IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000419
First-tier Tribunal No:
HU/50603/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FO (NIGERIA)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Ahmed, Senior Home Office Presenting Officer
For the Respondent: In person

Heard at Field House on 20 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and her son are 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 or her son. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State, I shall refer in this decision to the parties as they were before the First-tier Tribunal. FO will therefore be referred to as the Appellant and the Secretary of State as the Respondent.

2. The Appellant, a citizen of Nigeria, has had a deportation order made against her as a result of her conviction in 2008 for possession of a false identity

document with intent, for which she was sentenced to 12 months' imprisonment. She has sought, over a number of years, to resist her deportation to Nigeria on a variety of grounds. Previously these attempts have been unsuccessful.

3. However, she successfully persuaded First-tier Tribunal Judge Adio ("the Judge") in a decision dated 2 August 2023 that, in summary, her removal to Nigeria would breach her Article 3 ECHR rights in light of her poor health and would breach her Article 8 family and private life rights by reason of her relationship with her now adult son and the difficulties she might face as a result of her health on return. The Secretary of State now appeals against that decision.

4. I consider it appropriate to make an anonymity order in this appeal in respect of both the Appellant and her son. The Appellant suffers from serious health problems, both physical and mental, and her son has a history in the care system and of having suffered serious harm at his mother's hands. I therefore consider that their private life interests outweigh the public interest in publication of their identities or information that could lead to their identities. Moreover, although in light of the conclusion just reached this is not something I need to determine, this may also be a case to which s.1 of the Sexual Offences (Amendment) Act 1992 applies, because of allegations made in the past of potential sexual offences (against the son) and human trafficking (of the Appellant). That section requires anonymity to be granted.

5. Until the morning of the hearing before me, the Tribunal had been under the impression that the Appellant had instructed solicitors (and possibly counsel) to represent her, as they had before the First-tier Tribunal. However, on the morning of the hearing I was informed by my usher that the Appellant and her son had attended Field House in person, that they did not have a representative and that the Appellant, notwithstanding that she has been in the UK since at least 2008, would require a Yoruba interpreter. I was told that the Appellant's solicitors had come off the record a day earlier, but that this had not (and indeed still has not) been updated on CE-File. Fortunately, by putting back the hearing to later in the morning, the Tribunal was able to secure the services of Mr Anthony Labeodan to interpret the proceedings into Yoruba for the Appellant, albeit that he was only able to do so remotely. Mr Labeodan therefore was present via video-link, while the Appellant and her son, Ms Ahmed and I were in a courtroom in Field House. I am very grateful to Mr Labeodan for making himself available at short notice and for providing what was evidently the very highest quality of interpretation. I was wholly satisfied that through Mr Labeodan, the Appellant was able to participate fully and fairly in the proceedings as a result of his interpretation.

6. Notwithstanding the presence of an interpreter, given that the Appellant had lost the services of her representatives only a day before the hearing (which is not intended as a criticism of them) and suffers from quite obvious mental and physical ill-health, at the start of the hearing I enquired through Mr Labeodan whether the Appellant was content to proceed with the appeal or wished to try to secure the services of alternative solicitors and for the hearing to be adjourned to enable her to do so. The Appellant made clear that she did not anticipate being able to find new solicitors and that she wished to proceed with the appeal in person rather than for it to be put off to another day. I therefore proceeded to hear the appeal.

Background

7. As already noted, the Appellant is a citizen of Nigeria. She was born on 1 October 1981 and is accordingly currently 42 years of age. The Appellant has made claims to have entered the UK in 2001, 2007 and 2008. It is unclear (and does not matter for present purposes) which is the true date. She accepted before the Judge that her entry to the UK was illegal. Her presence in the UK has remained unlawful since.

8. On 19 June 2008, the Appellant was arrested for attempting to cash a cheque with a forged Nigerian passport. The next day, she was served papers as an illegal entrant.

9. On 25 July 2008, the Appellant was convicted at Snaresbrook Crown Court for possession of a false identity document with intent and sentenced to 12 months imprisonment. She was given full credit for her guilty plea.

10. On 8 August 2008, the Appellant was served in prison with notice of liability to automatic deportation.

11. On 18 December 2008, a Deportation Order was signed and, on 19 December 2008, the Appellant was detained under immigration powers.

12. On 9 January 2009, the Appellant claimed asylum. In her asylum screening interview, she claimed not to have any children, that three family members had died in 2001 and that she came to the UK in November 2001. In her asylum interview, she claimed that her father and brother were burnt alive inside their home and her mother was then killed.

