



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

AXB (Art 3 health: obligations; suicide) Jamaica [2019] UKUT 00397 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Field House, London**

**On Thursday 3 October 2019**

**Before**

**THE HONOURABLE MR JUSTICE LANE, PRESIDENT**

**UPPER TRIBUNAL JUDGE SMITH**

**DR HUGO STOREY, JUDGE OF THE UPPER TRIBUNAL**

**Between**

**AXB**

**[A protected party, by his litigation friend, NB]**

**[ANONYMITY DIRECTION MADE]**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation :**

For the Appellant: Mr D Chirico and Ms A Nicolaou, Counsel instructed by Duncan Lewis solicitors

For the Respondent: Dr C Staker, Counsel instructed by Government Legal Department

1. In a case where an individual asserts that his removal from the Returning State would violate his Article 3 ECHR rights because of the consequences to his health, the obligation on the authorities of a Returning State dealing with a health case is primarily one of examining the fears of an applicant as to what will occur following return and assessing the evidence. In order to fulfil its obligations, a Returning State must provide “appropriate procedures” to allow that examination and assessment to be carried out. In the UK, that is met in the first place by an examination of the case by the Secretary of State and then by an examination on appeal by the Tribunal and an assessment of the evidence before it.

2. There is no free-standing procedural obligation on a Returning State to make enquiries of the Receiving State concerning treatment in that State or obtain assurances in that regard. Properly understood, what is referred to at [185] to [187] of the Grand Chamber’s judgment in Paposhvili concerns the discharge of respective burdens of proof.

3. The burden is on the individual appellant to establish that, if he is removed, there is a real risk of a breach of Article 3 ECHR to the standard and threshold which apply. If the appellant provides evidence which is capable of proving his case to the standard which applies, the Secretary of State will be precluded from removing the appellant unless she is able to provide evidence countering the appellant's evidence or dispelling doubts arising from that evidence. Depending on the particular circumstances of the case, such evidence might include general evidence, specific evidence from the Receiving State following enquiries made or assurances from the Receiving State concerning the treatment of the appellant following return.

4. Where an individual asserts that he would be at real risk of committing suicide, following return to the Receiving State, the threshold for establishing Article 3 harm is the high threshold described in N v United Kingdom [2008] ECHR 453, unless the risk involves hostile actions of the Receiving State towards the individual: RA (Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ 1210; Y and Z v Secretary of State for the Home Department [2009] EWCA Civ 362.

### **Anonymity**

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

The appeal is on protection grounds. Accordingly, it is appropriate that the Appellant's identity be protected. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellant or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

## **DECISION AND REASONS**

### **BACKGROUND**

1.

The Appellant appeals against a decision of First- tier Tribunal Judge O'Keeffe promulgated on 23 April 2019 ("the Decision") dismissing the Appellant's appeal on protection grounds against the Secretary of State's decision dated 22 December 2017 refusing his protection and human rights claims but allowing the appeal on human rights grounds (Article 8 ECHR). The Appellant's claims were made in the context of a decision to deport him to Jamaica.

2.

Broadly, the Appellant claims that he will be at risk from gang members in Jamaica. He also claims to be entitled to humanitarian protection due to the level of violence in that country coupled with his own circumstances. The Appellant suffered a stroke in 2011 and was left wheelchair bound. He also suffers from mental health issues (although does not himself appear to recognise that he does and refuses any treatment to deal with his problems). He lacks capacity to provide instructions in his appeal; hence the appointment of a litigation friend. He did not give oral evidence before Judge O'Keeffe although he has been interviewed in connection with his claims (by the Respondent and, to some limited extent, by experts assessing his health issues).

3.

The Judge did not accept the credibility of the Appellant's asylum claim. She rejected it on that account. She accepted the broad thrust of the medical and other expert evidence produced on the Appellant's behalf but did not accept that this disclosed an entitlement to humanitarian protection or enabled the Appellant to succeed on Article 3 ECHR grounds. However, she accepted that the Appellant's circumstances considered cumulatively established a breach of Article 8, ECHR – in other

words, deportation to Jamaica would be a disproportionate response. The Respondent has not appealed those findings and has granted the Appellant thirty months' leave to remain. However, the Respondent does not dispute that the Appellant remains entitled to appeal against a hypothetical deportation on protection and Article 3 grounds more generally as, if he were to succeed on those other grounds, he may be entitled to a more preferential status. He is entitled to have his appeal considered in relation to those issues in any event, whether or not success would lead to any different status.

4.

Permission to appeal to this Tribunal was refused by First-tier Tribunal Judge Saffer on 16 May 2019 but granted by Deputy Upper Tribunal Judge Storey on 5 July 2019. His reasoning is as follows:

"It is arguable that the judge's adverse credibility findings in respect of the issue of whether the appellant, a national of Jamaica, qualified as a refugee failed to take into account relevant matters as set out in ground 1.

I do not consider ground 2 (which concerns the judge's rejection of humanitarian protection status) raises any issue distinct from the judge's consideration of the issue of refugee status.

However, ground 2 [should be 4], which concerns Article 3, raises the issue of whether the judge's assessment of risk on return in light of the appellant's mental health and disability stood in conflict with Strasbourg Article 3 jurisprudence, *Paposhvili* (app 41738/10) in particular. It has arguable merit. It is the principal contention of this ground that *Paposhvili* laid down a procedural obligation whereby when an applicant adduces evidence "capable of" demonstrating an Article 3 breach, "it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it": (paras 186-7) and the burden of proof is on the authorities "to verify on a case by case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness" so as to avoid a breach of Article 3 (para 189); and that "if serious doubts persist regarding the impact of removal on the persons concerned...the returning State must obtain individual and sufficient assurances from the receiving State as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3" (para 191). There is nothing to indicate that the judge understood that in the context of the Article 3 claim there was such a procedural obligation whose applicability to this case needed to be considered and this arguably vitiated the judge's Article 3 assessment.

It appears that apart from the concession by the respondent in *R (MM (Malawi))* [2018] EWCA Civ 1365, UK courts and tribunals have not addressed the UK's procedural obligation under Article 3 as identified in *Paposhvili*. For this reason, it is possible that this case will be put before a panel."

5.

It is as a result of the issue raised in the Appellant's ground four that the appeal comes before the Tribunal sitting as a Presidential panel, in order to provide some guidance on this issue. However, the Appellant pursued all grounds and we therefore need to determine whether there is an error of law in relation to any of the four grounds, which we now turn to do in the order they are pleaded.

6.

We were greatly assisted in our task by the detailed skeleton arguments and oral submissions of both Counsel. We were provided with a consolidated bundle of documents to which we refer as necessary

below as [AB/xx] by reference to the internal tab and page reference. We also have a Respondent's bundle including some additional evidence to which we refer as necessary as [RB/xx]

#### **GROUND ONE: PROTECTION CLAIM - CREDIBILITY ISSUES**

7.

In order to understand the Judge's credibility findings and the criticisms made of them, it is necessary to set out briefly the chronology of the Appellant's case and the outline of the substance of his case and his protection claim.

8.

The Appellant arrived in the UK in December 2000, then aged twenty -seven years. Following a short period of leave as a student, he overstayed. He thereafter used the identity of other persons who are British nationals, using documents which he had obtained in those identities. His convictions in the UK arise from those offences. Having travelled to Jamaica in 2006 for his brother's funeral, the Appellant was caught in possession of cocaine and sentenced to a period of imprisonment in Jamaica. Since he used a British identity in order to enter Jamaica, the Jamaican authorities thereafter deported him to the UK, believing him to be British. His deception was the n uncovered , and the Appellant was convicted and sentenced in 2010 to concurrent and consecutive sentences of between three and eighteen months. As a result, the Respondent initiated deportation action.

9.

The Appellant first claimed asylum in September 2010. He was interviewed in November 2010. At that time, he said that he feared members of the "One Order" gang who had killed his brother in Jamaica in 2006. He said that, in order to avenge his brother's death, another of his brother s had formed a gang and had been imprisoned in Jamaica. The Appellant claimed that one of his friends was killed by "One Order" gang members in 2009. On 19 May 2011, the Appellant withdrew his claim for asylum and requested a facilitated return to Jamaica.

10.

The Appellant made a second claim for asylum in April 2013 which was withdrawn on 8 July 2013 (according to Home Office records). He claimed for a third time in August 2017 and made a statement in September 2017 to clarify his case. By this stage, the Appellant was also claiming to be at risk as a result of having acted as an informer for the police in the UK against a drug dealer ("KB") and had been taken into witness protection . He claimed that he had stabbed a friend of KB . He said that, as a result of this incident , he would also be at risk from friends of KB . Th is incident is referred to in the skeleton arguments as the "KB /[B] claim" and we adopt that label for ease of reference.

11.

The Appellant claims that the feud against his family has continued with his nephew being shot in 2017 and his half-brother being murdered in 2016.

12.

Having recited the substance of the Respondent's decision under appeal , the Appellant's case and the relevant legal tests, the Judge considered the evidence and reached her findings in a section at [30] to [88] of the Decision. We note at this stage that since the Appellant was not able to give oral evidence and no other witnesses provided statements (apart from his lawyer) and the substance of the medical and expert evidence was not the subject of conflicting evidence, the hearing proceeded by way of legal submissions only.

13.

Ground one challenges various of the Judge's findings concerning the Appellant's protection claim made by reference to the Refugee Convention. We consider the grounds as pleaded. However, in his oral submissions, Mr Chirico identified certain issues which he accepted did not give rise to a freestanding error. Nonetheless, he said that those were still relevant to the materiality of the errors which he said were disclosed by the other grounds.

**Ground 1 (a)**

14.

The Judge did not accept as credible the "KB/[B] claim". Her consideration of this part of the claim appears at [38] to [43] of the Decision. She there refers to the Appellant's failure to raise this claim earlier (he did not mention it until 2017). In addition to being interviewed when he claimed asylum in 2010, the Appellant had written a letter in November 2010 where, once again, he did not mention this incident. In addition, he gave conflicting accounts as to the date of the incident. A note on the Home Office file dated 2001 indicated that an incident had occurred in the UK in 2000. However, the Appellant was said to be a victim of an attack and not the assailant and he and his ex-wife were housed by the local authority not the police. That contradicted his account. Although the Appellant's ex-wife ("C") had reported to the Appellant's UK lawyer, Ms Goodarzi that they had been put into witness protection following an attack, [C] had not made a statement herself and her evidence was untested. As a result, the Judge gave it less weight.

15.

The Appellant's complaint in relation to the Judge's finding is that she treated her finding as to credibility of the "KB/[B] claim" as determinative and had allowed it to influence her credibility findings as to the entirety of the claim.

16.

The Judge's findings as to credibility are summarised at [55] to [59] of the Decision. We set those out in full so that both the context and content are clear:

" 55. The appellant's credibility has to be considered in light of the factors set out in Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The appellant used a false British passport to travel to Jamaica in 2006 and to return to the UK in 2007. The appellant's offending includes offences of deception and possessing false identity documents. The appellant attempted to obtain a driving licence using the false passport. The appellant has had no leave to remain in the UK since 2001. The use of the false identity is clearly designed to enable the appellant not only to remain in the UK but to travel out of and back to the UK.

56. The appellant failed to report to the respondent whilst on temporary admission. He was circulated as an absconder until encountered on 26<sup>th</sup> July 2017. I share the respondent's view that this was with a view to delaying any decision in his case. I find that the appellant's credibility is damaged by these factors and I take that into account in my overall assessment of the evidence.

57. I take into account that both the appellant's expert witnesses consider his claim to be plausible. The appellant's claim does have some inconsistencies. The appellant did not mention when interviewed in 2010 that his problems started as result of the incident in 2000 when he fell foul of KB. There is evidence that the appellant was a police witness in 2000 but no evidence that he was in police protection or given an alternative identity. The Judge's sentencing remarks when sentencing

the appellant on 19<sup>th</sup> February 2010, indicate that the appellant used a false name when giving his statement.

