Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07328/2013

THE IMMIGRATION ACTS

Heard at Field House	**Date Sent**
On 20 November 2013	**On 10 February 2014**
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Before

UPPER TRIBUNAL JUDGE DEANS

Between

MASTER JOSIAH CHINYERE CHUKWUDI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Parkinson of Counsel, instructed by Hackney Law Centre
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1) Judge of the First-tier Tribunal Paul dismissed this appeal on asylum and human rights grounds. In doing so it appears that he made a finding that the appellant is a minor but would have adequate reception facilities through his family in Nigeria.

2) The appellant's date of birth was disputed. Permission to appeal was granted on the basis of an application which contended that the judge did not make an adequate finding as to whether the appellant was born on 14 July 1991 or 14 July 1996. It was further contended that the judge did not pay sufficient attention to the "best interests assessment" required by section 55 of the 2009 Act; that the judge failed properly to consider the respondent's "tracing obligation"; and that in his credibility assessment the judge paid inadequate attention to the finding that the appellant is a minor.

3) In his determination the judge noted that the appellant came to the UK in March 2011 with a student visa. He travelled on a direct flight using his own passport containing a valid visa. The date of birth in this passport was 14 July 1991. In May 2013 the appellant claimed asylum and stated that his correct date of birth was 14 July 1996. The appellant submitted a cancelled passport showing his date of birth as 14 July 1991 and a new passport containing the date of birth of 14 July 1996.

4) The appellant further claimed that he was born in Suleja in Nigeria to ethnic Igbo parents and brought up by them as a Pentecostal Christian. Around October 2010 the appellant was attacked by Muslims and left unconscious. He spent 2-3 months in hospital as a result of this attack. He claims to fear persecution in Nigeria due to his Pentecostal faith and to fear persecution on the grounds of his religion from the militant Islamist group, the Boko Haram. According to the appellant, in December 2011 his mother died and the appellant returned to Nigeria in January 2012 for the funeral. Later in 2012 the appellant lost contact with his father and travelled back to Nigeria in June of that year to look for him. He reported him missing and was told in August that the authorities believed that he had been killed by an extremist Muslim group. His return to Nigeria came about because his father's financial support had stopped and the appellant was unable to continue his studies. His return to Nigeria in June 2012 was funded by his church in the UK. At his church he had met a benefactor, Mrs Bernadette Stuart, who gave the appellant accommodation in her home and contributed to his tuition fees. It was she who took him to the Nigerian Embassy in London to have a new passport issued with his changed date of birth and took him to the Home Office in Croydon to explain his situation to the immigration authorities. In support of his asylum claim he produced a birth certificate dated 26 March 2013, confirmation dated 3 April 2013of his date of birth from the Nigerian Immigration Service Headquarters, an affidavit dated 5 April 2013 and a medical legal age assessment.

5) Both the appellant and Mrs Stuart gave evidence before the First-tier Tribunal.

6) Insofar as the appellant's age is concerned, the Judge of the First-tier Tribunal noted that there was an age assessment submitted on behalf of the appellant but none by the respondent. The respondent instead relied on undermining the appellant's credibility. In particular the respondent submitted that the appellant had travelled to the UK on a passport obtained for him by his father and then spent nearly two years in the UK on the basis of that passport. He applied to go to college on the basis of his original date of birth. The Judge of the First-tier Tribunal accepted that these matters were of some substance but they did not amount to a direct rebuttal of the age assessment report. Accordingly the judge concluded on balance that the appellant "may not have been born on 14 July 1991 and may have been born on or about 14 July 1996."

7) The Judge of the First-tier Tribunal then went on to consider the credibility of the appellant's evidence in relation to his asylum claim and the reception facilities that might exist in Nigeria. Having accepted that the appellant was a minor, the judge sought to give due allowance for the stress of giving evidence but concluded that the

appellant had not given a truthful account in his evidence. He further found Mrs Stuart to be "a totally unreliable witness".

8) The judge noted that according to Mrs Stuart in her evidence she made a phone call to the Nigerian High Commission in Abuja to obtain the appellant's birth certificate and the immigration document relating to the his date of birth. The judge pointed out that the Nigerian High Commission existed in countries outside Nigeria. It was stretching belief that by making a phone call to an official office in Nigeria the authorities then obtained the documents either from the hospital or the Magistrates' Court. The judge did not believe that the appellant had visited Nigeria twice in 2012 and did not believe that his father had disappeared. The judge concluded, at paragraph 40, that the "mere fact" that the appellant was a youth did not mean that he could not lie. The judge did not accept the appellant's evidence that his parents are deceased and that he has no siblings. The judge did not accept that simply by virtue of being a Christian a person was at risk of persecution in Nigeria without there being any adequate protection from the State. The judge noted that Nigeria has a large Christian population which is dominant in the south west and has communities all over the country. The appellant's assertion that when he was at school he was involved in fights between Muslims and Christians had been exaggerated out of all proportion to try and make it look as if he would be a victim were he to return.

