IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005403

First-tier Tribunal No:
PA/00779/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

18th March 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

OAB
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In Person
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 5 March 2024

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 25 September 1983. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his asylum and human rights claims.

2. The appellant entered the UK on 16 January 2007 on a Tier 4 student visa and subsequently switched to a Tier 4 dependent partner category, with leave until 18 May 2013 as his wife's dependant. He made a human rights Article 8 application on 28

February 2013 which was refused on 22 April 2013 with no right of appeal and made a further application as the dependent of his wife which was refused on 9 May 2013. He was served removal papers on 23 August 2013, together with his wife, and an appeal made by him and his wife and child on Article 8 grounds was dismissed in the First-tier Tribunal on 26 February 2014. The appellant made further submissions and applications on Article 8 grounds in 2014 and 2015 which were refused and he then made an asylum claim on 27 August 2019 after being encountered and detained. His claim was refused on 18 October 2019 and his appeal against that decision was dismissed by the First-tier Tribunal on 16 April 2020. The appellant's current appeal arises out of a decision of 17 July 2023 refusing a fresh claim made in further submissions of 22 July 2021.

3. The appellant's asylum claim, as initially considered by First-tier Tribunal Ficklin in the appeal heard on 9 March 2020, was based on his fear of being harmed by members of a cult called 'Buka' or 'Buccaneers' and by his father's political enemies. With regard to the former, he claimed that he was attacked and badly injured by members of the cult when he was a student at Lagos University in 2005, following his refusal to join them, leading to him being hospitalised and then withdrawing from university and being sent out of Nigeria by his father for his own safety, having secured a student visa for the UK. With regard to the latter, the appellant claimed that his parents were murdered on 4 June 2019 as a result of his father's political activities and that he found out about that from one of his father's friends, SS, who called him on his mobile telephone.

4. Judge Ficklin did not accept the appellant's account of being attacked by members of a cult, but found in any event that he would not be at risk on that basis, some 15 years later. Neither did he accept the appellant's account of his parents' murder. He found that the appellant was at no risk on return to Nigeria. He considered the appellant's health issues as there was evidence that the appellant suffered from a lung disease, sarcoidosis, and hepatitis B, for which he took medication, as well as suffering from depression and anxiety for which he received treatment. He concluded that the appellant could access family support and treatment in Nigeria and that his removal would breach neither Article 3 nor 8 in that regard. When considering Article 8, Judge Ficklin noted that the appellant had two children in the UK and that his relationship with his wife had broken down. He found that the appellant had failed to show that he had any direct contact with his children and he did not accept that he had a genuine and subsisting parental relationship with his children. He found that the appellant could not meet the requirements of the immigration rules in Appendix FM or paragraph 276ADE(1) and that there were no exceptional or compelling circumstances outside the immigration rules, and he dismissed the appeal in a decision promulgated on 16 April 2020.

5. The further submissions made on the appellant's behalf on 22 July 2021 were accompanied by fresh evidence which included a further statement from the appellant, photographs purporting to be of his deceased father and the funeral, an email from the friend of his father, SS, who had informed him of his father's death, letters and appointments relating to his mental health and his medical problems, and an expert report from Professor Aguilar. It was claimed in the submissions that the appellant continued to fear the People's Democratic Party whose members had killed his father and mother due to his father's involvement with the All Progressive Party, and that he continued to fear the Buka criminal gang. It was stated that the appellant had separated from his wife in 2017 and he had been unable to continue to share a relationship with his children due to his wife refusing him any contact with them. Both children had been diagnosed with sickle cell anaemia. His ex-wife and children had

been granted leave to remain in the UK and he would seek to challenge the refusal of access if he was granted status in the UK. Reliance was placed upon the medical evidence in relation to the appellant's poor physical and mental health, including a rule 35 report. It was stated in the submissions that the evidence addressed the concerns of Judge Ficklin: the photographs of the appellant's father and his funeral as well as the email from SS corroborated the account of his father's political activities and assassination; the medical notes attested to the appellant's mental health issued and his medical problems; and the expert report from Professor Aguilar supported his account of being attacked by members of a cult and his father's assassination.

6. The respondent considered the submissions and treated them as a fresh claim, but refused the claim in a decision dated 17 July 2023, referring to the findings made by Judge Ficklin and concluding that the fresh evidence did not lead to a different conclusion. The respondent maintained that the appellant was at no risk on return to Nigeria, either from the Buka cult or as a result of his father's activities and found, in any event, that he could avail himself of a sufficiency of protection from the police in Nigeria and could also reasonably and safely relocate to another part of the country. The respondent considered that the evidence did not demonstrate that the appellant's removal from the UK would breach his human rights under Article 3 or Article 8.

7. The appellant's appeal against that decision was heard by First-tier Tribunal Judge CJ Williams on 29 September 2023. The appellant had prepared a further witness statement for the appeal, dated 15 September 2023, and he appeared in person before the judge and gave oral evidence. Judge Williams took Judge Ficklin's finding as his starting point and considered the fresh evidence. He did not accept that the appellant was attacked by the Buka group or that he was at any risk from them. He considered that even if he had accepted that element of the claim he would not have found the appellant to be at risk on return given the passage of time, the fact that the appellant would not be returning as a student and the fact that there was no evidence of any further interest in him by the group since the claimed events. The judge did not accept that the appellant's father was assassinated because of his political affiliation, and did not find there would be any risk to the appellant because of any political connections on the part of his father. He found that, in any event, the appellant could seek protection from the authorities and that he had not shown that internal relocation would be unduly harsh. Judge Williams accepted that the appellant was a 'seriously ill person' within the Article 3 context, but did not find that he met the second limb of test in AM (Article 3, health cases) Zimbabwe [2022] UKUT 131, since he had not provided any evidence to show that the treatment he required would be unavailable or unaffordable for him in Nigeria. With regard to Article 8, the judge did not find there would be any obstacles to the appellant's integration into Nigeria and he did not find the decision to remove the appellant would be a disproportionate interference with his Article 8 rights. The judge accordingly dismissed the appeal, in a decision promulgated on 26 October 2023.

