IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2021-001839
& UI-2021-001840
First-tier Tribunal No: PA/51500/2021
IA/04095/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 March 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

OL
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie, instructed by South West London Law Centre
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House on 17 February 2023

DECISION AND REASONS

1. This is an appeal by both the original appellant, OL, and the Secretary of State for the Home Department ('SSLD') against the decision of the First-tier Tribunal allowing OL's appeal, on Article 3 human rights grounds, against the respondent's decision to refuse his protection and human rights claims and to refuse to revoke a deportation order previously made against him.

2. The appellant is a national of Nigeria born on 6 November 1988. He claims to have arrived in the UK on 13 April 2002 as an unaccompanied minor. He claimed asylum on 23 July 2002. His claim was refused, but he was granted exceptional leave to remain

until 5 November 2006. He applied for indefinite leave to remain on 2 October 2006 but his application was recorded as void. He got married on 11 July 2009, but was subsequently divorced when his mental health problems impacted upon his relationship.

3. On 28 October 2011, the appellant was convicted of four counts of robbery and one count of possessing an imitation firearm and he was sentenced to a total of 7 years' imprisonment.

4. As a result of his conviction the appellant was served, on 20 February 2012, with a notice of liability to under section 32(5) of the UK Borders Act 2007, to which he responded on 12 March 2012 giving reasons why he should not be deported, based upon his family life with his wife in the UK and his fear of persecution from terrorist groups who had previously killed his father and step-mother in Nigeria. He was interviewed about his asylum claim. On 30 July 2013 he was notified of his liability to deportation under section 72 of the Nationality, Immigration and Asylum Act 2002. A deportation order was signed on 29 April 2014 and on 30 April 2014 he was served with a reasons for deportation and asylum refusal decision. He appealed against the deportation decision. His appeal was dismissed by the First-tier Tribunal on 12 September 2014, but the decision was set aside in the Upper Tribunal and remitted to the First-tier Tribunal to be heard afresh. The appeal was dismissed again on 1 September 2015 by First-tier Tribunal Judge Trevaskis and that decision was upheld by the Upper Tribunal on 11 April 2016. The appellant was refused permission to appeal to the Court of Appeal and became appeal rights exhausted on 13 December 2016.

5. On 25 November 2016 the appellant was recalled to prison under his licence and on 25 April 2017 was transferred to St Bernard's Hospital Medium Secure Unit under section 47/49 of the Mental Health Act 1983 because of concerns about his mental health. On 18 January 2018 he was convicted of possession/intent to supply cocaine and was sentenced to a Hospital Order under section 37 of the Mental Health Act.

6. On 4 February 2019, 18 April 2019, 27 May 2020 and 22 October 2020 submissions were made on behalf of the appellant on asylum and Article 8 grounds. Those were treated as an application to revoke the deportation order previously made against him. On 24 March 2021 the respondent made a decision to refuse the appellant's protection and human rights claims, and refused to revoke the deportation order.

7. In that decision, the respondent referred to the finding of the First-tier Tribunal, on 1 September 2015, that the appellant had failed to rebut the presumption in section 72(2) of the NIAA 2002 that he had been convicted of a particularly serious crime and was a danger to the community, and considered that he continued to constitute a danger to the community. The respondent noted that the appellant had been diagnosed as suffering from unspecified non-organic psychosis, a mental illness that was prone to relapse and remissions, and accepted that he may be at risk of relapse if he failed to comply with his medication but considered that that was the case whether he was in the UK or Nigeria. The respondent considered that treatment and medication was available to the appellant in Nigeria, although accepting that no action would be taken to deport him whilst he remained detained under the Mental Health Act. The respondent did not accept that the UK was bound by any duty of care which amounted to a positive obligation under Article 3 to continue to provide the appellant with care, and did not accept that he would be at risk of harm or of committing suicide if he returned to Nigeria such as to result in his removal being in breach of Article 3 or 8 of the ECHR on medical grounds. Neither did the respondent accept that the appellant would be at risk of persecution in Nigeria as a result of his mental health or that his mental health issues constituted a membership of a particular social group for the

purposes of the Refugee Convention. The respondent concluded further that there were no very compelling circumstances outweighing the public interest in the appellant's deportation for the purposes of Article 8 and that the decision to deport him should be maintained.

8. The appellant's appeal against that decision was heard on 7 October 2021 in the First-tier Tribunal by Judge O'Garro. The appellant did not attend the hearing owing to his mental health and the risk of deterioration in his health. He remained in detention under the Mental Health Act. The judge had before her two reports from a clinical psychologist, Dr Desautels, from which she noted that the appellant was diagnosed as suffering from a trauma-related disorder with psychotic features.

9. Judge O'Garro considered first of all the certification under section 72 of the 2002 Act, noting that it was accepted that the appellant had been convicted of committing a particularly serious crime and having regard to the report of Dr Desautels which concluded that the risk the appellant posed whilst detained was low. She found that the risk to the public was reduced considerably whilst the appellant remained detained under the Mental Health Act and that the prohibition contained in Article 33(1) of the Refugee Convention applied to him. The judge noted further that there was an exception to deportation under section 33(6) of the UK Borders Act 2007 for those detained under section 37 of the Mental Health Act and considered that that applied to the appellant such that his appeal should succeed on that basis alone. She went on to make findings in the alternative. She was not satisfied that the appellant would face a serious, rapid and irreversible decline in his health leading to intense suffering and/ or a significant reduction in his life expectancy because of the absence of treatment or inaccessibility of treatment on return to Nigeria. However she found that if the appellant was to relapse, his behaviour may draw hostile and adverse attention particularly from the police leading to him being detained in prison as a criminal lunatic or under the Lunacy Act 1958 and that he would therefore be at risk of being treated as a lunatic and detained indefinitely and subjected to serious mistreatment. She considered it reasonably likely that the appellant would, as a result of relapse due to the lack of appropriate medical treatment, come into contact with the police and be detained in prison without treatment for his mental health illness such that his mental health would deteriorate and give rise to a risk of unhuman and degrading treatment in breach of Article 3. She allowed the appeal on that basis.

10.The SSHD sought permission to appeal to the Upper Tribunal against that decision on three grounds. Firstly, that the judge had made a mistake as to a material fact by finding that the SSHD had failed to have regard to the exception to deportation in section 33(6)(a) of the UK Borders Act 2007. Secondly, that the judge had failed to give adequate reasons for findings on a material matter, namely the section 72 certificate and the appellant's asylum claim. Thirdly, that the judge had failed to give adequate reasons for findings on a material matter and had made contradictory findings in relation to Article 3 as to the availability and accessibility of treatment in Nigeria.

11.The appellant also sought permission to appeal to the Upper Tribunal on the ground that the judge had erred by failing to make findings, for the purposes of the Refugee Convention, on whether the appellant be at risk of serious harm amounting to persecution and/or whether such persecution would be for reason of membership of a particular social group. Further, it was asserted that the judge had erred in not allowing the appeal on the basis that there would be a risk of a breach of Article 3 in the *AM (Zimbabwe)* sense if he remained living in the community and/ or under Article 8 on the basis of 'very compelling circumstances', although it was accepted that, since

he had succeeded in his appeal, the appellant was not entitled to appeal on those grounds.

12. Permission was granted in the First-tier Tribunal to both parties.

13.The matter then came before us for a hearing. Both parties accepted that the judge's decision had to be set aside and re-made. We agree that that is the case.

14.It was common ground that the judge had erred at [1] to [7] (of the re-numbered part of her decision) when finding that the appeal should be allowed on the basis that Exception 5 at section 33(6) of the UK Borders Act 2007 applied. The respondent had made clear that no deportation action would be taken whilst the appellant remained detained under the Mental Health Act. The judge had plainly failed to recognise that the appellant's appeal was not against the deportation order or decision to deport him but was against a decision to refuse his asylum and human rights claim, and therefore the relevant exception was Exception 1, at 33(2) of the 2007 Act. That was, of course, not material to the outcome of the appeal given that the judge went on to consider the relevant exceptions to deportation. However it was also common ground that there were other areas of the judge's decision which were problematic. Both parties were in agreement that the judge had failed to consider the appellant's claim to be at risk on return to Nigeria on Refugee Convention grounds and it was Mr Mackenzie's submission that the judge had given inadequate reasons for her finding at [11] in regard to the Article 3 risk to the appellant on medical grounds on the basis of availability of suitable treatment and had failed to consider the risks from the public and from traditional healers.

15.With regard to the disposal of the appeal, however, there was some disagreement between the parties. Mr Mackenzie sought to persuade us that there were findings in the judge's decision which could be preserved, whereas Mr Walker asked us to remit the case to the First-tier Tribunal for a *de novo* hearing.

16.Mr Mackenzie submitted that Judge O'Garro's finding on the section 72 certificate should be preserved, since her finding, that the appellant did not pose a risk to the community whilst detained under the Mental Health Act, was consistent with the Court of Appeal's decision in the Secretary of State for the Home Department v MM (Zimbabwe) [2017] EWCA Civ 797 where similar issues arose. We find the circumstances to be materially different in that case, however, in that MM's mental health condition was under control, through his compliance with his medicines regime, whilst he was in the community, whereas there was no evidence before Judge O'Garro to suggest that OL was at, or anywhere near, such a stage. There is, furthermore, merit in the Secretary of State's assertion, in her second ground of appeal, that there were a number of other relevant factors which the judge ought to have considered, but failed to do so, when assessing the appellant's risk to the community. Accordingly we find that the judge's decision on the section 72 certification cannot stand and that that is a matter which needs to be considered afresh by a different judge.

17.Mr Mackenzie also asked us to find that the judge, at [11] to [14], had drawn a distinction between the risk to the appellant in the community and upon detention by the police in Nigeria, and that she was entitled to do so. Whilst maintaining his challenge to the judge's findings on Article 3 at [11], he submitted that her findings at [12] to [14] could be preserved, whereby she found the appellant to be at risk of being picked up by the police owing to his behaviour arising from his mental health and of being ill-treated in detention. Mr Mackenzie submitted that the judge's findings in that regard were taken from, and were thus consistent with, the background country information in the appellant's appeal bundle. However we find it difficult to separate

the judge's findings and to preserve part whilst setting aside others on the Article 3 medical issue, given the overall lack of clarity in her findings. Mr Walker submitted that it was wrong to pick and mix findings and that the matter ought to be heard *de novo*. Given the extent of the errors in the judge's decision and the lack of clarity and the confusion in her findings, we have to agree.

18. Accordingly, we consider that the appropriate course is for the matter to be remitted to the First-tier Tribunal to be heard afresh by a different judge, with no findings preserved.

Notice of Decision

19. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge O'Garro.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. We continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 February 2023