Submissions

9) At the hearing before me Mr Parkinson for the appellant acknowledged that the judge had made a finding that the appellant was a minor. The question of whether such a finding had been made was raised as an issue in the application for permission to appeal. The Secretary of State had, however, submitted a Rule 24 notice dated 21 October 2013 in which it was accepted that the judge found the appellant was a minor. According to the respondent though, it did not follow that because the appellant was a minor the judge was bound to accept his claim as credible.

10) Mr Parkinson developed his argument by stating that as it was accepted that the appellant was a minor the Secretary of State had breached her policy on processing an asylum claim by a minor. When the appellant was interviewed he had not been accompanied by a responsible adult but the respondent sought to rely on inconsistencies at the interview to challenge the appellant's credibility. The Judge of the First-tier Tribunal had not properly considered the best interests of the child and did not refer specifically to section 55. The appellant's interests as a minor were considered only in relation to reception arrangements but not in relation to his asylum claim or Article 8. The judge observed at paragraph 32 that if the appellant was a minor the Secretary of State had not applied the policy in relation to an unaccompanied asylum-seeking child and therefore, on the face of it, the appellant should have been granted discretionary leave. The merits of the asylum claim should have been considered only if the appellant was an adult. The requirement to consider reception facilities came from paragraph 352ZC of the Immigration Rules, which required adequate reception facilities and entitlement to discretionary leave. There were

benefits from obtaining discretionary leave, such as the opportunity to apply for it to be extended.

11) Mr Parkinson continued that the judge did not properly assess the appellant's evidence on the basis that he was minor, for example, in interpreting the appellant's distress when giving evidence. The judge made an error of law by not finding a breach of the Secretary of State's policy, in accordance with AA (Afghanistan) [2007] EWCA Civ 12. The application was not considered as that of an unaccompanied asylum-seeking child. The appellant's status as a minor was relevant further to any question of internal relocation in Nigeria. In terms of DS (Afghanistan) [2011] EWCA Civ 305 there was a duty to have consideration to the appellant's age in considering the asylum application and to the question of reception facilities. These duties applied even if the child was lying. The proper course for the judge would have been to remit the appeal back to the Secretary of State.

12) For the respondent, Mr Wilding submitted that there was no error in the judge's determination, save for one that he had noticed only during the course of the present hearing. This was that the appellant had leave from 18 March 2011 to 30 August 2013 and his appeal was therefore under section 83 of the 2002 Act rather than section 82. Mr Wilding acknowledged that the judge's findings about the appellant's age were expressed in an odd way. The judge relied on discrepancies arising from cross-examination and from the asylum interview. The judge found the evidence of the appellant and his witness to be completely incredible. The witness, Mrs Stuart, was not believed. In the respondent's refusal letter it was not accepted that the appellant was a minor and notwithstanding the finding the judge made on the appellant's age, it did not follow that the judge could not make credibility findings. This case was not the same as AA (Afghanistan) or DS (Afghanistan) for two reasons. The first was the appellant had leave, although it had now expired, but he had 6 weeks left when his claim was refused. He was not denied the benefits of leave. In addition, the negative credibility finding in respect of the appellant's claim that his father was dead had a huge bearing on his status as an unaccompanied asylum-seeking child. Reference was made to the case of EU (Afghanistan) [2013] EWCA Civ 32.

13) Mr Wilding continued that Mrs Stuart had been found by the judge to be a total liar. Nigeria was not like Afghanistan. The appellant had leave to remain at the time his asylum claim was refused. He was not disadvantaged by not having the benefit of leave. There were two aspects to the policy, one of which was leave and the other was family contact. The rationale for the policy applied less as a child approached adulthood. There was no rule to say that a 19-year-old might be disbelieved but a 15-year-old could not be disbelieved. The appellant's evidence was totally disbelieved.