13. On 8 May 2009, the Appellant's asylum claim was refused and a Deportation Order was made against her on 11 May 2009. The Appellant did not appeal this, but on 11 June 2009, a judicial review claim was brought on the basis that the Deportation Order had not been properly served. It was therefore withdrawn and re-served to allow the Appellant to appeal it.

14. On 31 July 2009, the Appellant was granted bail and absconded. No appeal was brought against the re-served Deportation Order.

15. In 2011, the Appellant claims that her son arrived in the UK, aged 7.

16. On 17 June 2012, the Appellant came to light following a police incident at her home. Her son was immediately placed in foster care.

17. On 20 July 2012, the Appellant submitted a claim to have been a victim of trafficking. This claim was considered and refused by the Competent Authority on 27 July 2012. It was decided that there were no reasonable grounds to believe that the Appellant had been trafficked.

18. On 2 August 2012, the Appellant submitted an asylum claim based on her claimed fear of her husband in Nigeria. She was interviewed in respect of this claim on 30 November 2012.

19. On 20 March 2013, the Appellant's son was placed permanently into the care of the local authority due to the significant harm that he received in the Appellant's care.

20. On 22 May 2013, the Appellant's 2012 asylum claim was refused. This decision was appealed. In October 2013, shortly before her appeal to the First-tier Tribunal was due to be heard, the Appellant applied to the Family Court for contact with her son. This led to an adjournment of her asylum appeal. On 24 February 2014, the Appellant then applied to withdraw her application for contact. After further adjournments, the Appellant's asylum appeal was finally dismissed on 11 December 2014 by First-tier Tribunal Judge Kamara (as she then was). Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal and Upper Tribunal on 20 January 2015 and 7 May 2015 respectively. As Judge Kamara's decision forms the Devaseelan starting point for the Judge's decision, it will be necessary to say more about this decision below.

21. On 15 September 2015, the Appellant submitted further representations regarding family life in the UK and her medical issues. These were refused as not amounting to a fresh claim by decision dated 20 May 2016.

22. On 24 June 2016, the Appellant was re-detained under immigration powers.

23. On 5 July 2016, the Appellant sought judicial review of the May 2016 refusal. Permission to apply for judicial review was refused both on the papers and at an oral hearing by the Upper Tribunal and permission to appeal was also refused by the Court of Appeal.

24. In February 2017, the Appellant signed a letter stating that she wanted the Home Office to revoke her Deportation Order so that she could return to Nigeria to make a fresh application to re-enter the UK lawfully. Further to this, on 21 March 2017, the Appellant was interviewed by the Nigerian High Commission, who confirmed that she was a Nigerian national. The next day an Emergency Travel Document was agreed in principle by the High Commission.

25. On 4 May 2017, the Appellant then submitted further representations claiming it would breach her rights under the ECHR and the Refugee Convention to be removed to Nigeria.

26. On 25 August 2017, the Appellant's May 2017 submissions were refused as not amounting to a fresh claim.

27. On 13 March 2018, the Appellant made an application for Further *[sic]* Leave to Remain on private and family life grounds.

28. On 1 April 2019, the Appellant's son applied for Indefinite Leave to Remain in the UK. This was granted on 30 July 2019.

29. On 28 August 2019, the Appellant was granted contact rights to see her son by the Family Court.

30. On 17 December 2019 and on 5 March 2020, the Appellant's then solicitors submitted further information in relation to her 2018 FLR application.

31. On 14 January 2021, the Appellant submitted a further FLR application on the basis of family and private life grounds.

32. By decision dated 21 December 2022, the Appellant's December 2019 representations (and, presumably, the January 2021 application and March 2020 further information) were treated as a fresh claim but refused. That is the decision that gives rise to these appeal proceedings.

Devaseelan starting point

33. Given the way the Respondent puts her case on this appeal, it is necessary to consider First-tier Tribunal Judge Kamara's 11 December 2014 decision in a little detail as that formed the Devaseelan starting point before the Judge.

