IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005492
First-tier Tribunal No:
PA/54406/2021
IA/15375/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued
On the 19 July 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

OSB
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms J McKinney, Solicitor, Duncan Lewis Solicitors
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

Heard at Field House on 13 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

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

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria. His date of birth is 21 January 1986. He is a paranoid schizophrenic. The First-tier Tribunal made a direction to anonymise

the Appellant. There is no reason for me to interfere with this. I direct that the order continues.

2. The Appellant is a foreign criminal. He was convicted on 8 September 2009 at Southwark Crown Court of three counts of attempted rape and an offence of kidnap with the intention to commit relevant sexual offence. He was sentenced to an indefinite hospital order. The SSHD has made unsuccessful attempts to deport the Appellant. The last deportation order against the Appellant was made on 2 February 2017 pursuant to Section 5(1) of the Immigration Act 1971 (the 1971 Act).

3. In a decision of 15 November 2022 the First-tier Tribunal (Judge Hatton) granted the Appellant permission to appeal against the decision of the First-tier Tribunal (Judge Morgan) to dismiss his appeal against the decision of the SSHD on 7 September 2021 to refuse his application on human rights and asylum grounds. The Appellant appealed against the decision of 7 September 2021. The decision came about following further submissions made by the Appellant concerning his mental health. His appeal came before Judge Morgan on 6 October 2022.

4. The Appellant has a protracted immigration history. It is not necessary for the purpose of this decision to set it out. Suffice to say, for now, that he came to the United Kingdom on 10 February 2000 as a child, aged 14, and that in 2016 his appeal was dismissed by the First-tier Tribunal (Judge Asjad).

5. The Appellant and his mother attended the hearing before the First-tier Tribunal which was conducted remotely. The judge stated that the issues were agreed by the representatives as namely; whether the SSHD's decision to refuse the Appellant's human rights claim was a breach of Article 3 and/or Article 8 ECHR. The judge recorded that the representatives accepted that the appeal would turn primarily on the assessment of two medical reports which led to a fresh consideration by the SSHD of the Appellant's human rights claim.

6. The judge recorded that the SSHD relied on the *Devaseelan* [2002] UKAIT 702 and in the alternative it was submitted that the medical evidence did not reach the Article 3 threshold and/or did not amount to very compelling circumstances justifying a finding that there would be a breach of Article 8 if the Appellant were to return to Nigeria.

7. The judge considered the decision of the First-tier Tribunal in 2016 and observed that it was extremely detailed. There was evidence from Dr Babalola an NHS consultant psychiatrist which had not been before the judge in 2016. The judge found that his evidence was detailed and comprehensive and noted that there was no challenge to it by the SSHD. Dr Babalola confirmed the diagnosis of paranoid schizophrenia and that the Appellant currently presents with symptoms of paranoid schizophrenia and depression within the context of a major depressive order. Dr Babalola noted that the Appellant resides in supported accommodation which manages his mental health, medical administration, social skills and his general wellbeing. In Dr Babalola's opinion the absence of this care would most probably lead to a deterioration in the Appellant's mental state and may place others at risk. Dr Babalola considered that the Appellant's mental health is unlikely to be appropriately managed in Nigeria and that in his view the Appellant is currently not fit to fly. Dr Babalola considered that deporting the Appellant may well result in a substantial deterioration in his mental health and that the Appellant requires ongoing stabilisation, continued monitoring of his medication and full engagement with mental health services.

8. The judge noted at [16] that the representatives accepted that the second critical report for the purposes of the appeal was that provided by Dr Ogunwale, a chief consultant psychiatrist practising in Nigeria.[1] This evidence was not before the First-tier Tribunal in 2016. He provided a country assessment of the psychiatric resources available. The judge noted that the SSHD "pragmatically and correctly" did not seek to go behind Dr Ogunwale's expertise or impugn his ability to reach the conclusions contained within the report.

9. The judge at [17] recorded that Dr Ogunwale confirmed that the Appellant would be expected to pay for his mental healthcare should he be returned to Nigeria and that the costs would be relatively high given the scarcity of state funding for mental health. Dr Ogunwale set out in detail the medication which the Appellant was currently receiving and noted that one of the Appellant's major psychotropic medications is currently not readily available in Nigeria and that this "might constitute a therapeutic challenge at some point in his treatment". Dr Ogunwale noted the challenge was caused by counterfeit drugs in Nigeria which can affect both physical and mental health conditions. Dr Ogunwale noted the risk of chaining or shackling arises mainly in religious or traditional treatment facilities and that the Appellant would be unlikely to be forced to have electric shock treatment. Dr Ogunwale noted that mental illness is still significantly stigmatised in Nigeria and the mentally ill are likely to experience social discrimination as well as other forms of negative public attitudes.

