Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10081/2017

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 8 February 2019	**On: 22 February 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DS
(Anonymity Direction made)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr D Chirico, instructed by Birnberg Peirce & Partners

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing DS's appeal, to a limited extent, against the respondent's decision to refuse his protection and human rights claim further to a decision to deport him pursuant to section 32(5) of the UK Borders Act 2007.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and DS as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Jamaica, born on 7 November 1994. He arrived in the United Kingdom on a visitor visa on 9 August 2004, aged 10 years, to join his mother in the UK. No applications for further leave to remain were made. From July 2009 to January 2014 the appellant accumulated 10 convictions relating to 16 offences. On 3 June 2011 he was served with notice of liability to deportation and responded by claiming to be at risk on return to Jamaica. He was interviewed about his claim and then served with a further notice of liability to deportation on 14 October 2013.

4. On 15 January 2014 the appellant was convicted of blackmail, possessing a knife blade/ sharp pointed article in public and theft from a person and was sentenced to a total of 6 years' imprisonment. On 2 July 2014 and 26 August 2014 the respondent invited the appellant to seek to rebut the presumption under section 72 of the Nationality, Immigration Act 2002 that he had been convicted of a particularly serious crime and constituted a danger to the community. The appellant failed to respond. On 14 January 2015 the respondent issued a deportation order pursuant to section 32(5) of the 2007 Act and on 15 January 2015 the respondent made a decision to refuse the appellant's protection and human rights claim. The respondent, in that decision, certified the appellant's human rights claim under section 94B of the Nationality, Immigration and Asylum Act 2002. Following a judicial review claim challenging the certificate, the decision and certification were maintained in a further decision of 16 June 2015. However, the respondent subsequently withdrew the decision to certify the appellant's claim under section 94B following the Supreme Court decision in Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 42 and in light of the appellant's medical condition.

5. A new decision was made by the respondent on 21 September 2017, refusing the appellant's protection and human rights claim, but not certifying the claim under section 94B. In that decision the respondent certified that the presumption in section 72(2) of the 2002 Act applied to him and his asylum claim was refused on that basis. The respondent considered in any event that the appellant was at no risk on return to Jamaica, that he was not entitled to humanitarian protection and that his removal would not breach his Article 3 human rights. The respondent considered submissions made on 5 September 2016 in regard to the appellant's health, noting that on 1 September 2015 he had contracted TB meningitis whilst serving his custodial sentence, that he had been admitted to hospital with a life-threatening condition on 26 August 2015 and that he had been placed in an induced coma. He had had a shunt inserted in his head in a procedure on 14 October 2015, to relieve pressure from the TB meningitis, and had been receiving follow up treatment from a neurosurgeon. The respondent considered that the appellant no longer had TB and that he could receive adequate treatment in Jamaica. It was considered that Article 3 was not engaged on that basis or on the claimed risk of suicide. As for Article 8, the respondent noted that the appellant had no claim to any relationships in the UK and had no children and that he had been living in the UK without any lawful leave. It was considered that there were no very compelling circumstances which outweighed the public interest in his deportation and that his deportation would not, therefore, breach his Article 8 rights.

6. The appellant appealed against that decision. In the grounds of appeal to the First-tier Tribunal it was asserted that the appellant was at risk on return to Jamaica from gang members, that his Article 3 rights would be breached if he were deported on health grounds and that his deportation would breach his Article 8 rights on the grounds of family and private life as well as his serious mental and physical health issues. It was also asserted that the appellant had ongoing civil proceedings for clinical negligence due to him contracting TB meningitis whilst imprisoned, which required him to be present in the UK to meet with his legal team and to be assessed by medical experts, and that his removal whilst those proceedings were pending would breach his Article 6 rights.

