the Refugee Convention and Arts. 2 and 3 of the ECHR, said this:

> "The centrepiece of the Appellant's claim is that by reason of either his actual or imputed political opinions being against the monarchy in Morocco or by reason of his mental health he faces the risk of persecution or treatment contrary to Articles 2 and 3 ECHR. The Appellant has the burden of proof of showing to that low standard identified in the case of *Sivakumaran* [1998] Imm AR 147 that he faces that real risk of persecution and in facing it for a Convention reason alternatively because of his mental health he cannot have recourse to domestic protection, in the *Horvath* sense, nor is internal relocation a reasonable option."

Plainly, AA had not relied upon Art.2.

62. Notwithstanding that this was a re-determination of AA's appeals as a result of the successful appeals to the UT, there followed what can only be described as a superficial summary of the written evidence before the FTT [2] to [6]. Then the tribunal made these brief findings at [8] to [18]:-

> "8. The evidence was overwhelming that the Appellant's mental health not only significantly impacted upon his life in the United Kingdom but that the Appellant had been unwilling effectively to seek assistance in the United Kingdom or reluctant if not unwilling and further that there were plainly a variety of reasons for his psychosis including a drug-induced causes, the outcome of which was that if the Appellant could take the necessary medication and undergo treatment that there could be some improvement in his mental health but unsupported the likelihood was it would simply deteriorate. The Appellant did not believe that he could have recourse to family members including his mother in Morocco on the basis that they would not be interested in seeking to help him.
>
> 9. In addition to the report of Dr Day, dated 1 June 2020, there was correspondence from Dr Brahme, a paediatrician, and clearly the London Borough of Merton who were accommodating and supporting him similarly took steps to try and understand the basis of his mental health difficulties.
>
> 10. The Respondent disputed the extent, if at all, that the Appellant was blogging and the Appellant's evidence sought to explain that activity whilst the Appellant was in Morocco, emphasising that he had blogged as claimed but the Appellant essentially argued that there would be residual recollection of his presence and his activities which would attract the adverse attention of the state in Morocco.
>
> 11. A country expert report of Dr Fernandez-Molina, a lecturer in international relations, whose experience and qualifications are set out in her report, concluded that it was plausible that the Appellant's Facebook posts had come to the attention of the Moroccan authorities (AB/129) and that online activism on social media news such as the Appellant was likely to be monitored and put on a list by the Moroccan security services (AB/130) and if the Appellant returned to Morocco the Appellant's online political activism could put him at risk of further surveillance, ill-treatment during police interrogation and prosecution under the Penal Code and with the attendant risk of persecution (AB/131). As was pointed out by Ms Cohen, the country expert report makes clear that the Appellant is reasonably likely to be questioned on return and, even if such return does not engage with the Convention reason, it is likely to significantly enhance the risk in the process and the authorities' interest in him accordingly.

12. I found it was manifestly obvious that if a person subject to questioning was unable to give satisfactory and coherent explanations that the security services were unlikely to accept them and necessarily would detain and further question with the associated difficulties identified in the medical evidence of Dr Day. Relied upon but more difficult to assess was that the Appellant on return would face an increased risk of suicidal ideation and/or attempts at suicide. I did not find the evidence sufficiently coherent to reach any firm conclusion on that matter but sufficient to say his mental health would be an indicator of greater vulnerability if subject to pressing - examination by the security forces on a return to Morocco.

13. I had a short extract from the CPIN on mental health treatment in Morocco and if it was necessary to turn to *Paposhvili* (41738/10), the Respondent in very limited terms addressed the matter but there was unfortunately in that information very limited evidence relating to treatment in the receiving state of Morocco. Similarly there was no real examination of the medical evidence with reference to the exposure of the Appellant to treatment contrary to Article 3 ECHR. There was also no real assessment of what such treatment would cost and what the likelihood was that appropriate treatment would be available and accessible to the Appellant. The Respondent's review and the evidence relied upon really did not get to grips with the issue or why it was simply thought support of his family would be sufficient, bearing in mind the evident need for psychiatric treatment in the United Kingdom and the availability and his willingness for mental health reasons in seeking treatment on a return.

14. There was recited in the evidence, which I do not need to repeat, how the Appellant was fragile and had complex mental health issues (AB/60), how through removal his health could well deteriorate and he would be unable to have the necessary will in himself to seek help, let alone return to alcohol or drug abuse with its attendant consequences. Here in the United Kingdom he has been fortunate through the local authority to be able to engage with assessment and help, bearing in mind the profound personal and societal discrimination against mental health problems in individuals in Morocco.

15. It seems to me inevitable that the Appellant if removed would have to lose contact with his support network in the United Kingdom and it is really extremely difficult to assess the realities of him, in his current state, being able to have recourse to such help in Morocco.

16. I take into account Dr Day's conclusions (AB/89-91) in that, first, the Appellant's psychotic illness makes it difficult for him to integrate, seek employment and to help himself in Morocco.

Second, the Appellant was unlikely to seek help for his mental health difficulties and in terms of care it was evident that even now the Appellant currently required the help of three keyworkers provided by the local authority and there was nothing to indicate he could find this level of support let alone be able to pay for it. Third, given the Appellant's current psychotic illness, he remained a vulnerable young man and open to abuse, exploitation and ill-treatment. Fourth, there would be a significant risk of suicide and a risk of self-harm if removed due to his mental health being expected to deteriorate. Fifth, the Appellant's family may provide some supportive structure but the Appellant does not communicate his difficulties with them and there is nothing to indicate that they, over and above any ordinary person, are in a better position to provide help and protection from self-harm. Finally, the likelihood of the Appellant engaging with available mental health services in Morocco is very low.

17. Thus it seemed to me, applying the approach of looking at all the evidence in the round, that the issue of integration is relevant not only to the issue of the effects of any ill-treatment and difficulties on return but also in terms of whether there are very significant obstacles to his integration in Morocco, having regard to the extent of his support network in the United Kingdom and the likely deterioration therein contemplated. Therefore, whilst this appeal is being determined in the context of the prism of the Immigration Rules, I consider the claim in terms of whether those difficulties constitute or are likely to constitute a breach of Article 3 ECHR and also whether or not he engages with Article 8 ECHR.

18. Looking at all the evidence in the round I conclude that the Appellant is not now likely to face risk because of his posts sufficiently long ago but that his mental health is the key to the issues of return in that removing the Appellant from his support network, given his serious mental health problems and vulnerability, showed that there was the real risk of Article 3 ECHR ill-treatment either arising through societal discrimination or through the state in its treatment of him. I further conclude that the effect of removal would be significant in terms of the Appellant's ability to cope with his life, to make a life for himself and to have recourse to treatment. In the circumstances therefore I also concluded that the Appellant's removal is disproportionate to achieving the legitimate aims reflected in Article 8(2) ECHR and therefore a breach of Article 8. I take into account for obvious reasons the significance of maintaining effective immigration controls and the public interest. This was not a case where the Appellant's conduct of itself has given rise to harm within the United Kingdom and it seemed to me that the Respondent's approach has simply not got

> to grips with the difficulties faced by the Appellant as a result of his evident deterioration in mental health since he has been in the United Kingdom."

63. In summary, the SSHD's grounds of appeal against Judge Davey's decision were as follows:

(1) The FTT had still failed to address errors of law identified in the UT's decision to remit the case. There was still no proper free-standing assessment of the Art.3 claim based on ill-health;

(2) The appellant's evidence had pointed to the inadequacies of mental health treatment in Morocco compared to the UK, but that was not the test for a claim based on Art.3;

(3) The appellant had not adduced evidence to discharge the burden on him, in accordance with *AM (Zimbabwe)*, to show substantial grounds for believing that he would face a real risk in Morocco of being exposed to a "serious, rapid and irreversible decline" in his state of health "resulting in intense suffering." In any event, the FTT judge made no finding that the appellant had satisfied that test;

(4) Therefore, in [13] the FTT judge wrongly thought that the SSHD had become subject to an obligation to address the matters set out in *AM (Zimbabwe)* at [23(b) to (e)] and [32] and had failed to discharge that burden;

(5) In relation to para.276ADE(1)(vi), the judge failed to explain why the appellant would not be able to rely upon his family in Morocco to provide support, mitigating any very significant obstacles to integration which might otherwise be shown to exist. The judge did not address the broader factors relevant to the assessment required by *Kamara*.

64. I note one further matter raised in the respondent's application for permission to appeal. It was pointed out that Dr. Day had prepared her report as long ago as June 2020 and at that stage had recommended an urgent referral for further assessment and treatment (see [9] above). The respondent said that the referral had been made, but by September 2021 the appellant had not attended, and there was no information on whether the appellant had complied with Dr. Day's recommendation since then. It is not clear whether this point was pursued in the second FTT hearing. It certainly is not addressed in Judge Davey's decision.