34. Judge Kamara did not consider the Appellant to be a witness of truth. She had put forward different accounts of her circumstances in Nigeria during the criminal proceedings against her, as part of each of her two asylum claims and during the hearing of the appeal. None of the inconsistencies were resolved during the hearing. Not only was her account internally inconsistent, but it was also inconsistent with the accounts of various events given by her son. Her asylum claims and her claim to have been trafficked coincided with junctures when the Appellant came into contact with the UK authorities. Judge Kamara considered that the Appellant had been "thoroughly dishonest regarding her circumstances in both Nigeria and the United Kingdom as well of [sic] those of her child". She therefore rejected every aspect of her claim to fear her husband, that she was trafficked, forced into prostitution or servitude or that her family was ever embroiled in a land dispute. She further rejected the Appellant's account of her son's life in Nigeria prior to him coming to the UK. Judge Kamara accordingly rejected the Appellant's claim to fear persecution or ill-treatment in Nigeria.

35. Judge Kamara also rejected the Appellant's claim that her removal would breach Article 3 ECHR. She noted that there were no medical reports before her and, while she experienced bouts of tearfulness during her testimony, the manner in which she gave evidence did not cause her to have concerns that she was suffering from mental disorder.

36. As to the Appellant's Article 8 claim. The Appellant could not meet the relevant Immigration Rules on family and private life where a deportation order has been made. Outside of the Rules, Judge Kamara accepted that there was family life between the Appellant and her son, but did not accept that it was of such quality that there would be any real level of interference if the Appellant were removed.

37. In considering proportionality, Judge Kamara considered in detail the decision of HHJ Wright in November 2014 in relation to the Final Care Order made in respect of him, noting that Judge Wright had found (among other things) that:

    a. the Appellant's son had suffered emotional harm from the Appellant owing to her inability to be open and honest about her circumstances as well as her son's, including maintaining for some time a pretence about his age;
    b. the Appellant had cut herself and her son with broken glass and had made him lie about it, shortly after which the son (then aged around 10) expressed suicidal thoughts and had tried to wrap curtains and a cord around his neck;

c. the Appellant's son's school had reported sexualised play with dolls and drawing sexually explicit pictures and the school had already referred him to social services in March 2012, before the police incident, partially due to the Appellant's son's fear of the Appellant;
d. the Appellant's son had witnessed his mother and another man being violent to one another;
e. the Appellant's son had been exposed to adult sexual behaviour while in the Appellant's care and she had failed to protect him from this;
f. the attachment between the Appellant and her son was not secure and they were bonded by trauma;
g. the Appellant's son at that time wished to return to Nigeria to make contact with his father and other relatives;
h. at contact visits in the summer of 2012, the Appellant's son was left distressed as the Appellant showed no real insight and did not recognise the harm to which she had exposed him; and,
i. the Appellant's son's guardian was concerned that while he was in foster care, to date the Appellant had only written two letters to her son, as well as that her application for contact was borne out of her need to evidence to immigration authorities that she was having direct contact with her son to secure a stay in the UK.

38. Judge Kamara therefore found that it was in the Appellant's son's best interests to remain in the care of the local authority, to live with his foster carers on a long-term basis and that the Appellant's removal would not adversely affect his best interests. She further found that there was no realistic prospect of the Family Court making an order which would have a material impact on the relationship between the Appellant and her son.

39. As to the Appellant's private life, Judge Kamara noted that the Appellant had been residing unlawfully in the UK for around 10 years and during that period she had worked, using false documents to do so.

40. Nonetheless, the Appellant's removal, Judge Kamara considered, would amount to a degree of interference with her private and family life, such as it was. However, the public interest in deportation outweighed this and her removal was proportionate.

41. As already noted, the Appellant's applications for permission to appeal Judge Kamara's decision were refused.

The First-tier Tribunal Decision under Appeal

42. The decision under challenge before me comprises a detailed consideration of the Appellant's claims. After having introduced the decision, made an anonymity order, set out a summary of the Appellant's immigration history, noted the documentary evidence, summarised the issues in dispute, the evidence and submissions, and reminded himself of the standard and burden of proof and the legal test that applies in Article 3 healthcare cases, the Judge turned to his findings of facts and conclusions at para.21 as follows.

43. At para.21, the Judge noted that the starting point was that it was in the public interest to deport a foreign offender.

44. At paras.22-24, the Judge reminded himself of Devaseelan [2002] UKIAT 00702* and that the decision of Judge Kamara was therefore his starting point and the authoritative assessment of the Appellant's status at the time it was made.

45. At paras. 25-26, the Judge noted that the findings in the previous determination were relevant to the issues before him and that Judge Kamara had found the Appellant not to be a witness of truth. He noted that Judge Kamara records not having had medical reports before her in respect of the mental health claim.

46. At paras.27-28, the Judge considered that there had been a significant change in the relationship between the Appellant and her son. He found as a fact that the Appellant and her son see each other when he is not in college at some weekends and also during the holiday. As to this, the Judge considered that the evidence of the Appellant was "more credible than that of her son". This was because her son initially gave the impression that he spent eleven days with the Appellant, but he then accepted that for a five-week period he spent a couple of days with her in June, but did not sleep over, and did not visit her in July. The Appellant's evidence was "more credible" as she stated that she sees her son at the weekend if he is not in college and holidays if he does not go to school. There were pictures in the bundle showing a bond and loving relationship between them. The picture before the Judge was "definitely different from that which was before Judge Kamara". Putting aside the different account of the number of visits, the Judge accepted the Appellant's son's evidence that he needs his mother for his mental health, that she used to cook for him though she cannot do that now, that she is the only family he has in the UK, that he has not returned to Nigeria since he came to the UK, and that it is helpful for him to talk to her, that FaceTime is different from physical contact and that he can relate his problems to her on a daily basis.

47. At para.29, the Judge noted that the Appellant's unchallenged evidence was that she speaks to her son regularly. (I interpose to note that I assume by 'unchallenged' that the Judge meant that this was not addressed directly in cross-examination, as it is clear that the credibility of the Appellant as a witness was in issue generally). The Judge accepted that, contrary to the Appellant's earlier evidence, her son lived with his grandmother when he was in Nigeria. He noted that the Appellant now accepted this and so Judge Kamara was correct to find the Appellant had been dishonest about the circumstances in Nigeria. The Judge was however prepared to accept that the whereabouts of the Appellant's mother was unknown. Based on the evidence of the Appellant's son not witnessing any phone calls between her mother and other relatives overseas when he is with her, the Judge accepted that the only family member that the Appellant has in the UK is her son and vice versa. He found that the Appellant had a mutual dependent relationship and was therefore prepared to accept that there is continuation of family life as initially found by Judge Kamara.

48. At paras. 30-31 the Judge turned to the medical evidence and noted that there was evidence before him that was not before Judge Kamara. He had seen medical evidence that the Appellant had been on medication since 2013. She described taking six medications: three for mental health and three for physical health, which was as stated in the medical evidence. The Appellant mentioned the carers that look after her; she clearly had very limited mobility. She could no longer cook her meals due to her inability to mobilise properly, though she could toilet independently using a commode. She struggled to empty the bin of human waste. The Appellant struggled to put her trousers on, but if given time can wear her own cloths. She needs support to clean her home. She gave evidence that her

carers come seven days a week, twice a day for 30 minutes. The Judge considered that the Appellant's evidence was credible with regards to her care. There was a rota of carers and a number of reports of incidents concerning her mental health problems and its fluctuation throughout the bundle. At para.32, the Judge accepted as credible the Appellant's evidence that she is forgetful.

49. At para.33-34, the Judge considered the medical evidence relating to the Appellant's mental health in November 2022 and into 2023, which was fluctuating. A clinical note from November 2022, showed the Appellant's mental state appearing to have stabilised on her current medication, but that she stated she needed to be with her support network, namely her son and a friend in London. By contrast, in March-April 2023, the Appellant had been recorded as banging her head against the wall and hearing voices to harm herself, and as having suicidal thoughts. However, by May 2023, the Appellant's safety plan was working well and she was not self-harming and not engaging in any plan to end her life.

50. At para. 35, the Judge drew together his findings in relation to the Article 3 medical claim. He found that she had mental health problems for which she is taking pregabalin, quetiapine and mirtazapine. For the non-mental health issues she was taking co-codamol, lactulose and prochlorperazine. As this was consistent with the Appellant's evidence, the Judge found that the Appellant was not feigning her mental health and he found that she was being cared for due to her limited mobility and care needs. The Judge accepted that she had a friend assisting her and that the medical evidence showed that there is mental health care and treatment in Nigeria available. However, the Judge found that in the Appellant's state she was not able to work and would not have access to mental health treatment in Nigeria in that she would not be able to finance her treatment. Further, she does not have a support network in Nigeria to assist with her mental health and medical needs.

51. At para.36, the Judge considered it unlikely that the Appellant's son would accompany her to Nigeria given his ties to the UK and the Judge accepted that the Appellant has a recorded history of self-harm and has been experiencing fluctuating suicidal thoughts which there was a likelihood of reoccurring in Nigeria without the protective factor of her son being there and her medical and mental health needs being met.