7. The appellant's appeal was adjourned on more than one occasion in order to await medical reports which had been requested for the civil proceedings. The appeal then came before First-tier Tribunal Judge Onoufriou on 11 July 2018. The appellant was represented at that hearing by Mr Chirico. Mr Chirico produced a skeleton argument for the hearing in which he submitted that the appellant's deportation would be in breach of the respondent's obligations under the Human Rights Act 1998, in particular the decision to remove the appellant prior to the conclusion of his civil litigation would breach his Article 6 rights; the decision to remove the appellant prior to the conclusion of his civil litigation would breach his Article 3 and 8 procedural rights and the decision to remove the appellant was a breach of the respondent's duty to investigate in the context of his Article 3 and 8 claims.

8. Mr Chirico submitted, as a preliminary matter, that the appellant's removal whilst the civil proceedings were ongoing would breach his rights under Article 6 of the ECHR as he would not have the opportunity of a fair hearing if he had to conduct that hearing from Jamaica. He submitted that the appellant's civil proceedings had not been referred to by the respondent in the refusal letter. Mr Chirico also submitted that there was a potential breach of the appellant's Article 8 rights in respect of both proceedings, the civil proceedings and the deportation proceedings, as both required the procurement of the same experts' reports regarding his brain damage and mental health. Mr Chirico relied on the case of MS (Ivory Coast) v Secretary of State for the Home Department [2007] EWCA Civ 133 in submitting that the appellant should be granted a short period of leave to remain in the UK in order to pursue his civil action. He confirmed that the appellant was withdrawing his asylum claim. The Home Office Presenting Officer, Ms Syed is recorded in the judge's decision at [11] as having accepted that the refusal letter did not address the appellant's need to remain in the UK to pursue his civil proceedings and having agreed not to oppose Mr Chirico's request that the appellant be allowed limited leave to remain in the UK in order to pursue his civil claim provided his asylum claim was conceded.

9. Judge Onoufriou had regard to the evidence relating to the civil proceedings and the current situation as regards the procurement of relevant expert reports and referred to the case of Quaquah [2000] INLR 196 in relation to Article 6. He found that the appellant's removal from the UK before his civil litigation had concluded would breach his Article 6 rights to a fair trial and allowed the appeal to the limited extent that the appellant was to be granted discretionary leave to enable him to pursue his civil proceedings. The judge

said that the appellant's claims under Article 3 of the ECHR based on his medical condition and Article 8 in respect of private and family life were extant.

10. The Secretary of State sought permission to appeal to the Upper Tribunal, asserting that it was not clear what the judge meant when concluding that the appellant's claims under Article 3 and 8 were extant, as he was seized of determining the appeal at the date of the hearing. It was asserted that the judge had made insufficient findings as to why the appellant could not pursue his civil claim from Jamaica and it was not clear how Quaquah applied to the appellant's case. It was also asserted, with reference to the case of Ullah, R (on the Application of) v Special Adjudicator [2004] UKHL 26, that whilst Article 6 could be engaged in immigration appeals, there would have to be a flagrant violation of that right which had not been shown in the appellant's case.

11. Permission was granted in the First-tier Tribunal on 15 August 2018, albeit in a contradictory and incomplete decision.

12. In a Rule 24 response dated 24 September 2018, Mr Chirico, on behalf of the appellant submitted that the respondent's grounds failed to refer to the concession recorded at [11] of the judge's decision in which the Presenting Office had conceded that there was no objection to the appeal being allowed to the extent that leave be granted to the appellant whilst his civil proceedings were pending. The judge was entitled to rely on that concession and allow the appeal on the basis that he did. Mr Chirico also objected to the reference in the respondent's grounds to Article 6 having been raised belatedly at the hearing, when that was not the case and the matter had been raised in the previous judicial review proceedings in relation to the section 94B certificate and the grounds of appeal to the First-tier Tribunal. Mr Chirico asserted that it was not open to the respondent to advance the argument made in the grounds, that the appellant could pursue his civil claim from Jamaica, without applying to withdraw, and having consent to withdraw, the concession. As for the reliance in the grounds on Ullah, that was not a matter advanced before the First-tier Tribunal, it was inconsistent with the concession made at the hearing and it was misconceived as Ullah related to foreign claims.

