**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**[2018] CSIH 61**
XA1/18

Lord Brodie
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LORD GLENNIE

in the appeal

by

ELU

Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Appellants: Caskie; Drummond Miller LLP**
**Respondent: Gill; Office of the Advocate General**

18 September 2018

**Introduction**

[1] The appellant is a Nigerian national. She first came to the United Kingdom as a student in September 2008 and, after completion of her studies, remained in the United Kingdom until 2016 under a succession of Tier 1 visas. In June 2016, after her application for further leave to remain in the United Kingdom outwith the Immigration Rules was rejected,

the appellant claimed asylum under the Refugee Convention on the ground that she feared persecution if returned to Nigeria because of her imputed political opinions, she being an on-line political activist and blogger who had published articles critical of the Nigerian Government. She also argued that her removal from the United Kingdom would breach her rights under Articles 2, 3 and/or 8 ECHR. Her application was rejected by the Secretary of State in November 2016. Her appeal to the First-tier Tribunal (Immigration and Asylum Chamber) (hereafter "FTT") was refused, as was her appeal to the Upper Tribunal ("UT"). With the leave of this court, she now appeals to the Court of Session against the decision of the UT.

**The decisions of the UT and FTT**

[2] At paragraph 7 of his decision, the FTT judge set out what the appellant had to prove and to what standard. It is for the appellant to establish her case. But the standard of proof required of her is not high. It is a standard lower than the civil standard. She must establish a well-founded fear of being persecuted and an unwillingness on that account to return to her home state and avail herself of its protection. For her fears to be considered well-founded, she need only demonstrate a reasonable degree of likelihood, or a "real risk", of being persecuted for her political opinions on her return. That has to be assessed in the light of all relevant circumstances. This summary of the relevant principles was not the subject of challenge before this court.

[3] Although the FTT judge did not accept the appellant's explanation for not having claimed asylum until her application for further leave to remain was refused in 2016, he did not find against her on grounds relating to her credibility. Indeed, he went out of his way (in para 12) to commend the way she gave her evidence and said in terms (in para 14) that

he did not believe that she had acted in bad faith. In paragraph 14, he correctly identified his task as being to determine what risk the appellant would face on her return to Nigeria because of her *sur place* activities – that needed to be assessed against the objective evidence.

[4] The crux of his decision is to be found in paragraphs 15-18. He recognised (in para 15) that the appellant had posted blogs and Twitter feeds and had engaged in political discussion with the other members of a WhatsApp group which she had joined in or about December 2015. However, he could not see how this would bring her to the attention of the Nigerian authorities because the WhatsApp group was private and postings on it were encrypted. Her publicly accessible postings were on her Twitter account and on Facebook. Three tweets were identified on her Twitter account (in December 2015 and in January and April 2016), each of which had attracted online threats by others in response. However, the FTT judge had evidence before him in the form of a report from Freedom House which, he said, provided "useful objective evidence in relation to the Nigerian government and the authorities' response to online political activities". On the basis of such evidence, he noted that there had been four prosecutions of bloggers and online journalists for criticising government officials and powerful bankers, and that intimidation and harassment for online expression was reported to have become more common. However, no blocking or filtering of online content by the authorities was reported and there was "no evidence" (as opposed to suspicion) "that the Nigerian authorities proactively monitor Internet and mobile phone communications". The FTT judge concluded this part of his analysis in paragraph 16 as follows:

> "Unlike print and broadcast journalists, the [Freedom House] report says that online journalists and Internet users have not been subject to significant extralegal harassment, violence or threats for their activities although intimidation and reprisals for online expression have become more common."

Against this background, the FTT judge accepted (in para 17) that there had been instances of online bloggers being detained or harassed, but he did not accept that the appellant had established that she had a sufficiently high profile to put her at risk if she returned to Nigeria:

> "The extent of her publicly accessible *sur place* activities is limited and I think it is reasonable to conclude that given the absence of any credible evidence that the Nigerian authorities are proactively monitoring the Internet and mobile phone communications, I cannot see how the Appellant would be known to them."

