IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-001110
First-tier Tribunal No:
PA/51602/2021
IA/05258/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01 November 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AVM
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Chirico, instructed by Elder Rahimi Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 26 October 2023

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his asylum and human rights claims.

2. The appellant is a national of Zimbabwe born on 17 April 1974. He arrived in the UK in September 2002 as a visitor and overstayed. He claimed asylum in November 2008 after being arrested for driving offences. His asylum claim was refused and his appeal against the refusal decision was dismissed in January 2010. Following his conviction for rape on 26 March 2015 the appellant was sentenced to six years' imprisonment and on 22 June 2016 he was served with a decision to deport him in accordance with section 32(5) of the UK Borders Act 2007. He made further representations in response but on 20 March 2018 he was served with a signed deportation order and a deportation decision refusing to treat his submissions as fresh protection and human

rights claim under paragraph 353 of the immigration rules. The appellant made further submissions on 24 June 2019 which were refused under paragraph 353 on 13 February 2020, but were subsequently reconsidered by the respondent and treated as a fresh protection and human rights claim in a decision of 24 March 2021.

3. In that decision, the respondent certified that the presumption in section 72(2) of the Nationality, Immigration and Asylum Act 2002 applied to the appellant as a result of his criminal offending and the risk he continued to pose to the community, so that he was excluded from protection under the Refugee Convention. The respondent considered the appellant's claim to be at risk of persecution as a result of his involvement with the Movement for Democratic Change (MDC) in Zimbabwe and in the UK, but concluded that he was not at risk, as consistent with the findings made by the Tribunal in his previous asylum appeal. The respondent rejected the appellant's claim that his deportation would put the UK in breach of its obligations under Article 3 owing to his mental health issues, concluding that there were mental health services available to him in Zimbabwe. The respondent considered that the appellant was excluded from humanitarian protection and that his deportation would not be in breach of Article 8.

4. The appellant appealed against the respondent's decision. His appeal came before First-tier Tribunal Judge Cruthers on 22 November 2022. There was evidence before the judge of the appellant's mental health problems. The judge heard from the appellant's wife and sister in that regard and gave consideration to an expert report from Dr Bell, a consultant psychiatrist. The appellant did not give oral evidence, having been deemed unfit to do so by Dr Bell. The judge upheld the s72 certification, finding that the appellant was a danger to the community. He found that the appellant was not at risk of persecution arising from involvement with the MDC, concluding that there was no reason to depart from the adverse findings made by the Tribunal in January 2010. The judge found further that the appellant's return to Zimbabwe would not give rise to an Article 3 risk on the basis of his mental health status and that neither would his return be in breach of Article 8.

5. The appellant sought permission to appeal to the Upper Tribunal on four grounds: firstly, that the judge had erred in his approach to the evidence relating to Article 3 by failing to make findings on the evidence from the appellant's wife and sister who were his primary carers; secondly, that the judge had erred in his approach to the evidence relating to Article 3 by adopting a flawed basis for deciding to attach less weight to Dr Bell's reports; thirdly that the judge, in upholding the s72 certificate, had erred in his approach to the evidence of the appellant's probation officer and the evidence of the appellant's wife; and fourthly, that the judge had erred in his approach to the appellant's evidence about being interviewed by members of the Zimbabwean CIO.

6. Permission was granted in the First-tier Tribunal, primarily on the first two grounds. The respondent filed a Rule 24 response opposing the appeal.

7. The matter then came before me for a hearing.

8. Having heard Mr Chirico's submissions in relation to grounds one and two, Mr Bates conceded that the judge had materially erred in law in relation to his findings on Article 3. He agreed with Mr Chirico that the judge had made errors at [69] of his decision when relying upon a "crucial point" in relation to Dr Bell's report, which was based upon a mistake of fact, and that he had focussed on that point in according limited weight to Dr Bell's reports rather than assessing Dr Bell's evidence as a whole. Mr Bates conceded that that was relevant to the judge's assessment of the severity of the appellant's mental health condition which in turn was also relevant to ground one

challenging the lack of explicit findings on the evidence of the appellant's wife and sister on the extent of the appellant's illness and the degree of care required. Mr Bates conceded that the judge's conclusions on Article 3 were therefore flawed and that his decision needed to be set aside in that respect and the matter considered afresh.

9. With regard to the third and fourth grounds, Mr Bates relied upon the rule 24 response, but submitted that, given that the main focus of the appellant's case was his medical condition, he was content for the matter to be remitted in its entirety to the First-tier Tribunal to be heard afresh.

10. In light of Mr Bates' concession on grounds one and two, with which I entirely agree, Judge Cruthers' decision in relation to Article 3 cannot stand and must be set aside. The judge made mistakes of fact in his assessment of the medical evidence and failed to make findings on the evidence of the witnesses who had knowledge of the appellant's care needs. In the circumstances there needs to be a re-making of the decision in that regard. As for the third and fourth grounds, it seems to me that, in particular with the third ground, the appellant's mental health condition is a relevant factor and that the errors in the first two grounds may well have infected the assessment in relation to the s72 certification. Whilst the fourth ground is more of a discrete matter, it seems to me that the lack of clarity in the judge's decision as a whole makes it appropriate that the entire case be reconsidered and a decision made afresh on all aspects of the case. The most appropriate course, in the circumstances, as requested by Mr Chirico, with no opposition from Mr Bates, is for the case to be remitted to the First-tier Tribunal for a *de novo* hearing.

Notice of Decision

11. 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 Cruthers.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 October 2023