Appeal hearing and submissions on 19 November 2018

13. The appeal came before me initially on 19 November 2018. At that hearing, the appellant was represented by Mr Furner and the respondent by Mr Lindsay. Mr Furner produced a witness statement from Mr Chirico in relation to the proceedings before the First-tier Tribunal.

14. In that statement Mr Chirico confirmed that [8] to [11] of the judge's decision was entirely consistent with his own recollection of the proceedings. Mr Chirico confirmed that the issue of the appellant's Article 6 rights was before the Secretary of State as part of the appellant's human rights claim long before the decision in the current proceedings and formed part of the grounds of appeal before the First-tier Tribunal. Mr Chirico confirmed that he informed the judge at the hearing that he did not seek a further adjournment but was asking that the appeal be allowed outright on Article 6 and other procedural grounds.

He confirmed that the judge then asked the Home Office Presenting Officer, Ms Syed, whether the respondent would oppose the appeal being allowed on limited Article 6 grounds, with a view to a grant of leave for the period of the civil claim. He confirmed that she had accepted that the most recent decision did not deal with Article 6 at all and she was clearly aware of the Article 6 issue. When asked by the judge to confirm whether the Secretary of State would agree to allowing the appeal on limited Article 6 grounds, she provided that confirmation. The judge then confirmed that the appeal would be allowed on that basis and as a result no further submissions were made on the evidence. Mr Chirico confirmed that when chatting to Ms Syed after the judge had left the courtroom it was perfectly clear that both of them were aware that the appeal had been allowed and no objection was raised by Ms Syed.

15. Mr Lindsay appeared before me at the hearing for the Secretary of State and said that he had not seen the Rule 24 response prior to the hearing and was unaware of the issue relating to a concession. He produced the appeal hearing record sheet completed by Ms Syed on 11 July 2018 which he submitted did not indicate that there had been any concession by the respondent. He submitted that [11] of the judge's decision was not a record of a concession that the appeal be allowed, but that the appellant be allowed to argue the Article 6 point as Ms Syed may have believed that it had only been raised at the hearing. Mr Lindsay submitted that if it was considered that there had been such a concession, then it was a concession of law and not fact and had been wrongly made on the law and therefore did not bind the Secretary of State. It had been wrongly made because the test of flagrant denial of justice, as set out in Ullah, had not been reached. If it was considered that an application needed to be made to withdraw the concession, then such an application was made. The key point was that the appellant could pursue his civil claim from Jamaica and it was for the appellant to show why he could not do so. The test in Ullah was not met.

16. Mr Furner submitted that it was not possible to read [11] in the way Mr Lindsay suggested as it was clear that Article 6 had been raised previously and not only at the hearing itself. It was clear that a concession had been made that the appellant be granted a period of leave. The note from Ms Syed was not clear and there was no statement from her. There was no ambiguity given the Tribunal's record of proceedings and Mr Chirico's statement. If there had been no concession, then it was difficult to understand why there were no further submissions about the expert evidence. Mr Furner accepted that the Tribunal was not always bound to accept a concession made by the Secretary of State, but submitted that it would only be in exceptional circumstances that a concession could be withdrawn. Mr Furner relied on the case of AK (Sierra Leone) v Secretary of State for the Home Department [2016] EWCA Civ 999 in submitting that in this case the concession was as to the outcome of the appeal and therefore was not a concession of law as Mr Lindsay suggested. The judge did not err in law by accepting the concession. At [20], when referring to the Article 3 and 8 claims being extant, the judge was simply recognising that the substantive Article 3 and 8 claims could not be determined until the outcome of the civil proceedings. The procedural protection in Article 8 was, however, the same as in Article 6. The judge did not err, therefore, by not determining the substantive Article 3 and

8 claims. The respondent's reliance on Ullah was misconceived as that case was referring to "foreign" cases and there was therefore no flagrancy threshold in this case.