14) Mr Wilding pointed out that in the respondent's reasons for refusal letter of 17 July 2013 the asylum claim was assessed on the basis that it was taken at its highest, notwithstanding that the appellant's account was not believed, and it was considered by the Secretary of State that there was a sufficiency of protection in Nigeria and that internal relocation was a viable option for the appellant. The judge had done what he

was supposed to do, which was to make findings on age and on credibility. The credibility findings showed that the appellant's claim was entirely without merit. The appellant had faked the claim that his father was dead but this was done on the supporting evidence of Mrs Stuart. The decision of the Secretary of State was not unlawful. The appellant had not been disadvantaged by not being granted leave. There was no question of inadequate reception facilities in Nigeria. There was no need for the judge to have remitted the case to the Secretary of State. The appellant was now less than 2 months away from becoming 17½ years old, which was a relevant factor in terms of EU (Afghanistan). The duty to trace applied with less force with increasing age.

15) Mr Parkinson responded that the adverse credibility findings went to the heart of the decision. The judge had not considered whether the credibility findings derived from a breach of the respondent's policy. The judge should have considered what prejudice arose for the appellant from the breach of the policy. He was not afforded the safeguards and protection of the policy. It was not relevant that the appellant was not approaching 17½ years old.

Discussion

16) In his submission for the respondent, Mr Wilding sought to distinguish the present appeal from the cases of AA (Afghanistan) and DS (Afghanistan). One distinction he made was that the appellant had leave at the time he made his asylum claim and there was therefore no requirement for the Secretary of State to consider granting leave. The other distinction was that the judge made a negative credibility finding in respect of the appellant's claim that his father had been killed and this affected the tracing obligation in respect of reception arrangements in Nigeria.

17) I consider that both of these points carry considerable weight, particularly as the respondent did not accept at the time when the asylum claim was under consideration that the appellant was a minor. A finding to this effect was made only by the First-tier Tribunal on appeal.

18) Mr Parkinson submitted that having made this finding the Judge of the First-tier Tribunal should have remitted the appeal to the Secretary of State for the procedures involving unaccompanied asylum-seeking children to be properly observed. One of the procedures which it was said was not properly observed by the respondent referred to the asylum interview conducted on behalf of the respondent on 30 May 2013. It was submitted that the appellant should not have been interviewed when he was unaccompanied. At the hearing before me, however, it was pointed out that according to the interview record the appellant's current representatives, Hackney Community Law Centre were recorded as representing the appellant but were not present. No reason is given for the absence of a representative from the Law Centre.

19) Be that as it may, the potential consequences of a breach of the respondent's policy were considered in EU (Afghanistan). In the judgment of Sir Stanley Burnton it was

pointed out that for a breach of the Secretary of State's policy to give rise to a remedy for the asylum seeker it must be shown that there was a causative link between the Secretary of State's breach of duty and the appellant's claim to protection (paragraph 7). Sir Stanley Burnton quoted with approved from the judgment of Maurice Kay LJ in KA (Afghanistan) [2012] EWCA Civ 1014 in which reference was made to a spectrum, at one end of which was an applicant who gave a credible and co-operative account of having no surviving family in Afghanistan or having lost touch with family members and having failed, notwithstanding his best endeavours, to re-establish contact. At the other end of the spectrum was an applicant whose claim to have no surviving family in Afghanistan was disbelieved and in respect of whom it was found that he had been unco-operative so as to frustrate any attempt to trace his family. Such a person would have failed to prove a risk on return and there would be no causative link between the Secretary of State's breach of duty and the appellant's claim to protection.

20) I may add that there is no question so far as I am aware of any deliberate breach of duty by the Secretary of State in respect of the present appeal. The refusal decision was made on the basis that the Secretary of State did not accept that the appellant was a minor. An attempt is now made to show prejudice to the appellant because the appellant was not given the benefit of the policy for unaccompanied asylum-seeking children. As was pointed out in EU (Afghanistan), however, in order to rely on the policy the appellant must show a causative link between the Secretary of State's breach of duty and the claimed protection. The difficulty for the appellant is in establishing such a link.

21) Furthermore, as Mr Wilding pointed out in his submission, according to Sir Stanley Burnton at paragraph 8 of his judgment, a further issue to be taken into account is the line between minority and adulthood. The rationale relating to the return of an unaccompanied young child applies with less force with increasing age.

