Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08119/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 November 2014	**On 24 November 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Onyema Chas Jnr Ofoegbu
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms D Akinsette, instructed by Templeton Legal Services
For the respondent: Ms S Kandola, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Onyema Chas Jnr Ofoegbu, date of birth 2.8.76, is a citizen of Nigeria.

2. This is his appeal against the decision of First-tier Tribunal Judge Wolley promulgated 20.8.14, dismissing his appeal against the decision of the respondent, dated 23.1.14, to refuse his human rights application for leave to remain in the UK. The Judge heard the appeal on 8.8.14.

3. First-tier Tribunal Judge Brunnen granted permission to appeal on 7.10.14.

4. Thus the matter came before me on 21.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Woolley should be set aside.

6. There is an error of law in the determination that is not raised in the grounds of appeal. According to §9 of the decision of the First-tier Tribunal, the representatives for the Secretary of State and the appellant agreed at the outset of the First-tier Tribunal appeal hearing that as the application had been made before the new Immigration Rules in force from 9.7.12, they did not apply. That is not correct. As I understand it, the appellant's claim related to human rights under article 8. Prior to 9.7.12 there were no Immigration Rules for a human rights claim and thus there could be no transitional provisions for the application of the new Rules. The only Rules to which the Secretary of State could turn were those in Appendix FM with family life and in paragraph 276ADE with private life. The transitional provisions have no relevance to an application made entirely outside the Immigration Rules, as there was no equivalent provision under the old Rules for consideration of the application. The only framework for considering private and family life in existence at the date of decision was that of the new Rules under paragraph 276ADE and Appendix FM. The Secretary of State is required to undertake a proportionality assessment and the new Rules comprise the framework for that assessment. This is entirely consistent with both Haleemudeen, and Edgehill.

7. However, this error was not one raised by the appellant and even if the judge had addressed Appendix FM or paragraph 276ADE, it seems unlikely that it would have assisted the appellant.

8. The grounds of appeal contend that the judge erred in law in that her rejection of the article 3 claim, making negative credibility findings against the appellant, was substantially influenced by the inaccurate assertion in the determination that the appellant had not previously put forward any article 3 claim, whereas there was evidence before the tribunal that he had done so in 2012. Judge Brunnen considered this ground was arguable and thus granted permission on all grounds.

9. The article 3 claim is allegedly based on the claim that that the appellant would be at risk on return to Nigeria because he would be killed as the only son of his father in order that other family members would then inherit his property in accordance with what the appellant alleged was part of the Igbo clan culture.

10. The difficulty for the appellant in respect of this ground is that at §9 the judge recorded that the two representatives agreed at the outset of the appeal that the only issue was article 8. That is repeated in the judge's summary of the submissions at §24.

11. Further, at §16 the judge noted the appellant's evidence that he did not make an asylum or article 3 claim immediately because he thought the easier route for him

would be to sit for examinations in the UK. At §33 the judge noted the confirmation of the appellant's representative that no asylum claim had been made.

12. Despite the aforementioned agreement between the representatives that the only issue was article 8, at §34 the judge went on to consider the risk on return for the appellant. In doing so, the judge apparently made an error in stating that there was no evidence of having made an article 3 claim, and the appellant's statement that he had done so but that it had been ignored by the respondent. However, even if the judge was in error in stating that there had been no past article 3 claim, it is clear from a reading of the determination as a whole that the judge properly considered the appellant's factual case and assessed the risk of harm to him.

13. In summary, the judge did not accept the appellant's factual account. Neither he nor his sister were found to be credible witnesses and the judge set out his reasons for that finding over two pages. In particular, at §32 the judge did not accept that his father had been killed by relatives, or unlawfully killed, or that there was a family feud. The judge did not accept the appellant's account of what happened when he returned to Nigeria and concluded, "I do not accept that he would be at risk should he return there."

14. It is thus clear that notwithstanding any error as to whether the appellant had made an article 3 claim, the judge disbelieved the appellant's factual account and reached the conclusion that he would not be at any risk on return for any of the reasons claimed by him. There has thus been a de facto consideration of the article 3 claim. The appellant has failed to demonstrate that any factual error as to whether he had made an article 3 claim previously could or would have produced any different outcome to the appeal. Finally on this issue, I find that the appellant's own representative did not pursue an article 3 claim, agreeing that the sole issue was article 8 ECHR.

15. In the circumstances I find no error of law on this ground of appeal.

16. The second ground of appeal is that at §31 the judge erred in stating that the appellant would not be a primary target in the "Igbo caste system," as there was no evidence in support. In fact, both the appellant and his witnesses had stated that and thus it is suggested that the judge was in error, undermining the other findings in the determination. I have carefully considered the appellant's statement and that of his witnesses. The grounds submit that the statement was "completely unsubstantiated and amounts to an error of law." It is suggested that the judge should have adjourned for expert evidence on the issue.

17. I find that it is the assertions of the appellant and his witnesses that was completely unsubstantiated by any independent evidence. Actually, what the judge stated was that, "There is no evidence before me that a son is a primary target in the Igbo caste system." It is clear that the judge was referring to objective evidence in support of the contention by the appellant and his witnesses. Clearly the judge was aware that was

being urged by the appellant, otherwise, logically, there would be no purpose in this short paragraph.

18. At §4 of the witness statement of Rita Ukwunna Ofoegbu (A67) it is stated that, "As the only son to the family, he was in particular danger as his death would have meant that the extended family would inherit from our family." The appellant's sister's statement (A52) referred to a family feud and that, "As the only son, my parents were psychologically disturbed at the threat that the appellant would be killed." The appellant's latest witness statement, handed in at the First-tier Tribunal appeal hearing, stated at §5, "I am the only son of my parents and Igbu land that means a lot, as culturally I am prune (sic) to death and danger.

19. It is not entirely clear from the above whether the appellant's case was that he was at risk because of a particular family feud, or because he is only son of the family and that if he died other relatives would inherit the property of his immediate family. However, it was for the appellant to produce satisfactory evidence of what he claimed. There was no request for an adjournment and I reject the suggestion that the judge should have, of his own motion, adjourned for such expert evidence to be obtained. The judge was entitled to point out that there was no evidence before her that a son is a primary target in the Igbo caste system. It is obvious and can be safely inferred that the judge must have been referring to evidence in support of the subjective claims of the appellant and his witnesses. In the circumstances, I find no error of law in this regard.

Conclusions:

20. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

Signed: Date: 21 November 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed:  Date: 21 November 2014

Deputy Upper Tribunal Judge Pickup