17. In response Mr Lindsay submitted that the Home Office was not aware of the Rule 24 notice and there was no evidence of it having been received. Therefore the Home Office was not on notice of any need to obtain a witness statement from Ms Syed. The Tribunal was not bound by the asserted concession.

18. In a decision of 28 November 2018 I made the following findings and directions:

> "18. I deal firstly with a preliminary matter which was addressed at the commencement of the hearing in regard to the grant of permission, in that the decision made by the First-tier Tribunal granting permission was in substance contradictory, suggesting in parts that permission would not be granted but in others that it should. It was agreed by all parties that permission would be taken as having been granted and the matter therefore proceeded on the basis that the Upper Tribunal was seized of the matter.
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> 19. Turning to the respondent's grounds seeking permission, I agree with Mr Furner that the author of the grounds appears to have had limited understanding of the evidence before the Tribunal and the issues arising at the hearing when drafting the grounds. Paragraph 5 of the grounds refers to the issue of Article 6 having only been raised at the hearing and it appears that it was on the basis of that misunderstanding that the author of the grounds considered, at paragraph 5, that the concession made by the Presenting Officer was an acceptance that Article 6 grounds could be raised and argued by Mr Chirico at the hearing. However Mr Lindsay quite rightly accepted that Article 6 had been a matter before the Secretary of State for some time, that it had been included in the grounds of appeal before the First-tier Tribunal and that it had not been raised only at the hearing.
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> 20. Nevertheless Mr Lindsay sought to pursue that argument and to rely on such an explanation for the concession recorded at [11] of the judge's decision, submitting that that was consistent with Ms Syed's appeal hearing record sheet, and that there had in fact been no concession by the respondent that the appeal should be allowed. However I agree with Mr Furner that that simply cannot explain the concession recorded at [11], given that it was absolutely clear that Article 6 was already a ground of appeal before the Tribunal and there was therefore no need for any concession to be made to permit Mr Chirico to argue the matter. The judge's record at [11] was of a clear concession by Ms Syed that she did not oppose Mr Chirico's request that the appeal be allowed on the limited basis that the appellant be granted a period of leave to pursue his civil claim. That is entirely consistent with the extract I read out to the parties from the judge's handwritten record of proceedings, which states as follows:
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> > "Ms Syed: …If PA claim fallen away to be recorded in Determination. In those circs I would not oppose Mr Chirico's request that app. allowed under Art. 6 to ltd extent that A can conclude his clinical neg claim."
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> 21. It is also consistent with Mr Chirico's detailed recollection of what happened at the appeal hearing, as set out in his witness statement and the attached attendance notes. It is also consistent, as Mr Furner submitted, with there having been no further submissions made and with the judge allowing the

appeal at that point without hearing further from the parties. As for Ms Syed's note, upon which Mr Lindsay relies, whilst there is no reference therein to a concession, the note does not make her position clear. Mr Lindsay relies upon the record of Ms Syed's submission, in her note, that the civil proceedings could still be continued from Jamaica, but on the other hand the penultimate paragraph of her note refers to her acceptance of the judge's indication that he was minded to allow the appeal. I do not agree with Mr Lindsay that such an ambiguous record can support the respondent's position that there was no concession as to the outcome of the appeal, when considered in the light of the judge's handwritten record of the proceedings, Mr Chirico's statement and attendance note and the judge's record at [11] of his decision. I am therefore entirely of the view that there was an unequivocal concession made by the respondent at the hearing before Judge Onoufriou that the appeal be allowed to the extent that the appellant be granted a period of limited leave in order to pursue the civil proceedings.

22. The second issue to be determined is whether the respondent could, however, now withdraw the concession. It was Mr Lindsay's case that the concession was a concession of law which had been wrongly made and should therefore be withdrawn. He submitted that the concession was contrary to the legal position set out in Ullah, that there would have to be shown to have been a "flagrant denial of justice", which the appellant had not done. However I am in agreement with Mr Furner that the respondent's reliance upon Ullah is misconceived, since Ullah was concerned with "foreign" cases, as the extract quoted in the grounds clearly shows: "*It can be regarded as settled law that where there is a real risk of flagrant denial of justice in the country to which an individual is to be deported article 6 may be engaged*." That is entirely different to the appellant's case, which involved civil proceedings in the UK and was thus a "domestic" case. I therefore reject the respondent's grounds in that respect.

