



**Upper Tier Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/04803/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 8 May 2019**

**Decision and  
Promulgated  
On 10 May 2019**

**Reasons**

**Before**

**Upper Tribunal Judge McWilliam  
Deputy Upper Tribunal Judge Pickup**

**Between**

**MM  
[Anonymity direction made]**

**and**

**Secretary of State for the Home Department**

Appellant

Respondent

**Representation:**

For the appellant: Mr A Jafar, instructed by UK Imm Lawyers & Advocates  
For the respondent: Mr J Whitwell, Senior Home Office Presenting Officer

**NOTICE UNDER RULE 39**

1. The appellant appeal against the decision of First-tier Tribunal Judge Abebrese promulgated 4.7.18, dismissing his appeal against the decision of the Secretary of State, dated 153.18, to refuse his protection claim raised on the basis of ethnicity as a non-Arab Darfuri and *sur place* anti-regime political activity.
2. First-tier Tribunal Judge Hollingworth granted permission to appeal to the Upper Tribunal on 13.8.18.

3. The appeal was listed as an error of law hearing before Deputy Upper Tribunal Judge O’Ryan on 22.11.18.
4. Although Judge O’Ryan does not appear to have promulgated any decision or issued any directions arising from the hearing on 22.11.18, both parties agree and we have verified from the Record of Proceedings that at that hearing the Secretary of State conceded that the decision of the First-tier Tribunal contained such error of law as to require it to be set aside and remade.
5. Judge O’Ryan noted the errors of law as being that the First-tier Tribunal:
  - (a) Failed to make sufficiently clear findings of fact as to the appellant’s sur place activity and, therefore, the nature of his profile; and
  - (b) Failed to give reasons adequate in law at [45] of the decision for finding, notwithstanding the evidence that the Sudanese authorities monitor political activity in the diaspora, that the appellant was not at risk of harm.
6. We are satisfied and the parties concur that Judge O’Ryan intended that the decision of the First-tier Tribunal be set aside to be remade with no findings preserved. However, it was not practically possible to proceed to immediately remake the decision given the lack of court time and that the respondent’s presenting officer was not in a position to make submissions in the rehearing of the appeal. In the circumstances, Judge O’Ryan adjourned the remaking of the decision with the intention that it should be listed before him at a future date.
7. The Record of Proceedings indicates that Judge O’Ryan intended to issue an order setting the decision aside by consent, pursuant to Rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008. For reasons unclear to us that does not appear to have been done.
8. The appeal then came before us on 8.4.19, sitting as a panel in the Upper Tribunal with the matter listed as a resumed hearing.
9. In preliminary discussions with the two representatives, it became clear that neither understood that the matter was to be a resumed hearing and both were confused by the absence of any error of law decision or Rule 39 Notice. Mr Jafar had forgotten his role in the proceedings before Judge O’Ryan and in any event had advised his client not to bring his key witness to court, expecting an error of law hearing. For his part, Mr Whitwell was also unprepared for a resumed hearing on a de novo basis. We also note that the time estimate provided appears woefully inadequate for the issues requiring resolution. Further, no interpreter had been booked by the tribunal.
10. In the circumstances, it was clear that this matter could not proceed. We drew to the representatives’ attention that the Upper Tribunal is in the course of issuing new Country Guidance in respect of Sudan and the issue

of risk on return for a non-Arab Darfuri. If the appeal remains in the Upper Tribunal, it would not be heard until after the promulgation of the pending Country Guidance, which is not expected until July 2019. In light of that, Mr Jafar requested the matter to be remitted to the First-tier Tribunal. Mr Whitwell did not oppose that.

11. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.
12. In all the circumstances, at the invitation of the appellant's representative and with the agreement of both parties, we direct the appeal to be relisted for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The nature and extent of the judicial fact finding necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, we find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

### *Decision*

By consent pursuant to Rule 39 the decision of the First-tier Tribunal is set aside and remitted to the First-Tier Tribunal to be remade afresh.

**Signed**

**DMW Pickup**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

### **Consequential Directions**

13. The appeal is remitted to the First-tier Tribunal sitting at Taylor House;
14. The appeal is to be decided afresh with no findings of fact preserved;
15. The ELH is 3 hours;
16. An interpreter in Arabic will be required
17. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judges Grimes, Abebrese, or Hollingworth;

### **Direction Regarding Anonymity**

The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. There was no request for anonymity. However, given the circumstances, we make an anonymity direction.

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

**Signed**

**DMW Pickup**

**Deputy Upper Tribunal Judge Pickup**

**Dated**