Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02503/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
on 8 April 2013	**On 11 April 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

IKECHUKWU ABBA ONYEANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr R Gibb of Quinn Martin & Langan, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant is a citizen of Nigeria, born on 27 July 1962. First-tier Tribunal Blair dismissed his appeal by determination promulgated on 8 January 2014. He appeals to the Upper Tribunal on the following grounds:

...

2 The appeal had been remitted to be reheard on all grounds other than asylum (it having been accepted that the previous First-tier Tribunal's previous findings on internal flight did not disclose any error of law). The appellant argued that his removal to Nigeria would breach ECHR Article 3 because of the risk that he would take his own life if returned to Nigeria. Following the Court of Appeal decision in *Y&Z Sri Lanka [2009] EWCA(Civ) 362* it was argued that the appeal could succeed under this ground if the appellant could demonstrate that he had a subjective fear of persecution

in Nigeria, even though, objectively speaking, any such risk could be avoided by internal relocation. However, it was also accepted that in order for the appeal to succeed on this basis the appellant would need to demonstrate that his account of previous ill-treatment in Nigeria was true.

3 The judge erred in law in reaching his negative findings as to credibility … for the reasons set out below.

4 At paragraph 42 of the determination the judge states:

> "The position of the appellant was that Kalu Opki wanted the land belonging to his father. His father was murdered and *there was no explanation* why given that the obstacle to achieving that was removed, this man took no steps to seize the land [pleader's emphasis]".

5 This is not correct. The appellant suggested some possible explanations for Kalu Opki's delay in seizing the land in response to Questions 98-99 of his asylum interview (Respondent's bundle at Y14) and in paragraph 13 of his first witness statement (Appellant's first bundle at 1/4).

6 The judge appears to have failed to take these proposed explanations into account. If he had taken them into account he cannot possibly have come to the conclusion that "there was no explanation" of this matter. Therefore his failure to take this evidence into account is an error in law.

7 At paragraph 48 of the determination the judge stated:

> "In that regard one important piece of evidence *not addressed by the appellant* was the letter from Legal Konsults of 18 July 2000 which made it clear that the appellant had not sought to mislead the respondent by claiming asylum on grounds that could be frivolous [pleader's emphasis]".

8 This is also not correct. The appellant has sought to explain this at paragraph 20 of his first witness statement (appellant's first bundle at 1/6). The appellant's explanation is that his then representatives (Legal Konsults) did not check this letter with him before sending it to the Home Office. By clear implication, if they had checked it with him he would have not consented to the use of the phraseology in question ("frivolous grounds"). It is clear that the judge has not been aware of (and therefore not taken into account) the appellant's explanation of this matter. As such he has failed to take relevant factors into account and has therefore erred in law.

9 At paragraph 53 of his determination the judge has stated that there was a further discrepancy regarding the appellant's last address in Nigeria. The judge goes on to assert that this discrepancy "… was not addressed before me." This is a further error … The alleged discrepancy was addressed directly by the appellant in paragraph 41 of his first witness statement (appellant's first bundle at 1/12). His explanation seems reasonable. By failing to take it into account the judge has erred in law.

10 … there are several aspects of the appellant's evidence that the judge has simply failed to take into account. Given that most of these aspects of evidence appear in the appellant's principal witness statement, question marks must be raised as to whether or not the judge has taken this witness statement into account at all. As such there must be grave doubts as to whether the determination is safe or sustainable. In any event, it cannot be said with certainty that the judge would have reached the same conclusion on credibility … if he had taken the evidence in question into account. Therefore … the said errors amount to material errors in law.

11 … in light of the errors identified the determination should be set aside and the appeal remitted to be heard again by a differently constituted First-tier Tribunal.

2) Mr Gibb said that the grounds were largely self-explanatory. In three instances, the judge said there was a lack of an explanation or a lack of evidence, where explanations and evidence were provided. While these errors went to only three of a number of reasons given by the judge, together they reflected failure to take account of an important item of evidence, the appellant's statement of 10 April 2013. None of the findings in the determination referred to the statement. Mr Gibb accepted that the determination refers at paragraph 16 to the appellant's 4 inventories of productions, and at paragraph 18 records that the appellant "adopted his first, second and second supplementary witness statements." However, the determination mentions them no further.