52. At para.37, the Judge noted that the medical records supported the Appellant's claim that she arrived in the UK illegally in 2008. He considered that the Appellant's deteriorating physical and mental health and medical evidence previously not available to the Tribunal in 2014 showed that there would be significant obstacles in the Appellant's reintegration in Nigeria. While the Judge accepted that there was provision for mental health in Nigeria available to the Appellant, the fact remained that due to her situation she would be unable to access such treatment. Her physical and mental health would be severely compromised with her already having suicidal thoughts. A combination of the Appellant's conditions amounted, the Judge considered, to her being seriously ill and he considered that there was a real risk that there would a decline in her mental health. This would serious, rapid and irreversible, bearing in mind the lack of network available in Nigeria.

53. At para.39, the Judge considered that even if the Appellant could contact family, there was no evidence they could assist her financially or meet her needs or

assist her to access treatment. She would clearly need to pay for her medication and without a job or the potential to be employed with her current condition in Nigeria, her mental and physical health would only worsen. Further, if she did not take her medication she would end up having suicidal thoughts. The Judge accordingly found that the cumulative effect of all these issues was that removal would amount to a real risk of a breach of Article 3 ECHR.

54. At paras. 40 onwards, the Judge turned to Article 8. At paras.41-42, he set out certain legal provisions. At para.43, the Judge noted that the Appellant's deportation is in the public interest. At para.44, the Judge considered that the Appellant could not meet Exception 1 in s.117C of the Nationality, Immigration and Asylum Act 2002 because she had not been lawfully resident in the UK for most of her life. The Judge found that she came to the UK in 2008. Notwithstanding the Appellant's offending, the Judge considered at paras.45-46 that she is socially and culturally integrated in the UK. At paras.47-48, the Judge considered that the Appellant's health meant that she would find it difficult to operate on a day-to-day basis in society and build up within a reasonable time a variety of human relationships to give substance to her private and family life. There would therefore be very significant obstacles to her integration in Nigeria.

55. At para. 49, the Judge noted that the Appellant did not meet the requirements in Exception 2.

56. At paras.50-53, the Judge considered the Appellant's claim under Article 8 outside of the Rules. At para. 50, the Judge stated that "the principle legal issue concerns the relevance and weight to be given to rehabilitation and the proper approach to assessing the seriousness of the offending." At para.51, the Judge considered that, "Since this is a revocation of deportation case the case of **EYF (Turkey)** is relevant". Applying that, "a passage of ten years raises a presumption that the balance has shifted though it does not mean that revocation [by which I assume the Judge meant deportation] automatically falls away." Bearing in mind that shift in balance, the Judge considered that the Appellant had not reoffended since 2008, had taken part in community work which showed rehabilitation and now had a family life with her son. The Judge accepted that separation of both Appellant and her son would be traumatic and would worsen the Appellant's suicidal thoughts and mental health.

57. At para.52, the Judge accepted the Appellant's evidence of the rapport she now has with her son. He considered that there was no indication that she would reoffend "in view of how [the Appellant] has carried on her life". The presumption, the Judge considered, was now in her favour.

58. At para.53, the Judge concluded that the Appellant had demonstrated that there were very compelling circumstances rendering deportation disproportionate.

59. The Judge accordingly allowed the Appellant's appeal on Article 3 and 8 grounds.

Grounds of Appeal

60. The grounds of appeal are not well structured. It seems to me that they can be more sensibly grouped as follows:

a. Ground 1: The previous findings/Devaseelan;

b. Ground 2: The Judge wrongly took account of the Appellant's demeanour in giving evidence in concluding that her evidence was credible;
c. Ground 3: The Judge failed to give adequate reasons why the Appellant's son's evidence could be accepted as credible;
d. Ground 4: The Judge erred in his application to the threshold required in an Article 3 health case;
e. Ground 5: The Judge has misapplied EYF (Turkey) v Secretary of State for the Home Department [2019] EWCA Civ 592.

61. In the grounds it was also suggested that the very compelling circumstances test in s.117C(6) of the 2002 Act was not applicable to 'medium offenders' such as the Appellant. Ms Ahmed rightly withdrew that ground in light of the well-established authorities to the contrary.

62. Permission to appeal was granted on all grounds by First-tier Tribunal Judge Chinweze on 1 February 2024. He considered it arguable that the Judge, in finding that there was an Article 8 family life between the Appellant and her adult son, failed to give adequate reasons for preferring the evidence of the Appellant over her son in light of the contradictory nature of their evidence at the hearing and a previous finding that the Appellant was not a witness of truth. He further considered it arguable that the Judge gave insufficient reasons for finding that the Appellant met the high threshold for an Article 3 health claim in light of the available medical care in Nigeria and the absence of an expert medical report.

Grounds 1-3: Fact finding

63. It is convenient to deal with the Respondent's first three grounds (as I have structured them above) together, given that they relate to the Judge's approach to fact-finding and in particular the Appellant's and her son's credibility.

64. This Tribunal's role is not to redetermine the appeal below or to substitute my view for that of the Judge. My role is limited to discerning whether there is an error of law in the decision of the First-tier Tribunal, an expert Tribunal, whose findings are not to be lightly disturbed and whose reasons are not required to be exhaustive. The Appellant in her submissions sought to emphasise the importance of her son to her, her lack of money to access medical care in Nigeria and sought to suggest that there had been no inconsistencies in her evidence over the years and that the findings to the contrary must be due to poor interpretation or the way she understood what had been put to her. This was in reality the giving of evidence rather than directed to the questions of law that arise on this appeal. In light of this I have considered with care the Respondent's submissions and kept at the forefront of my mind whether in truth they consist of errors of law.

65. The Respondent's submissions were, in part, a mere disagreement with the Judge's findings dressed up as an attack on the Judge's reasons or other errors of law. The Respondent also at times appeared to fall into the trap of assuming that, because the Appellant's evidence was previously disbelieved, it necessarily followed that it fell to be rejected in every aspect, which is an approach mistaken in law. I also reject the Respondent's submission that the Judge did not properly apply the test in Devaseelan. He referred to the test and there is nothing in the decision that requires me to depart from the assumption that the Judge did not know or apply the correct legal test in this regard.

66. I also reject the Respondent's submission that the Judge was wrong to take into account the Appellant's demeanour in giving evidence in assessing her relationship with her son. In SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391, Leggatt LJ (as he then was) warned against the dangers, particularly in cases involving foreign nationals, of relying too heavily on demeanour. However he recognised that "No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence." While "to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices", this does not mean that taking into account demeanour is, in and of itself, an error of law.

67. There are however certain aspects of the Judge's reasoning in relation to the facts that merit closer consideration.

68. First, there is para.28, in which, as noted above, the Judge found the Appellant's evidence to be "more credible" than that of her son's and, on that basis, accepted the Appellant's evidence in relation to the frequency of contact with her son. As the Judge noted, the son's evidence had changed before the Tribunal and was therefore not accepted. It does not however follow from the fact that the son's evidence was rejected on this issue that the Appellant's evidence was credible. Evidence that is more credible than not credible is not necessarily credible. The Judge's chain of reasoning for accepting the Appellant's account of this is therefore logically flawed and he has not given any other reason beyond it being more credible than the Appellant's son's incredible evidence why he considered it could be accepted. In relation to the contact arrangements and family life between the Appellant and her son, the Judge has also not taken into account that the Appellant lives in Norwich, whereas her son lives independently in St Leonards-on-Sea.

69. Second, also in para.28, I also consider that the Judge's reasoning as to why he accepted aspects of the Appellant's son's evidence difficult to follow and legally deficient. The starting point in relation to the son's evidence was that there is a real disconnect between the previous findings made and significant aspects of his witness statement. For example, the previous findings record that the Appellant came to the UK leaving her son in Nigeria and then, when he came to the UK, subjected him to significant emotional and physical harm, such that he needed to be taken into the care of the local authority. By contrast, in his statement (para.6) he stated that "Since my birth…my mother has exemplified the qualities of a dedicated and caring mother. Her unwavering love and commitment to my well-being and development has shaped the person I am today. She has provided me with a loving and nurturing environment, ensuring that my physical, emotional and educational needs are met to the best of her abilities." It may be that this evidence is explicable on a basis other than that it is embellishment designed to give an impression of the Appellant's mother that is more positive than the reality, but if so this required explaining. This is particularly so where the Judge found the Appellant's son's evidence not to be credible in relation to the contact he has with his mother, which also appeared to be an attempt to paint their relationship in a more developed light than was the reality. In those circumstances, it seems to me that, although the Judge might quite properly have been able to accept the son's evidence on other matters, he was required to explain why taking account of the previous findings. For example, given that there was no evidence in the son's witness statement or by way of e.g. medical

letters, that the son suffers from mental ill health, I am unclear on what basis the Judge accepted his evidence that he needs his mother for his mental health, particularly in circumstances in which, as already noted, the Appellant's son lives independently and a long distance away from his mother.