22) The position found by the Secretary of State in the refusal decision, and accepted by the Judge of the First-tier Tribunal on appeal, was that even if the appellant's asylum claim was taken at its highest, he had no claim to refugee status or to humanitarian protection. This was because, first, there was a sufficiency of protection for Christians in Nigeria and, second, there was the possibility of internal relocation if the appellant had a well founded fear of persecution in his home area. As far as I am aware, the first of these points is not disputed. So far as the second is concerned, Mr Parkinson submitted that the question of the appellant's age was relevant to the viability of internal relocation on the basis that it would be unduly harsh or unreasonable to expect an unaccompanied child to relocate.

23) The difficulty for Mr Parkinson in pursuing this argument is that the Judge of the First-tier Tribunal found that the appellant would not be an unaccompanied child were he to return to Nigeria. The judge simply did not accept that both the appellant's parents were deceased and that he had lost contact with his family.

24) To address this point, Mr Parkinson submitted that the appellant's credibility had not been assessed as it should have been as a minor and that the interview was not carried out fairly as it should have been for an unaccompanied minor.

25) So far as the appellant's evidence at the hearing is concerned, the judge specifically stated at paragraph 37 that he had taken into account that the appellant was a minor and given due allowance to the stress of giving evidence,. The judge then went on to observe at paragraph 40 that "the mere fact that the appellant is a youth does not mean that he cannot lie, and I am satisfied that the lies were bolstered by the false distress that he put on to try and convince the Tribunal."

26) It seems to me that these findings are adequate expressions by the judge of the need to be aware of age-related factors when assessing the evidence of a minor. As the judge pointed out, it does not follow from this that the minor's evidence must be believed.

27) The second point on which Mr Parkinson relies on this regard is that the adverse credibility finding was based in part on inconsistencies in the appellant's asylum interview and these inconsistencies would not necessarily have arisen had the proper policy for the interviewing of unaccompanied asylum-seeking children been followed.

28) A similar point arose in AA (Afghanistan), in which it was said that the Secretary of State's policy, as it stood in March 2003 when the interview under consideration in that case took place, that an unaccompanied minor seeking asylum should not have been interviewed other than in exceptional circumstances and only then by a specially trained officer and in the presence of a responsible adult. The Court accepted that there was a breach of the policy and that the adjudicator (as then termed) might not have made the same finding if aware of the policy on such interviews. The claim is made in the present appeal not that the appellant should not have been interviewed but that the interview should have taken place in the presence of a responsible adult and the decision on behalf of the respondent taken by a person trained to deal with asylum claims from children.

29) The circumstances of this appeal, however, are rather different from those in AA (Afghanistan). In that case, had the appellant's account been believed, it appears that he would have qualified for refugee status or humanitarian protection. In the current appeal, however, the Secretary of State's position, accepted by the Judge of the First-tier Tribunal, was that even were the appellant's claim taken at its highest, he would not be entitled to refugee status or humanitarian protection. This was simply because he did not face a real risk of persecution or serious harm in Nigeria by reason of religion. The adverse credibility finding made by the judge was principally directed not to refusal of the substantive asylum claim but to refusal of the claim that there were inadequate reception facilities in Nigeria for the appellant.

30) This brings me back to Mr Parkinson's argument that if the appellant had been properly regarded as a minor, then this would have shown that it was not a viable option for him to relocate internally within Nigeria. This argument, of course, relies on

the assumption that the appellant was telling the truth about the death of both of his parents and that it was this adverse credibility finding made by the Judge of the First-tier Tribunal in respect of the deaths of the appellant's parents that led to the refusal of the appellant's claim for refugee status.

31) Mr Parkinson's argument in this regard deserves further consideration. I start with the age of the appellant at the date of the interview, which was conducted on 30 May 2013. A finding has been made that the appellant was born on 14 July 1996. Accordingly, he would have been about 6 weeks short of his 17th birthday at the time he was interviewed. By this time he had been studying in the UK away from family support for about two years. I mention this only to indicate that although the appellant was a minor at the time he was interviewed, he was a minor who was accustomed to a considerable degree of independence.

32) One of the points arising from the interview, which was founded upon by the respondent, related to an affidavit produced by the appellant giving his date of birth as 14 July 1996. According to the respondent, this affidavit bore to have been signed by the appellant's father on 5 April 2013, which was some 14 months after the appellant's father was alleged to have disappeared and was presumed dead. At his asylum interview the appellant was asked to explain this inconsistency and said that the affidavit came from the Magistrates' Court. It was Mrs Stuart who had made a call to them and someone had to sign the affidavit. The appellant said it had not been signed by his own father.

33) The same issue arose when the appellant was giving evidence before the First-tier Tribunal. The appellant contended that the affidavit was true (as to its content) but it was sworn by his uncle, not by his father. The judge noted, however, that on the face of it the person swearing the affidavit stated that he was the biological father of the appellant.

