



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000944

First-tier Tribunal No:
HU/00068/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of June 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

RH

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, Counsel; instructed by JCWI

For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 8 May 2024

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 Appellant, a citizen of Algeria, appeals with permission against the decision of First-tier Tribunal Judge Lingam, who by a decision promulgated on 7 December 2023, dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim, under Article 8 and Article 3 arising from the Respondent's decision to make a deportation order dated 22 May 2021 (we note the judge's reference to the appeal before her arising directly from the Respondent decision to make a Deportation Order. That was incorrect; the right of appeal was attached to the refusal of the subsequent human rights claim).
2. At the hearing before the First-tier Tribunal, the Appellant was unrepresented and had produced a witness statement which sought to raise a fresh protection claim.
3. In the course of her findings, the judge found as follows at §§30-31 of the decision:

“30. I observed from the Appellant's appeal witness statement his claim that if he were forced to return to Algeria, he feared persecution by non-state agents. My examination of his Appeal Notice under (d) required him to state his grounds of appeal within the specified boxes at (1)-(5)(boxes [boxes (6)and (7) were not applicable to him]. Box (8) required him to

specify any new matter precisely not mentioned. The appellant there wrote: 'NIA'. As the appellant's asylum claim was raised only in his hearing appeal witness statement and not disclosed at the specified stage; such 'new matter' ground cannot be considered at appeal hearing stage.

31. Therefore, the only live issue in appeal is the appellant's Art 8 claim rights against the respondent's deportation decision order..."

4. The judge proceeded to consider the human rights issues under and outside the immigration rules and dismissed the Appellant's appeal under Articles 3 (in respect of a medical claim) and 8 (in respect of family and private life).
5. The Appellant appealed against the decision on the sole ground that the judge had materially erred in law by failing to determine the Appellant's protection claim as it related to the Refugee Convention.
6. Permission to appeal was granted by First-tier Tribunal Judge Moon .
7. At the hearing before us, Mr Bandegani argued that contrary to the judge's view, she did *potentially* have jurisdiction to determine the refugee ground in the appeal before her under sections 82-85 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) because the matter was raised in the Appellant's witness statement, as acknowledged by the judge at §30 of the decision. This was crucial as, in OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC), it was accepted on behalf of the Home Office that it is possible for the contents of a witness statement to constitute a "statement" for the purposes of section 120(2) of the 2002 Act. Thus, Mr Bandegani submitted, the judge should have raised the issue and at least given the unrepresented Appellant the opportunity of seeking consent from the Respondent in order for what was accepted to be a "new matter" to be considered in the appeal, pursuant to section 85(5) of the 2002 Act. The judge's failure to do so was an error by way of a legal misdirection and, but for that error, the Respondent would have considered whether to provide consent and had consent been given, the judge could then have decided whether the Applicant was entitled to refugee protection.

8. Ms Nolan conceded that the judge's approach at §30 was incorrect in light of the grounds, but highlighted that the judge's findings concerning deportation and Article 3 and 8 had not been challenged in the onward appeal. Although Ms Nolan began to elaborate upon what might occur if the decision in this appeal were to be re-made, we shall not record her submissions here as they are, in effect, for another day: for now, we are only concerned with the error of law issue.
9. Notwithstanding Ms Nolan's acceptance of the judge's error, we agree with the grounds argued by Mr Bandegani that the Appellant's witness statement was capable of representing a "statement" which was sufficient for the purposes of section 120 of the 2002 Act in raising a new matter. Indeed, MU ("Statement of Additional Grounds": Long Residence - Discretion) Bangladesh [2010] UKUT 442 (IAC) confirms that there is no particular form that a statement must take for the purposes of section 120(2) of the 2002 Act; nor is there a specific time limit for the production of such a statement.
10. As an aside, we acknowledge that it is not for us to speculate whether or not the Respondent would have consented or withheld consent for what was self-evidently a new matter to be considered under section 85(5) of the 2002 Act. We are only concerned with whether the judge erred in finding that the new matter was not before her by virtue of the Appellant's witness statement, and as expressed above, we are so satisfied that this discrete, specific error has occurred which was material to that hypothetical aspect of the Appellant's appeal.
11. In summary, we find that the judge should have raised the new matter with the parties and we also note in any event that the Respondent's Presenting Officer should also have assisted the judge by referring to the terms of the published Right of Appeal Guidance where a new matter is evident. In cases concerning litigants in person, the Respondent may sometimes need to go a little further in order to assist the tribunal, pursuant to the overriding objective.
12. We set aside the judge's decision solely on the basis described above. We do not disturb the remainder of the decision and otherwise

preserve those findings made by the judge in respect of the deportation and human rights claims, relating as they did to Articles 3 and 8, as they have not been challenged and are in any event free from error and uninfected by the judge's discrete jurisdictional error in respect of the new matter.

13. We wish to make it clear that the preserved findings relating to Articles 3 and 8 are not concerned with protection issues. In respect of Article 3, the judge was only concerned with Appellant's claim that removal would result in a violation of that protected right because of his health conditions. In respect of Article 8, the judge was only concerned with the Appellant's private and family life in the United Kingdom.
14. Accordingly, future consideration of this appeal will not in our judgment be rendered artificial by the preservation of findings on Articles 3 and 8.
15. Although there may be some concern as to the merit of the Appellant's protection claim in its present form, it is clear that his representatives intend to take instructions and may, if so advised, produce new evidence to the Respondent prior to any decision as to whether consent will be given. It would be premature at this stage to provide any further comment on the substance of that claim.
16. In light of the above, the new matter issue remains pending, subject to whether or not the Respondent will consent to that matter being determined by the First-tier Tribunal under s.85(5) of the 2002 Act.
17. If in due course the Respondent declines to give consent to the new matter being considered in the remitted proceedings, the Appellant's appeal would fall to be formally dismissed without further substantive consideration as there would be no remaining issues for the First-tier Tribunal to determine. However, if, on advice, the Appellant chose to pursue judicial review against a refusal by the Respondent to give consent, the appeal would then likely be stayed pending the outcome of those proceedings.

Disposal

18. Given the error identified above, and as indicated by the parties' wishes should the decision be set aside for material error, the appeal is remitted to be heard by the First-tier Tribunal at IAC Taylor House by a judge other than First-tier Tribunal Judge Lingam.
19. We issue directions to the parties and the First-tier Tribunal, below, in order to progress this case.

Anonymity

20. No anonymity direction was made by the judge and that is not surprising given that there was no protection claim before her as such. However, the situation may now be different and, on a precautionary basis, we do make a direction.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision is set aside to the extent described in this error of law decision.

The appeal is remitted to the First-tier Tribunal to be heard by any judge of the First-tier Tribunal other than Judge Lingam.

Directions to the parties

- (1) No later than 35 days after this error of law decision is sent out, the Appellant shall serve on the Respondent any new evidence relied on in respect of the protection claim (which, for the avoidance of any doubt, does constitute a "new matter"), together with any written submissions as to why consent should be given for that "new matter" to be considered by the First-tier Tribunal in due course;**
- (2) No later than 14 days after receipt of any new evidence and written submissions provided by the Appellant, the Respondent shall confirm in writing to the Appellant and the**

First-tier Tribunal (Taylor House hearing centre) whether or not consent to consider the “new matter” is given;

- (3) The parties have liberty to apply to vary these directions, on 48 hours’ notice to the other side.**

Directions to the First-tier Tribunal

- (1) Once the parties have complied with the directions set out above, the First-tier Tribunal (Taylor House hearing centre) shall list this appeal for a Case Management Review hearing on the first available date.**

P. Saini

**Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber**

Dated: 29 May 2024