



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/33403/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4 July 2016**

**Decision & Reasons
Promulgated
On 12 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**BABATUNDE ADETUYI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Chikwe, Solicitor of St Valchikwe, solicitors
For the Respondent: Ms Z Ahmad of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 22 November 1966. In March 2006 he unlawfully entered the United Kingdom. Subsequently he was granted discretionary leave for three years from 26 May 2011 on the basis

of his family life. In time, on 9 May 2014 he applied for further leave on the same basis.

The Secretary of State's Decision

2. On 6 August 2014 the Respondent refused his application. She noted the Appellant had failed to provide sufficient documentary evidence to show he still enjoyed family life with his partner and so failed to meet the requirements of paragraph E-LTRP.1.2. of Appendix FM of the Immigration Rules and further she considered his presence not conducive to the public good because of his conduct. His criminal convictions, character, associations or other reasons made it undesirable for him to be allowed to remain. Since the Appellant had failed to meet any of the requirements of the Immigration Rules necessary to engage Appendix FM he was unable to rely on the benefit of Section EX.1 of Appendix FM. She went on to consider his private life by way of reference to paragraph 276ADE(1) of the Immigration Rules and was satisfied he did not meet any of the relevant time criteria and that there were no very significant obstacles to his return to Nigeria. She noted there were no exceptional circumstances making it appropriate to consider that his return to Nigeria would engage the United Kingdom's obligations under Article 8 of the European Convention outside the Immigration Rules.
3. Most importantly for the appeal in the Upper Tribunal, she further stated that if he considered he was in fear of persecution on return to Nigeria or was in fear of serious harm on return such as would engage the United Kingdom's obligations under Article 3 of the European Convention, then he needed to make a separate and personal application. The Appellant did not make and has not made any such application.
4. On 21 August 2014 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds and the Statement of Additional Grounds are expressed in generic terms and make reference to the European Convention and the Refugee Convention. They indicate that further grounds may follow but none have.

The First-tier Tribunal Proceedings

5. By a decision promulgated on 29 September 2015 Judge of the First-tier Tribunal Owens dismissed the appeal. Her decision records at paragraph 14 that Mr Chikwe who represented the Appellant in the First-tier Tribunal as well as in the Upper Tribunal confirmed the Appellant would not be pursuing his claim on asylum grounds. She also made a finding that the Appellant's relationship with his partner had come to an end in May 2012.
6. The Appellant sought permission to appeal on grounds which related solely to the Judge's treatment of his claims in respect of private and family life. On 28 April 2016 Judge of the First-tier Tribunal Ford refused permission to appeal. The application was renewed to the Upper Tribunal in the same

terms but with additional grounds at paragraph 7 referring to the Judge's treatment of the Appellant's claim that if returned to Nigeria he would face real risk of serious harm engaging the United Kingdom's obligations under Articles 2 and 3 of the European Convention. On 26 May 2016 Upper Tribunal Judge Reeds granted permission on the basis that arguably the Judge had erred in law in his lack of assessment of the Appellant's claim in light of the evidence at the hearing, the contents of his statement and the original grounds of appeal. These all appeared to be inconsistent with the Judge's recording of the concession made for the Appellant at the First-tier Tribunal hearing that the protection claim under Articles 2 and 3 of the European Convention was not being pursued. She added that at the error of law hearing the parties would be required to address the issue of what concession, if any, was made.

The Upper Tribunal Hearing

7. Mr Chikwe for the Appellant who had appeared before the First-tier Tribunal referred to the original grounds of appeal raising claims under the Refugee Convention 1951 and the European Convention 1950. He submitted that the final sentence of paragraph 35 of the Judge's decision was inaccurate. I acknowledged that the Judge's Record of Proceedings contained references to submissions made about the risk to the Appellant on return to Nigeria of serious harm, but not of persecution. After some discussion about the difference between claims made under each of the Refugee and European Conventions, Mr Chikwe submitted that the Judge had confined herself to a consideration of only the Appellant's claim based on respect for his private and family life as evidenced by paragraphs 2 and 13 of her decision. However, in the Appellant's statement and his oral testimony there was considerable reference to what had happened to him in Nigeria in 2001 and 2006. He, Mr Chikwe, had made submissions to the Judge on the Appellant's claims under Articles 2 and 3 of the European Convention. Indeed, at paragraph 26 of her decision the Judge had referred to the extensive evidence given at the hearing about the events which the Appellant said had prompted him to leave Nigeria.
8. He continued that the Appellant had returned to Nigeria in 2005 with a view to starting a new life there with his wife but he had been arrested and subsequently had fled back to the United Kingdom. The Judge had erred in not making any findings about the risk of serious ill-treatment if the Appellant was returned to Nigeria, notwithstanding that his claim under Articles 2 and 3 of the European Convention had been properly argued before her. This was a material error of law and the First-tier Tribunal's decision could not stand.