10. The judge directed himself in relation to the *Devaseelan* at [18]. The judge stated as follows:

> "…..the Respondent's primary submission, which is set out in detail in the Respondent's review, is that applying the Devaseelan principles, I should look for a very good reason to depart from the earlier findings set out within the second appeal decision (see above). In particular, the question is whether the new evidence is so cogent and compelling as to justify a different finding. Alternatively the Respondent submits that the medical evidence provided does not reach the high threshold necessary to enable or justify a finding that there is a real risk that Article 3 will be breached. I am persuaded by these submissions and find that the medical evidence before me is not so cogent and compelling to justify different findings. Even if I may not have reached the same conclusion myself in respect of Article 3 that is not the correct approach. In the alternative however, I am also persuaded by the Respondent's submission that the two medical reports relied upon do not disclose a real risk that the Appellant will face a breach of his Article 3 rights if he returns to Nigeria".

11. The judge stated as follows at [32]:-

> "The difficulty for the Appellant however is that the evidence before me does not enable a finding that there are such compelling circumstances. The Appellant appears to no longer pose a risk to the public because if he did it is difficult to see how he could have released from his indefinite hospital detention. It is not therefore the risk of further offending that justifies the public interest in deportation but rather the seriousness of the index offences."

12. The judge went on to conclude that the Appellant has not satisfied the exceptions and he has not shown very compelling circumstances in the context of s.117(6) of the 2002 Act.

[1] The judge in error referred to Dr Ogunwale as Dr Bello throughout the decision.

13. The judge at [36] stated as follows:-

> "I note for the sake of completeness that it may be that the Respondent would struggle to deport the Appellant. I note in particular the finding of the UK based consultant psychiatrist that the Appellant is currently unfit to fly. If this is the case I would anticipate that the Appellant would remain in the supported accommodation and in the support regime that he currently receives."

The Grounds of Appeal

14. **Ground 1:** it is asserted that the judge did not make material findings in respect of the Appellant's asylum/protection appeal. The raised a protection claim relying on *DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 00223.* The Appellant lodged his appeal and the grounds included a challenge to the decision under the Refugee Convention. Indeed the First-tier Tribunal allocated a reference number starting with "PA" and the Appellant's ASA before the First-tier Tribunal made clear submissions regarding the Appellant's asylum claim and why it was not conceded on his behalf that s. 72 NIAA 2002 was satisfied.

15. In relation to [4] of the decision, it is stated that there was no specific concession made on the Appellant's behalf that the only issue for the determination was the human rights ground of appeal. While it is of note that the RFRL does not deal with s.72, it was a live issue for the First-tier Tribunal to determine.

16. **Ground 2**: The First-tier Tribunal misapplied *Devaseelan.*

17. The *Devaseelan* principles make it clear that there is no need for the Tribunal to be satisfied that it is a prerequisite to meet a "very high threshold" to depart from the previous findings. The specific findings in the case of *SSHD v Patel* [*2022] EWCA Civ 36* can be distinguished in view of the fact it involved determinations relating to different parties to the appeals.

18. The Appellant's protection claim has never been subject to previous determination by the First-tier Tribunal. There were no findings previously made in respect of the Appellant's claim on protection grounds and therefore there was no requirement for any departure from the findings of the First-tier Tribunal. Judge Morgan acknowledged that the medical and country evidence all postdated the previous decision of the First-tier Tribunal.

19. The medical and country background evidence in 2016 was limited. The Appellant was represented by different solicitors.

20. The Appellant provided extensive medical evidence, both specific to him and country background evidence relating to mental health provision in Nigeria. This evidence was not before the First-tier Tribunal previously. It is submitted that the evidence is cogent and compelling. Dr Ogunwale accepts that chaining of the mentally ill does occur in Nigeria and that all the prescription drugs are not available. The SSHD offered no evidence in rebuttal of Dr Ogunwale's evidence in her review or at the hearing. The only submission she made in her review was a generic irrelevant one regarding the medical expert appearing to be accept the Appellant's claim at face value. However, Dr Ogunwale had the Appellant's up-to-date prescription chart before him and he comments on the factual position of the mentally ill in Nigeria and had not met with the Appellant. The Appellant's

mental health condition is not in dispute. It is commonly accepted that chaining and shackling amounts to breach of Article 3 ECHR.