58. The appellant's claim that he is at risk in Jamaica as a result of a feud is not supported by the fact that he was able to travel back there without difficulty for his brother's funeral in 2006. It is not credible that the appellant would have been coerced into carrying drugs by gunmen as part of the feud against him. The appellant's expert considers this part of the appellant's account to be vague but plausible. Applying the lower standard of proof, there is evidence that the appellant's half - brother was murdered in 2016. There is no background evidence however to link this to a feud which places the appellant at risk. The expert evidence demonstrates sadly that violent crime is not uncommon in Jamaica.

59. There is no background evidence to support the appellant's claim that his best friend and nephew have been targeted as a result of the feud. Whilst the expert s consider this to be plausible, I was not referred to any parts of their report which suggest they have made enquiries of the police in Jamaica to verify these crimes. The appellant said in interview that he had last heard that he was at risk in 2009 . I have to consider the position as at the date of the hearing before me. The appellant's credibility has been damaged for the reasons set out above. Applying the lower standard of proof and considering the evidence as a whole, I find that the appellant has not demonstrated that he has a well - founded fear of persecution on return to Jamaica. I find that the appellant has not demonstrated that he is a refugee."

17.

The Appellant does not suggest that it was not open to the Judge on the evidence to reject the "KB/ [ B ] claim" as not credible. T he Judge has provided clear and cogent reasons for so doing. There were evident inconsistencies in the Appellant's account regarding the claim . It cannot sensibly be suggested that the Judge was not entitled to take into account in her overall credibility findings that this aspect of the claim was not credible. The Appellant does not go that far. What is said is that, just because one aspect of a claim is not credible, this does not mean that the core of the claim cannot be independently believed.

18.

As Dr Staker pointed out, the Judge's credibility findings as to this incident are merely part of her summary of reasons for rejecting the claim as a whole, as is apparent , in particular based on what is said at the end of [59] of the Decision. As we have pointed out above, the Judge had already considered the substance of and evidence relating to this aspect of the claim separately from the remainder , earlier in the Decision. Her findings as to credibility of this part of the account are relevant to her overall finding of adverse credibility. She has not treated them as determinative of the whole. There is no error in the Judge's approach.

### **Ground 1(b)**

19.

This ground challenges the Judge's findings for failure to take into account relevant considerations, the taking into account of irrelevant considerations and a failure to give adequate reasons for finding the Appellant's claim not to be credible. As such, the ground is formed of a number of component s which we consider in turn.

#### Inconsistency as to the claim of being forced to traffic drugs

20.

It is said that the Judge has fallen into error in the finding made at [58] of the Decision. It is asserted that it was not part of the Appellant's case that he was forced to traffic drugs by the "One Order" gang. The Appellant's case is said to be that he did not know the identity of the gunmen who forced him to do so. The Judge is therefore said to have fallen into error by misunderstanding the Appellant's case. The Judge's finding at [58] stems from what is said at [45] of the Decision which is also criticised as being an error. There the Judge said this:

"The appellant was not subjected to any violence whilst in Jamaica but claims that he was forced by gunmen to carry drugs back to the UK. If, as the appellant claims, he is at risk of death from this gang, it seems a rather strange ploy that they should choose to force him to carry drugs rather than kill him when they had the opportunity."

21.

Our attention was drawn to two items of evidence which are said to be relevant to this part of the claim. First, at [ RB/ OO1] is an undated letter, apparently written by the Appellant to clarify his case. Although undated, the letter appears to have been sent by fax on 17 November 2017. He says this about being forced to traffic drugs:

" 5. I was at my friend [ C ] rip barber shop when I was picked up by men arm with guns and was taken to the Country near the Montego bay Airport where I was given drugs by forced with instruction with warning to take to the UK, the gunmen didn't reveal them self to [me].

6. It's all revenge !!!"

Mr Chirico observed that this did not say that the Appellant had been coerced by the "One Order" gang to traffic drugs. We accept that it does not say so in terms , although we note what is said at [6] of the letter and that what is there said also follows the Appellant's record of his brother being killed in 2006 by that gang. The Appellant claims that the feud started with the rape of his brother's "baby mother". The inference from what is there said is that the Appellant believed the gunmen to be targeting him as revenge for what had occurred even though they did not identify themselves.

22.

Second, the Respondent relies on a letter written by the Appellant, undated but stamped as received by the Respondent on 17 November 20 10 (annexed to the Respondent's skeleton argument for the hearing before us) . In that letter, the Appellant says this about the incident:

" When I arrived in Jamaica the same gun man that kill my brother ' order ' me to carry drugs to the UK, but at the airport in Jamaica I gave the drugs to the police and tell them the situation and the police said that I have to do a short sentence so that the gun [man] would thi nk that it was busted and I was sentenced to 15 months in prison in Jamaica [ in ] 2006 which I done 9 months and was sent back to the UK in 2007."

23.

Mr Chirico accepted that this passage tended in the direction of suggesting that the " One Order " gang was involved in the incident but said that it was not sufficiently clear to draw from it the inconsistency on which the Judge relied. We disagree. Taken together we consider that this is ample evidence to justify the Judge's conclusion and comment at [45] of the Decision. It follows that there is no error in the Judge's taking into account of this reason for rejecting the Appellant's claim in this regard .

#### Expert's ability to make enquiries of the police

24.

At [57], [58] and [59] of the Decision, the Judge records the views of the country experts that elements of the Appellant's claim are plausible. However, at [57] and [58] of the Decision, the Judge points to inconsistencies in the evidence and other reasons for rejecting the claim nonetheless. At [59] of the Decision, she goes on to record that the experts had not made enquiries of the police. It is that latter reason which is challenged by the Appellant as not being open to the Judge on the evidence or not being a relevant reason reducing the weight which could be placed on the expert reports .

25.

The Appellant's case in this regard is based on the witness statement of Ms Goodarzi who, it will be recalled, is the Appellant's legal representative. She has signed three statements in this appeal , and it is that dated 8 March 2019 which is relied upon in this regard. She records at [9] to [11] of that statement her efforts to obtain information from the Jamaican police by telephone without success . She says that she was told by Mr Sobers who is one of the country experts that , in order to make a written enquiry which might enable the information to be obtained, certain documents would be required such as the Appellant's fingerprints and the biodata page of his passport. She says that as she was unable to provide all those documents, she did not make the request. We do not need to consider at this stage why Ms Goodarzi was unable to obtain the documents as what we are assessing is whether the Judge erred in law by taking this reason against the experts without making reference to Ms Goodarzi's evidence as to the difficulties which exist.

26.

The Judge was clearly aware of Ms Goodarzi's evidence. She refers to it in relation to other aspects of the case ([ 41] , [48] ). We accept however that she does not refer to Ms Goodarzi's evidence on this point .

27.

However, we do not accept that this amounts to a material error for the following reasons. First, although the evidence of Mr Sobers and Dr de Noronho, the two country experts, was not the subject of cross-examination or any competing evidence, and was therefore taken as read, it remains the case that this evidence is based only on the Appellant's own account when considered against general background evidence . That is relevant to the weight which the Judge had to give to that evidence. It is not disputed that there was no other corroborating evidence from any other source and the Judge was entitled to take that into account.

28.

Second, neither expert has met with the Appellant. That is unsurprising given that the experts were instructed only after the third asylum claim and when the Appellant had already suffered his health issues following his stroke. However, as such, the experts were confined to expressing the claims as being "plausible" when considered against the general background evidence . They were not able to test the Appellant's own evidence or form a view on the credibility of his account.

29.

Third, in this context, the Judge makes certain criticisms of Dr de Noronho's report and conclusions as to plausibility at [50] , [53] and [54] of the Decision. In particular, she draws attention to Dr de Noronho's conclusion as to plausibility notwithstanding his failure to take some aspects of the Appellant's case into account when forming that view. Those criticisms were, in our view, entirely sound.



30.

Fourth, and finally, the position of country experts is very different to that of a trainee solicitor practising in the UK. We do not criticise Ms Goodarzi for seeking to undertake enquiries for herself. Her commitment to the preparation of this case is admirable. However, she has no contacts with police in a foreign country. A person acting as an expert in relation to that country with wide contacts there might be expected to have access which would not be available to an individual particularly one making enquiries on behalf of a person with criminal connections by telephone or, if she had been able to, in writing.

31.

We note in that regard Mr Sobers' general experience which includes "significant ties...professionally and personally" in Jamaica where he visits annually. We recognise, given his profile, that those ties may not be directly with the Jamaican police, but it is clear from what is recorded in Ms Goodarzi's statement that he is well aware of how the police operate and must therefore have some contacts who are capable of making enquiries. It is perhaps surprising in that context that he did not at least offer to make enquiries for Ms Goodarzi but, for whatever reason, he did not do so. Again, we do not criticise him for not doing so. It may be that he was concerned about disclosure of the Appellant's identity and claim. However, the Judge was entitled, notwithstanding Ms Goodarzi's evidence, to take this into account when considering the weight to be given to the evidence.

32.

Dr de Noronha's experience is perhaps less extensive and of a lower profile. However, he expressly mentions a communication with a police officer at [27] of his report which he describes as an "interview". It would appear therefore that he has some connections which he could have used to make enquiries had he directed his mind to do so.

33.

We cannot be sure that the Judge addressed her mind to the evidence about the difficulties which might exist in making enquiries of the Jamaican police about the Appellant's case (or more accurately have left this out of account as a reason for discounting the expert's views as to plausibility). Even if she did not, though, for the reasons which we give, we do not consider this error to be material taken with the credibility findings as a whole.

#### Evidence of the Appellant's ex-wife given to Dr Lisa Wootton

34.

Dr Wootton is a consultant forensic psychiatrist who has provided no less than six reports dealing with aspects of the Appellant's mental health which are within her expertise. She has however only spoken to the Appellant on a limited number of occasions due to his lack of cooperation. As such, much of her evidence is based on documentary evidence and testimony from others. It is in this context that this ground falls to be addressed.

35.

In her report dated 30 November 2018 at ([AB/F/135]), Dr Wootton records a telephone conversation with the Appellant's ex-wife, [C], who lives in Antigua. She begins by saying that the Appellant's ex-wife was not given any forewarning of the call. She does not give the date of the call nor does she provide any verbatim note of it. Her account of the conversation is as follows:

" 7(b) [C] told me: She is from the same community as [AXB] and has known him since he was in his 20s. When they first met, he was calm. "He used to be a nice person." They were married in around

1998 for about three years. They have two children together aged [...] and [...]. They remain in regular contact by phone. He calls her to ask about the children. She last spoke to him a few weeks ago. Things changed during their relationship. "They started to kill his brothers and he had to run away I don't know if it is that caused the problem with him." She mentioned about one of his brothers being put in a barrel in Jamaica. After that he would get easily angry. She was vague about dates. She thinks he has mental health problems. Sometimes she does not like to talk to him "sometimes he will talk good to you and the next time I don't like his reasoning ". "He talks some things which really aren't relevant. It doesn't really make no sense." When I asked if he says things that are strange or paranoid she said "sometimes when he talks you do wonder". She has noticed he has memory problems "he don't remember things" he calls her to ask when the children were born etc. A few years ago they killed one of his brothers and this might have made things worse. "He has been through a lot." She said she was not able to comment in much more detail because she only speaks to him on the phone and she was unsure of the dates. However, she said that she knows his family and their problems in Jamaica were real."

36.

Before moving to the specific criticism made of the Judge's failure to deal with this evidence, we make three general observations. First, unsurprisingly given her role in this appeal, we read that passage as being evidence of Dr Wootton trying to ascertain the nature and extent of the Appellant's mental health problems rather than probing the facts and circumstances of the Appellant's protection claim. Second, the evidence is in any event double hearsay and as such, even if the Judge had referred to it, it is difficult to see how it could be given any real weight. Third, stemming from that and as is evident from the content, it records conversations by telephone between the Appellant and his ex-wife which his ex-wife herself admits make no sense at times and where she also admits that he has memory lapses and in circumstances where the Appellant's ex-wife herself was "vague about dates".

37.

Of greater importance to the question whether the failure to refer to this evidence amounts to an error of law is its materiality to the issues which the Judge had to decide. It is trite law that a Judge is not obliged to refer to every piece of evidence but only to that which has relevance to the issues.

38.