23. However, there is a further matter which appears not to have been considered by the judge or the parties at the First-tier Tribunal and which was not raised in the respondent's grounds seeking permission or by the parties in the hearing before me. Indeed, the respondent's grounds at [9] are to the contrary. That is, that the judge could not have allowed the appeal under Article 6. The appellant and the judge had regard to the case of Quaquah in that respect, but subsequent jurisprudence confirms that Article 6 is not applicable in immigration decisions.

24. In Maaouia v. France - 39652/98 [2000] ECHR 455, the ECHR held at [40] that: "The Court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention."

25. The House of Lords, in RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10, relied upon the ECHR judgment in Maaouia at [172] and found at [175] that: "It is clear that the criterion for the ECHR in deciding whether article 6 is engaged is the nature of the proceedings and not the articles of the Convention which are alleged to be violated. If the proceedings concern deportation, article 6 is not engaged, whatever might be the other articles potentially infringed by removal to another country."

26. The question therefore arises whether the respondent was correct in submitting that the concession was one of law which had been wrongly made, albeit for different reasons than those argued by Mr Lindsay. It seems to me that, whilst the concession referred to Article 6, what was in fact conceded was that the appellant's removal would breach his human rights on the basis that it would deprive him of the opportunity to have a fair trial in regard to the civil proceedings. That was similar to the issue in MS (Ivory Coast) which was relied upon by Mr Chirico as recorded at [9] of the judge's decision and which was followed by Ms Syed's concession as recorded at [11], that the appellant ought to be granted a period leave in order to pursue his civil claim. Accordingly it seems to me that the concession was not one of law but was in fact a concession of the type referred to at [48] and [49] of AK (Sierra Leone), to which Mr Furner referred, in that it was such as to determine the entire appeal. That is because the effect of the concession is that the exceptions to deportation are met and the appellant cannot be deported.

27. Therefore, whether or not the respondent had had sight of the appellant's Rule 24 response to the grant of permission referring to the concession, and thus had not had an opportunity to make a formal application for the concession to be withdrawn, I do not consider there to be any grounds justifying a withdrawal of the concession and I see no justification for permitting a resurrection of the Secretary of State's case that the appellant could pursue his civil claim from Jamaica. The respondent made a clear and unequivocal concession at the hearing and it was on that basis that the appeal was allowed. The judge did not err by allowing the appeal in line with the concession and the respondent cannot now resile from that concession.

28. As to the judge's comment at [20], that the appellant's claims under Article 3 and 8 are extant, Mr Furner explained that the appellant had effectively withdrawn his grounds of appeal on substantive Article 3 and 8 grounds. That was on the basis that the intention was that an application would then be made on those grounds prior to the end of the period of discretionary leave which was to be granted, since those matters could not be decided currently as it was necessary to await the outcome of the civil proceedings. Mr Furner explained that the procedural aspects of the protection provided by Articles 3 and 8 were the same as that afforded by Article 6. I therefore see nothing material arising from the judge's comment at [20], although it could have been more clearly expressed.

29. That then brings me to the disposal of this appeal. Whilst I have no hesitation in concluding that the judge made no error of law in allowing the appeal on the limited basis that the appellant be granted a period of discretionary leave to enable him to pursue his civil proceedings, I do find that he erred in law by allowing the appeal under Article 6, for the reasons given above. In view of the fact that the respondent's concession, and the judge's basis for allowing the appeal, was effectively that the public interest did not lie in removing the appellant and, consequently, as long as Article 8 was engaged, removal would be disproportionate at that point in time, my preliminary view is that the decision can simply be re-made by allowing the appeal on Article 8 private life grounds, to the limited extent stated by the judge at [18]. That would be consistent with the outcome in MS (Ivory Coast) and with Mr Chirico's submission, relying on the case of Gudanaviciene & Ors, R (on the application of) v The Director of Legal Aid Casework & Or [2014] EWCA Civ 1622, that the procedural protection

provided by Article 8 was in practice indistinguishable from that provided in civil proceedings by Article 6 and would be consistent with a finding that the Article 6 aspect of the appellant's case provided very compelling circumstances under paragraph 398 of the immigration rules.

