



# Upper Tribunal Immigration and Asylum Chamber

## Judicial Review

## Notice of Order

The Queen on the application of Patrick Abayomi Payne

**Applicant**

v

Secretary of State for the Home Department

**Respondent**

### **Decision of the Hon. Mrs Justice Hill (sitting as a Judge of the Upper Tribunal)**

Having considered all documents lodged by the parties and having heard the parties' respective representatives, Grace Brown of Counsel, instructed by Legit Solicitors, on behalf of the Applicant and Mona Bayoumi of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 12 May 2022.

- (1) The legal issue inherent in Ground 1 of the claim for judicial review is answered as follows: the question of whether the Applicant used verbal deception in entering the UK is not a question of precedent fact, but the Respondent can issue a Notification of Liability to Detention where she has reasonable grounds for suspecting that the Applicant is an illegal entrant.
- (2) Ground 2 of the claim for judicial review alleging procedural unfairness is dismissed.
- (3) Insofar as a further hearing in the case is required in light of the ruling on Ground 1, no such hearing is to be listed before 12 August 2022. On or before that date the parties shall write to the Tribunal indicating whether a further hearing is needed, and if so, proposing directions for the same.
- (4) The Applicant shall pay the Respondent's costs of the claim for a sum to be assessed. The Respondent to provide a costs schedule for the attention of the hearing judge by 4.30 pm on 19 May 2022.

Signed: Herminette Hill  
**The Hon. Mrs Justice Hill (Sitting as a Judge of the  
Upper Tribunal)**

Dated:

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Sent to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):  
Home Office Ref:

IN THE UPPER TRIBUNAL  
EX TEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR-2021-LON-000391  
JR/1188/2021

Field House,  
Breams Buildings  
London  
EC4A 1WR

12 May 2022

**THE QUEEN  
(ON THE APPLICATION OF)  
PATRICK ABAYOMI PAYNE**

Applicant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**BEFORE**

**THE HONOURABLE MRS JUSTICE HILL  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)**

- - - - -

Ms G Brown, instructed by Legit Solicitors appeared on behalf of the Applicant.

Ms M Bayoumi, instructed by the Government Legal Department appeared on behalf of the Respondent.

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**ON AN APPLICATION FOR JUDICIAL REVIEW**

**APPROVED JUDGMENT**

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MRS JUSTICE HILL: By a claim issued on 4 August 2021 the applicant challenges the decision of the Secretary of State to serve him with a notice entitled 'Notification of Liability to Detention' on 7 May 2021. Permission to proceed by way of a judicial review was refused on the papers by Upper Tribunal Judge Macleman on 21 September 2021 but it was granted after an oral hearing by Upper Tribunal Judge Keith on 12 November 2021.

2. In granting permission Upper Tribunal Judge Keith made clear that the sole question for determination at this hearing was the legal issue underpinning ground 1. It was not intended that this hearing would involve any factual findings on the evidence relating to that point: rather, that would occur on a further date if the legal ruling led to the conclusion that such a hearing was necessary.
3. This hearing therefore proceeded by way of legal submissions only in relation to both ground 1 and ground 2. I have been greatly assisted by the submissions from both counsel and have been taken to a bundle containing the relevant evidence. This was principally the notification itself dated 7 May 2021, the transcript of the interview on 7 May 2021 and the applicant's witness statement dated 5 July 2021.

#### The background facts

4. The background facts can be summarised as follows. The applicant is a Nigerian national born on 8 May 1984. He last arrived in the UK on 30 January 2021 using a visitor's visa. On 22 April 2021 he claimed asylum. On 7 May 2021 he attended a screening interview at the respondent's designated place for registration of asylum claims following which he was served with the Notification of Liability to Detention on an ILL EN 101 notice.

5. In the notice the following indication was given:

"You have admitted that your true intention for coming to the United Kingdom was to claim asylum and not as per your entry clearance. You are therefore an illegal entrant and you have committed a breach under Section 26(1)(c) of the IA [Immigration Act] 1971 - verbal deception."

6. The Notification of Liability to Detention had as a footnote the following: "Paragraph 16 of Schedule 2 or paragraph 2 of Schedule 3 to the Immigration Act 1971." That was footnote numbered 1 and it was included by reference to the heading of the document. The parties agree that of those two powers, paragraph 16 of Schedule 2 is the one in issue in this case.

7. On the notice there were two boxes at the bottom of the form that said:

"What happens next?

A. You are to be detained.

B. You are to be granted immigration bail; see separate notice."

Box B was checked in this case.

8. The applicant denies that he employed deception in gaining access to the UK in January 2021. It is his evidence that at the time of his visit he was properly using a multi-visit visa that had been issued to him on 15 December 2020 and that when he entered the UK he genuinely intended to visit his family in the UK. His evidence is that his claim for asylum was only made once he became aware, while already in the UK, that his life would be in danger if he returned to Nigeria.

9. His asylum claim arises, in summary, from the fact that his family are ancestral chiefs, or Elejofis, in the Nigerian

state of Ekiti. On the death of one chief the position passes to the eldest son. The applicant's father had been in that position but passed away on 6 August 2018. The title should then have passed to the applicant's older brother. He declined to undertake this role because it was incompatible with his Christian beliefs. The next oldest son is the applicant. He shares his brother's Christian beliefs and is not willing to become an Elejofi. His claim is that his refusal to take this role up would expose him to a risk of persecution.

### The legal framework

10. The pertinent legal framework can be summarised as follows. An illegal entrant is defined by Section 33(1) of the Immigration Act 1971 as follows:

"For purposes of this Act, except insofar as the context otherwise requires -

...

'entrant' means a person entering or seeking to enter the United Kingdom and 'illegal entrant' means a person

(a) unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, or

(b) entering or seeking to enter by means which include deception by another person,

and includes also a person who has entered as mentioned in paragraph (a) or (b) above."

11. Section 26(1) of the Immigration Act 1971 creates an offence of making false representations to an Immigration Officer. It states that:

"A person shall be guilty of an offence punishable on summary conviction with a fine of not more than level 5 on the standard scale or with imprisonment for not more than six months, or with both, in any of the following cases -

(a) if, without reasonable excuse, he refuses or fails to submit to examination under Schedule 2 to this Act;

...

(c) if on any such examination or otherwise he makes or causes to be made to an Immigration Officer or other person lawfully acting in the execution of a relevant enactment a return, statement or representation which he knows to be false or does not believe to be true."

The passage "if on any such examination" is at sub-Section (c) and it is that part of this paragraph that is said to be pertinent here.

12. Paragraph 16(2) of Schedule 2 of the Immigration Act 1971 - which, as I have indicated, was the power specifically referenced on the Notification of Liability to Detention given to the applicant - provides as follows:

"If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an Immigration Officer pending -

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions."

13. Of the 'paragraphs 8 to 10A or 12 to 14' referred to in paragraph 16(2), it is agreed that paragraph 9 is the

pertinent paragraph in this case. Paragraph 9 provides as follows:

“(1) Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an Immigration Officer may give any such directions in respect of him as in a case within paragraph 8 above are authorised by paragraph 8(1).

(2) Any leave to enter the United Kingdom which is obtained by deception shall be disregarded for the purposes of this paragraph.”

14. The applicant advances two grounds in his claim for judicial review.

15. First, he submits that the notice that he was served with on 7 May 2021 had no basis because as a matter of fact, he had not practised any deception when entering the UK and the question of his deception or otherwise is a matter of precedent fact to be satisfied on a balance of probabilities standard, not on mere reasonable grounds for suspicion. The Secretary of State disputes that proposition and relies on the wording of paragraph 16(2) which begins with “if there are reasonable grounds”.

16. Second, the applicant submits that the decision to issue him with the notice was reached through an unfair procedure, principally because he was given no real opportunity to respond to the Secretary of State’s allegations of deception. The respondent denies this and argues that even if, for example, a “minded to” letter had been sent to the applicant, his responses would have been in accordance with the witness statement provided in these proceedings and that would still have generated the necessary suspicion.

#### Ground 1



17. In respect of ground 1 reliance is placed on the significance of the Notification of Liability to Detention. It is said on the applicant's behalf that a decision that a foreign national is an illegal entrant and thus liable to detention alters their rights and restricts their liberty. The person will lose all permissions accompanying their grant of leave. They may be subjected to bail conditions or be detained. Further decisions may follow such as the taking and retaining of their passport. Their immigration history is damaged, which will have implications for their ability to travel to the UK in the future and to travel to other countries which take an interest in UK immigration control. These further decisions, it is said, depend entirely on the initial decision that the foreign national is an illegal immigrant.
18. The central dispute between the parties, however, arises from the manner in which the provisions have been considered in the case law.
19. The first key case on which the respondent relies is **R (AA (Afghanistan)) v Secretary of State for the Home Department [2012] EWCA Civ 1383**. The respondent's position is that this authority provides a complete or close to complete answer on the question inherent in ground 1.
20. **AA Afghanistan** was concerned with the provisions of paragraph 16(2). This much is apparent from paragraph 19 of the judgment. In giving the judgment of the court, Arden LJ said as follows about the meaning of Section 16(2):
- "40. The crucial words in the statutory detention power are the opening words, namely 'if there are reasonable grounds for suspecting'. In my judgment, this is correct and these words are unequivocal. They mean that the statutory detention power is

exercisable when the Secretary of State forms the view that there are reasonable grounds for suspicion. It is not necessary for her also to show that the matters which she suspects are in fact as she reasonably suspects them to be.