The Judge had before her witness statements from Ms Goodarzi to which we have already referred. Two of those statements ( both dated 18 March 2019) report her own conversations with [C]. In the first, ([AB/C/ 8-10] ) , [C] tells Ms Goodarzi about what she says happened in the UK in 2000 and about the murder of the Appellant's brother in Jamaica which she said occurred in 2006/2007. She also says that the Appellant's nephew was shot in 2017 "but no one knows his whereabouts". In the second, ([AB/I/ 1-4]), Ms Goodarzi records that [C] had changed her mind about providing a witness statement herself. However, [C] is said to have confirmed that the Appellant's half-brother ("W" or "O") was killed by gangs in Jamaica in 2016. She also deals with a video recording showing the Appellant's half- brother's dead body.

39.

The Judge deals with that evidence at [41] (as to the events in 2000) and [48] (as to the killing of the Appellant's half- brother). The Judge also records at [48] that she watched the video evidence. In relation to both, the Judge gives less weight to the evidence of [C] because it could not be tested in cross-examination and was not first-hand. The Judge was clearly entitled to assess the evidence in that way. The same would be true of what [C] said to Dr Wootton. If anything, that evidence would be likely

to bear less weight in light of the context of the conversation and that Dr Wootton, as a mental health expert, was not concerned with the facts of the protection claim.

40.

More crucially, though, and in spite of asking Mr Chirico about the materiality of this evidence on several occasions, we are still at a loss to see what is the relevance of what [C] is reported to have said to Dr Wootton particularly since the Judge expressly confirms at [48] of the Decision that she accepts that the Appellant's half- brother was murdered in 2016. The Judge accepts also that the Appellant 's brother was killed as she accepts that he returned for his brother's funeral in 2006 .

41.

The highest that Mr Chirico could put the Appellant's case in relation to what Dr Wootton records is that [C] said that " they started killing his brothers" (our emphasis) . He said that this is confirmation that one gang was involved in the killings . However, that is less detailed than [C] 's evidence to Ms Goodarzi . Even there, [C] says that the Appellant's brother and half-brother were killed by gangs but does not say which gang nor that it was the same gang. [C] also confirms that his family in Jamaica has "problems" which are "real". The use of the word "they" therefore has to be taken in context. What [C] is said to have told Dr Wootton does not add to what is said in Ms Goodarzi's statement that [C] reported there to be "gang issues" . As we have already noted, the Judge was not prepared to give Ms Goodarzi's report of [C]'s evidence any weight and was entitled not to do so. What [C] is said to have told Dr Wootton does not add to that evidence and the Judge was not therefore obliged to deal with it. Any failure would not in any event be material.

#### The Appellant's visit to Jamaica in 2006

42.

Mr Chirico accepted that the Judge was entitled to take into account that the Appellant did not suffer harm when he went to Jamaica for his brother's funeral in 2006 ( [58]). He said though that if other errors were made out, this may go to the materiality of any error as another Judge could find in the Appellant's favour notwithstanding this point. The Appellant was at liberty in Jamaica for one month before being arrested on drugs charges (which we have already noted the Judge did not accept had any link to the gang).

#### Failure to mention death threats in 2010

43.

Mr Chirico accepted that the Appellant had not mentioned the death threats made to him when he was interviewed and had raised these only after that interview by way of the letter received by the Home Office on 17 November 2010 (as attached to the Respondent's skeleton argument and recorded by the Judge as part of the evidence at [36] of the Decision) . The Appellant's grounds plead this as an omission and assert that the Judge should have taken into account that the information was volunteered less than a week after interview and before any decision was taken by the Respondent . Mr Chirico again accepted that the Judge was entitled to take into account that these threats were not mentioned in interview; he again asserted that this error was not freestanding but went to materiality.

44.

In our view, not only was the Judge entitled to take into account the Appellant's failure to mention this earlier , but that "omission" is also very difficult for the Appellant to explain away in the way pleaded in the grounds.

45.

Dr Staker took us to the asylum interview ([AB/L/1-17 ]) . At question [36], the Appellant was asked “[t]hese events took place eight years after you left, why would you fear going back now?” to which the Appellant replied “[b]ecause the crime is continuing. It is a revenge killing. My best friend was killed last year. He was not involved in crime and they killed him”. In follow up to that answer, at question [37] , the Appellant was asked how he knew that his friend was killed by a gang to which he replied “[b]ecause they say he (my friend) is the one who is informing me of what is happening out there ”. He was then asked why he would be affected since he had lived in the UK since 1999 and said that this is because his family is in the heart of this and has had to leave the community. At question [45], the Appellant was asked how he knew that “One Order” was “after [him]” if he did not retain contact with anyone in Jamaica to which he replied “ [m]y sister always tells me what is going on”. As Dr Staker pointed out, the obvious answer to all and any of those questions was that the Appellant had received threats , but he did not assert that this was the case.

46.

For that reason, we do not accept that there is any error in relation to the Judge’s reliance on the failure to mention the threats earlier as an inconsistency .

#### Appellant’s failure to report and reasons therefor

47.

At [56] of the Decision, the Judge noted the Appellant’s failure to report whilst on temporary admission . He was treated as an absconder until he was encountered on 26 July 2017. The Judge accepted the Respondent’s view that the reason was likely to be in order to delay any decision in his case.

48.

As is pointed out in the grounds, the Appellant suffered a stroke in June 2011. It is said that this might explain his failure to report. However, there was no evidence before the Judge that this was the reason. The Appellant did not ask to vary reporting because of his medical condition. There is no medical evidence supporting an inability to report. There is no evidence from him or on his behalf which gives his condition as a reason. Furthermore, the failure covers a lengthy period of some six years after he suffered the stroke. The Judge was well aware that the Appellant had suffered a stroke and of his medical complications. She was also well aware of the Appellant’s lack of capacity to litigate. She was not however bound to consider or give weight to reasons which were not put forward by the Appellant or on his behalf to explain his failure to report .

#### **Summary in Relation to Ground One**

49.

We have set out above our reasons for rejecting the Appellant’s grounds challenging the Judge’s findings regarding credibility. Mr Chirico indicated that the main focus in relation to ground 1(b) was the reference to the experts failing to make enquiries of the police, the evidence of what [C] said to Dr Wootton and the failure to take into account the Appellant’s medical condition when looking at the reasons for failing to report. We have explained why we do not accept that those grounds disclose any material errors of law. We have also explained why we do not accept that there are any errors of law in the other components of ground 1(b) nor in relation to ground 1(a). Such minor failures by the Judge as we have identified above do not make any material difference to the Judge’s overall conclusion as to credibility . For the avoidance of doubt, we do not consider that any of these issues falls to be regarded as material; nor that they do so when viewed cumulatively.

50.

We feel bound to mention also that the Judge did not only rely on the findings to which we have drawn attention in the course of considering the grounds. Relevant also to credibility were the commission of offences of deception ([55]) and the inconsistency in the Appellant's account about events post-dating his brother's death, in particular the death of his best friend and the shooting of his nephew ([47]). The latter issue in particular goes to the question of present risk. Whilst Mr Chirico is right to point out that the Judge did not find on an alternative basis that, if there were any historic risk, it was not shown still to exist, the Judge did make the point at [59] of the Decision that the Appellant had failed to make out a case as to any present risk which further undermined the claim as made in 2017 .

## **GROUND TWO : HUMANITARIAN PROTECTION**

51.

Before we turn to deal with this ground, we consider it appropriate to record that the Judge did not deal with the Respondent's exclusion of the Appellant from humanitarian protection, applying paragraph 339C and 339D of the Immigration Rules to this aspect of the claim , on the basis that he had committed a serious crime ([61] to [67] of the Respondent's decision dated 22 December 2017: [AB/E/1- 21 ]) . There is nothing to indicate that the Respondent had withdrawn that part of the decision. The issue is raised in the Appellant's skeleton argument before Judge O'Keeffe ( at [34] of that skeleton). Indeed, the Judge recorded the Respondent's conclusion at [12] of the Decision. The Judge did not however deal with this issue when coming to look at humanitarian protection. The Appellant has (for obvious reasons) not challenged this failure. The Respondent has not sought to uphold the Decision on the additional basis that the Appellant would be excluded from humanitarian protection. Mr Staker confirmed to us that the Respondent did not seek to rely on it. We accept therefore that it is not something which we should consider when looking at whether there is an error of law.

52.

The Appellant's ground two is, in essence, that the Judge has misunderstood the humanitarian protection aspect of the Appellant's case. The Judge dealt with humanitarian protection at [60] to [63] of the Decision before moving on to deal with the Article 3 claim (which is the subject of grounds three and four). She understood the claim to be based on the generalised risk of violence in the form of robbery or crime due to the high incidence of crime in Jamaica. That was to be coupled with the general vulnerability of deportees from the UK and based on the Appellant's individual circumstances, particularly due to his disability and mental health conditions. Her reasons for rejecting this aspect of the claim are as follows:

" 60. For the same reasons I find that the appellant has not demonstrated that he is entitled to humanitarian protection or is at risk of treatment contrary to Articles 2 or 3 on the grounds of a feud involving his family in Jamaica. It was argued in the alternative that the appellant was entitled to humanitarian protection because of the generalised risk to him in the form of robbery or crime. I accept that the expert evidence of Mr Sobers supports a conclusion that deportees are marked out and are vulnerable. That however does not mean that the appellant would face a real risk of suffering serious harm simply because he was deported from the UK and because he is a wheelchair user.

61. The expert evidence reveals that whilst facilities for disabled people are very far from first class in Jamaica, they do exist. The expert evidence demonstrates that all Jamaicans have access to free health care in the public system; there are three major hospitals and a network of free clinics. The National Health Fund provides subsidized prescription medications to any Jamaican who joins the

programme. Mr Sobers also indicated that the appellant would be entitled to some state benefits in the form of PATH although this was subject to eligibility criteria and a Tax Registration Number.

62. Dr de Noronha provided information about the Open Arms Drop In Centre in East Kingston which has a contract with the British High Commission to house destitute deportees from the UK. Dr de Noronha said that although the shelter was usually full, the appellant should be able to secure a bed as he would be deported from the UK. I accept that the description of the accommodation means that it is far from ideal for a wheelchair user, Dr de Noronha did say however that it accommodated people with various physical disabilities.

63. He said that the appellant would not be able to leave the centre without a car or van. The evidence before me is that the appellant cannot leave the current accommodation in the UK without assistance. The occupational health report of Abigail Wren indicates that the appellant had the ability to transfer independently from his wheelchair to a bed or other chair. The appellant can also undertake personal care, toileting, eating and drinking . On the evidence before me considered as a whole, I find that it has not been demonstrated that the appellant is entitled to humanitarian protection.”

53.

Mr Chirico confirmed that it was not being said on the Appellant’s behalf that all deportees from the UK to Jamaica are at risk of generalised violence on that account. It is not suggested that Article 15(c) of the Qualification Directive applies. The claim in this regard is squarely based on Article 15(b). There is no criticism made of what is said at [60] of the Decision . The tenor of the Appellant ’s ground two is that , when considering the issue of risk of violence and crime, the Judge has failed to appreciate that the risk is said to arise “very specifically at the point of return ”. Based on Mr Sobers’ expert report, it is said that the Appellant would, as a deportee, be taken to the Central Police Station in Kingston immediately upon his return . When released from there and with nowhere to go, he would be at risk of crime and violence in that general area which, Mr Sobers says, is particularly high.

54.

We begin by looking at Mr Sobers’ evidence in this regard as follows ([AB/G/22]) :

“82) Persons deported to Jamaica are taken from the Norman Manley International ai rport to the Central Police Station in Kingston where they are interviewed by the police. At the end of the interview, the deportee is typically expected to make his or her own way from there. The police have reported that, at times, many such deportees can still be found outside the police station in the early hours of the morning as they have nowhere to go and do not know where to go.

83) A recent news report (March 2017) of the arrival of a group of deported persons noted the following:

...family members waited to see relatives, some of whom left the island as children, while others, who had no ties to the island, were met by hustlers waiting to provide phone calls and accommodation. Others who had no family members or friends to meet them were perplexed about their next move. Some were assisted by a woman who gave her name as ‘Tasha’. She would not disclose how much she is paid for a call on her cellphone...