65. The appellant raised two grounds of appeal against the FTT's determination of his asylum/humanitarian protection appeal:

(1) The FTT judge found in [14] that the appellant is not likely now to face persecution on political grounds because his posts had been so long ago. But the judge referred only to the period of time which had elapsed, and so failed to address the country expert report which stated that the appellant was likely to have been monitored and put on a list by Moroccan security services, so that he might be identified as such on his return;

(2) The FTT judge failed to make a finding on a live issue, namely whether the appellant was at a real risk of persecution or ill-treatment on return to Morocco because he is a member of a PSG, namely persons living with mental ill-health.

The second decision of the Upper Tribunal

66. The UT's reasoning was essentially contained in [25] to [29] of its decision:

> "25. For the Secretary of State, Ms Everett accepted that the First-tier Judge's decision did not deal properly with the country report produced by the claimant, nor with the assessment of risk on return.
>
> 26. She argued that the First-tier Judge had given inadequate reasons for his conclusion that family support was not available to the claimant. That was obviously material: if a person had a supportive family, that was part of what needed to be considered when assessing whether he was a member of a particular social group.
>
> 27. For the claimant, Ms Cohen submitted that there was overwhelming evidence for both a lack of family support and a risk of intense suffering on return.
>
> **Conclusions**
>
> 28. Given those concerns, and the mirror criticisms of the First-tier Judge's reasoning by both the Secretary of State and the claimant, we are satisfied that this decision cannot stand. The appeals of the Secretary of State and the claimant both succeed.
>
> 29. The decision in this appeal will be remade afresh in the First-tier Tribunal with no findings of fact or credibility preserved."

67. As I have said, neither party raises any ground of appeal in this court in relation to the UT's decision that AA's asylum/humanitarian protection appeal should be redetermined for the reasons advanced by AA (see [65(1)] above). Indeed, the FTT's finding in [18] that AA is not now likely to face risk because his posts had been "sufficiently long ago" ignores, and on the face of it is inconsistent with, the tribunal's findings in [11].

68. In relation to his human rights appeal, AA challenges the UT's decision to allow the SSHD's appeal against the FTT's decision and to remit that matter to the tribunal for redetermination. The appellant submits that the UT ignored his opposition to that appeal and failed to determine the issue between the parties. The UT wrongly proceeded on the basis that the appellant had agreed that the SSHD's appeal should be allowed and the matter remitted.

69. The respondent submitted that the UT's decision to allow her appeal against the FTT's decision on the human rights appeal had been correct for the reasons summarised in [63] above. Alternatively, even if this court should overturn the UT's decision on that matter, there was no error of law in the UT's decision to remit both the

asylum/humanitarian protection appeal and the human rights appeal to the FTT for redetermination. The UT had the power to do so and had not erred in law in exercising its discretion by remitting the entire case to the FTT. The appellant responded that if there had been no error of law in the decision on the human rights appeal, the UT had no power to remit the whole case to the FTT; alternatively if it did, the Tribunal had not exercised its discretion in the matter and this court should do so in the appellant's favour.

Discussion

70. It is plain from the appellant's skeleton before the UT that he opposed the SSHD's appeal against the FTT's determination of his human rights appeal. The transcript of the hearing before the UT confirms that the appellant maintained that position and asked that only the asylum/humanitarian protection appeal be remitted for redetermination. Counsel never accepted that the human rights appeal should be remitted.

71. The UT's decision recorded the submissions by Ms. Cohen for AA that there was overwhelming evidence for both a lack of family support and a risk of "intense suffering" on return [27]. But AA went further than the UT's sparse summary of his case. He submitted that Judge Davey's decision should be read as referring to and accepting that evidence and therefore his reasoning was legally adequate as a basis for allowing his human rights appeal. Accordingly, the SSHD's appeal should be rejected. How then the UT came to suggest in [28] that the appellant had criticised the FTT's reasoning on that part of the case, or had expressed concerns in that regard, is difficult to understand. It seems that the UT failed to appreciate, or to recall, that AA had supported that part of Judge Davey's reasoning.

72. Worse still, in para.9 of the reasons for refusing AA's application for permission to appeal to the Court of Appeal, Judge Gleeson said this:

> "The submissions now made were not made at the hearing: Ms Cohen raised no objection to the First-tier Tribunal's decision being set aside and remade, and for that reason, the reasons given are concise."

That response is incorrect. It is contradicted by the transcript of what was said during the hearing of the appeal to the UT.