41. The opening words of the statutory detention power were not present in the detention power considered in **Al-Khawaja** [an earlier case]. The detention power in that case required the fact that the person in question was an illegal entrant to be proved as an objective fact. However, the House of Lords made it clear that the position would have been different if the question whether a person was an 'illegal entrant' was not a question of that kind. Thus Lord Scarman, for instance, referring to Section 3 of the Habeas Corpus Act 1816, stated that 'it was the beginning of the modern jurisprudence the effect of which is to displace, unless Parliament by plain words otherwise provides" the **Wednesbury** principle [the principle that the Acts of the executive are not reviewable unless unreasonable] in cases where liberty is infringed by an Act of the executive.' (page 110C with the underlining added. See also per Lord Fraser at 97E and per Lord Bridge at 123A to 124C."

21. Finally, and perhaps more pertinently, Arden LJ said this at paragraph 42: "By including the opening words of the statutory detention power in issue in this case, Parliament has clearly displaced the need for precedent facts to be established objectively."

22. **AA (Afghanistan)** went on to consider the implications of Section 55 of the Borders, Citizenship and Immigration Act

2009, which requires the Secretary of State to make arrangements to ensure that those who take decisions about children for immigration purposes have proper regard to the welfare of children. However, the Secretary of State's case is that paragraphs 40 to 42 remain of relevance to paragraph 16(2) and are indeed of critical importance to understanding the power in this case.

23. The applicant relies on another case, **R (AA (Sudan)) v Secretary of State for the Home Department with the Equality and Human Rights Commission intervening [2017] EWCA Civ 138.** Paragraphs 17-19 of the judgment of the court, given by Davis LJ, indicated that the relevant powers were again those contained in Schedule 2. The judge quoted paragraph 16(2). However by the time this case came before the court, a new paragraph (2A) had been added to the paragraph, providing as follows: "But the detention of an unaccompanied child under subparagraph (2) is subject to paragraph 18B." Paragraph 18B then sets out particular provisions in relation to the detention of an unaccompanied child, for example detailing where such a child can be kept, the maximum period for detention and things of that nature.
24. The central reasoning of the court is set out, for my purposes, at paragraphs 29 through to 33.
25. Davis LJ concluded as follows at paragraph 29:

"I consider - with some reluctance but no real doubt - that the plain language of the amended provisions compels the conclusion that where, in point of fact, the detainee is an (unaccompanied) child then detention beyond what is sanctioned in paragraph 18B(1) and (2) is unlawful. It does not suffice that there were reasonable grounds for believing or suspecting at the time of detention that the individual was an adult. The outcome reached by the

Supreme Court in the AA (Afghanistan) case has been superseded by the amended legislation.”

26. His reasoning was set out at paragraphs 31-33, thus:

“31. Paragraph 16 (2) is, by amendment, qualified by the new paragraph 16 (2A). That the entirety of paragraph 16 (2) is so qualified is made plain by the explicit wording of paragraph 16 (2A) and its commencement with the emphatic word “But”. That qualification is then further confirmed by the like qualification to paragraph 18 (1) contained in paragraph 18 (1A). Those qualifications in terms indicate that the power of detention is subordinated to the requirements of paragraph 18B.

32. Paragraph 18B relates to a detained person who “is” an unaccompanied child. With regard to an unaccompanied child, as defined, it imposes mandatory requirements both as to place of detention under paragraph 18B (1) and as to period of detention under paragraph 18B (2). The definition of “unaccompanied child” in 18B (7) is in this regard specific: it requires that the person *is* (emphasis added) under the age of 18. There is no qualification by reference to reasonable grounds of belief or suspicion: which, moreover, is to be compared and contrasted with the language elsewhere used in the same paragraph, at paragraph 18B (4).

33. I thus would agree with Mr Wise’s submission that the legal landscape has changed since the decision of the Supreme Court in *AA (Afghanistan)*. As matters stood at the time of that decision there were no such specific legislative provisions with regard to the detention of unaccompanied children. But now there are, and in unambiguous language.”