84) The area around Central Police Station is impoverished, dangerous and the site of gang activity, gun violence, and drug-related crime. Deported persons are immediately confronted by these hazards. If the deported person has no family support, they must secure their own food and lodging with no real material assistance.”

55.

The passage in Mr Sobers' report which immediately precedes those paragraphs deals with general risks to deportees because they are blamed by the local population for the public safety problems in Jamaica. The passage which follows deals with availability of shelter from State and other public organisations. As such, the same paragraphs of Mr Sobers' report deal with both the general risk to deportees based on the level of crime around the police station and the availability of support for someone who has no family to assist.

56.

We also make the following observations about the passage we have cited. First, the assumption that the Appellant would be taken to the Central Police Station in Kingston is unsourced. The evidence that deportees with nowhere to go hang around the police station is founded on a newspaper report from 2004. Following a question put to Mr Chirico, he confirmed to us orally and on instruction that the news report of March 2017 does refer elsewhere to deportees being taken to a police station, but it is not clear from the report whether that is the Kingston Central Police Station. We were not shown the report itself. In any event, Mr Sobers' purpose in citing it appears to be that those without family support would not know where to go.

57.

Second, and in any event, what Mr Sobers does not mention is any direct report of violence to a deportee taken to Central Police Station in Kingston immediately following deportation. We have to say that, speaking for ourselves, it would not have been evident that the passage cited was intended to demonstrate a generalised risk of violence at the "pinch - point" of return based on the location of the police station to which the Appellant would (or might) be taken.

58.

We accept that the Appellant's skeleton argument before Judge O'Keeffe did refer under this heading to a risk of "kidnap or robbery as a returnee from the UK" (as well as risk of revenge killing which is already dealt with under the Refugee Convention heading). We also accept that in one sentence of Mr Sobers' report at [33(b)] reference is made to the risk of "finding himself stranded in his wheelchair outside of Central Police Station, an area that is "impoverished, dangerous and the site of gang activity, gun violence and drug-related crime". That is however only one sentence in a paragraph which otherwise flags the risk as being one of generalised risk based on being a returnee and because of the Appellant's physical and mental vulnerability.

59.

We accept that the Judge does not refer expressly to this asserted risk or the passage in Mr Sobers' evidence which we have cited. We also observe that at least some of what is said by the Judge at [60] to [63] crosses over into the area covered by Article 3 ECHR relating to the Appellant's health. That may well be due to the overlap in the evidence to which we have referred. This has led to the criticism in ground two of the Judge's reasoning on the basis that the evidence referred to does not deal with the risk which is said to be of violence and harm.

60.

However, the Judge's reasoning has to be considered as a whole. What the Judge is dealing with in this section is the availability of State support to deal with the Appellant's health conditions in much the same way as does Mr Sobers when considering whether the Appellant will be at risk of generalised violence based on his disability and having nowhere to go to avoid that risk. That applies to the Appellant's position after return but also encompasses what is said to be the immediate

difficulty of accessing accommodation on deportation. That is the point made at [62] of the Decision ( which refer s to the links between the Open Arms Centre and the British High Commission). The Open Arms Centre is a shelter described in more detail by Dr de Noronha at [49] to [55] of his report ([AB/G/60]) .

61.

Whilst we accept that there is no express reference to what would happen to the Appellant immediately on return, when the findings are read as a whole, the Judge has dealt with the case which was put to her. Even if she has not done so, given the limitation of the evidence about the circumstances at the “pinch - point” of return to which we have already referred , we would have concluded that any error was immaterial. There is simply insufficient evidence on which to base the case on which the Appellant now seeks to focus.

62.

There is a further difficulty about the way in which the Appellant’s representatives have sought to advance the humanitarian protection argument. They have sought to base that argument to a significant degree on the lack of appropriate treatment for the Appellant’s health problems but in the context of Article 15(b) o f the Qualification Directive (as incorporated by paragraph 339C of the Immigration Rules) . In that context , the CJEU has made very clear that the wording of Article 15(b) is different from Article 3 ECHR and that the sole purpose of Article 15(b) is to protect applicants against denial of appropriate treatment that is intentionally inflicted by the authorities of the applicant’s country of origin. Thus, in MP (Sri Lanka) v Secretary of State for the Home Department [2018] 1 WLR 5585 (Case C-353 /16), the Court held that “the serious harm referred to in article 15(b) of Directive 2004/83 cannot simply be the result of general shortcomings in the health system of the country of origin. The risk of deterioration in the health of a third-country national who is suffering from a serious illness, as a res u lt of there being no appropriate treatment in his country of origin, is not sufficient, unless that third-country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection”. Mr Chirico confirmed that it was not part of the Appellant’s case that the Jamaican authorities would intentionally deprive the Appellant of appropriate treatment. It follows that the alleged lack of appropriate treatment accessible or available to the Appellant in Jamaica does not advance his claim for humanitarian protection.

63.

Finally, w e also reiterate the point we made about the exclusion from humanitarian protection . However, in light of the foregoing , we do not need to go into that point. In conclusion, therefore, we do not consider that ground two discloses any error of law in the Decision , such as to necessitate the setting aside of the Decision .

### **GROUND THREE AND FOUR: HEALTH, SUICIDE AND SUPPORT ISSUES : ARTICLE 3 ECHR**

64.

The Appellant’s ground three asserts that Judge O’Keeffe erred in law when dealing with the substance of the Article 3 ECHR claim . It is said that the Judge failed to engage with the medical evidence and failed to apply the correct threshold, particularly since the Appellant’s case was not a pure health case but involved also access difficulties arising from his physical disability and the discrimination faced by disabled persons in Jamaica.

65.

Ground four concerns what are said to be the UK’s procedural obligations under Article 3 ECHR. The Appellant asserts that those procedural obligations are not addressed in the domestic case-law



concerning Article 3 ECHR and that the Judge should therefore have applied the test encompassed in the Grand Chamber's decision in Paposhvili v Belgium (41738/10 – judgment 11 December 2016) (“Paposhvili ”) .

66.

Before we turn to address those grounds in the context of this case, and given the need to provide some guidance on, in particular, the procedural obligation issue, we deal with the competing submissions on these issues generally . Before we turn to those submissions, we set out the relevant case-law on which those submissions depend.

### **Substantive and Procedural Obligations in Health Cases Before Paposhvili**

67.

We are bound to apply domestic and binding case-law preceding Paposhvili ( following the Court of Appeal ’ s judgment in AM (Zimbabwe) and another v Secretary of State for the Home Department [2018] 1 WLR 2933 – “ AM (Zimbabwe) ” ). That case-law mainly concerns the substantive obligation. However, the procedural obligation for which the Appellant contends is, for reasons we later explain, inextricably bound up with the substantive obligation. We therefore also deal with the case-law considering the substantive obligation which applies to a State party to the ECHR which is returning a foreign national (“the Returning State”) to his home country (“the Receiving State”).

68.

Until the Grand Chamber's decision in Paposhvili in December 2016, the obligation of the Returning State in health cases had been narrowly confined. The obligation of the Returning State is in principle the same as applies in a protection case where the foreign national claims that he would be at risk of torture, inhuman or degrading treatment in the Receiving State ( stemming from Soering v United Kingdom 11 EHRR 439 – “ Soering ” ) . In that case, the ECtHR explained that the obligation arises not from the treatment which will occur in the Receiving State but from the act of returning the person to face that treatment ( [96] of the judgment) . Article 3 ECHR is of course an absolute right and therefore a Returning State cannot derogate from its obligation because of any misconduct on the part of the applicant (see Saadi v Italy (2009) 49 EHRR 30). As the Court made clear at [94] of the judgment in Soering , however , the burden lies with the applicant to “substantiate his fear that he will be exposed to treatment or punishment falling under that Article.”

69.

In health cases, the ECtHR adopted a narrower focus to the obligation of the Returning State, perhaps recognising that , in such cases, the treatment to which an applicant would be exposed did not arise directly from any act of the Receiving State but rather from the applicant ’ s medical condition and the potential lack of available treatment in the Receiving State. So it was that in D v United Kingdom (1997) 24 EHRR 423 (“ D ”) , the ECtHR found in D's favour on the Article 3 issue because of the advanced stage of his illness coupled with the “acute mental and physical suffering” which would await him during the final days of his life in St Kitts where he would have no support. As the Court put it at [53] of the judgment :

“Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (art. 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.”

70.

The case - law surrounding Article 3 ECHR in health cases was considered again in N v United Kingdom (2008) 47 EHRR 39 (“N”). The applicant was a Ugandan woman who was diagnosed HIV positive. If her antiretroviral treatment was withdrawn, her life expectancy would be less than one year. Treatment of a similar nature in Uganda was costly and not easily accessible. In spite of these factors, the ECtHR found no violation of Article 3 ECHR by the UK. The Court summarised the case-law in health cases thus:

“42. In summary, the Court observes that since *D v United Kingdom* it has consistently applied the following principles.

Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting state is not sufficient in itself to give rise to a breach of Art. 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under Art. 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v United Kingdom* and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

44. Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the contracting state and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Art. 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Art. 3 does not place an obligation on the contracting state to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the contracting states.

45. Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost.”

### **The Case of Paposhvili**

71.

As the Grand Chamber observed in *Paposh v ili* , the application of the principles derived from *D* and *N* had led to numerous applications before the ECtHR having been declared inadmissible as being manifestly ill-founded. That, together with the extreme facts of Mr Paposhvili's case , perhaps explains the reason for the Grand Chamber's reconsideration of those principles. Before we set out the Grand Chamber's reformulation of those principles, therefore, it is necessary to say something about the factual background to the *Paposhvili* case.

72.

Mr Paposhvili was a national of Georgia who had lived in Belgium with his family since 1998. He had committed a number of criminal offences and had no legal basis of stay in Belgium. The Belgian authorities refused to regularise his stay on exceptional grounds on several occasions . The Aliens Office refused to examine the substance of Mr Paposhvili's applications , citing various procedural reasons and his criminal offending. His wife and children were however eventually granted indefinite leave to remain. The Belgian authorities also issued a deportation decision against Mr Paposhvili in 2007 but that was never enforced. He was however informed of his liability to removal and detention for that purpose when his applications to remain were refused. His removal was stayed following the issuing of a Rule 39 indication by the Strasbourg court.

73.

Mr Paposhvili suffered from very serious illnesses. In 2006, he was diagnosed with chronic lymphocytic leukaemia . In 2008, he was said to have a life expectancy of three to five years. In 2014, Mr Paposhvili's condition having deteriorated further, he started on a new course of treatment as part of a study and in preparation for a donor stem cell transplant. He was unable to have the transplant due to his lack of a residence permit. A GP report indicated that, absent such treatment, Mr Paposhvili's life expectancy would be very short indeed – a matter of a few months.

74.

In addition, Mr Paposhvili also developed chronic obstructive pulmonary disease, resulting from tuberculosis. He received treatment also for that disease. He also suffered from hepatitis C and liver fibrosis. His hepatitis C condition was said to be stable by 2015. Mr Paposhvili suffered a stroke in March 2015, resulting in permanent paralysis of his arm. The effects of the stroke were managed with an anti-epilepsy drug. Mr Paposhvili died from his illnesses in Belgium on 7 June 2016 (after the first instance judgment but before the Grand Chamber proceedings). His family were permitted to continue the proceedings.

75.

The evidence provided to the ECtHR by the Georgian authorities was to the effect that the Georgian health-care system could have provided "appropriate treatment" for all of the illnesses from which Mr Paposhvili suffered.

76.

The general principles applied by the Grand Chamber are set out at [172] to [193] of the judgment . We set out the relevant part of that passage as those principles are central both to the threshold which applies in Article 3 health cases and the procedural duty for which the Appellant contends . We have emphasised those parts of the judgment which are of importance to the issues we are considering . Having recited the background to the applicability of Article 3 ECHR in health cases and the principles in *D* and *N* , the Grand Chamber said this (with our emphasis as to the most relevant parts of the judgment) :

“ 181 . The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N. v. the United Kingdom* , has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision. As a corollary to this, the case-law subsequent to *N. v. the United Kingdom* has not provided more detailed guidance regarding the “very exceptional cases” referred to in *N. v. the United Kingdom* , other than the case contemplated in *D. v. the United Kingdom* .