3) Mr Mullen said that a judge is not required to deal with every detailed aspect of the evidence before him. It was significant that the cross-examination of the appellant, which derived from his statements, was thoroughly rehearsed and dealt with in the determination. None of the three points said to have been overlooked were of much substance. At paragraph 13 of his statement, the appellant said that he could not explain why Kalu Okpi had not taken possession of the land in dispute immediately after his father's death, and that the explanation he had suggested at interview was only tentative. This was an absence of explanation, not a matter requiring analysis. Paragraph 48 of the determination was to be read in context, in particular with paragraph 47. The judge did not accept the appellant's account of how he came to leave Nigeria, when he came to the UK, or why he would not have claimed asylum at a much earlier date. The explanation in the appellant's statement at paragraph 20 was that he could not remember seeing the letter from his previous solicitors, and could not explain why they would have said that he had not deliberately misled immigration officials by trying to seek asylum on frivolous grounds. That did not bear on the point made by the judge. The appellant did not purport to have made any asylum claim, frivolous or substantial, on or before 18 July 2000. The third point, relating to paragraph 53 of the determination, was whether the appellant addressed an apparent discrepancy over giving his last address in Abuja whereas in his asylum claim he had said he lived in his home village before going to Lagos. His explanation at paragraph 41 of his statement is that he said that he was in Abia [his village] not in Abuja; and that he never said he lived in Abuja, but the person filling out the form might have got mixed up. Even if the person completing the form might have made an error, this point was clearly a very minor one in the scheme of the whole determination. It contained a whole series of reasons for finding the appellant an unreliable witness, set out mainly from paragraph 36 at page 5 to paragraph 64 at page 9. The three minor points raised did not amount to a reason to set the determination aside.

4) Mr Gibb in response accepted regarding the first point that the appellant's position was that this was a matter not within his knowledge rather one he could explain. Nevertheless, he said the judge overlooked such explanation as there was. As to the second point, he said that the terms of the letter from the solicitors were more likely to have been formulated by them than

by the appellant, which fitted his explanation. As to the discrepancy between Abia and Abuja, the appellant's account of a misrecording had been overlooked. While there were other reasons to be found in the determination, there were also factors which might properly have been found to bear on the appellant's favour, including mental health evidence, the physical evidence of scarring, his reactions when interviewed by the respondent and by medical professionals, the internal consistency of his account, and its consistency with background evidence in the respondent's Country of Origin Information Report. His evidence had been capable of being found credible.

5) Mr Gibb submitted that the legal tests were to be found in *Judes* [2001] EWCA Civ 825 per Schiemann LJ at paragraph 3:

> [in *Manzeke* 1997 Imm AR 524 at page 531] … Lord Woolf MR set out … the appropriate test …: even if the Tribunal had not made the error as to the credibility of the appellant, would it inevitably have reached the same conclusion? In other words, my task, if I am to refuse relief to the claimant … is to be satisfied that had the IAT not made the clear error that it did, it would inevitably have reached the same conclusion. That is, of course, a very high hurdle for the defendant to leap over, and it has to be borne in mind that it arises in the context of an asylum case which demands … the most anxious scrutiny …

6) And in *Gashi* [2002] EWCA 227 (Admin) per Munby J at paragraphs 29 and 30:

> Ms Giovannetti, I think, accepted what is, in any event, in my judgment, the law: that if Mr Grieves succeeds, as he has, in persuading me that there has been misdirection here, the matter has to go back to a different adjudicator for a fresh hearing unless she can demonstrate to me that no sensible adjudicator, properly directing himself or herself to all the relevant factors, could possibly arrive at any conclusion other than the conclusion at which in fact this adjudicator arrived. In other words, in this particular context, the text for resisting what would otherwise be the granting of a quashing order is the classic Wednesbury test.
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> Putting it slightly differently, Ms Giovannetti accepted that if she is to resist the remittance of this matter to the fresh adjudicator, the case would have to be one in which, had this adjudicator in fact found for the claimant rather than, as he did, against him, the Secretary of State would have been able in this court to quash that decision on the ground of irrationality. That is, and appropriately, as it seems to me, a high test. It is a difficult hurdle to overcome in any context, and all the more so in the context of asylum, where this claimant is entitled in this court, as elsewhere, to the most anxious scrutiny of his claim.

7) I reserved my determination.

8) In *Judes* the adjudicator overlooked a significant medical report. Scheimann LJ found it a case "just on the side of the line" where the omission "could conceivably make a difference", and said at the end of his judgment that this was "a question which will attract different answers on the facts of different cases; the present one is a borderline one. I would allow this appeal."

9) In *Gashi* it was overlooked that the appellant claimed that he would be at risk if returned to Kosovo because he was a Catholic, and Catholics were

perceived as having been collaborators with the Serb regime. The critical point was that the adjudicator understood the case as based on fear because of ethnic origin and there was "conspicuously lacking any reference to the factor of religion" (paragraph 24).

10) The errors in *Judes* and *Gashi* were on a different plane to those asserted in this appeal.

11) I do not quote or summarise the judge's findings and reasons at paragraph 36 onwards of his determination. They speak for themselves. The determination is thorough and thoughtful, giving numerous good reasons, in which no legal error has been or could be averred, for concluding that the appellant has not given a reliable account of himself.

12) The first point taken in the grounds of appeal does not amount to much more than saying that there was an implausible aspect of the appellant's account, which it was not within his scope to explain further. The second point, I think, is misleadingly taken. Whether or not the appellant instructed his legal representatives in 2000 to try to impress the respondent by saying that he had not resorted to a frivolous asylum claim, the fact was that he had not then purported to have any claim on asylum grounds. The third matter is trivial. Taken together, the three points do not amount to good reason for setting aside the determination.

13) The determination of the First-tier Tribunal shall stand.

10 April 2014
Judge of the Upper Tribunal