34) Another issue which arose from the interview was when the appellant first became aware that he had given an incorrect date of birth. The appellant said at interview that he did not become aware of this until around October or November 2012. It was submitted on behalf of the respondent at the hearing that by this time the appellant had been living in the UK for nearly two years and that he had applied to a college in London in April 2011 on the basis of his date of birth being 14 July 1991.

35) In his evidence before the First-tier Tribunal the appellant said that he first became aware that his passport had the wrong date of birth when he went to register with Crystal Palace as a trainee footballer in or about December 2011. Because of this he went to the High Commission, who made enquiries and confirmed that his real date of birth was 14 July 1996. He nevertheless accepted that he went to Nigeria twice in 2012 using his old passport.

36) These discrepancies in the evidence, first about who signed the Affidavit of May 2013 and, second, when the appellant became aware that his date of birth was incorrect, are

not matters of inference or derivations from subtle distinctions of meaning which could have led to findings either for or against the appellant. They are stark discrepancies in the appellant's evidence striking directly at the credibility of his account. The appellant had the opportunity before the First-tier Tribunal to provide adequate explanations for these inconsistencies but could not do so and instead appears to have broken down when giving evidence in what the judge described as "a show of distress so as to try and bolster what I consider to be a fundamentally false account." The judge made this finding while expressly having regard to the appellant's age.

37) The position is that this was an asylum claim found by the Judge of the First-tier Tribunal to be entirely without merit. It is at the far end of the spectrum referred to in the case of EU (Afghanistan), where the appellant has failed to prove the risk on return and shown no causative link between the Secretary of State's breach of duty and his claim to protection. For such an appellant, there is great difficulty in establishing a disadvantage from the Secretary of State's breach of duty. In other words, the causative link between the Secretary of State's breach of duty and the claim to protection is lacking. The same principle applies to the Secretary of State's duty to trace. Although the Secretary of State has such a duty, as discussed in SHL (Tracing Obligation/Trafficking) Afghanistan [2013] UKUT 00312, which was referred to by the appellant in the application for permission to appeal, a breach of the tracing duty will not necessarily give rise to a grant of relief for the appellant. It is incumbent on the Tribunal to evaluate the effects and consequences of the breach in the fact sensitive context under consideration. In the circumstances of the present appeal, the appellant has not been able to show prejudice to his position by the lack of any attempt by the respondent to trace his family.

38) So far as the duty under section 55 is concerned to have regard to the best interests of the child, although as Mr Parkinson pointed out, the Judge of the First-tier Tribunal did not refer at any point expressly to section 55, nevertheless it is difficult to envisage in what way the best interests of the appellant as a child were not taken into account in the decision. The conclusion reached by the judge was that the appellant's family were waiting to receive him and support him on return to Nigeria. Furthermore, as Mr Wilding pointed out, the only issues before the judge were whether the appellant was entitled to be recognised as a refugee or to be granted humanitarian protection in terms of section 83 of the 2002 Act. Mr Wilding suggested that the judge may have fallen into error by failing to recognise that this appeal was made only under section 83, rather than under section 82 of the 2002 Act. Although the judge does not refer expressly to section 83, it is clear from the determination that the only issues he was considering were entitlement to refugee status or humanitarian protection. The refusal decision before the judge dated 18 July 2013 was stated as having been made under section 83 and there is no reason to suppose that the judge misdirected himself as to the grounds on which the appeal was made.

39) The question of the appellant's right to private or family life was, accordingly, not before the First-tier Tribunal and it is in this respect that the best interests of the child might have been expected to have assumed some significance. So far as this appeal is

concerned, the judge was entitled to reach the conclusion which he did, namely that the appellant would have adequate family arrangements waiting for him in Nigeria and there would be no breach of the Refugee Convention and no real risk of serious harm were he to return there.

40) I have considered in some detail the arguments advanced by Mr Parkinson in an attempt to establish that the Judge of the First-tier Tribunal erred in law in making the decision which he did. In the circumstances of this appeal, however, I do not consider that the arguments relied upon by Mr Parkinson are made out, for the reasons which I have given above. Accordingly the decision shall stand.

Conclusions

41) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

42) I do not set aside the decision.

Anonymity

43) Notwithstanding the finding as to age, the First-tier Tribunal did not make a direction for anonymity and no application for such a direction was made before me.

Signed Date

Judge of the Upper Tribunal