182. In the light of the foregoing, and **reiterating that it is essential that the Convention is interpreted and applied in a manner which renders its rights practical and effective and not theoretical and illusory ... the Court is of the view that the approach adopted hitherto should be clarified.**

183. **The Court considers that the “other very exceptional cases” within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer 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. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.**

184. **As to whether the above conditions are satisfied in a given situation, the Court observes that in cases involving the expulsion of aliens, the Court does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens. By virtue of Article 1 of the Convention the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities, who are thus required to examine the applicants’ fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3. ...**

185. **Accordingly, in cases of this kind, the authorities’ obligation under Article 3 to protect the integrity of the persons concerned is fulfilled primarily through appropriate procedures allowing such examination to be carried out** (see, *mutatis mutandis* , *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no . [39630/09](#) , § 182, ECHR 2012; *Tarakhel* , cited above, § 104; and *F.G. v. Sweden* , cited above, § 117).

186. **In the context of these procedures, it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3** (see *Saadi* , cited above, § 129, and *F.G. v. Sweden* , cited above, § 120) . **In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment** (see, in particular, *Trabelsi v. Belgium* , no. [140/10](#) , § 130, ECHR 2014 (extracts)).

187. **Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it** (see *Saadi* , cited above, §

129, and *F.G. v. Sweden* , cited above, § 120). The risk alleged must be subjected to close scrutiny (see *Saadi* , cited above, § 128; *Sufi and Elmi v. the United Kingdom* , nos. 8319/07 and 11449/07, § 214, 28 June 2011; *Hirsi Jamaa and Others* , cited above, § 116; and *Tarakhel* , cited above, § 104) in the course of which **the authorities in the returning State must consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances** (see *Vilvarajah and Others* , cited above, § 108; *El-Masri* , cited above, § 213; and *Tarakhel* , cited above, § 105). **The assessment of the risk as defined above (see paragraphs 183-84) must therefore take into consideration general sources such as reports of the World Health Organisation or of reputable non-governmental organisations and the medical certificates concerning the person in question.**

188. As the Court has observed above (see paragraph 173), what is in issue here is the negative obligation not to expose persons to a risk of ill-treatment proscribed by Article 3. It follows that **the impact of removal on the person concerned must be assessed by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State.**

189. As regards the factors to be taken into consideration, the authorities in the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3 (see paragraph 183 above). **The benchmark is not the level of care existing in the returning State; it is not a question of ascertaining whether the care in the receiving State would be equivalent or inferior to that provided by the health-care system in the returning State. Nor is it possible to derive from Article 3 a right to receive specific treatment in the receiving State which is not available to the rest of the population.**

190. **The authorities must also consider the extent to which the individual in question will actually have access to this care and these facilities in the receiving State.** The Court observes in that regard that it has previously questioned the **accessibility of care** (see *Aswat* , cited above, § 55, and *Tatar* , cited above, §§ 47-49) and referred to the **need to consider the cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care** (see *Karagoz v. France* (dec.), no . 47531/99 , 15 November 2001; *N. v. the United Kingdom* , cited above, §§ 34-41, and the references cited therein; and *E.O. v. Italy* (dec.), cited above).

191. **Where, after the relevant information has been examined, serious doubts persist regarding the impact of removal on the persons concerned - on account of the general situation in the receiving country and/or their individual situation - the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3** (on the subject of individual assurances, see *Tarakhel* , cited above, § 120).

192. The Court emphasises that, in cases concerning the removal of seriously ill persons, the event which triggers the inhuman and degrading treatment, and which engages the responsibility of the returning State under Article 3, is not the lack of medical infrastructure in the receiving State. Likewise, the issue is not one of any obligation for the returning State to alleviate the disparities between its health-care system and the level of treatment existing in the receiving State through the

provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. The responsibility that is engaged under the Convention in cases of this type is that of the returning State, on account of an act - in this instance, expulsion - which would result in an individual being exposed to a risk of treatment prohibited by Article 3.

193. Lastly, the fact that the third country concerned is a Contracting Party to the Convention is not decisive. While the Court agrees with the Government that the possibility for the applicant to initiate proceedings on his return to Georgia was, in principle, the most natural remedy under the Convention system, it observes that the authorities in the returning State are not exempted on that account from their duty of prevention under Article 3 of the Convention (see, among other authorities, *M.S.S. v. Belgium and Greece* , cited above, §§ 357-59, and *Tarakhel* , cited above, §§ 104-05). ”

### **Substantive and Procedural Obligations in Health Cases After Paposhvili**

77.

The judgment in *Paposhvili* was considered at some length by the Court of Appeal in *AM (Zimbabwe)* . The Court of Appeal there held that , although the Grand Chamber’s judgment marked a relaxation “to a very modest extent” of the test for a breach of Article 3 ECHR in a health case, domestic courts and tribunals remain bound by the previous case-law as set out in particular in the judgment of the House of Lords in *N*’s case ([2005] UKHL 31) so far as the applicable threshold is concerned ([30]). In essence, the Grand Chamber had shown itself willing to expand upon the category of exceptional cases which formed the basis of the judgment in *N* . Unless and until the Supreme Court considers the Grand Chamber’s judgment in *Paposhvili* (which it is due to do in December 2019), we remain bound by the previous case-law which is as set out at [176] to [178] of the judgment in *Paposhvili* ; in other words the principles set out in *D* and *N* continue to apply as they did also when the appeal was before Judge O’Keeffe .

78.

We note in particular what is said by the Court of Appeal at [38] of the judgment in *AM (Zimbabwe)* as to what is meant by [183] of the judgment in *Paposhvili* concerning the threshold. Sales LJ (as he then was) explained the test as follows:

“...This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e to the article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e likely “rapid” experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state.”

79.

We can deal very shortly with a point made by Mr Chirico concerning the way in which Sales LJ explained the test in the final sentence of this passage. He submitted that, as a matter of construction of the judgment in *Paposhvili* the test is whether an applicant is exposed to a real risk of an imminent decline in health or to a significant reduction in life expectancy rather than the significant reduction in life expectancy having to be caused by the imminent decline in health. Although that argument was described as not “fanciful or even unarguable” by Hickinbottom LJ in *MM (Malawi) and another v Secretary of State for the Home Department* [2018] EWCA Civ 2482 (“ *MM (Malawi)* ”) , we do not consider it necessary to deal with it for the following reasons. First, and most significantly, we are

bound to apply N and not Paposhvili so it is immaterial what is meant by that analysis. Second, it will be for the Supreme Court to interpret what is there meant. Third, and as an aside, we are far from clear that the interpretation which the Appellant places on that final sentence is correct when read in the context of the first sentence. Fourth, and in any event, as noted by Hickinbottom LJ at [57] and [58] of the judgment in MM (Malawi), it was conceded by Counsel making the argument in that case that the reduction in life expectancy would still have to be “substantial”.

80.

The Court of Appeal in AM (Zimbabwe) also said this about the manner in which an Article 3 breach would be established by reference to what was said by the Grand Chamber at [186 – 187] in Paposhvili :

“ 16. It is common ground that where a foreign national seeks to rely upon article 3 as an answer to an attempt by a state to remove him to another country, the overall legal burden is on him to show that article 3 would be infringed in his case by showing that there are substantial grounds for believing that he would face a real risk of being subject to torture or to inhuman or degrading treatment in that other country: see, e g , *Soering v United Kingdom* (1989) 11 EHRR 439, para 91, which is reflected in the formulations in Paposhvili [2017] Imm AR 867, paras 173 and 183, set out below. In Paposhvili, at paras 186-187, set out below, the Grand Chamber of the ECtHR has given guidance how he may achieve that, by raising a prima facie case of infringement of article 3 which then casts an evidential burden onto the defending state which is seeking to expel him.”

81.

The Court of Appeal went on to consider how that test was applied in practice by the Grand Chamber in Paposhvili itself as follows:

“ 25. At paras 194-206 the Grand Chamber applied those principles to the particular case. It found that the applicant had raised a case regarding difficulties in relation to treatment of his illness if he were returned to Georgia which was "not without some credibility" (para. [197]), i.e. which prima facie raised an issue under Article 3. It found that the relevant decision-making authorities had not examined that issue: paras. [198]-[201]. The fact that an assessment could have been carried out immediately before the removal measure was enforced was not an adequate response to the applicant's case on the particular facts (para. [202]; it is also germane here that the Fifth Section in its judgment at paras. [94]-[109] had already ruled that the possibility of an urgent application to stay removal at the final stage did not constitute an adequate alternative remedy for the purposes of Article 35 of the Convention because, as had already been determined in the judgment in *MSS v Belgium and Greece* (2011) 53 EHRR 2 , the procedure at that stage could not be relied upon to be sufficiently rigorous in its examination of the complaint under Article 3). At para. [205] the Grand Chamber said:

"In conclusion, the Court considers that in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities was insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention (see paragraph 183 ...)".

26.

On this basis, the Grand Chamber found that there had been a violation of

Article 3. It also dealt with claims under Article 2 and Article 8, but it is not necessary to discuss those claims here. The Grand Chamber's formal disposal of the claim based on Article 3 was in these terms:

"For these reasons, the Court, unanimously,

Holds that there would have been a violation of Article 3 of the Convention if the applicant had been removed to Georgia without the Belgian authorities having assessed, in accordance with that provision, the risk faced by him in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia."

27.

I have dealt with the Grand Chamber's judgment in *Paposhvili* at some length because the context of the case and what exactly was decided in it are of significance for interpreting the guidance given at para. [183]. The Grand Chamber did not itself rule that on the medical evidence adduced by the applicant and his contentions about the state and availability of medical assistance in Georgia, had those been properly examined by the Belgian authorities, it would in fact have been a violation of Article 3 to remove him to Georgia. Its ruling was to the effect that Belgium would have violated a procedural aspect of Article 3 if it had removed him without examination of the issue which the applicant had raised relying on Article 3 and his medical condition. "

82.

The Court of Appeal had cause to look again at the test in *Paposhvili* and what was said in *AM (Zimbabwe)* in the case of *MM (Malawi)* . In relation to the way in which the burden of proof applies, the Court said this:

"38. In my view, the UT did not arguably err in its approach to its task. Indeed, this paragraph is phrased in appropriate terms. As Sales LJ explained in *AM (Zimbabwe)* at [16] ..., whilst the legal burden of proof is on an applicant to show that article 3 would be infringed if he were removed from the UK to the proposed receiving country, where he shows that there are substantial grounds for believing that he would face a real risk of being subjected to treatment proscribed by article 3, then the burden moves to the Secretary of State to dispel that risk..."

83.

Following the conclusion of the hearing before us, Mr Chirico directed our attention to a recent case of the ECtHR – *Savran v Denmark* (57467/15) – judgment 1 October 2019 (" *Savran* "). As appears from the judgment itself, this is the first case in which the ECtHR has applied *Paposhvili* . We therefore gave both parties the opportunity to provide short written submissions as to the judgment.

84.

In *Savran* , the ECtHR found a violation of Article 3 ECHR. It did so though by a narrow majority (4:3). The minority judgment is particularly critical of what it saw as a dilution of the principles articulated by the Grand Chamber in *Paposhvili* . Their criticism relates to the substantive threshold as set out at [183] of the judgment in *Paposhvili* . They did not consider that threshold to be met in the *Savran* case and criticised the majority for failing to consider that threshold. In relation to the procedural obligation, the minority judgment restated that the burden of proof lay with the applicant ([15]).

85.

The facts of *Savran* can be shortly stated. The applicant, a Turkish national, suffered from serious mental health problems. He had lived in Denmark since he was a child. His entire family save for one aunt lived in Denmark. He received medication and therapy for his condition in Denmark. The crux of the majority's finding of a violation was that the applicant might not have a regular contact person for supervision following return to Turkey to ensure that he complied with his treatment and was able to



rehabilitate in a suitable environment (the applicant had been convicted and detained for a serious assault; he remained detained in a mental health establishment).

86.