He concluded that in his belief she could safely return to Nigeria. Her claims to asylum and humanitarian protection failed. Her claims under Articles 2 and 3 ECHR also failed. She did not qualify under the Immigration Rules and there was no basis either upon which an Article 8 ECHR claim outwith the Immigration Rules could succeed.

[5] The UT judge dismissed the appellant's appeal from the FTT, characterising it as amounting to no more than reassertion and disagreement on the facts found by the FTT. It was not shown that the FTT had erred in law.

**The appeal – argument and discussion**

[6] The appeal is from the decision of the UT refusing the appeal from the decision of the FTT. The structure of such an appeal is, typically, a complaint that the UT erred in law in failing to identify or correct an error of law by the FTT. That is how the present appeal was presented. It is therefore convenient in this Opinion, as in argument, to focus on the errors allegedly made by the FTT which, so it is said, the UT ought to have identified and corrected.

[7] A number of points were raised in the Grounds of Appeal and in the Note of Argument lodged on behalf of the appellant. Many of them were either not insisted upon or

were not pressed in argument. An argument that the FTT had erred in its findings as to the number of followers of the appellant on her Twitter account was rightly not insisted upon. A criticism of the FTT judge's adverse findings about the appellant's explanation for her delay in claiming asylum was not pressed; and rightly so, since the judge made it clear that it was irrelevant to his assessment, on an objective basis, of what risk the appellant would face on her return. Likewise, a criticism that the FTT judge failed to place any or sufficient weight on a report by Intersociety indicating that the appellant might be at risk on her return to Nigeria was also not pressed; the FTT judge was clearly aware of that evidence and it was not incumbent on him to cite or refer to every piece of evidence adduced before him.

[8] Ultimately the appellant's argument before us focused on two distinct but overlapping points: (a) did the FTT judge err in his assessment of the appellant's profile; and (b) did the FTT judge err in requiring the appellant to establish that she had a profile at any particular level so as to put her at risk if she were to return to Nigeria? We deal with these points below in that order, though logically we can see some sense in reversing the order.

[9] In support of the argument that the FTT judge had erred in his assessment of the appellant's profile, it was submitted that in concluding that the appellant did not have a sufficiently high profile to attract the attention of the Nigerian authorities the judge had had regard only to his findings about items posted on the Internet but had failed to take account of the fact that the appellant had published articles critical of the government in the printed press. It was this which had prompted the invitation to her to join the WhatsApp group. Even if the Nigerian authorities did not monitor the Internet, they would be aware of items published in the printed press. This was an error of law by the FTT judge, since he had found that the appellant had published newspaper articles critical of the government but

had failed to take those findings into account in his assessment of the risk she would face if returned to Nigeria. In discussions with the bench, however, doubt emerged as to whether the FTT judge had in fact made any findings about the appellant having published articles in the printed press. The references to "articles" in paragraph 15 of the FTT decision was clearly a reference to online publications on her Twitter account or on Facebook. References to "articles" in other parts of the decision also appeared to be references to online articles in online "newspapers". This interpretation was consistent with the way in which the same argument was dealt with in the UT (in particular at paras 6 and 12). In those circumstances where the FTT judge does not appear to have found that the appellant had published anti-government articles in the printed press, it is impossible to conclude that he erred in law in limiting his consideration of risk (ie the risk of persecution if returned to Nigeria) to a consideration of the extent of the authorities' monitoring of the Internet.

