



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005659
First-tier Tribunal No:
HU/56602/2021 (LH/00173/2022)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

BO
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain, Counsel

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 3 August 2023

DECISION AND REASONS

1. The Appellant is a national of Nigeria, born on 3 April 1969 who on 22 December 2020 applied for leave to remain on human rights grounds.
2. The Respondent refused his application in a decision sent out on 14 October 2021 because he had not demonstrated there would be very significant obstacles within paragraph 276ADE(1)(vi) HC 395 and there were no exceptional circumstances which merited a grant outside the Immigration Rules. The Appellant appealed this decision.
3. The case was listed before Judge of the First-tier Tribunal Cruthers (hereinafter referred to as the FTTJ) on 30 August 2022 and in a decision promulgated on 5 October 2022 the appeal was dismissed.

4. Permission to appeal was sought on behalf of the Appellant by his representative on 19 October 2022 which was initially refused by a First-tier Tribunal Judge. Permission to appeal was renewed to the Upper Tribunal and permission was granted by Upper Tribunal Judge Perkins on 3 January 2023 who gave permission to appeal on all grounds and stated:

“3. I am particularly concerned that the First-tier Tribunal Judge might have erred in making adverse findings when the Respondent did not consider the claim on human rights grounds because it could have been made on asylum grounds and then by not attending the hearing.

4. I am also concerned that the Judge’s finding that the appellant’s activities were too low key to be problematic in the event of his return may not have shown sufficient regard to the background evidence.”

5. Mr Hussain relied on the grounds of appeal and submitted there was an error in law for the reasons identified in the grant of permission Mr Hussain submitted there was an element of unfairness in the way the FTTJ had dealt with the Appellant’s appeal. At paragraph [49] the FTTJ made adverse findings about the way the Appellant expressed himself finding the Appellant “manufactured a case for international protection as opposed to being a genuine political activity flowing from the Appellant’s beliefs relating to the regime of President Buhari”. The Respondent did not attend and the FTTJ did not pose questions to the Appellant before making this finding. The FTTJ acknowledged this was a private life claim with reference to Paragraph 276ADE HC 395 but considered the claim through the prism of a protection and a risk of serious harm which are different tests to that of “very significant obstacles”. The FTTJ further erred by failing to consider whether the Appellant would face very significant obstacles if he were to continue his beliefs in Nigeria. Additionally, the FTTJ did not apply the Respondent’s own guidance on private life claims (see paragraph [4] of the renewed grounds of appeal and he submitted the FTTJ erred by not finding the Appellant would suffer harassment or discrimination in Nigeria.
6. Mr Diwnycz adopted the Rule 24 response and submitted there was no error in law. As stated in the refusal letter the Appellant had not made a formal protection claim and the FTTJ was entitled to consider the unwillingness of the Appellant to subject himself to an interview by an appropriately trained interviewing officer. The lack of a presenting officer should not be held against the FTTJ especially where the FTTJ carefully considered all the evidence. Whilst Mr Hussain argued that the FTTJ erred in looking at his protection claim through paragraph 276ADE HC 395 it should not be forgotten that it was the Appellant who provided all this information in his own statement. The FTTJ was entitled to deal with the case in the round as he did.
7. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (512008 /269) an Anonymity Order is made. Unless the Upper Tribunal or

Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

DISCUSSION AND FINDINGS

8. Having heard submissions from the two representatives I reserved my decision. For the reasons herein after given I find there is no error in law.
9. Permission to appeal had been given for the reasons given in paragraph [4] above, but in assessing whether the FTTJ erred it is important to look at the totality of the evidence and then how the FTTJ approached that evidence given there was no presenting officer at the First-tier Tribunal hearing.
10. The Appellant provided three witness statements-a statement dated 22 December 2020 (page 319 of UT bundle), a statement dated 8 February 2022 (page 62 of the UT bundle) and a statement dated 13 August 2022 (page 281 of the UT bundle).
11. His first statement described his general political activity at that time which highlighted his claim that his writings had not been received well in Nigeria and that he now feared death, arrest, torture or imprisonment without a human right court trial. He stated clearly at paragraph [30] he was not seeking asylum because such a procedure took too long. This statement supported his application and led to the Respondent refusing his claim but advising him that he could claim asylum.
12. His second statement responded to the refusal letter and stated “the Home Office has said that I could live in Nigeria because I have lived there until the age of 37, and I know the life, language, and culture. I want to say that I have never claimed that I cannot live in Nigeria because of these reasons.” His statement stressed he was unable to live in Nigeria because of his views of the APC and that he had not claimed asylum as he hoped that the political position would change in the future and “that freedom of expression and association shall be without fear of unnecessary arrest and threat to one's life regardless of the state of location within and outside Nigeria.” His statement went on to explain why he could not live in any part of Nigeria and why he could not remain silent about what was happening.
13. His final statement referred to additional evidence about continuing human right abuses, endemic corruption of state officials and incoherent and failed economic policies.
14. His application form (page 302 of the UT bundle) made it clear it was a private life claim only and the refusal letter (page 295 of the UT bundle) considered the claim on article 8 ECHR grounds only. There was a respondent’s review which dealt with the article 8 issues and made it clear that unless an asylum claim was made then the Appellant had to

demonstrate such a claim amounted to very significant difficulties on the balance of probabilities and the Respondent would refer the Tribunal to the Appellant's failure to claim asylum.