70. Third, it is also unclear on what basis the Judge was willing to accept in para.29 that the whereabouts of the Appellant's mother – with whom the Appellant's son lived before he came to the UK – is unknown, the Appellant having accepted that her previous account that her mother was dead was a fabrication. While the Appellant states in her witness statement (para.8) that she had "not maintained contact with the few family members I have in Nigeria", it does not obviously follow from this that she would be unable to re-establish contact with them. The Appellant's son's witness statement did not say that he was not in contact with his grandmother or the other family members ("maternal grandparents, cousins and aunts") he previously lived with. Rather, it said (para. 10) that "I have no family members [in Nigeria] that I am aware of that will be able to support me" [emphasis added], having previously stated that as his proficiency in Yoruba has diminished over time, "it would be increasingly challenging for me to communicate effectively and connect with relatives or individuals in Nigeria", which is at least indicative of the possibility of being able to make contact with relatives in Nigeria. It may be that there were proper reasons for the Judge being able to accept that the Appellant's mother's whereabouts is unknown, but in my judgment in light of what the Appellant and her son say in their witness statements, the previous rejection of the Appellant's evidence, the apparent exaggeration of aspects of the Appellant's son's evidence and Judge Kamara's finding that in 2014 the Appellant's son had wanted to return to live with family members in Nigeria (which the Judge does not mention in this context), this needed to be explained.

71. I remind myself that the duty to give reasons does not require that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained: English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605 at [19]. However, in light of the findings of Judge Kamara, the issues of credibility in this case, and in particular those considered above, were in my judgment vital to the Judge's conclusions in relation to both Article 3 and Article 8. The support network available in Nigeria was relevant to Article 3 and the other issues go to the quality of the relationship between the Appellant and her son, which is central to the Article 8 analysis. The Judge was accordingly required to explain the manner in which he resolved these issues. His failure to do so amounts to an error of law.

Ground 4: Article 3 healthcare

72. The test to be applied in an Article 3 healthcare case is a very stringent one. In AM (Article 3, health cases) Zimbabwe [2022] UKUT 131 (IAC); [2022] Imm AR 1021, this Tribunal (Foster J and Plimmer and Smith UTJJ) held that in an Article 3 case it was necessary for an appellant to show that, as well as being a seriously ill person, there were substantial grounds for believing that he or she would face a real risk on account of the absence of appropriate treatment in the receiving country of the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.

73. There is no dispute that this is the test that the Judge sought to apply. The Secretary of State's principal criticism is that the Judge failed to properly explain why he considered that the Appellant would not be able to access the treatment that he found was available in Nigeria. I accept that submission. This is for two reasons. First, the error identified in relation to the Judge's failure adequately to reason his finding about the Appellant's mother's whereabouts in para.68 above, feeds into what support the Appellant would have if returned to Nigeria, including in relation to her ability to access medical treatment. Perhaps of more importance however is, second, that, as the Judge records at para.26, the Appellant's son lived with a number of family members in Nigeria prior to coming to the UK and there is in my judgment no proper explanation given as to why they could not also assist. The Appellant has suggested that she does not know there whereabouts, but that needed to be scrutinised if it was to be accepted.

74. Although this does not form part of the Grounds, I make two further observations on the Article 3 aspect of this case:

a. First, the Judge has not considered, and has therefore made no findings on, whether the Appellant's son or her friends and/or other contacts through her community work in the UK could assist her to access healthcare in Nigeria. There are references to the Appellant's son studying, but there is nothing in the Judge's decision to indicate that he cannot work to help his mother to obtain the requisite medication in Nigeria as necessary. The same is true of the rest of the Appellant's social network in the UK.

b. Second, the Judge's finding on Article 3 is that there would be a serious, rapid and irreversible decline in the Appellant's mental health. There is no finding that there would be a significant reduction in life expectancy and no finding that the Appellant is at a real risk of a completed act of suicide (as is required: see R (Carlos) v Secretary of State for the Home Department [2021] EWHC 986 (Admin) at [159]). In the absence of such a finding, it is unclear to me what the "irreversible" decline in the Appellant's mental health is thought to be, given the fluctuating nature of her condition, as recorded. This is, in my judgment a further failure in the Judge's duty to give reasons.

Ground 5: EYF Turkey

75. EYF (Turkey) v Secretary of State for the Home Department [2019] EWCA Civ 592 is a decision about the non-revocation of deportation orders after a long period of time has passed. As noted above, the Judge considered that the case established that after 10 years there was a shift in the balance and that there was a presumption in favour of revocation (see para.52).