In the majority judgment, the ECtHR concluded at [59] that the Danish courts had not given consideration to the need for that supervision when reviewing the medical evidence. The majority also relied on the lack of family and social support in Turkey which increased the need for follow-up and control. The Court therefore found that the Danish authorities should have assured themselves that a contact person would be available.

87.

The majority judgment has some relevance to the procedural obligation for which the Appellant argues. The reasoning put forward by the majority for finding the violation proven is as follows:

“64. Therefore, a follow-up and control scheme is essential for the applicant’s psychological outpatient therapy and for the prevention of a degeneration of his immune system. For that purpose he would need, at least, assistance in the form of a regular and personal contact person. Accordingly, in the Court’s view, the Danish authorities should have assured themselves that upon return to Turkey, a regular and personal contact person would be available, offered by the Turkish authorities, suitable to the applicant’s needs.

65. Accordingly, although the threshold for the application of Article 3 of the Convention is high in cases concerning the removal of aliens suffering from serious illness, the Court shares the concern expressed by the City Court, that it is unclear whether the applicant has a real possibility of receiving relevant psychiatric treatment, including the necessary follow-up and control in connection with intensive outpatient therapy, if returned to Turkey (see paragraph 27 above).

66. In the Court’s view, this uncertainty raises serious doubts as to the impact of removal on the applicant. When such serious doubts persist, the returning State must either dispel such doubts or obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3 (see Paposhvili , cited above, §§ 187 and 191).

67. It follows that if the applicant were to be removed to Turkey without the Danish authorities having obtained such individual and sufficient assurances, there would be a violation of Article 3 of the Convention.”

88.

In her submissions dealing with Savran , the Respondent referred for the first time to the House of Lords’ judgment in Secretary of State for the Home Department v Nasser [2009] UKHL ( “ Nasser ”) in support of a submission that the Tribunal is bound by domestic precedent to find that there is no freestanding procedural obligation. At [15] , Lord Hoffman n (with whom the other Law Lords agreed) said:

“ There is accordingly, as Laws LJ said in this case in the Court of Appeal ( [\[2008\] 3 WLR 1386](#) , para 18) no “freestanding duty to investigate.” It is true that in Jabari v Turkey [2001] INLR 136 , para 39 the ECHR said that when an individual claims that his deportation will infringe his rights under article 3, “a rigorous scrutiny must necessarily be conducted” of his claim and a similar statement was made (with a reference to Jabari ) in Kandomabadi v The Netherlands (29 June 2004) (Application Nos 6276/03 and 6122/04). But the impersonal passive construction used by the ECHR was in my opinion

intended to mean that the ECHR will conduct a rigorous scrutiny of the claim and that unless a Member State has done so, it runs the risk of being held in breach: see the previous authorities of *Chahal v United Kingdom* (1996) 23 EHRR 413 at paragraph 96 and *Vilvarajah v United Kingdom* (1991) 14 EHRR 248 at paragraph 108. **It did not mean that even though there is actually no real risk of treatment contrary to article 3 in the receiving state, a Member State will be in breach because it did not adequately investigate the matter . "**

( our emphasis)

89.

Mr Chirico sought a right of reply on this point and we permitted him to provide short written submissions. In those submissions, he clarified a point which had troubled us during the hearing ; namely whether the Appellant is arguing for a freestanding procedural duty or merely a duty which arises in relation to the proof of a substantive breach. Mr Chirico made clear that the Appellant " does not submit that there is a (wholly) free-standing Art. 3 procedural right or duty, existing independently of any substantive Art. 3 claim. A's case is that the procedural obligation is triggered when an applicant, upon whom the initial evidential burden lies, adduces evidence " **capable of** demonstrating " a real risk of exposure to treatment in which would attain such severity as to amount to a breach of Art. 3."

90.

As Mr Chirico also pointed out, the House of Lords in *Nasseri* did not have to consider whether the Respondent was under any obligation to investigate the position for the appellant in Greece as it accepted that the appellant had not provided evidence sufficient to show that he was at real risk of refoulement as he had asserted.

### **Substantive Obligations : Article 3 ECHR Non-Health Cases**

91.

Whilst recognising that we (and Judge O'Keeffe) are bound to apply the principles in *N* for the time being, Mr Chirico argues that there are three categories of case where the "extreme threshold of seriousness" required by *N* does not apply. He says that those are :

a.

Cases where there is a real risk of self-harm or suicide ( *J v Secretary of State for the Home Department* [2005] EWCA Civ 629 - " *J* " ; *Y and Z (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362 - " *Y and Z* " ; *Kochieva v Sweden* (2013) 57 EHRR SE6 - " *Kochieva* " ; *CK v Slovenia* (2017) C-578/16 PPU ) - " *CK* " ) ;

b.

Cases where the removal is pursuant to the Dublin Regulations ( *MSS v Belgium and Greece* (2011) 53 EHRR 2 - " *MSS* " ; *Tarakhel v Switzerland* (2015) 60 EHRR 28 - " *Tarakhel* " ) ; and

c.

Cases where the conditions to which a person will be non-deliberately exposed and which are inhuman or degrading are predominantly due to the direct and indirect actions of the parties to a conflict ( *Sufi and Elmi v UK* (2012) 52 EHRR 9) - " *Sufi and Elmi* " ) .

He also submits that the ECtHR's reliance on some of those cases in *Paposhvili* informs its guidance on the procedural obligation .

92.

Dealing first with the difference between those cases and the guidance in *N*, we accept that, at least in the cases within categories (b) and (c), the Strasbourg Court has not applied a test of “exceptional circumstances”. The position is however different in suicide risk cases for reasons we explain below.

93.

Taking category (b) cases first, the Dublin Regulation cases are ones in which either a systemic failure of the system for examining asylum cases was found (“*MSS*”) or where there was a serious doubt about whether the way in which the Receiving State would deal with the asylum seekers in question would amount to inhuman or degrading treatment (“*Tarakhel*”). Those cases are also informed by the obligations of Member States under the Dublin Regulation and the hierarchy established as to the appropriate Member State responsible for considering an asylum claim. That is a very different context to health cases. It is therefore hardly surprising that the Court would not view such cases in the same way as other health cases and would not apply the *N* guidance to them.

94.

As to category (c), in *Sufi and Elmi*, we accept that the Court rejected the UK Government’s contention that the test in relation to humanitarian conditions was that of exceptional circumstances as in *N* but that was due to the evidence in those particular cases that the humanitarian crisis had been “predominantly due to the direct and indirect actions of the parties to the conflict” ([282]); in other words that the case was akin to cases involving deliberate harm.

95.

That analysis is consistent with the ECtHR’s judgment in *SHH v United Kingdom* (2013) 57 EHRR 18, on which the Respondent relies. In that case, the Court had to consider whether removal of a disabled failed asylum seeker to Afghanistan would breach Article 3. The Court found that the applicant had failed to adduce evidence that disabled persons were at greater risk of violence than the general population, although they might suffer discrimination or poor humanitarian conditions. The Court distinguished the cases of *MSS* and *Sufi and Elmi*, finding that *MSS* was based on the failure of the Greek authorities to comply with their positive obligations and the transfer by the Belgian authorities knowing of that failure. In *Sufi and Elmi* it was relevant that the humanitarian crisis in Somalia was seen in large part to be due to the actions of the parties to the conflict there.

96.

As regards category (a), the Appellant also says that the threshold differs in cases involving a risk of suicide. In *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, the Court of Appeal set out six principles when assessing whether the removal of a person who claims to be at risk of suicide would breach Article 3 ([26] to [31] of the judgment). The first is the requirement for treatment which meets the “minimum level of severity”.

97.

Secondly, and relying on *Soering*, a causal link must be shown between the removal and the alleged violation of the applicant’s Article 3 rights. Furthermore, the finding of an Article 3 violation against a Returning State in a removal case has to be shown to be caused by the act of removal and not the treatment within the Receiving State. That is the point made also at [28] of the judgment in relation to the third principle, where Dyson LJ pointed out that the threshold 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*”.

98.

The Court of Appeal accepted that an Article 3 claim can in principle succeed in a suicide case (the fourth principle) . However, if the fear upon which the suicide risk is predicated is not objectively well-founded, that will tend to weigh against there being a real risk (fifth principle) and the sixth principle is whether the Returning State and Receiving State have mechanisms in place to protect against the risk of suicide.

99.

We accept that at [42] of its judgment in *J* , Dyson LJ said that suicide cases were not “precisely analogous” to other health cases. That observation, however, has to be read in the light of the subsequent judgment of the Court of Appeal in *RA (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 1210 (“ *RA* ”) . Mr Chirico did not draw our attention to this judgment, although it is referred to in Sedley LJ’s judgment in *Y and Z* .

100.

At [49] and [50] of *RA* , the Court held (per Richards LJ):

“..49. There has been some debate in our domestic case-law as to the extent to which cases of mental illness, in particular where it is said that removal will give rise to a risk or increased risk of suicide, are analogous to cases of physical illness for the purposes of the application of article 3: see *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, para 42; *R (Tozlukaya) v Secretary of State for the Home Department* [2006] EWCA Civ 379, para 62; *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736, para 15; and *CN (Burundi) v Secretary of State for the Home Department* [2007] EWCA Civ 587, paras 25-26. Mr Mackenzie contended that a material difference exists between the two types of case, since in the suicide risk case the very act of expulsion causes or may cause a deterioration in the applicant’s condition whereas in the HIV/AIDS situation it is the loss of assistance or services currently enjoyed that gives rise to the issue under article 3. Whilst there may be factual differences between the two types of case, the passage I have quoted from *N v United Kingdom* makes clear, as it seems to me, that the same principles are to be applied to them both. Nor do I detect any important difference of approach in the domestic cases on suicide risk. In the present case the senior immigration judge relied both on the line of domestic authority beginning with *J v Secretary of State for the Home Department* and on the line of Strasbourg authority beginning with *D v United Kingdom* . In my view that resulted in a perfectly coherent approach, in line with the statement of principles now to be found in *N v United Kingdom*.

50. In any event, I am satisfied that the senior immigration judge was entitled to conclude that the appellant’s removal to Sri Lanka would not have such adverse consequences for the appellant’s psychiatric condition as to reach the article 3 threshold; on her findings of fact, this could not be said to be a very exceptional case where the humanitarian grounds against removal are compelling. She was similarly entitled to conclude that his removal would not be in breach of article 8.”

101.

The Court of Appeal referred to the judgment in *RA* in *Y and Z* . It did so without any evident disapproval but distinguished the two cases on the basis that, in *Y and Z* , the “anticipated self-harm would be the consequence of the acts of the Sri Lankan security forces, not of a naturally occurring illness” and because the past torture of the appellants in that case by the Sri Lankan authorities was accepted as being genuine and as being causative (at least in part) of the suicide risk which was accepted to arise following removal. We note also that, as recently as 2016 , and whilst not referring to *RA* , the Court of Appeal in *Wasif and another v Secretary of State for the Home Department* [2016]

[EWCA Civ 82](#), summarised at [44] of its judgment, the relevant authorities in relation to risk of suicide following removal, saying that “[i]t is clear from those authorities that such a claim will only succeed if there are ‘exceptional circumstances’ comparable in impact to those of the terminal patient in *D v United Kingdom*”. *Y and Z* was again distinguished on the basis of the responsibility borne by the Sri Lankan authorities for the appellants’ mental health problems which were causative of the suicide risk.

102.

This approach is not confined to domestic cases. In the case of *Balogun v United Kingdom* (Application no 60286/09) [2012] ECHR 614, the ECtHR concluded as follows ([34]):

“...The Court emphasises the high threshold for article 3, as described in *N*, cited above, and which applies with equal force in cases involving a risk of suicide as in other cases (see *Kharsa*, cited above). In the light of the precautions to be taken by the Government and the existence of adequate psychiatric care in Nigeria, should the applicant require it, the Court is unable to find that the applicant’s deportation would result in a real and imminent risk of treatment of such a severity as to reach this threshold. It therefore follows that the applicant’s complaint under Article 3 is manifestly ill-founded and thus inadmissible...”

103.