73. The merits of AA's opposition to the SSHD's appeal against Judge Davey's decision on his human rights appeal therefore need to be determined. Both parties agree that this court is able to take that decision. The respondent asks us to do so. However, the appellant says that this issue should be remitted to the UT for determination, so as to preserve a right of appeal to this court.

74. The issue to be determined, whether in the UT or this court, is a question of law. Pending the resolution of this issue, the redetermination of the asylum/humanitarian protection appeal has been deferred. If they were to be preserved, rights of appeal would belong to the respondent as well as to the appellant. Whichever way the issue is resolved, a determination by the UT could result in yet more delay to this litigation, which ought to have been reached a final conclusion some time ago. The UT is in no better position to determine the question of law than this court. The point is

straightforward and there would be no real benefit in the matter being considered by the UT before this court came to consider it. The issue is before this court now and, subject to the views of my Lord and my Lady, should be decided now.

75. Despite the submissions made attractively by Ms. Cohen, I am in no doubt that the SSHD's appeal against Judge Davey's determination of the human rights appeal must be allowed and the matter remitted for redetermination by the FTT with no findings preserved. On that basis there is no need for this court to determine whether the UT erred in law in remitting the whole case to the FTT if the only legal errors in Judge Davey's decision had related to his determination of AA's asylum/humanitarian protection appeal (see [69] above).

76. Ms. Cohen sought to demonstrate that the appellant had presented a strong case to show a lack of family support in Morocco, a risk of "intense suffering" (the test in *AM (Zimbabwe)* for the purposes of the Art.3 claim) and very significant obstacles to integration. She submitted that the FTT had this evidence well in mind when it explained why it allowed AA's human rights appeal.

77. The problem with this submission is that it treats the SSHD's appeal as if it is only concerned with the standard of reasoning in Judge Davey's determination. It is not.

78. There are a number of substantial legal errors in that decision. It reads as if the judge had not considered, or taken on board, the decision of UT Judge Smith, which set out very clearly the faults in the FTT's first determination of AA's appeals. In my judgment, the SSHD has made good each of the grounds of appeal to the UT summarised in [63] above. With respect, the submissions made by Ms. Cohen are not an answer to those grounds.

79. One of the problems with the decision of the FTT is that it failed to deal with each claim separately in a logical sequence, setting out for each matter the relevant legal tests and the tribunals' findings of fact and then applying those tests to those findings. The fact that some of the evidence was relevant to more than one of AA's claims did not alter the need for the FTT to ensure that the relevant legal tests for each claim were applied separately.

80. Unfortunately, the FTT's decision jumps from one subject to another without a clear, coherent, and comprehensive legal structure for determining each claim. In this way, the FTT improperly elided issues under AA's claims which called for separate treatment.

81. For example, in [17] Judge Davey said that, while he was considering "*the* claim" through the prism of the Immigration Rules (he appears only to have had in mind para.276ADE(1)(vi)), he would consider whether "those difficulties" (referring to "very significant obstacles") would be likely to constitute a breach of Art.3 and/or Art.8.

82. This approach continued in [18], where the judge referred once again to looking at "all the evidence in the round", before touching momentarily on the refugee claim, then moving on to AA's support network for the purposes of Art.3 and, in the same breath, Art.8.

83. The analysis in [23] to [43] above demonstrates why the evidence in this case and its application to the relevant legal tests could not lawfully be considered in the round, failing to distinguish between the different protections and rights. The FTT had to apply different legal tests in relation to AA's different claims (even where relevant facts overlapped), including different standards of proof, a shifting burden of proof, absolute rights and qualified rights, which are the subject of a proportionality test.

84. What was required was a series of proper determinations of each claim in a logical sequence, for example, asylum, humanitarian protection, Art.3 health issues and non-health issues, and para.276ADE(1)(vi) (followed by residual Art.8 points outside the rules, if any). That was clear from the previous decision in the UT of Judge Smith.

85. Thus, the SSHD rightly complains that Judge Davey failed to redetermine the case in accordance with the decision of the UT (see e.g. [57] above). In addition, the judge did not deal with the "new matter" issue under s. 85(5) of the 2002 Act (see [53] above). It was not suggested to us that the Secretary of State had given her consent to the matter being dealt with by the FTT.

86. It is surprising to find the FTT judge saying in [13] "if it was necessary to turn to *Paposhvili*". Plainly it was. More accurately, the judge should have directed himself to the relevant principles in *AM (Zimbabwe)*. If he had done so, he ought not to have made the errors in the remainder of [13], where he criticised the respondent for having failed to deal with matters set out in *AM (Zimbabwe)* at [23] and [32] and for not getting to "grips with the issue". With respect, what the judge failed to do was to reach conclusions on the prior legal question, namely whether the appellant had satisfied the threshold test for seeking to rely upon Art.3 in a case of ill-health. Unless the appellant met that test, the points made in [13] of his decision did not arise.