76. At that time EYF was decided, paragraph 391 of the Immigration Rules provided that in the case of someone who had been sentenced to a period of less than 4 years' imprisonment, the continuation of a deportation order would be the proper course unless 10 years had elapsed since the making of the order, after which consideration would be given on a case-by-case basis to whether deportation should be maintained.

77. It had previously been decided in the Upper Tribunal that this created a presumption that after 10 years had elapsed a deportation order should be revoked unless there were strong public policy reasons for it to be continued. The Court of Appeal in EYF disagreed with this. At para.26, the Court agreed with

obiter comments made by David Richards LJ in another case that the effect of 10 years was simply that the presumption against revocation fell away. The Senior President held that "Within the ten year period, it will be very difficult for other factors to counterbalance the presumptive effect of the Secretary of State's policy… Once the ten year period has elapsed it becomes easier to argue that the balance has shifted in favour of revocation on the facts of a particular case because the presumption has fallen away; but that does not mean that revocation thereafter is automatic or presumed" (para.28).

78. It seems to me that there the Judge has erred in three respects in relation to EYF.

79. First, it is clear that the Judge considered that, given that more than 10 years had elapsed since the deportation order was made, the Appellant benefited from a presumption that it would be set aside when considering the public interest under Article 8. That is flatly contrary to what the Court of Appeal held the proper approach was in EYF. There is no presumption and the Judge erred in applying one.

80. Second, as Ms Ahmed emphasised, even if there were a presumption it is obviously relevant to consider why the Appellant has not been deported in that time. As set out above, the Appellant has been nothing if not persistent in the bringing of claims to seek to remain the UK and that needed to be considered, which it was not. This is not a case in which the Respondent has simply sat back and done nothing and the Judge has not factored the reasons for the delay into his analysis.

81. Third, since 12 April 2023, the Secretary of State's statement of practice, set out in para. 391 of the Immigration Rules has itself been revoked. Since then, the Rules on the revocation of a deportation order have provided that:

> "13.4.4. Where an application for revocation is made, a deportation order will be revoked where:
>
> (a) In the case of a foreign national who has been convicted of an offence and sentenced to a period of imprisonment of less than 4 years, the Article 8 private or family life exception set out in paragraph 13.2.3 or 13.2.4, or both, is met or where there are very compelling circumstances which would make a decision not to revoke the deportation order a breach of Article 8 of the Human Rights Convention; or
>
> (b) In the case of a foreign national who has been convicted of an offence and sentenced to a period of imprisonment of 4 years or more, there are very compelling circumstances which would make a decision not to revoke the deportation order a breach of Article 8 of the Human Rights Convention; or
>
> (c) A decision not to revoke the deportation order would be contrary to the Human Rights Convention or the Refugee Convention."

82. Paragraphs 13.2.3 and 13.2.4 reflect Exceptions 1 and 2 contained in s.117C of the 2002 Act.

83. It accordingly seems to me that EYF is no longer good law. The Respondent's policy is now dependent on the question whether there is a breach of, inter alia, Article 8. It would therefore be wholly circular to consider this policy in

determining whether there was a breach of Article 8. It follows that the Judge should not have applied it, as, by the date of the hearing when the Article 8 assessment must be carried out, paragraph 391 had already been revoked.

84. In my judgment the Judge accordingly erred in law both in applying EYF at all and in his application of it.

85. That is not to say that delay may not be relevant to the question of the public interest in deporting someone, which is a well-established factor that may be relevant in certain circumstances: see Laci v Secretary of State for the Home Department [2021] EWCA Civ 769; [2021] 4 WLR 86 at [75]. But reliance on presumptions either way now seems to me to be, in light of the Respondent's change to the Immigration Rules, something that can be consigned to history.

Conclusions and relief

86. For the reasons set out above, I consider that the Judge's decision involved the making of errors of law. Those errors seem cumulatively to affect the whole of the Judge's decision and it I therefore appropriate to set it aside in full and not to preserve any of the Judge's findings of fact.

87. Given that the appeal will require *de novo* redetermination (subject to Devaseelan) and the scope of the fact finding that will accordingly be required, it is in my view appropriate for the appeal to be remitted to the First-tier Tribunal for redetermination by a different judge.

Notice of Decision

The Decision of First-tier Tribunal Judge Adio dated 2 August 2023 involved the making of an error on a point of law and is therefore set aside. The appeal is remitted to the First-tier Tribunal for redetermination.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
9 April 2024