The other cases on which Mr Chirico relied do not in our view assist him. In *Kochieva*, the ECtHR similarly referred to *N* when setting out the threshold which applied to the health case ([33]) and did not indicate that any lesser threshold applied when reaching its conclusions thereafter on the suicide risk element (at [34] to [37]). The health case under Article 3 ECHR was declared manifestly ill-founded. *CK* is a judgment of the CJEU concerning transfer under the Dublin Regulation. As such, it falls within category (b) and our comments above apply.

### **Substantive Obligations: Article 3 Health Cases - Conclusion**

104.

The judgment in *RA* could not be clearer. It is plainly binding on us. Accordingly, where an individual asserts that he would be at real risk of committing suicide, following return to the Receiving State, the threshold for establishing Article 3 harm is the high threshold described in *N v United Kingdom* [2008] ECHR 453, unless the risk involves hostile actions of the Receiving State towards the individual: *RA (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 1210; *Y and Z v Secretary of State for the Home Department* [2009] EWCA Civ 362. On Judge O’Keeffe’s findings, that does not arise here.

105.

There can be no question of Judge O’Keeffe having applied too severe a test to the evidence in relation to suicide risk or in relation to the Appellant’s health issues. We reiterate that we remain bound by the guidance in *N* in relation to health cases as was Judge O’Keeffe.

### **Procedural Obligations: Submissions and Discussion**

106.

Turning then to what the Appellant says is the procedural obligation on the authorities of a Returning State, Mr Chirico accepts that what is first required of a Returning State when expelling an individual is an examination and assessment of the risk faced on return ([184] and [185] of *Paposhvili*). He accepts that the authorities of the Returning State include the Courts and Tribunal. Although we

accept that the ECtHR referred in that context to the case of El-Masri v Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25 ( " El-Masri " ) , we do not derive any assistance from that case which concerns a duty to carry out an effective investigation into the applicant's allegations of ill-treatment including against agents of the Returning State in the context of a secret rendition operation .

107.

We first consider the Dublin Regulation cases. In the case of Tarakhel (on which reliance was also placed in Paposhvili ) , the ECtHR 's concern was that, following return, the asylum - seeking family being returned from Switzerland to Italy (under the Dublin Regulation) would not be kept together and would be held in conditions unsuitable for the minor children. The Court considered that the publicly available information raised "serious doubts as to the current capacities of the system". For that reason, "in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit, the Court considers that the Swiss authorities do not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children" ([121]). The Court concluded that "were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of art. 3 of the Convention".

108.

In MSS , another Dublin Regulation case where the ECtHR was considering whether a return to Greece breached Article 3, the court concluded that the applicant "should not be expected to bear the entire burden of proof " (our emphasis) because the general situation for asylum seekers in Greece was well known to the Belgian authorities. The Court rejected the Belgian Government's argument that it had sought sufficient assurances . It did not consider those assurances to be sufficient.

109.

We do not consider that the approach of the CJEU in the context of the Dublin Regulation differs to any significant degree from the approach taken by the ECtHR . We were referred to the CJEU 's judgment in CK . That case concerned a take charge request issued by the Slovenian authorities to Croatia. The CJEU held that "in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his state of health, that transfer would constitute inhuman and degrading treatment, within the meaning of that article" (our emphasis) . The Court went on to say the following about the way in which a breach would be established:

"75. ..where an asylum seeker provides, particularly in the context of an effective remedy guaranteed to him by Article 27 of the Dublin III Regulation, objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are, on the contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of the decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person...

76. It is, therefore, for those authorities to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned. In this regard, in particular in the case of a serious psychiatric illness, it is not sufficient to consider only the consequences of physically

transporting the person concerned from one Member State to another, but all the significant and permanent consequences that might arise from the transfer must be taken into consideration.”

110.

The approach of requiring Member States to assess the risk of inhuman and degrading treatment in medical cases as there set out is no different to the assessment in any other Article 3 case. Although the CJEU then went on to talk of suspending removal where necessary precautions could not be put in place to deal with risks during or after removal or if necessary applying the discretionary clauses to examine the asylum claim in the State seeking to return the asylum seeker, those comments have to be seen in context of the Dublin Regulation itself which provides a hierarchy of obligations on individual Member States to consider asylum claims. As an arrangement between Member States, it is unsurprising that the approach of the CJEU would be to look to an exchange of information between States. That judgment cannot be said to impose any different approach or threshold to the assessment of risk of Article 3 ill-treatment.

111.

The Appellant accepts that the “initial evidential burden” is on him. He says however that he is not required to go so far as to demonstrate substantial grounds for believing that there is a real risk of ill-treatment etc meeting the high threshold as that is the ultimate test for a breach and there would be no need for any further enquiry. Mr Chirico was inclined to accept what was said by Sales LJ in *AM (Zimbabwe)* that the initial burden is to establish “a prima case of infringement of article 3”. He did not seek to support the argument rejected by the Upper Tribunal in *HKK (Article 3: Burden/Standard of Proof)* [2018] UKUT 381 (IAC) (“*HKK*”) that an appellant need only establish a claim which is not clearly unfounded in order to meet his burden.

112.

That acceptance however begs the question of what standard applies to that burden. Mr Chirico did not suggest that we should lay down any hard and fast rule in this regard as he said that this is a matter of assessment in an individual case whether the evidence is sufficient. We accept that this may be so. However, we do not accept, as Mr Chirico submitted, that what an appellant has to show must be to a lower threshold than an Article 3 risk. In our view, the words “capable of proving” suggest that, if an appellant’s evidence is not challenged or countered, that evidence would make out his case that Article 3 would be breached by removal, by reference to whatever threshold is applicable; that is to say the “ordinary” one of real risk or the higher one reserved for health cases. It is in that context that the Returning State has to provide evidence pointing the other way. As the Respondent points out, that can comprise (a) general evidence; (b) specific enquiries made by the Respondent of the authorities or other organisations in the Receiving State; and (c) the obtaining by the Respondent of specific assurances from the Receiving State relating to the Appellant.

113.

We accept that the guidance in *Paposhvili* involves a two-stage process involving investigations by the Returning State and the seeking of assurances from the Receiving State (assuming that an appellant has discharged his obligation). However, this distinction is readily explained by what the assessment of the Article 3 risk involves. In this context, the Appellant says that one of the ways in which the Grand Chamber in *Paposhvili* departed from the guidance in *N* is in relation to the acceptance that a “certain degree of speculation is inherent in the preventative purpose of Article 3” ([186]), thereby adopting the same approach involved in cases alleging deliberate harm. However, we do not discern any changed approach from what is said at [50] of the ECtHR’s judgment in *N* that, when assessing what will happen in the Receiving State, the effect of removal on a person’s health “must involve a

certain degree of speculation". We do not read that as undermining the case of N (as the Appellant asserts is the position) but as simply reflecting what is the reality that, when looking at the impact on a person's health and the imminence of impact, the assessing authorities will have to speculate to some extent.

114.

We also accept that the guidance in Paposhvili requires consideration of the accessibility of care and facilities ([190]). However, that does no more than require the assessing authorities to consider what treatment would be available and whether the individual appellant would be able to access it (including considerations as to cost etc). It does not diminish the high threshold which applies to establishing that there are substantial grounds for believing that there is a real risk of a breach of Article 3 arising from the conditions in the Receiving State . The burden of establishing the real risk remains with an appellant.

115.

The speculative nature of what will befall an appellant in the Receiving State and the need to consider access to care and facilities there explains the two-stage process set out in Paposhvili . If an appellant provides evidence which is unchallenged and assessed as being "capable of" proving that the threshold test is met, it is at that stage that the evidential burden shifts to the Returning State in the sense that the Returning State will need to do something to counter that evidence, if it is to succeed in removing the person concerned, compatibly with that State's obligations under the ECHR . We accept that the evidence provided by the appellant does not have to amount to "clear proof" in terms of the standard which applies : that is due to the speculative nature of what has to be proved and is what justifies the application of the "real risk" test in cases of this kind .

116.

However, the burden on the appellant remains one of showing that the relevant threshold test is met. As was said by the minority of Judges in Savran , when determining whether the burden is met, the Court or Tribunal has to have regard to what it is which must be established. In Article 3 health cases, even after Paposhvili , that is to show that there is a real risk 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". This also accords with Lord Hoffman's judgment in Nasseri .

117.

To that extent, we do not disagree with the Appellant's contention that there is what could be described in our domestic law as a shifting burden of proof where an applicant raises sufficient evidence to meet his burden. Where we part company with the Appellant is in relation to whether this imposes a free-standing procedural obligation on the Returning State or simply impacts on the substantive outcome. In other words, if an appellant provides sufficient evidence to meet the burden on him to the requisite standard and the authorities of the Returning State do nothing whether by way of investigation or the obtaining of assurances, then the appellant will succeed in establishing his case. The Returning State will not be able to remove. That is consistent with what has been said by the ECtHR in the Dublin Regulation cases (see in particular what is said at [122] of the judgment in Tarakhel which we cite at [ 107 ] above).

118.

As is said by the Grand Chamber at [ 185 ] of Paposhvili , the obligation of the authorities is primarily one to provide appropriate procedures allowing an examination of the individual claim. The Court does not identify any free-standing procedural duty to investigate or obtain assurances. Indeed, if we



have correctly understood Mr Chirico's written submissions in response to the Respondent's submissions on Sav ran , it is not contended that such an obligation is free-standing or not wholly so.

119.

Mr Chirico suggested at one point during his oral submissions that there is no difference between a procedural duty and the discharge of the burden of proof. We disagree. A free-standing procedural duty would itself entail a violation of Article 3 if not carried out. That is what we understand to have been decided by the Strasbourg courts in El-Masri and other similar cases. However, the duty to investigate in that context is very different. It arises because the actions complained of are those of the State; in other words, those cases are not foreign cases involving removal.

120.

In his skeleton argument, Mr Chirico makes the submission that Strasbourg does not always decide Article 3 cases based on whether removal would lead to a substantive breach but based on whether there has been a procedural breach. He relies by way of example on Paposhvili itself. However, as Mr Chirico there recognises that is a very unusual case because, by the time of the Grand Chamber judgment, Mr Paposhvili had died and therefore there would have been no purpose in looking forward to what would happen if he were removed. In order to determine that there had been a breach, the Grand Chamber had to look backward to what would have been the position if he had been removed as intended in the past. It is in that context that one needs to read the Grand Chamber's conclusion at [205] that "in the absence of assessment by the domestic authorities of the risk facing the applicant ... the information available to those authorities was insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention " and at [206] that "if the applicant had been returned to Georgia without these factors being assessed, there would have been a violation of Article 3." We also observe in this context that what the Grand Chamber found to be missing was not a duty to investigate in terms of making enquiries or seeking assurances but a failure to assess the evidence. That is consistent with the duty to provide a mechanism to assess the risk as set out at [185] of the judgment (as we note at [ 106 ] above). That mechanism is met in the UK by a combination of the consideration of the evidence by the Respondent and the scrutiny of the evidence by the Tribunal.

121.

That is also consistent with what is said in Nasseri to which the Respondent makes reference in her submissions concerning the Sav ran case in the passage which we have set out at [ 88 ] above. We accept, as the Appellant points out in his submissions in reply, that this is said in a different context but we do not accept that the judgment in MSS helps either ( see [ 108 ] above). The point there made (that Belgium ought to have known of the general situation in Greece and taken that into account when making take charge requests) is in the context of the Dublin Regulation which is an arrangement between Member States and not in the context of a removal to a country outside the EU with which the UK has no such arrangements.

122.

As the Tribunal observed in HKK (where the point was argued as being one of relative burdens of proof), what is said at [186] and [187] in Paposhvili is no more than a restatement of principles which have long applied in the protection context ([42] ) . The burden is on an asylum applicant to adduce evidence capable of proving that there are substantial grounds for believing that removal would violate Article 3 ([1] of the headnote). That this is about burdens of proof rather than any free-standing duty to investigate or obtain assurances is also consistent with what was said by the majority in Savran . The majority held that the Danish Government must seek assurances from Turkey, in the

absence of which, the applicant could not be removed to Turkey. The violation would arise not from the Danish Government's failure to obtain assurances but because removal in the absence of assurances would violate the substantive obligation not to remove where there would be a real risk of a violation of Article 3 ECHR.

### **Article 3 Procedural Obligations: Conclusions**

123.