30. However, I am mindful that this is a matter that has arisen after the hearing without the parties being given an opportunity to make submissions. Accordingly it is appropriate for such an opportunity to be given by way of oral or written submissions. The appeal will therefore be listed for a resumed hearing before the Upper Tribunal and I make the following directions for that hearing.

Directions

(1) The parties may make written submissions in the alternative to attending the hearing, provided that those submissions are filed with this Tribunal and served on the opposing party no later than 14 days before the hearing.

(2) Any further documentary evidence is to be filed with this Tribunal and served on the opposing party, not less than 14 days before the date of the resumed hearing."

Appeal Hearing and Submissions on 8 February 2019

19. In response to the directions above, both parties made further written submissions and both appeared before me at the hearing and made further submissions in person.

20. Mr Jarvis accepted that if the Tribunal was against him in regard to the relevance of Article 6, that would dispose of the appeal, given the Tribunal's view on the respondent's concession. However the respondent did not accept that Article 6 applied and any concession by Mr Lindsay to the contrary was withdrawn. Mr Jarvis did not accept that there were two types of Article 8 claims, namely procedural and substantive, and therefore there had been a failure by the First-tier Tribunal Judge to determine the Article 3 and 8 grounds of appeal, which he had referred to as being extant. He considered there to be concerns about the Upper Tribunal's jurisdiction in the appeal as a result of the failure of the First-tier Tribunal to determine all the grounds before it. Mr Jarvis submitted that there was no domestic or EU jurisprudence subsequent to Quaquah supporting the claim that Article 6 was applicable and he referred additionally to the case of Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363 in that regard. He submitted that the concession made before the First-tier Tribunal was wrong in law and therefore could not stand, as in the case of Koori & Ors v The Secretary of State for the Home Department [2016] EWCA Civ 552. The concession could not be read as accepting that the case succeeded under Article 8 as there had not been a full Article 8 assessment including consideration of section 117A to D. The question of "very compelling circumstances" still needed to be determined.

21. I advised Mr Chirico at that point that I had some difficulty with my own previous indication at [26] to [29] of my previous decision in regard to the reach of the concession, and that I needed to be persuaded that my previous view was correct, namely that the concession determined the whole proceedings and would have necessitated the appeal being allowed under Article 8 in the event that Article 6 could not be relied upon.

22. Mr Chirico accepted that if Article 6 could not apply, the presenting officer's concession before the First-tier Tribunal had been wrongly made in law. However it was his case that Article 6 did apply and that Quaquah remained good law and was not inconsistent with subsequent caselaw. He relied in particular on Ullah and RB (Algeria). He submitted that if the Tribunal was against him in that regard, it was his case that a decision allowing the appeal under Article 8 could be substituted and he asked me to maintain the previous position I had held in that regard. Mr Chirico submitted that if it was found that Article 6 did not apply and the findings could not be transferred into an Article 8 decision, there would need to be a hearing de novo in the First-tier Tribunal.