87. Mr Tom Brown for the SSHD rightly contrasted the confused reasoning of the FTT in this case with the clear approach to Art.3 taken by the UT in *AM (Zimbabwe)* [2022] UKUT 00131 (IAC) following the decision of the Supreme Court. This was a panel which included Judge Smith and was presided over by Foster J. In the present case there ought to have been findings by the FTT as to whether (*inter alia*) AA had produced evidence capable of demonstrating that there were substantial grounds for believing that he would face a real risk (i) on account of the absence of appropriate treatment in Morocco or his lack of access to it, (ii) of being exposed (a) to a serious, rapid and irreversible decline in his state of health resulting in intense suffering, or (b) to a significant reduction in life expectancy. It has not been suggested that alternative (b) was engaged in the present case. Here, the judge made no findings on whether there is a risk of a "serious, rapid and *irreversible*" decline in AA's state of health and consequential "intense suffering". In those circumstances, it was inappropriate for him to treat the SSHD as having become subject to a burden to deal with the matters in [23] of *AM (Zimbabwe)*.

88. I had understood the appellant to be seeking to rely upon a risk of suicide as part of his case under Art.3. In [16] and [17] the judge appears to have adopted a series of points taken from the report of Dr Day, including "there would be a significant risk of suicide and a risk of self-harm if removed due to his mental health being expected to deteriorate." However, at [12] he had referred to the difficulty of assessing the risk of suicide or attempted suicide in this case, and decided that the evidence was not "sufficiently coherent" to be able to reach any firm conclusion on the matter. The

judge's decision does not contain any other reasoning to enable this apparent conflict to be reconciled. That is why it is so important that the judge made no findings about a risk of any other form of suffering which would be "intense" and thus satisfy the threshold test for Art.3.

89. It is possible that the judge's finding on the lack of coherence in the evidence on suicide risk [12] refers back to qualifications to which Dr. Day's opinion was subject, in particular the need for further assessment for a formal diagnosis to be made, and the apparent lack of material updating the tribunal on the psychiatric assessment and treatment. No doubt the parties will consider such issues in preparing for the redetermination of the appeals.

90. As regards the judge's approach of looking at all the evidence in the round, it is possible that he had in mind *Kamara* at [14] (see [35] above). But that passage simply relates to "the very serious obstacles to integration" test in para.276ADE(1)(vi). It did not justify eliding the consideration of AA's various claims in his appeals to the FTT.

91. In relation to the judge's decision on the application of para.276ADE(1)(vi), he failed to give effect to the reasoning of UT Judge Smith when he set aside the first decision of the FTT (see [56] above). This is apparent from the section of the FTT decision quoted above. I also note that in [16] Judge Davey said that the appellant's family may provide some "supportive structure" in Morocco, but there was nothing to indicate that they were "in a better position to provide help and protection from self-harm" as compared with any ordinary person. But the judge's observation ignores his earlier finding that the evidence had not enabled him to reach any firm conclusion about the risk of attempted suicide [12]. Furthermore, there does not appear to have been any evidence from the appellant's family or an assessment as to what support they could, or could not, provide whether in relation to mental health specifically or integration generally. The assessment required as a result of the decision of Judge Smith has not been carried out.

92. If the UT had not failed to recognise that the appellant opposed the SSHD's appeal and the remittal of the human rights issue to the FTT, it would have been obliged to identify and grapple with the legal errors in the decision of Judge Davey, including the failure to comply with the decision of Judge Smith. If the UT had carried out its task properly, it seems unlikely that a second appeal to this court would have been necessary.

93. Accordingly, I would uphold the order of the UT to remit the whole of the case to a different constitution of the FTT with no findings preserved, but for the reasons expressed in this judgment and not those given by the UT.

94. It is highly regrettable that the entire case has now to be determined for a third time. The matter should be remitted to the FTT to be heard by a judge other than Judge Hussain or Judge Davey. The matter should be placed before the President of the First-tier Tribunal (Immigration and Asylum Chamber) to consider case management. That should include directions for any further evidence and the preparation by the parties of an agreed list of issues which they ask the FTT to determine.

Lady Justice Elisabeth Laing

95. I agree.

Lord Justice Baker

96. I also agree.