15. The FTTJ outlined how he would have to consider this appeal in his decision. Firstly, at paragraph [3] he made it clear that although the Appellant suggested he would be at risk of death/serious harm the appropriate test of very significant obstacles to integration applied pursuant to paragraph 276ADE HC 395. The FTTJ made it clear that given the nature of the claim being made he would apply the lower standard of proof which of course increased the chances of the Appellant's account being accepted. At paragraph [8] the FTTJ stated the Appellant's case stood or fell by applying the very significant obstacles test already referred to.
16. The FTTJ referred in paragraph [9] to the Appellant's core claims and also to Counsel's skeleton argument. Counsel referred in the skeleton argument to the fact "the appellant's removal would be in breach of Articles 2, 3 and 8 of the ECHR" and "in the alternative the Appellant relies upon Article 8 ECHR outside the Immigration Rules".
17. Mr Hussain criticised the FTTJ's approach because neither article 2 nor 3 ECHR had been raised in the application form or considered in the refusal letter but this criticism overlooks the fact the Appellant's own advocate, the drafter of the grounds of appeal, himself raised those issues before the First-tier Tribunal albeit I accept the copy oral submissions made to the Tribunal made no reference to articles 2 or 3 ECHR and concentrated solely on article 8 and paragraph 276ADE HC 395. Given neither article 2 nor 3 were claimed at the application stage and were not considered by the Respondent it would seem to me that the FTTJ was only dealing with a claim through article 8/paragraph 276ADE HC 395.
18. I have considered the FTTJ's decision to identify whether he considered this claim outside of article 8/paragraph 276ADE HC 395 and I find that at all times he has reminded himself that this is an article 8/paragraph 276ADE HC 395 claim as he repeatedly considered whether there would be "very significant obstacles on his return to Nigeria". At paragraph [36] the FTTJ set out the principles of article 8 ECHR and paragraph 276 ADE HC 395 and even at paragraph [46] where he mentioned article 3 ECHR he also stated he was not prepared "even on the reasonable likelihood standard, to accept the appellant's claim that he faces a risk of death, article 3 treatment or very significant obstacles on his return to Nigeria."
19. Mr Hussain submitted the FTTJ erred with his finding in paragraph [49] but I find that there was no necessity for the FTTJ to ask further questions. It is not the FTTJ's role to take on the role of inquisitor unless there are areas in the decision letter that the Appellant has not answered and the FTTJ believes answers are needed to reach the correct decision. The FTTJ's findings in paragraph [49] were open to him as long as he then proceeded

to reach a conclusion under the right legislation. The FTTJ had to make findings about the Appellant's motives which is what he did.

20. The FTTJ accepted at paragraph [51] that some of the comments on Facebook amounted to criticism of President Buhari and his regime. At paragraph [53] the FTTJ considered his future activities concluding "even taking the appellant's case at its highest, his social media offerings border on the trivial. It is very unlikely that someone in Nigeria with real power or influence would trouble himself / herself with what the appellant has published via social media. Additionally, there is no real correlation between the appellant's evidenced activities and, for example, the activities of the people who the 2019 Amnesty International report records as having experienced persecutory ill treatment - the appellant's profile is nowhere near that of the people referred to as persecuted in the 2019 report. And there is no good reason to think that the appellant will engage in political activities that are less trivial after his return to Nigeria." The FTTJ continued to consider the Appellant's activities culminating in him concluding at paragraph [67] "in essence, I agree with the points on page 2 of the RFRL that relate to the very significant obstacles test." The FTTJ did not deal with this case either as a protection or a very serious harm claim.
21. The FTTJ considered the Appellant's activities and based on his findings he did not find paragraph 276ADE HC 395 engaged. Thereafter the FTTJ considered the appeal outside the Rules and from the detailed reasoning from paragraph [73] onwards he found there were no exceptional circumstances.
22. The main thrust of this appeal was that the FTTJ had treated this as a protection/article 3 claim.
23. Due to the way the claim was brought the FTTJ had to consider his fears, but he did this through an article 8/paragraph 276 ADE HC 395 claim and made no findings under either the Refugee Convention or Article 2 or 3 ECHR. All of the findings were properly open to the FTTJ and I reject all the grounds of appeal.

Notice of Decision

There is no error in law. The First-tier Tribunal's decision shall stand, and the appeal is dismissed.

Deputy Judge of the Upper Tribunal Alis
Immigration and Asylum Chamber

8 August 2023