In a case where an individual asserts that his removal from the Returning State would violate his Article 3 ECHR rights because of the consequences to his health, the obligation on the authorities of a Returning State dealing with a health case is primarily one of examining the fears of an applicant as to what will occur following return and assessing the evidence. In order to fulfil its obligations, a Returning State must provide "appropriate procedures" to allow that examination and assessment to be carried out. In the UK, that is met in the first place by an examination of the case by the Secretary of State and then by an examination on appeal by the Tribunal and an assessment of the evidence before it.

124.

There is no free-standing procedural obligation on a Returning State to make enquiries of the Receiving State concerning treatment in that State or obtain assurances in that regard. Properly understood, what is referred to at [185] to [187] of the Grand Chamber's judgment in Paposhvili concerns the discharge of respective burdens of proof.

125.

The burden is on the individual appellant to establish that, if he is removed, there is a real risk of a breach of Article 3 ECHR to the standard and threshold which apply. If the appellant provides evidence which is capable of proving his case to the standard which applies, the Secretary of State will be precluded from removing the appellant unless she is able to provide evidence countering the appellant's evidence or dispelling doubts arising from that evidence. Depending on the particular circumstances of the case, such evidence might include general evidence, specific evidence from the Receiving State following enquiries made or assurances from the Receiving State concerning the treatment of the appellant following return.

### **Grounds three and four**

126.

We now turn to deal with the way in which Judge O'Keeffe dealt with the medical evidence and Article 3 health issues (including risk of suicide) in the Decision.

127.

We begin by observing that this is an unusual health case. Whilst it is clear from the evidence that the Appellant suffers from a physical disability and also displays mental health problems to the extent that he is not considered to be capable of participating in these proceedings, he takes no medication for either disability. Neither is he receiving any counselling or other treatment for his mental health problems. The Appellant himself will not accept that he has mental health problems and has therefore been largely uncooperative with the doctors who have been instructed to provide evidence. He has engaged with those professionals on only a handful of occasions. Some of the reports are no more than desk studies of other written reports all of which have been obtained for the purposes of this litigation rather than coming from any medical professional who is treating the Appellant. So far as treatment following return is concerned therefore, this case is about the level of support which the

Appellant requires for his physical and mental disabilities rather than about treatment for his conditions.

128.

The Judge 's consideration of the medical evidence is dealt with under the heading of humanitarian protection as well as in the passage dealing with Article 3. As such, the passage at [60] to [63] set out at [ 52 ] above form s part of her assessment of the risk of inhuman and degrading treatment. The Judge also summarised the medical evidence at [30] to [34] of the Decision and can be assumed to have taken into account what is there said in her conclusions. Having set out the relevant threshold (including reference to Paposhvili as well as N ), the Judge examined the medical evidence adduced by the Appellant at [67] to [74] of the Decision. Her conclusio n appears at [75] of the Decision as follows:

“On the evidence before me considered as a whole, I find that it has not been demonstrated that the appellant’s health or the risk of suicide engages the high threshold of Article 3. It has not been demonstrated that conditions for this appellant in Jamaica are such that he faces imminent intense suffering or death because of the non-availability in Jamaica of treatment available to him in the UK.”

129.

The Appellant’s ground three challenges the Judge’s findings on three bases. First, it is said that the Judge’s finding at [70] of the Decision that the Appellant would find a place to s tay at the Open Arms Drop - in Centre in Kingston takes no account of the evidence of Dr d e Noronha that the facilities the y were “by no means wheelchair accessible” and that “[i]t is unlikely that [AXB] would be able to live with dignity” there. Dr d e Noronha deals with this issue at [49] to [55] of his report. He says that the centre is not wheelchair accessible because it is down a dirt track and therefore the Appellant would not be able to leave the centre on his own without transport. There is a vehicle , but the driver only works part-time . D r d e Noronha is unaware whether that vehicle is wheelchair accessible. He says that the layout of the centre is such that “it would certainly be difficult to navigate in a wheelchair”. He also says that “[w]hile there are people with various physical disabilities living in Open Arms, [he] saw no one in a wheelchair”. That leads to his conclusion that the Appellant would not be able to live with dignity at that centre. The remaining paragraphs concern the safety of the centre , particularly for a “stigmatised deportee” and if the Appellant were targeted . However, the Judge had already rejected a claim based on generalised violence and the Appellant’s individual protection claim.

130.

The Judge dealt with the Appellant’s disab ility at [70] of the Decision as follows:

“The appellant is now a wheelchair user as a result of his stroke. He also suffers from epilepsy. The expert evidence before me shows that he does need assistance with day to day activities and an adapted living environment. There is evidence of discrimination in Jamaica towards people with disabilities. I have already referred to the availability of hostel accommodation in Jamaica for those with disabilities. Dr de Noronho does say that he saw nobody in a wheelchair in the Open Arms facility but gives no evidence as to what adaptations have been made for those with physical disabilities who can and have been accommodated there. He noted the external physical constraints of the building but says nothing about any internal adaptations.”

131.

The reference to earlier consideration of hostel facilities is that referred to at [62] and [63] ( cited at [ 52 ] above) which includes reference to the accommodation being “far from ideal for a wheelchair user” and the need for a car or a van to be able to leave the centre. However, the Judge also had

regard to other evidence at [63] of the Decision which showed that the Appellant cannot leave his current accommodation without assistance but that he can move around independently from wheelchair to bed or a chair and that he can “ undertake personal care , toileting, eating and drinking”.

132.

It cannot sensibly be suggested that Dr de Noronha’s assertion that the centre is “by no means wheelchair accessible” or that the Appellant could not live there with dignity has been overlooked by the Judge . By a combination of what is said at [62] and [63] with what is said at [70] of the Decision, the Judge has analysed the available evidence and reached a conclusion which is open to her.

133.

We accept that the Judge has not considered what would happen to the Appellant after the six months accommodation which the Open Arms Centre is said to offer. However, even the Paposhvili guidance makes clear that what the Tribunal has to consider is whether there is an “imminent” risk of intense suffering or substantial reduction in life expectancy . Moreover, although described as “inadequate”, Dr de Noronha does refer to a social security system existing in Jamaica. This and the public health system are dealt with in more detail in Mr Sobers’ report . That evidence is therefore considered by the Judge at [61] of the Decision.

134.

Turning then to the second criticism made of the Decision within ground three, it is submitted that the Judge has ignored the expert evidence that “[i]t was highly likely that [the Appellant] would make desperate efforts to resist his removal which were likely to include threats or acts of self-harm or a suicide attempt” . It is said that the evidence shows that these risks would increase after removal due to additional stressors and risk factors and loss of protective factors.

135.

We do not discern any challenge to the test which was applied by the Judge when dealing with the suicide risk. The Judge expressly refers to the case of J at [71] of the Decision. At [75] of the Decision, she applies the test of whether the “risk of suicide engages the high threshold of Article 3.” If anything, she may have applied too low a test, having regard to the case-law to which we refer at [ 96 ] to [ 103 ] above.

136.

The Judge dealt with the suicide risk at [71] to [74] of the Decision. We note that what is said at [71] of the Decision mirrors the quotation in the grounds which we set out at [1 34 ] above and that this is a direct quotation from the report of Dr Wootton dated 4 March 2019. Dr Wootton says that the risk of suicide after removal “would remain elevated”. She says that it is difficult to manage the Appellant’s condition because “he is suspicious of others, refuses treatment and is non-compliant”. That too is recorded at [71] of the Decision.

137.

At [72] of the Decision, the Judge considers the factors which Dr Wootton says are relevant to the suicide risk. As the Judge notes there , many of those factors have existed for much of the Appellant’s life and are unrelated to his claim. The Judge goes on to say that “[d]espite these risk factors, I was not referred to any evidence to suggest that the appellant had attempted suicide in the past”. The Judge had regard to the Appellant’s refusal of food and drink but also to Dr Wootton’s observation that “there may also be an element of protest and trying to get his needs met”.

138.

Read as a whole, it is apparent from what is said at [71] and [72] of the Decision that the Judge did not accept that the evidence showed a real risk that the Appellant would commit suicide. Her views are consonant with the medical evidence read as a whole. As the Appellant points out, at [74] of the Decision, the Judge found that the process of deportation would be “adequately managed”. It is said that this finding is made without any evidence. However, that paragraph itself refers to the evidence which was to be found in a case record indicating that the Respondent had taken medical advice in connection with the Appellant’s removal.

139.

The Judge also had regard to the availability of medication and treatment. It is asserted that the Judge did not consider whether the mechanisms were effective to reduce the risk of suicide. However, the Judge did not accept that there was a real risk that the Appellant would try to commit suicide (and nor did Dr Wootton say that he would following removal). The Judge’s reference to the lack of any attempt is relevant. The Judge’s findings as to available treatment in Jamaica has to be read in the context of the medical evidence taken as a whole that the Appellant does not receive treatment for his mental health condition – he refuses it because he does not consider himself to be mentally ill.

140.

The final criticism is that the Judge failed to consider the evidence concerning the alleged Article 3 breach in the round. The allegation included not simply the risk to the Appellant’s health due to lack of treatment but also the cumulative effect of that and the discrimination against disabled people coupled with the difficulties for the Appellant of dealing with an environment not adapted to his needs. However, as we have already observed, the consideration of the evidence and findings in relation to healthcare in the Article 3 context has to be read with the Judge’s findings in relation to humanitarian protection at [60] to [63] of the Decision which includes reference to all those factors. The conclusion at [75] of the Decision is reached on the evidence “considered as a whole”. Although the references in that paragraph are to the Appellant’s health and risk of suicide, those incorporate both his mental and physical health as well as the conditions in Jamaica.

141.

For those reasons, ground three does not disclose any error of law.

142.

In light of our earlier conclusions about what is said to be a procedural duty to make enquiries or seek assurances, we can deal with ground four very shortly. There is no freestanding procedural duty. The evidence adduced by the Appellant has to be “capable of” demonstrating a real risk of ill-treatment contrary to Article 3 (to the threshold which applies in a health case). If the Appellant’s evidence does so, the Respondent will need to counter that evidence with general background evidence; enquiries of the Receiving State; or assurances from that State, as the case may be, if the Respondent is to secure the Appellant’s removal compatibly with the ECHR. Here the Judge concluded that the evidence did not show any such risk. It is said that there were gaps in the evidence about the availability of care for a person such as the Appellant at the Open Arms Centre and concerning healthcare which the Judge should have required the Respondent to plug. However, we have already explained why the Judge did not find that such gaps existed.

143.

An additional factor identified as not being dealt with is the risk that the Appellant would suffer a further stroke as a result of the stress of removal. However, the Judge dealt with the evidence about

this at [66] to [69] of the Decision and concluded that “the medical evidence falls short of demonstrating that the process of removal would increase the risk of stroke”. As is there explained, that asserted risk is undermined by the report of Dr Ahmed who points out that the Appellant has not been taking any medication to prevent a further stroke since he suffered his stroke in 2011 but has still not suffered any further stroke. Dr Ahmed himself said that it was difficult to answer the question whether forced removal would risk inducing further strokes. As the Judge concluded, that report did not provide evidence that removal itself would cause that risk.

144.

It is asserted in the grounds that “serious doubts must have persisted regarding the impact of removal on [AXB]”. We disagree. We can discern no such doubts in the Judge’s reasoning nor any evidence which she considered needed to be clarified or investigated. She had such evidence as she considered she required to resolve the issues and did so. Since we have concluded that any duty to investigate or seek assurances is merely part of the burden of proof and that the Judge concluded that the Appellant had not met his burden in this regard, the “procedural obligation” argument did not arise, and the Judge had no need to deal with it. For that reason, there is no error of law disclosed by ground four.

### **DECISION**

**We are satisfied that no material error of law is disclosed in the Decision of First-tier Tribunal Judge O’Keeffe promulgated on 23 April 2019 in relation to her conclusion on Article 3 ECHR grounds. We therefore uphold the Decision in this regard. There has been no challenge to the Decision allowing the appeal on Article 8 ECHR grounds. Accordingly, the Appellant’s appeal is allowed on Article 8 grounds only.**

Signed 

Date d: 15 November 2019

Upper Tribunal Judge Smith