Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02356/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 November 2021	**On 09 December 2021**

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SO
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For SO:	Ms. I. Nnamani, counsel instructed by Duncan Lewis solicitors
For the Secretary of State:	Ms S. Cunha, Senior Home Office Presenting Office

DECISION AND REASONS

1. The Appellant is a national of Nigeria, born on 19 July 1981. He made an application for asylum on the basis that he had a well-founded fear of persecution in Nigeria as a bisexual male. This application was refused on 2 July 2019 and the Appellant appealed against this decision. His appeal came before Judge of the First tier Tribunal Chinweze for hearing on 10 December 2020 via cloud video platform. In a decision and reasons promulgated on 22 January 2021 the Judge dismissed the appeal.

2. An application for permission to appeal to the Upper Tribunal was made out of time on 7 May 2021. The explanation provided in the application was that the Appellant's solicitors had not received the decision and reasons until 19 April 2021; the relevant fee earner had not seen it until 26 April 2021 and grounds were only received from counsel on 7 May 2021 (albeit we note that the grounds of appeal are in fact dated 28 April 2021). In terms of the substance of the grounds of appeal, these asserted that the First tier Tribunal Judge had erred in law: "*by failing to identify and apply the correct standard of proof*" in that at [34], [35] and [55] the Judge applied the balance of probabilities to the appeal. It was further asserted at [7] of the grounds that the Judge failed to adequately consider the Appellant's private life under Article 8, particularly as a vulnerable person with mental health problems and misdirected himself in conflating the requirements of paragraph 276ADE(1)(vi) and the terms of article 8 of ECHR and thus misdirected himself on the law and failed to properly assess the article 8 claim.

3. Permission to appeal was granted by First tier Tribunal Judge Andrew on 17 June 2021, notwithstanding the absence of any real explanation for the application being out of time, save the assertion that the decision was received late from the Tribunal. The Judge found there is an arguable error of law in the decision in that at [27] the Judge refers to the standard of proof being on the balance of probabilities and she found that this infected the whole of the decision.

Hearing

4. No rule 24 response had been received by the Upper Tribunal. Ms Cunha, on behalf of the Secretary of State, accepted that there are mistakes in the standard of proof applied by the First tier Tribunal Judge. She also accepted that the medical report dealing with the Appellant's scarring had not been dealt with properly by the Judge.

5. We accepted Ms Cunha's concession, as it is clear that the First tier Tribunal Judge throughout has applied the wrong, higher standard of the balance of probabilities to the Appellant's asylum appeal. What the Judge should have done was to consider whether there was a reasonable degree of likelihood that the Appellant's fear of persecution was well-founded: *R v. SSHD, ex parte Sivakumaran* [1988] AC 956, per Lord Goff at 1000F-G. The fact that the Judge applied a higher standard of proof i.e. the balance of probabilities, has

infected his consideration of the elements of the Appellant's asylum claim and it is not possible to know whether if the correct standard of proof had been applied the Judge would have reached the same conclusions.

6. We invited submissions from the parties as to remedy. Ms Nnamani invited us to set aside the whole of the decision and reasons, including the Judge's findings in respect of Article 3 (medical) because he had made no finding with regard to the letter from the Helen Bamber Foundation dated 28 October 2020 in his assessment of the Appellant's credibility. She submitted that the appeal should be remitted back to the First tier Tribunal rather than be retained in the Upper Tribunal because the nature of the case and the Appellant's vulnerability meant that he has not had an adequate consideration of his case.

7. It was pointed out by the Upper Tribunal that no challenge had been made to the Judge's Article 3 findings in the grounds of appeal. Ms Nnamani submitted that she had pleaded an error of law with regard to the Judge's findings in respect of article 8 and proportionality, so that aspect including whether removal of the Appellant would be contrary to his physical and moral integrity, would remain open for reconsideration at the next hearing.

8. Ms Cunha agreed that credibility had to be entirely re-determined and that this would best be done at a full fact finding hearing before the First tier Tribunal, albeit the Judge's findings themselves are not irrational in terms of looking at whether or not the Appellant's return to Nigeria would result in irreversible harm to him as per Article 3 of ECHR in light of the judgment in *AM (Zimbabwe)* [2020[UKSC 17.

9. We indicated that we found an error of law for the reasons canvassed, but reserved the decision whether to retain the appeal in the Upper Tribunal or to remit it back to the First tier Tribunal.

Decision and reasons

10. We have concluded that the appeal should be remitted for a hearing *de novo* before the First tier Tribunal. This is because although there was no challenge to the findings by the First tier Tribunal Judge with regard to the Article 3 (medical) claim and we find no error of law in respect of the findings at [56]-[65], we accept Ms Cunha's concession that there is merit in the challenge to the Judge's findings regarding Article 8 of ECHR, which failed to consider the medical evidence and the Appellant's vulnerability as part of his private life in the United Kingdom. Consequently, it is appropriate to set aside the Judge's decision on both asylum and human rights grounds, without preserving any findings. This is to enable a full consideration of all aspects of the appeal on the next occasion, including any potential further evidence that might touch upon the Article 3 and Article 8 elements of the human rights claim.

DECISION

The First-tier Tribunal decision involved the making of an error of law.

The decision will be remitted for a hearing *de novo* before the First tier Tribunal.

Signed *Rebecca Chapman*
Deputy Upper Tribunal Judge Chapman

Date: 29 November 2021