27. The applicant seeks to draw an analogy with AA (Sudan) and the facts of this case. He argues that while paragraph 16(2) includes on its face a reasonable grounds provision, this must be read in accordance with the relevant powers in issue, namely paragraph 9 and Section 33, and neither of those includes a reasonable grounds provision. Rather, Section 33, as I have already indicated, simply provides a definition of who an illegal entrant is. An illegal entrant means a person doing one of the things that I have set out and it is not caveated by any reasonable grounds introduction. The applicant therefore argues that the outcome should be the same as was reached in AA (Sudan), meaning that the notice could only have been issued to him if he was, in fact, an illegal entrant, which he was not.
28. I am not persuaded by the applicant's arguments in this regard. In my view, the court in AA (Sudan) was considering the very specific provisions that had been introduced in relation to children, particularly in relation to the detention of unaccompanied children under paragraph 16(2A). I am not persuaded that the court in AA (Sudan) made any wider finding about the meaning of paragraph 16(2) in general terms. I accept the respondent's submission that if the court in AA (Sudan) was intending to do that, it would have said so explicitly in terms. My reading of the judgment is that where it is said there has been a departure from AA (Afghanistan), that is in the specific context of the powers that apply to unaccompanied children, and only that context.
29. It follows that in my view the correct interpretation of paragraph 16(2) is still to be drawn from AA (Afghanistan). Therefore, pursuant to the key paragraphs of that judgment, paragraphs 40 to 42, what is required under paragraph 16(2) is a reasonable grounds determination, and not a determination of precedent facts on the balance of probabilities.

30. My conclusion on ground 1 is therefore that in order to serve the notice on the applicant, it was sufficient for the Secretary of State to rely on reasonable grounds for suspecting that he was an illegal entrant.

## Ground 2

31. The second ground advanced by the applicant is, as I have already indicated, in relation to procedural fairness.

32. He places reliance on **R (Balajigari) v The Secretary of State for the Home Department [2019] 1 WLR 4647**. That was a case in which migrants had applied for leave to remain and there were substantial discrepancies found by the Secretary of State between what each appellant had said they were earning and the earnings which had been declared to the Inland Revenue in their respective tax returns. They were consequently refused on the grounds that it would be undesirable to permit them to remain in the UK in light of their dishonesty. Underhill LJ in giving judgment of the court said the following at paragraph 60:

“Unless the circumstances of a particular case make this impracticable, the ability to make representations only *after* a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the

decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come.”

33. The arguments for the applicant are as follows.
34. First, he did not have put to him in a “minded to” letter or similar the allegation that he had used deception to enter the UK and he has not been given an opportunity to make representations in response to the interviewing officer’s suspicion or belief as to his conduct before issuing him with the notice.
35. Second, there are serious consequences to him from the notice and therefore, following Balajigari at paragraphs 51, 52 and 81, there is a requirement for fairness that is exacting.
36. Third, it was not sufficient to simply put the questions in box 3.4 of the questionnaire to him. The stress of the interview created a real risk that either he may have misunderstood the questions or that his answers were misconstrued. That is what the evidence from the applicant indicates.
37. Fourth, although the respondent’s position is that only unambiguous questions were asked of the applicant, this was necessarily a stressful setting and questions that were put to him could reasonably have been misunderstood.
38. Overall, he argues that a procedurally fair process would have enabled, or would have required the interviewing officer to state clearly that she had concerns about the answers that were given and given him the opportunity to explain the appearance of dishonesty.

39. The respondent's arguments in response to these allegations of procedural unfairness are as follows.
40. The applicant indicated that he spoke English, he was happy to be interviewed in English without an interpreter and he confirmed that he understood all the questions asked.
41. Unlike Balajigari, he had been interviewed. Therefore, there is no need for a "minded to" letter as suggested.
42. He was asked clear questions in interview concerning what he had told the Immigration Officers as the reason for him coming to the UK. He was asked, according to the transcript of the interview, what his reason was for coming to the UK, whether he intended to return to Nigeria, when he realised he could not return, when he decided that he wanted to claim asylum. Section 3.4 of the questionnaire records his answers to these questions. Reliance is placed in particular on the following:

"When did you realise you could not return to your country?

Last year.

When did you decide that you wanted to claim asylum?

Last year."

It was argued that these were clear questions with clear answers and there were no issues with understanding the questions, given the applicant speaking English and having been content to proceed without an interpreter.

43. The respondent also relied on the fact that this was not a screening interview at port but was an interview that took place after the applicant had spoken to his family and taken some legal advice about his options. There was no suggestion he was suffering with any particular difficulties or that he



was unable to understand the questions or that it was dealt with in a heavy-handed manner.

44. Having considered the competing arguments with care, I prefer the respondent's submissions. I am not satisfied that on the facts of this case there was procedural unfairness that requires me to quash the notice that was given to the applicant. He had been interviewed and asked clear questions. He had given no indication he did not understand. His answers were clear.

45. I therefore dismiss ground 2.

### Conclusion

46. For these reasons, ground 1 is to be answered in the way that I have indicated above and ground 2 is to be dismissed.