21. It was submitted on the Appellant's behalf that the medical and country background evidence shows a real possibility of relapse in his mental health condition if the Appellant is returned to Nigeria and a real risk of a potential breach of Article 3 ECHR.

22. There was no challenge by the SSHD to the expert medical evidence of Dr Ogunwale. The judge found that the two medical reports the Appellant provided did not disclose a real risk that he would face a breach of his Article 3 rights if he returns. However, the judge did not explain why or how he has reached this conclusion. This is a failure to provide adequate reasons with reference to *MK (duty to give reasons) Pakistan [2013] UKUT 00641.* The SSHD did not offer evidence in rebuttal to the two medical reports and the country background evidence as regards the mentally ill.

23. **Ground 3**: The judge failed to make findings in respect of the risk of Article 3 breach upon removal. Dr Babalola who declared him as unfit to fly. The SSHD's decision engages with the contents of Dr Babalola's report and states at [61] that suitable arrangements would be made for his removal with qualified escorts.

24. Dr Babalola raises real concerns regarding a potential reasonable degree of likelihood or real risk of an Article 3 ECHR breach upon the Appellant's removal from the UK or more likely than not, a disproportionate breach of his right to private life relating to physical and moral integrity under Article 8 ECHR. The Tribunal was ceased of jurisdiction in relation to the Appellant's human rights appeal. At [36] the judge states:

> "I note for the sake of completeness that it may be that the respondent will struggle to deport the appellant. I note in particular the finding of the UK-based consultant psychiatrist that the appellant is currently unfit to fly. If this is the case I would anticipate that the appellant would remain in the supported accommodation and in the support regime that he currently receives."

25. The SSHD has not given an indication or undertaking that the Appellant will remain in his supported accommodation and in the support regime that he currently receives in the event that she is unable to remove him from the UK.

26. The judge's jurisdiction is solely confined to considering and refusing or allowing the Appellant's protection and human rights appeal. If the judge felt that he was satisfied there was a real risk of a potential Article 3 breach or more likely than not that the Appellant's removal would amount to a disproportionate breach of his private life in the UK, as at the date of the decision, then he should have simply allowed the appeal on human rights grounds on that basis.

Submissions

27. I heard submissions from the parties. Ms Ahmed submitted that the judge properly assessed the medical evidence. I deal specifically with her submissions below. Ms McKinney expanded in the grounds.

Error of Law

28. Before the First-tier Tribunal there was evidence from an NHS consultant psychiatrist Dr Babalola and Doctor Ogunwale a chief consultant psychiatrist

practising in Nigeria. The judge set out Dr Babalola's evidence at [15] and Dr Ogunwale's evidence at [17]. Their expertise was not challenged by the SSHD.

29. Ms Ahmed said at the hearing before me that the evidence which is not accepted by the SSHD is that concerning the availability of medication and she referred me to the SSHD's review before the First-tier Tribunal. However, she accepted that it was not challenged that the Appellant is a seriously ill person (with reference to *AM (Zimbabwe) v SSHD* [2020] UKSC 17).

30. The SSHD relied on *Devaseelan* at the hearing before the First-tier Tribunal; however, in the alternative stated that the evidence of the Appellant's mental health does not engage Article 3 or amount to very compelling circumstances. In my view the submission discloses a misunderstanding of the *Devaseelan* test.

31. The judge set out the SSHD's primary submission at [18] in respect of *Devaseelan*. The judge found that the medical evidence was not so cogent and compelling to justify different findings. This is not the test set out in D*evaseelan.* Moreover, there was insufficient analysis of the new evidence and inadequate reasons were given by the judge for deciding not to depart from the 2016 findings.

32. The judge was not bound to depart from the findings in 2016, but it was incumbent on them to take into account the date of the new medical evidence and that it was not before the judge in 2016 and nor could it have been when assessing the wight to be attached to it. The judge should have considered all the evidence and then decided whether or not to depart from the 2016 findings. Moreover, the judge did not seem to appreciate that the judge in 2016 applied the *N* test (*N v SSHD [2005] UKHL 31* which is no longer the test to be applied. It may be that the evidence was no different to that before the judge in 2016, but the judge did not specifically state this nor did the judge appreciate that the legal test had changed. Moreover, the judge further muddies the waters with the observation at [18] "even if I may not have reached the same conclusion myself in respect of article 3 that is not the correct approach". This misunderstands the application of *Devaseelan* and the task before the judge which is not a review of the decision of the First-tier Tribunal.

