IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI 2022 006408

First-tier Tribunal No: HU/52458/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 August 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

T.A.O.
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 10 August 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge CH O'Rourke promulgated on 7 December 2022.

2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.

3. Permission to appeal was granted by First-tier Tribunal Judge JM Dixon on 25 February 2023.

Anonymity

4. No anonymity direction was made previously, however as this appeal concerns the appellant's confidential medical history, it is appropriate that this matter be anonymised.

Factual Background

5. The appellant is a national of Nigeria, born in 1986. He first entered the United Kingdom during September 2012 with leave to enter as a Tier 4 migrant which was valid until 31 January 2014. The appellant's application to extend his leave to remain in the United Kingdom was rejected on 17 March 2014. He made a human rights application on 19 June 2014 and was subsequently granted leave to remain outside the Rules until 11 June 2015. The appellant was granted a further period of leave on 26 September 2016 which was valid until 26 March 2016. A further application made by the appellant for leave, based on his physical health, was refused. His appeal against that decision was dismissed on 7 January 2020 and his appeal rights were exhausted on 17 August 2020.

6. Shortly thereafter the appellant made further submissions, which led to a decision dated 18 December 2020 to refuse to treat them as amounting to a fresh claim. Those submissions were based on the appellant's health conditions as well as aspects of his private life which he had developed in the United Kingdom. Following a judicial review challenge, the respondent agreed to reconsider the decision of 18 December 2020. Upon reconsidering the matter, the respondent refused the appellant's further submissions by way of a decision dated 9 April 2021 and this is the decision which is currently under appeal.

The decision of the First-tier Tribunal

7. At the hearing before the First-tier Tribunal, the appellant represented himself and relied upon medical evidence as well as background country information. The judge concluded that the respondent's decision to refuse to grant the appellant leave to remain breached the United Kingdom's obligations in respect of Article 3 ECHR and allowed the appeal.

The grounds of appeal

8. The grounds of appeal argued, in essence, that the judge had misdirected himself in failing to give adequate reasons for allowing the appeal which had been recently dismissed on the same basis, applying *Devaseelan* (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702.

9. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

> The Judge allowed the appeal on Article 3 medical grounds and, although identified that there was evidence which post-dated the previous FtT decision, does not appear to have

explained why that evidence warranted departure from the prior (very recent) judicial findings which is arguably a material error as argued in the respondent's grounds.

10. No respondent's Rule 24 response was filed.

The error of law hearing

11. The appellant attended the hearing in person. He was initially unable to follow the proceedings owing to a hearing impairment. My clerk was able to locate an audio induction loop for the appellant to use, following which he could hear and take part in the proceedings without difficulty. Thereafter I heard succinct submissions from Ms Rushforth on the *Devaseelan* point. The appellant was invited to respond to those submissions and while he made several points, he was unable to say much regarding the grounds.

12. At the end of the hearing, I informed the parties that I was satisfied that the decision of the First-tier Tribunal contained a material error of law and that it was set aside. I provide my reasons below. There was some discussion regarding the venue of remaking. The appellant did not express a view other than to say that he was concerned about the delay in his case concluding. Ms Rushforth suggested that the First-tier Tribunal might be more appropriate.

Decision on error of law

13. The appellant's human rights claim was previously refused and determined on the papers by First-tier Tribunal Judge Moran in a decision promulgated on 7 January 2020. That claim concerned the appellant's medical diagnoses of Tuberculosis and Hepatitis B in the context of removal to Nigeria. The appeal was dismissed on both Articles 3 and 8 ECHR. As far as Article 8 was concerned, Judge Moran found that the appellant could not meet the requirements of paragraph 276ADE (1) of the Immigration Rules by way of demonstrating that there were very significant obstacles to his re-integration and he concluded that his removal was otherwise proportionate. On Article 3, Judge Moran reached the following conclusion.

> I also consider Article 3 but on the findings I have made it is clearly not engaged on health grounds as it has not been proved that treatment is not available in Nigeria and there is no evidential basis for finding that his life is at risk on return there.

14. By contrast, Judge O'Rourke made no findings in respect of Article 8 and came to the opposite conclusion on Article 3, finding that.

> While violation of Article 3 is a 'demanding threshold', I believe in this case that the Appellant has provided evidence 'capable of showing substantial grounds' for breach in this case.

15. In *Devaseelan*, the following guidance was given in dealing with second appeals.

> The first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned.

16. In Judge O'Rourke's decision, it is apparent that he was aware of the previous determination because he mentions it in passing at [8(vi)] as well as the evidence which was before Judge Moran at [9(i)]. Despite acknowledging the previous decision, the judge made no mention of *Devaseelan* nor was there any attempt to apply its guidance. The case advanced by the appellant was largely the same, in that it involved his own medical issues, the situation of his brother in Nigeria and the availability of treatment. Yet Judge O'Rourke did not take the previous decision as the starting point and nor did he explain why he was departing from the previous findings as to whether Article 3 ECHR was engaged, let alone made out.

17. Nowhere in the decision and reasons is there any justification for the judge coming to a differing conclusion. While I note that the appellant attended the hearing before Judge O'Rourke, that there was additional evidence and that time had passed since the previous determination, these were not points made by Judge O'Rourke in his decision. While the grounds of appeal were restricted to the *Devaseelan* point, it is apparent that the judge failed to make findings on Article 8 and that his Article 3 findings did not engage substantially with the test in *AM* (Zimbabwe) [2020] UKSC 17.

18. I canvassed the views of the parties as to the venue of any remaking. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. I took into consideration the history of this case, the nature and extent of the findings to be made as well as the fact that the nature of the error of law in this case meant that the parties were deprived of an adequate consideration of the decision under appeal. I further consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and therefore remit the appeal to the First-tier Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal at Newport to be reheard by any judge except First-tier Tribunal Judges O'Rourke or Moran.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 August 2023