[10] We were referred to the findings in the FTT decision about the arrest of a human rights activist ("JD") and his laptop and telephone being taken from him. It was submitted that, before his arrest, JD had had a profile similar to that of the appellant; and that his subsequent high profile stemmed from that arrest. But there was nothing in the material placed before the court to support that submission and the FTT judge made no finding to that effect. It was also submitted that the seizure of JD's laptop would have enabled the authorities to see JD's communications with the appellant so that they would know who she was. There were a number of problems with this submission. We understood the evidence about JD and the laptop to relate to the WhatsApp group, but it was accepted that messages on that group were encrypted. Further, it appeared from material placed before us that JD was arrested in January 2015, whereas the appellant had first published an article critical of the government – and it was because she published articles that she came to the attention of

the activist and the WhatsApp group – in December 2015; so it was unclear how JD's arrest in January 2015 could have led to the appellant becoming known to the authorities. He may have been arrested again at a later date, possibly in January 2016, but it was unclear when his laptop and mobile phone were taken from him.

[11] Looking at the matter in the round, we have in mind that the FTT is the prime decision maker in cases such as this. We can see no basis for concluding that the FTT judge erred in his assessment of the evidence on this point, still less that he erred in law.

[12] In support of the second point, essentially an argument that all online critics of the government were liable to be identified and persecuted whatever their individual profile, we were referred to the following remarks of Sedley LJ in *YB (Eritrea)* v *Secretary of State for the Home Department* [2008] EWCA Civ 360 at paragraph 18:

> "18 As has been seen (§7 above), the tribunal, while accepting that the appellant's political activity in this country was genuine, were not prepared to accept in the absence of positive evidence that the Eritrean authorities had 'the means and the inclination' to monitor such activities as a demonstration outside their embassy, or that they would be able to identify the appellant from photographs of the demonstration. In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality. Where, as here, the tribunal has objective evidence which 'paints a bleak picture of the suppression of political opponents' by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – and perhaps more – that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. …"

It was submitted that those comments applied *mutatis mutandis* to the present case. The FTT judge was wrong to require positive evidence that the Nigerian authorities were proactively monitoring the internet and mobile phone communications. That approach risked "losing contact with reality". The FTT judge ought to have proceeded on the assumption that a

regime such as that in power in Nigeria would monitor the Internet for information about oppositionist groups. On that basis the appellant would probably have become known to the Nigerian authorities – or at least there was a real risk that she would come to their attention – whatever the FTT judge might have thought about her profile, and this would put her at risk of persecution if she were to be returned to Nigeria.

[13] We have no difficulty with the tenor of the remarks quoted above. They make good sense. But as Sedley LJ makes clear, the tribunal in that case had objective evidence which painted a bleak picture of the suppression of political opponents by the Eritrean regime. It was because of that that it was legitimate, without more, to infer a probability that the state would monitor the Internet for information about oppositionist groups. But that reasoning cannot simply be transposed from one regime to another. One cannot simply delete "Eritrea" and substitute "Nigeria". All depends on the evidence. Proceeding on the basis of evidence in the Freedom House report, the FTT judge found that there is in Nigeria a robust civil society which helps to protect and enhance Internet freedoms for Nigerians. He accepted the evidence that the Nigerian government was forced to back down when it sought to introduce legislation designed to constrain critical expression on social media. The FTT judge noted that at the time of the hearing before him a Bill drafted by civil society groups with a view to codifying protections for Internet freedom in Nigeria was going through the Nigerian parliament. According to the Freedom House evidence, although intimidation and reprisals for online expression was becoming more common, in general online journalists and Internet users had not been subject to significant extralegal harassment, violence or threats. On the basis of that evidence, which was accepted by the FTT judge, it is quite impossible to transpose what Sedley LJ said about Eritrea and apply it uncritically to Nigeria. It is for the FTT to assess the evidence. The FTT judge was entitled

to proceed on the basis of the evidence before him and, in particular, was entitled to have regard to the absence of evidence that the Nigerian authorities proactively monitor the Internet and mobile phone communications.

[14] Accordingly the challenge to the FTT's decision under this head must fail.

**Decision**

[15] Since it has not been shown that the FTT judge fell into error in reaching his decision, it follows that the UT did not err in law in refusing the appeal from the FTT. This appeal against the decision of the UT must therefore be refused. The UT's decision of 26 May 2017 must stand.

[16] All questions of expenses are reserved.