33. The judge then considered "the alternative" (the SSHD's submission) namely whether the evidence reached the high threshold test. The reference to the threshold, as I understand it is to Article 3 and not *Devaseelan.* The judge said " in the alternative however I am also persuaded by the Respondent's submission that the two medical reports relied upon do not disclose a real risk that the Appellant will face a breach of his article 3 rights if he returns to Nigeria". As I understand it, Ms Ahmed's view is that this saves the determination. However, I disagree. There is no proper analysis of the evidence and an inadequacy of reasons.

34. The evidence of Dr Babalola and Dr Ogunwale was not before the first judge. It is difficult to understand Ms Ahmed's submission that this evidence fell into the category referred to at [40(4)] of *Devaseelan*. The evidence did not exist in 2016. It concerns the situation at the date of the hearing before the First-tier Tribunal in 2022. While it was the case in 2016 that the Appellant was a paranoid schizophrenic and had been detained under the Mental Health Act following his serious criminal offending, the first judge in 2016 for obvious reasons did not have medical evidence pertaining to his condition in 2022. The judge did, however, in 2016 accept the seriousness of the Appellant's mental illness and that he would not be entitled to free medical care and medication but that he

could not meet the high *N* Article 3 threshold. There is no engagement by the judge with this finding in the context of the evidence of Dr Ogunwale and *AM (Zimbabwe)*.

35. The judge did not properly apply *Devaseelan.* It may be that confusion was caused by the SSHD's review and the reliance on *Patel.* However, *Patel* was concerned with a "different party case" and an overlap of evidence. It was incumbent on this judge to consider the evidence in the round, taking into account the nature of the new evidence in accordance with *Devaseelan* and to decide whether all the evidence before him justified a departure from the starting point (the 2016 decision).

36. The Appellant raised a claim on protection grounds in his further submissions, grounds of appeal and skeleton argument. It is engaged with by the SSHD in the review before the First-tier Tribunal. I accept that there is nothing to support the Appellant having made a concession. I have seen a statement from Jonathan Knight dated 12 October 2022 who represented the Appellant at the hearing before the First-tier Tribunal. I am told by Ms McKinney that sadly Mr Knight is now deceased. His evidence was that the asylum ground was live and there was no concession. I have also considered the witness statement from the Home Office Presenting Officer at the hearing before the First-tier Tribunal whose evidence is not that there was a concession made by the Appellant that a ground of appeal was not to be pursued, but rather there was a clarification of the grounds by the parties that was properly recorded by the judge. The judge did not expressly state that a concession had been made by the Appellant in relation to one of the grounds of appeal. It is likely the judge and the Home Office Presenting Officer misunderstood the breadth of the grounds. This may be because the Appellant was relying on the same evidence; namely, his mental health in the context of his claim on protection grounds as well as Article 3. This is unusual. There was no protection claim based on a different factual matrix. However, there is simply no evidence to support that this Appellant made a concession/withdrew or abandoned a ground of appeal which hitherto had been clearly articulated in his further submissions, grounds of appeal and skeleton argument. In those circumstances it was incumbent on the judge to make a finding in respect of s.72 and refugee convention.

37. I have not engaged with all the issues raised in the grounds. For the reasons I have given, the judge is infected by error. In the light of the nature of the errors, I set aside the decision.

38. I remit the appeal to the First-tier Tribunal.[2] While the issues are narrow in respect of Article 3, Ms Ahmed having accepted that the issue with the expert evidence was availability of treatment, the First-tier Tribunal may need to consider accessibility to treatment. (I am not entirely sure that the position taken by Ms Ahmed reflects the position of the SSHD set out in the respondent's review, but these are matters to be considered by the First-tier Tribunal on the re-hearing of the appeal.) When considering venue of the rehearing, I take into account that the First-tier Tribunal did not consider a live ground of appeal (protection and the s72 matter) which will need to be determined on re-hearing and that the misapplication of *Devaseelan* raises fairness issues.

39. I communicated my decision to the parties at the hearing that the judge materially erred. I found that the grounds were made out. It is not necessary for

[2] My provisional view at the error of law hearing which I communicated to the parties was that the matter should be reheard in the UT; however, on further consideration of this and taking into account *Begum (remaking or remittal) 2023 UKUT 00046*, I have decided that it would be appropriate for the matter to be remitted to the First-tier Tribunal .

me to engage with all the issues raised in the grounds. I set aside the decision of the First-tier Tribunal to dismiss the appeal under Article 3. I remit the matter to the First-tier Tribunal for a rehearing.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 July 2023