23. With regard to the applicability of Article 6, it was Mr Chirico's case that there were two types of human rights claims and that it was only the first type that recent jurisprudence considered fell outside the scope of Article 6. Those were challenges to the fairness of immigration proceedings and included issues such as challenges to section 94B certification and closed hearings. Maaoui was such a case which involved a challenge on the basis of the length of the immigration proceedings. However there were type 2 claims which were challenges to removal on the basis that it would prevent the enjoyment of fair proceedings and there was nothing preventing claims being brought under Article 6 on that basis, as in the appellant's case. In cases such as Ullah it was found that Article 6 could be relied upon in immigration cases in such circumstances, although Ullah dealt specifically with out of country breaches in which there had to be shown a flagrant breach. Mr Chirico referred to RB (Algeria) which involved both type 1 and type 2 claims. The House of Lords found that Article 6 did not apply to the challenge to closed proceedings, as that was a type 1 claim and was consistent with the decision in Maaoui. However, the appellant Othman's case also involved a type 2 claim and Article 6 was found to be applicable with respect to the question of the fairness of criminal proceedings, albeit in Jordan. That was not inconsistent with Quaquah. Therefore, if it was accepted that Article 6 could apply, the First-tier Tribunal was entitled to accept the respondent's concession. Mr Chirico submitted that if the Tribunal was not with him in that regard, then the appellant's case should be considered to fall within the scope of a physical integrity Article 8 case and the First-tier Tribunal's decision should be substituted with a decision allowing the appeal under Article 8. If not, the case needed to be remitted to the First-tier Tribunal for a fresh hearing.

24. Mr Jarvis, in response, submitted that Ullah and RB (Algeria) were looking at the extra-territorial effect of civil proceedings and therefore did not apply to the appellant's circumstances. There was no answer to the appellant's claim in respect of domestic proceedings such as those that arose in the cases of Mohan and Ciliz v. The Netherlands - 29192/95 [2000] ECHR 365, which proceeded on Article 8 grounds. Article 6 was therefore not applicable and the concession made by the presenting officer was wrong in law. Mr Chirico responded by submitting that those were all family law cases, in which it may have been decided that it was appropriate to proceed under Article 8, but the appellant's case was not a family case. If there was no authority on the point, then Quaquah remained good law and the Tribunal ought to follow it.

Discussion

25. As I informed the parties at the appeal, I am not in agreement with Mr Jarvis's suggestion that the Upper Tribunal had no jurisdiction in the matter. Whilst he argued that First-tier Tribunal Judge Onoufriou had failed to determine all the grounds of appeal before him, namely Article 3 and 8, it is the case that the judge made a decision on the appeal and it seems to me that the manner in which he dealt with the grounds of appeal on Article 3 and 8 forms part of the Upper Tribunal's jurisdiction in determining the error of law.

26. However, I am otherwise in agreement with the submissions made by Mr Jarvis. I am grateful to Mr Jarvis for presenting a clear and properly reasoned argument for the respondent and it is indeed unfortunate that there was not such clarity at the earlier stages in this case where the respondent's position lacked consistency.

27. Whilst I understand the arguments Mr Chirico was presenting, also in a very clear and comprehensive way, I am not in agreement with his submissions on the applicability of Article 6. As Mr Jarvis submitted, aside from Quaquah there is no domestic or European jurisprudence supporting the appellant's position on Article 6. It is also the case, in my view, that Quaquah is in any event limited in its support of the appellant's case on Article 6 for various reasons, including the fact that it pre-dated the incorporation of the rights set out in the European Convention on Human Rights (ECHR) into domestic British law and thus pre-dated by many years the growing jurisprudence in that subject, that it was a judicial review application rather than a full statutory appeal and that it went no further than deciding that the Secretary of State's approach to the question of granting exceptional leave was unlawful and failed to take account of all relevant considerations. It was not a case of a statutory appeal being successfully resolved on Article 6 grounds.

28. As for Mr Chirico's reliance on the cases of Ullah and RB (Algeria), those were "foreign cases" in which the impact on removal of the applicant of unfair proceedings in the receiving country was the relevant consideration. I take Mr Chirico's point that RB (Algeria) involved two types of challenges, type 1 challenging the legality of the proceedings themselves, including the use of closed proceedings, where the findings in Maaouia were specifically relied upon in concluding that Article 6 was not engaged (paragraph 175) (with which Mr Chirico has no quarrel), and type 2, in particular in the case of Abu Qatada, challenging the lawfulness of removal in the light of unfair proceedings, which Mr Chirico relies upon as being relevant in the appellant's case before me. However neither RB (Algeria) nor Ullah involved any consideration of removal in the case of outstanding domestic civil or criminal proceedings in the UK and I do not agree with Mr Chirico that the findings in RB (Algeria) can be extrapolated to include such circumstances. The issues involved and the impact on the appellant are entirely different. In any event I find nothing in the findings of any of the Judges in the House of Lords or in [197] relied upon by Mr Chirico endorsing such an approach. Neither do I agree with Mr Chirico that a lacuna in the jurisprudence means that Quaquah should be followed.