Submissions for the Respondent

9. Ms Ahmad relied on the file note made by the Presenting Officer the day after the hearing before the First-tier Tribunal. The asylum claim had not been pursued and this was clear from the note which was attached to the

Respondent's response of 15 June 2016 under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

10. It was of considerable note that neither the Appellant nor his solicitor had provided a statement detailing what they considered happened at the First-tier Tribunal hearing and his solicitor had failed to provide any Record of Proceedings, contemporaneous or otherwise.
11. At paragraph 26 of her decision, the Judge had adequately disposed of the Appellant's claims under Articles 2 and 3 of the European Convention. At paragraph 35 she referred to the difficulties the Appellant had experienced in 2006 when he had returned to Nigeria, but noted that this was some nine years previous to the date of the hearing and that he had not claimed asylum. So it could not be said the Judge had failed to consider the claim under Articles 2 and 3. The decision should stand.

Response for the Appellant

12. Mr Chikwe referred to paragraph 14 of the Judge's decision which identified the Appellant was not making an asylum claim and submitted there was no similar finding that the Appellant would not be relying on Articles 2 and 3 of the European Convention. Further, the Judge had not made any adverse credibility finding about the Appellant's claim under Articles 2 and 3 of the European Convention.

Consideration and Decision

13. I have carefully considered the file and the mostly legible Record of Proceedings made by the Judge. I am satisfied that with respect to any putative asylum claim, Mr Chikwe informed the Judge the Appellant would not be pursuing before her his asylum claim such as it might be. I also take into account the remarks of the Respondent in the Reasons for Refusal Letter that if the Appellant proposed to make a claim under the Refugee Convention then he needed to make a separate claim in person, as the Respondent had informed him.
14. There remains the claim under Articles 2 and 3 of the European Convention. Having regard to paragraphs 21 and 22 of the judgment in *Patel and Others v SSHD [2013] UKSC 72* I am satisfied the Appellant did raise a claim under Articles 2 and 3 of the European Convention. This is supported not only by what was said in the notice of appeal and the additional grounds in response to the warning under Section 120 of the 2002 Act contained in the Notice of Decision and that the claim under Articles 2 and 3 was before the First-tier Tribunal. There was ample evidence to support it and albeit that, looking at the Judge's Record of Proceedings, it could be said the submissions on Articles 2 and 3 were secondary to those made under Article 8. The Judge did not make any findings of credibility in relation to the matters which the Appellant claimed gave rise to his claim under Articles 2 and 3 and did not make a decision on this part of the appeal which was before her.

15. I would add that I do not find the Respondent was entitled to rely on what was said in the Notice of Decision that the Appellant needed to make a separate claim under Article 3 of the European Convention. The Judge's error is compounded by an apparent failure clearly to distinguish between claims under the Refugee Convention and under the European Convention.
16. The consequence is that the decision cannot stand in relation to the Appellant's claim under Articles 2 and 3 of the European Convention because it failed adequately to address them. There is no reason why the decision so far as it relates to the Appellant's claim based on his private and family life in the United Kingdom and all findings in relation to it should not stand.
17. It will be necessary for extensive findings of credibility and fact to be made in relation to the Appellant's claims about what happened to him in Nigeria in 2001 and 2006 and why he remains at risk on return, such that the obligations of the United Kingdom under Articles 2 and 3 of the European Convention are engaged.
18. Having regard to Section 12(2) of the Tribunal's, Courts and Enforcement Act 2007 and paragraph 7.2 of the Practice Statement of 10 February 2010 (as amended) it is appropriate for the appeal to be remitted to the First-tier Tribunal for hearing before a Judge other than Judge Owens.

Anonymity

19. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained an error of law such that the elements of the Appellant's claim under Articles 2 and 3 of the European Convention remain effectively to be decided. To that extent the appeal of the Appellant in the Upper Tribunal is allowed.

Anonymity direction not made.

Signed/Official Crest
2016

Date 08. vii.

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal