Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29548/2015

THE IMMIGRATION ACTS

Heard at Field House
On 23 August 2017

Decision & Reasons Promulgated
On 26 October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KELECHI CHUKWU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms N Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr M Biggs of Counsel instructed by Dylan Conrad Kreolle

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Blake promulgated on 13 December 2016 in which he allowed the appeal of Ms Chukwu against a decision of the Secretary of State for the Home Department dated 11 August 2015 refusing a human rights claim.

2. Although before me the Secretary of State for the Home Department is the Appellant and Ms Chukwu is the Respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Chukwu as the Appellant and the Secretary of State as the Respondent.

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3. The Appellant is a citizen of Nigeria born on 16 February 1980. She entered the United Kingdom on 7 October 2008 with a visa as a student valid until 31 December 2010. On 15 December 2010 she applied for variation of leave to remain as a Tier 4 migrant; her application was granted on 19 January 2011 with leave valid until 31 December 2013.

4. During the currency of her leave the Appellant sought to apply to join the British Army, and it appears that she also made an application to the Respondent to regularise her status accordingly. There is some confusion in the materials before me as to the exact sequence of events, and the nature and status of the Appellant's application to the British Army. The Judge has noted something of this history in the Decision: however, it appears that the Judge did not have the benefit of the Respondent's bundle – see paragraph 47(i). (It is unclear as to why this should have been: a copy of the bundle is presently on file and there is a note on file indicated it was 'printed from the portal' on 6 October 2015 – a full month before the hearing before Judge Blake. Be that as it may Mr Biggs indicated that he understood that the Appellant had not ever been served with the Respondent's bundle.) I return to this aspect of the appeal below.

5. Be that as it may, it is apparent that the Appellant made an application for leave to remain in order to enlist in the army on 13 September 2013, which was refused on 22 January 2014. The Appellant appealed this decision (ref IA/05270/2015), and succeeded in her appeal to the extent that it was determined that the Respondent's decision was not in accordance with the law and that the Appellant's application remained open for a fresh decision by the Respondent.

6. The Appellant's appeal in IA/05270/2015 was decided 'on the papers', with the decision being promulgated on 9 June 2015. Written submissions drafted by Counsel dated 28 March 2015 were made on behalf of the Appellant. Those submissions may now be found at Annex C of the Respondent's bundle – although as noted above this was not seemingly before the First-tier Tribunal. However, the written submissions were also incorporated in the Appellant's bundle before the First-tier Tribunal (pages 10–16). For present purposes it is relevant to note three matters in particular that are referred to in the written submissions. Firstly, it is asserted that because of delay on the part of the Army the Appellant "*became too old for admission to the army… and following an interview on 12 June 2013, it was suggested by the army that she instead apply as a reservist, however this necessitated possession of ILR in the United Kingdom*"; it is acknowledged that the Army withdrew the Appellant's application to enlist. Secondly it is acknowledged that the Appellant did not lodge a valid appeal against the Respondent's decision of 22 January 2014 until 16 January 2015, when she made an application for extension of time which was in due course successful. The delay in lodging a valid appeal is explained by reference to a rogue adviser: the Appellant had thought that a valid application had been made in February 2014, and it was

only in December 2014 that she became aware that no appeal had been lodged and she learnt that her adviser had been suspended and disbarred. Thirdly, it was stated that the Appellant had "*raised concerns*" about the safety of returning to Nigeria with reference to her father having been a tribal leader and a member of the Movement for the Actualisation of the Sovereign State of Biafra ('MASSOB') which had resulted in him being killed by the police, and her own involvement in the "*grassroots sanitation section of MASSOB*". In this context, amongst other things, it was said that the Appellant was "*contemplating making a formal asylum application*".

7. The decision of the First-tier Tribunal in IA/05270/2015 did not engage with any of the three matters I have set out above. The reasoning is short and essentially limited to a conclusion that the Respondent had not considered the Appellant's Article 8 rights, and the decision was therefore not in accordance with the law.

8. The Appellant's application was again considered, and again refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 11 August 2015. The application was considered with reference to paragraph 276ADE(1) and Article 8 of the ECHR. In respect of the Appellant's expressed fears, the RFRL informed the Appellant of the procedures for making a claim for protection via an Asylum Screening Unit.

9. The Appellant appealed to the IAC. It is to be noted that the scope of her appeal was governed by section 82(1)(b) and section 84(2) of the Nationality, Immigration and Asylum Act 2002 - that is to say it was an appeal confined to human rights grounds with reference to section 84(2) and section 6 of the Human Rights Act 1998.

10. I pause to note that it is not clear or obvious that First-tier Tribunal Judge Blake recognised the nature of the Tribunal's jurisdiction in this regard: the appeal was purportedly allowed under the Immigration Rules as well as under Article 8.

11. Be that as it may, the appeal was indeed allowed reasons set out in the Decision of the First-tier Tribunal.

12. The Respondent applied for permission to appeal which was granted by First-tier Tribunal Judge Ransley on 22 June 2017.

13. In my judgement there is a clear and obvious error in the Decision of the First-tier Tribunal.

14. The Judge found that the Appellant's father had been arrested in Nigeria as a result of his activities with MASSOB (paragraph 100), and that the Appellant "*had herself been a spokesperson for the organisation and that they had received on occasions harsh treatment from the government*" (paragraph 101). The Judge indicated that he considered that this history was relevant when evaluating insurmountable obstacles in the context of paragraph 276 ADE (1)(vi):

    "*I consider that there were insurmountable obstacles to the Appellant's return to Nigeria. I was satisfied that she was associated with the organisation mass of. I found that she would be returned to Nigeria as a single lone female who had no family left living there who could offer her support. I found the basis of such fact that there were insurmountable obstacles such as to qualify her under the Immigration Rules.*" (paragraph 108).

15. It is also clear that the judge considered that this history was relevant in evaluating Article 8: see paragraphs 112 and 113.

16. However, I am completely unable to detect within the Decision any reasoning as to *why* such a history might occasion the Appellant any difficulties upon return such that it should materially inform an evaluation of either 'insurmountable obstacles' or proportionality.

17. It is important to note the context of the findings in this regard. The Appellant's father died in July 2010. The Appellant's own involvement in MASSOB is not suggested to have continued since she left Nigeria for the UK in October 2008.

18. Moreover the 'background evidence' or 'country information' as to the situation in Nigeria in respect of MASSOB was limited. A Wikipedia entry (Appellant's bundle pages 63-65) does not appear to refer to any events after February 2013; a blog entry (pages 66-77) covers the period 2000-2006; the most recent reports in the bundle (pages 78 and 80) refer to incidents in early 2015.

19. Reports loose on the file relate to protests that culminated in violence in May 2016, and warnings issued by the authorities against disruption of the peace in October 2016.

20. It does not appear to have been asserted by the Appellant that she wishes to resume political activism or that she has any continuing interest in the Biafran independence movement. In any event the Judge has not stated any findings in relation to such matters, and has not stated any findings in relation to the 'country' evidence to demonstrate what it might be about the Appellant's past association with MASSOB

that would presently impact on her ability to reintegrate in Nigeria or otherwise enjoy a private life there.

21. In short, the decision in this regard is devoid of any relevant findings or reasons.

22. However, notwithstanding what I consider to be a very clear and obvious error on the part of the First-tier Tribunal Judge, Mr Biggs resists the setting aside of the First-tier Tribunal decision on this basis by arguing that this error is not identified in the Grounds of Appeal. He directed my attention to relevant case law as to the jurisdiction of the Tribunal – see below.

23. Ms Willocks-Briscoe argues that the error is subsumed in the Grounds when read as a whole. (She expressly indicated that she did not seek to amend the Grounds in order to make such a basis of challenge clearer.)

24. Mr Biggs pleaded in aid the following passage at paragraph 16 of **Shaheen v Secretary of State for the Home Department** **[2005] EWCA Civ 1294**:

"*…it is now clearly established that the IAT had no jurisdiction to allow an appeal on the grounds of an error of law which was not ventilated in the grounds of appeal (see B v SSHD [2005] EWCA Civ 61; Miftari v SSHD [2005] EWCA Civ 481; R (Iran) v SSHD [2005] EWCA Civ 982…*"

25. Further analysis of **R (Iran)** is set out in **Shaheen**: this is in respect of allegations of error of law based on mistake of fact. Perhaps more helpful and of clearer application to the submission pursued by Mr Biggs are the cases of **B** and **Miftari**. I note in particular the following from **Miftari**:

"*So far as principle is concerned, three points arise. First, the grounds are the basis, and the only basis, on which permission to appeal is granted or refused. The Vice-President who considers that application must determine jurisdiction on the basis of the grounds; subject, if he does discern a point that the parties have not taken, to his being able to invite an amendment of the grounds. But all that must take place within the boundary of the grounds as finally formulated. Second, as the Master of the Rolls said in paragraph 18 of the judgment of the court in* B*:*

> "*the grounds form the agenda on which the IAT considers the grant of permission and, if granted, conducts the appeal*...*with the recent limitation of the IAT it is particularly important that the grounds should clearly establish that the appeal does at least in form fall within that jurisdiction*"

That means that the IAT can only consider what is legitimately found in the actual or amended grounds. It does not have jurisdiction to consider anything that is not there found. Third, whilst a court will not ordinarily be required, in the absence of the point being raised, to consider whether it has jurisdiction to take a particular case, that is not so of the IAT. It has to consider jurisdiction expressly because it has to pass on the grounds of appeal. It is very difficult to see how a decision as to jurisdiction can be saved by demonstrating that although the basis on which it was taken was unjustified, the Vice-President could have granted permission on a different basis that was not before the court.

I conclude, therefore, that the IAT only had jurisdiction to consider the appeal to them if a point of law could be found within the formulated grounds."

26. My attention has also been directed to the case of **Nixon (permission to appeal: grounds) [2014] UKUT 00368 (IAC)** which authoritatively sets out and emphasises guidance as to good practice both in drafting Grounds and considering applications for permission to appeal. However, beyond such guidance its does not seem to me that it adds anything for present purposes any more useful to the Appellant's arguments than the passage quoted above from **Miftari**.

27. It is against this jurisprudential background that I turn to a consideration of the Respondent's challenge to the First-tier Tribunal's reasoning pertaining to return and past association with MASSOB.

28. After the heading 'Making a material misdirection in law on a material matter', paragraphs 6 and 7 of the Respondent's Grounds of Appeal are in these terms:

"*6. More pertinently, at [81] the FtTJ records the Appellant's submissions through Council as follows:*

> *"Mr Emezie confirmed that he was not putting forward an asylum claim within the appeal. He submitted however the facts might form part of a future asylum claim which might be relevant to Article 8 ECHR to a limited extent"*

7. However by [108] the FtTJ is of the view that there were 'insurmountable obstacles' and one strand of the reasoning to underpin such finding included the Appellant's association with MASSOB. It is submitted that the Appellant having expressly declined to run a protection claim, it was subsequently not open to the FtTJ to rely upon the absence of such risk factors to find an inability to resume a private life in Nigeria."

29. I accept Mr Biggs' characterisation of such grounds as being primarily a submission that in principal because the Appellant had not made a protection claim she could not rely upon any consequences of her association with MASSOB in the context of an Article 8 case. I also accept Mr Biggs' submission that such a ground is misconceived:

there is no reason in principal why a person who has not claimed asylum cannot rely in arguments in relation to 276ADE 'obstacles' and/or in respect of the proportionality of a removal decision, on claims in respect of anticipated circumstances on return that might also inform a protection claim.

30. Nonetheless, in my judgement it is clear that what was being challenged in substance was the Judge's reliance upon the Appellant's past association with MASSOB in the context of her circumstances in the event of return.

31. Further, it seems to me that paragraphs 6 and 7 of the Grounds must be read holistically, and in particular with the immediately following paragraphs 8 and 9:

"*8. Furthermore it is not reasoned at all why a single loan female in Nigeria is unable to help private life, see [108] when the Appellant's case was her grandmother remained in Nigeria.*

9. It is further submitted that the same point can be made in respect of the FtTJ's findings at [113] that there were exceptional circumstances to warrant consideration of the claim outwith the Rules under Article 8 of the ECHR."

32. It is to be noted that in the paragraphs in the Decision immediately leading up to paragraph 113 - i.e. paragraphs 109-112 under the heading 'Article 8 ECHR' – the Judge's reasoning relates exclusively to private life circumstances in the UK and 'delay', save in one regard – "*her association with MASSOB*" (paragraph 112). Accordingly it seems to me that in substance the Grounds include an allegation that the Judge failed to reason why the Appellant's association with MASSOB should have been viewed favourably in the context of the Article 8 evaluation.

33. Notwithstanding that it seems to me that there is some considerable weight to Mr Biggs' criticisms of the clarity of the drafting of the Grounds of Appeal, the matter was clearly enough understood by First-tier Tribunal Judge Ransley in granting permission to appeal when he articulated the substance of this aspect of the Respondent's challenge in this way:

"*Ground (2) – it is arguable that in finding that the Appellant met the 'insurmountable obstacle' tests the Judge wrongly assumed that she would face a risk on return to Nigeria due to her association with MASSOB, when the Appellant had expressly declined to make a protection claim. The same argument can be made in respect of the Judge's finding that there were exceptional circumstances in the Appellant's case to warrant considering her Article 8 claim outside the Rules.*"

The reference to the Judge's 'assumption' is telling: an assumption is indicative of an absence of reasoning.

34. In all such circumstances I am persuaded by Ms Willocks-Briscoe submission that the clear and obvious error to which I have referred above was in substance identified in the Grounds of Appeal to a sufficient extent to found a jurisdiction in the Tribunal – even though it might be said it was not articulated in as clear and obvious a manner as the error itself.

35. The error is sufficiently material that the decision in the appeal requires to be set aside.

36. The Respondent has also raised arguments in respect of the Judge's approach to the issue of 'delay'. There are two aspects to this challenge: that there was nothing exceptional in the delay - or the opportunistic consolidation of private life in consequence - bearing in mind that length of residence is a consideration subsumed within paragraph 276ADE of the Immigration Rules; in any event the delay should not be considered to diminish the weight to be accorded the imperative of maintaining effective immigration control in circumstances where the delay appears to have been whilst the Appellant was within the appeal regime, and not a delay occasioned by tardy decision-making.

37. The Grounds of Appeal in this regard might again be said to lack a degree of sharpness of focus. Charitably, this may in part be because of the lack of clarity in the First-tier Tribunal's decision, and also in part because the Judge – and seemingly in turn the drafter of the Grounds – does not seem to have identified the substantial delay occasioned by reason of the conduct of the Appellant's 'rogue' adviser. Indeed it seems to me clear that the Judge could not possibly have given any consideration to the very helpful narrative chronology set out in the written submissions in the earlier proceedings (which as I have noted were reproduced in the Appellant's bundle before the First-tier Tribunal herein), because the Judge concluded that the Appellant "*still had an extant application*" to join the British Army (paragraph 114), notwithstanding that in March 2015 her Counsel acknowledged that the British Army had withdrawn her application because of her age. Moreover, it does seem to me that in referring to delay the Judge had in mind delay on the part of the British Army rather than any delay on the part of the Respondent.

38. On balance I am persuaded that the Judge has failed to articulate with any satisfactory clarity the way in which delay on the part of the British Army informed the proportionality decision. Moreover, there was no evidential foundation to conclude that the delay was such that the Appellant still had an extant application. There is not otherwise identified delay in processing any immigration applications or appeals. Moreover, the omission of any reference to the delay caused by the

Appellant's own adviser is indicative of a lack of careful scrutiny of the relevant circumstances.

39. It was common ground between the representatives before me that in the event that I concluded that there was a material error of law requiring the decision in the appeal to be set aside, that the appropriate forum for remaking the appeal would be the First-tier Tribunal. I agree. No findings of fact of First-tier Tribunal may safely be preserved. As I have already noted the proceedings before the First-tier Tribunal was seemingly in the absence of a Respondent's bundle; moreover the Judge does not seem to have appreciated the full chronology overlooking both the delay occasioned by the Appellant's own adviser, and the acknowledgement that the Army application had been withdrawn.

40. For completeness I note that I was not persuaded that the First-tier Tribunal Judge had erred in law as alleged in relying on a Wikipedia entry whilst omitting consideration of the source of the entry. It was for the Judge to determine what weight to accord to supporting documentary evidence, and it was no part of such an evaluation that the Judge should have unilaterally conducted further searches in respect of quoted source materials.

41. It does not follow, however, that the Wikipedia article is to be accepted uncritically at the rehearing. It is a matter for the next Judge what weight should be accorded to the article. However, the Appellant is now on notice that the Respondent has raised questions as to the reliability of the Wikipedia article in circumstances where the website quoted as the source appears to have been deactivated. The Judge may also wish to give consideration to the manner in which Wikipedia articles may be edited by members of the public. Both parties may wish to give some consideration to the history of the relevant Wikipedia page, and adduce evidence as appropriate. The Appellant in particular may wish to give consideration to adducing further and different evidence in support of her claim to have been an activist within MASSOB.

42. Be that as it may I do not propose to make any specific Directions as to the further conduct of the appeal. The Respondent should ensure that an appeal bundle has been duly served on the Appellant. Otherwise, it is for the parties to decide what, if any, further evidence they wish to file. Standard directions will suffice in this regard.

<u>Notice of Decision</u>

43. The decision of the First-tier Tribunal contained material errors of law and is set aside.

44. The decision in the appeal is to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge Blake, with all issues at large

45. No anonymity direction is sought or made.

Signed: Date: **25 October 2017**

Deputy Upper Tribunal Judge I A Lewis