IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000919

First-tier Tribunal No:
HU/51867/2022
LH/06096/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 July 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SB
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: Mr V Jagadeesham, instructed by TRP Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 28 June 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of the Democratic Republic of Congo. He arrived in the UK on 26 January 2002 and there is an extensive immigration history that I do not need to set out in this decision. For present purposes it is sufficient to note that he has made a series of claims to the respondent, without success. He has been convicted of criminal

offences and was made the subject of a deportation order on 1 February 2010. Most recently, on 7 March 2022 the respondent made a decision to refuse to revoke the deportation order. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Athwal ("Judge Athwal") for reasons set out in a decision dated 25 January 2024.

2. The appellant claims the decision of judge Athwal is vitiated by material errors of law. The three grounds of appeal relied upon by the appellant are summarised in the decision of Upper Tribunal Judge Reeds in her decision dated 9 April 2024, when she granted permission to appeal. She said:

> "2. There are three grounds of challenge. As to ground 1, it is arguable that the FtTJ misdirected himself in reaching the finding that the appellant was fit to give evidence. The grounds and the renewed grounds on this issue provide arguable grounds that the finding made was inconsistent with the decision in *AM (Afghanistan) v SSHD* [2017] EWCA Civ and the practice direction and with the medical evidence identified and was thus procedurally unfair. The adverse inference drawn from any failure was a factor affecting the weight to the testimony (see paragraph 58 and paragraph 59).
>
> 3. As to ground 2, it is arguable that the FtTJ erred in his assessment of the appellant's relationship with the children. While stating that he took the decision of the UT panel as a starting point, it is arguable that he did not do so when addressing the findings and it is also arguable that the FtTJ made an error of fact or proceeded on a mistaken basis when addressing the relevant circumstances stating that they had moved on since 2018. As the renewed grounds that out, this arguably may have had an effect on the consideration of other evidence including the social work evidence.
>
> 4. As to ground 3, this is a challenge to the article 3 assessment. The issue arises from the grounds to whether the findings made on the evidence were ones that were reasonably open to the FtTJ based on a proper analysis of that evidence and whether the judge failed to properly address the matters which have been articulated in the grounds. Ground 3 is arguable."

3. Permission to appeal was granted on all three grounds.

4. At the hearing before me, Mr Bates candidly accepted the decision of Judge Athwal is infected by material errors of law and must be set aside, essentially for the reasons identified in the grounds of appeal. He acknowledges the appellant did not give evidence at the hearing of the appeal on the basis that he is a vulnerable witness and was unfit to give evidence. The Judge accepted the appellant has a history of mental health problems and the judge accepted he is a vulnerable witness. Mr Bates accepts that the judge erred in his assessment and the extent to which the medical evidence, read together, establishes whether the appellant was fit to give evidence and in the analysis he undertook at paragraphs [46] to [50] of the decision. Mr Bates accepts that the error as to whether the appellant was fit to give evidence and the judge's approach to the appellant's vulnerability, undermines the other findings and conclusions reached by the judge regarding the various strands of his claim, and the decision cannot therefore stand. He submits that the discrete finding at

paragraph [40] that the appellant has rebutted the presumption under s72 of the Nationality, Immigration and Asylum Act 2002 that the appellant constitutes a danger to the community can be preserved. That discrete finding was reached for the reasons set out at paragraphs [33] to [39] of the decision and is not infected by the errors conceded.

5. Standing back, having considered the decision of the FtT I am satisfied that the decision of Judge Athwal is vitiated by material errors of law for the reasons set out in the grounds of appeal and conceded by Mr Bates.

6. As to disposal, I am conscious of the Court of Appeal's decision in *AEB v SSHD* [2022] EWCA Civ 1512, *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC) and §7.2 of the Senior President's Practice Statements. Sub-paragraph (a) deals with where the effect of the error has been to deprive a party before the Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the FtT, whereas sub-paragraph (b) directs me to consider whether I am satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7. Although this is a matter that has a lengthy history, having regard to the nature of the errors of law, I accept the appellant was deprived of a fair opportunity to have his appeal considered by the FtT and the appropriate course, in fairness to the appellant, is for the appeal to be remitted for rehearing before the FtT.

8. It is common ground that the discrete finding that the appellant has rebutted the presumption under s72 of the Nationality, Immigration and Asylum Act 2002 that the appellant constitutes a danger to the community, can be preserved.

Notice of Decision

9. The appeal to the Upper Tribunal is allowed.

10. The decision of First-tier Tribunal Judge Athwal dated 25 January 2024 is set aside. The only finding preserved is that the appellant has rebutted the presumption under s72 of the Nationality, Immigration and Asylum Act 2002 that the appellant constitutes a danger to the community

11. The appeal is remitted to the First-tier Tribunal for hearing afresh with no other findings preserved. The parties will be advised of a hearing date in due course.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal

Immigration and Asylum Chamber

28 June 2024