29. On the contrary, I agree with Mr Jarvis that such considerations have been addressed by subsequent caselaw, such as Ciliz, MS (Ivory Coast) and Mohan, through the prism of Article 8 and that that is by way of a full Article 8 assessment rather than there being a separation, as Mr Chirico argued, of a procedural and substantive Article 8 element. Indeed, in Mohan, at [6], the Court of Appeal specifically considered arguments that deportation would infringe the claimant's Article 6, as well as his Article 8 rights, having regard to unfinished family law proceedings, concluding that "*Although reference was made to article 6 and article 8, it is common ground in this court that article 6 does not avail the claimant*." I do not agree with Mr Chirico's submission that these cases were different to this case because they were family cases involving family law proceedings. That is immaterial. What is material is that they involved the issue of separate, outstanding non-immigration proceedings and addressed how that fitted in with a consideration of the question of the applicant's removal from the UK.

30. It seems to me that, in relying upon Article 6, Mr Chirico is in fact confusing a challenge to the fairness of the civil proceedings themselves on the basis of them taking place in the appellant's absence, which could engage Article 6, and a challenge to the immigration proceedings involving Article 8 and deportation, which cannot engage Article 6, as found in Maaoui. The relevance of the fairness of proceeding with the civil case in the appellant's absence has to be one of the many considerations in considering Article 8 and proportionality, rather than determinative of a human rights claim on Article 6 grounds.

31. Accordingly I do not agree Mr Chirico that it is possible to invoke Article 6 in the current immigration proceedings. First-tier Tribunal Judge Onoufriou erred in law in concluding that it was and in determining the appeal on such a basis. As I indicated to the parties, I do not agree with the position I took at [26] and [27] of my previous decision of 28 November 2018 as to the reach of Ms Syed's concession. Indeed Mr Chirico accepted that if I found against him in regard to the application of Article 6 and found that it could not be engaged, then the concession made by the presenting officer before the First-tier Tribunal was wrong in law and could not be maintained. That is consistent with the findings in Koori v Secretary of State for the Home Department [2016] EWCA Civ 552, as referred to at [37] of AK (Sierra Leone), upon which Mr Jarvis properly relied.

32. Neither do I maintain the previous, preliminary view I took in my decision of 28 November 2018, that the decision wrongly made by the First-tier Tribunal Judge in Article 6 could simply be transferred over to Article 8, such that the appeal could, without more, be allowed on Article 8 grounds. I agree with Mr Jarvis that a full assessment of Article 8 would have to take account of all relevant matters including the public interest factors in section 117A to D of the 2002 Act. The fairness or otherwise of the civil proceedings without the appellant's physical presence would, of course, be a significant matter for consideration but would need to be assessed against the other relevant factors in a proper proportionality exercise.

33. Accordingly I conclude that the third scenario suggested by Mr Chirico is the correct one, namely that the case has to be remitted to the First-tier Tribunal for a full human

rights assessment under Article 8, and Article 3 if that is also pursued, since those matters have not yet been determined. I appreciate, as Mr Cherico said, that such a decision will be upsetting for the appellant who had understood that he had succeeded in his appeal and that the decision was a final one with which the Secretary of State agreed. However the law was not properly applied by the First-tier Tribunal and the decision has to be re-made upon a proper application of the law.

DECISION

34. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, with no findings preserved, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Onoufriou.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Upper Tribunal Judge Kebede

Dated: 12 February 2019