8. The appellant sought permission to appeal against the judge's decision on five grounds. Firstly, that the judge had failed to accord appropriate weight to the medical evidence; secondly, that the judge had erred in making his negative credibility findings; thirdly, that the judge had erred in not mentioning his children and had failed to consider their best interests; fourthly, that the judge had failed properly to evaluate his full circumstances under paragraph 276ADE of the immigration rules; and fifthly, that the judge had failed to make a full proportionality assessment under Article 8 outside the immigration rules.

9. Permission was refused in the First-tier Tribunal on all grounds, but was subsequently granted by the Upper Tribunal on the following basis:

> "1. Ground 3 argues that the judge erred by not considering the best interests of the appellant's children. There is no mention in the decision of the appellant's children. This may be because this was not raised, in which case it will be difficult for the appellant to establish that an error was made. (I note that the appellant's children were not identified as an issue in dispute in paragraph 6). However, it is arguable that the issue of the children was before the judge and that this needed to be considered in the article 8 assessment. I therefore find that ground 3 is arguable.
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> 2. I do not restrict the grounds that can be pursued but make the observation that the challenge to the protection decision appears hopeless given the unchallenged findings about state protection and internal relocation."

10.The matter then came before us for a hearing. At the appellant's request, the appeal was heard remotely. The appellant did not have legal representation. Mr Tan made his submissions and the appellant then responded. The submissions are addressed in our discussion below.

Discussion

11. Permission was granted primarily on the third ground of appeal, which asserted that the judge failed to consider the best interests of the appellant's children. Mr Tan therefore focussed his submissions on that ground. He submitted that it was understandable that the judge did not address the matter because it did not appear to be an issue before him. We agree. As Mr Tan pointed out to us, Judge Williams listed all the issues before him at [6] of his decision. Those issues were agreed by the parties and did not include anything about the appellant's children.

12.The appellant's relationship with his children had, however, been a matter specifically considered in the appeal before Judge Ficklin in March 2020, where it was noted by the judge that the appellant had given inconsistent evidence about his contact with his children, claiming to have last seen them in February 2019 but also claiming to have seen them the week before the hearing. The appellant's evidence before the judge was that he had not applied for a child arrangements order because it was expensive and he believed that he would have a better chance in the family courts if he had leave to remain in the UK. At [65] of his decision, Judge Ficklin concluded that the appellant had not shown that he currently had a genuine and subsisting parental relationship with his children.

13.Since that time the appellant had not produced any evidence to show that the circumstances in relation to his children had changed. Indeed, the submissions made by the appellant's then legal representatives dated 20 July 2021, which gave rise to this appeal, made no mention of the appellant's children and their best interests as forming any part of his case. The lengthy list of documentary evidence produced with the submissions did not include any evidence about the children. In his witness statement dated 1 July 2021, produced with the submissions, the appellant referred at [36] to [39] to having had no recent contact with his children since his wife had refused him access following the breakdown of their relationship, and he made no mention of their best interests. Furthermore, the respondent's refusal decision of 18 April 2023 referred, under the heading "consideration under the parent route", to the appellant having claimed not to know the whereabouts of his children. Of relevance also is that the appellant made no mention at all of his children in his witness statement of 15 September 2023 produced for the appeal before Judge Williams.

14.In his grounds of appeal the appellant refers to having made submissions before Judge Williams about his children. Having ourselves sought clarification from the appellant, it transpires that he simply mentioned the two children in response to an enquiry by the judge following the presenting officer's submissions, but there had otherwise been no evidence about the children prior to the submissions. There was certainly no indication that the appellant was relying upon the best interests of his children as part of his Article 8 claim.

15.In the circumstances we agree with Mr Tan that the best interests of the appellant's children was not a matter which was realistically before the judge or that it was a matter which he ought to have considered. It simply cannot be the case that the judge erred by not dealing with an issue which was not before him. Even if there is an argument to be made for a judge applying some initiative to the issues before him when an appellant appears as a litigant in person, it cannot be said that that applies in the particular circumstances of this case, as outlined above. In any event, even if it was a matter which the judge ought, simply by the mere mention of the two children, to have addressed, there was no evidence before the judge to enable him to reach any different conclusion from that reached by Judge Ficklin and the outcome would inevitably have been the same. The ground is therefore not made out.

16.As for the other grounds, we find these to be equally without merit. Contrary to the assertion in the first ground, Judge Williams had full and proper regard to the medical evidence before him. He made specific reference at [15] to the rule 35 report and made findings in that regard when considering the credibility of the appellant's claim to have been attacked by members of the Buka cult. The judge referred at [24] to the significant medical evidence confirming the appellant's various health conditions, both physical and psychological, when considering Article 3. The extent of the medical evidence can be seen from the index to the appellant's bundle and it was unrealistic for the judge to refer to each and every report. What is clear is that the judge had full regard to the findings of Judge Ficklin who, some three years previously, had undertaken a detailed assessment of the medical evidence and had considered at length the appellant's medical conditions and psychological issues, as well as the risk of suicide, and had concluded that none of those issues were sufficient to reach the Article 3 threshold. What is also clear is that Judge Williams, having considered the appellant's various physical ailments and psychological issues again, based on the updated medical evidence, accepted that the appellant was a 'seriously ill person' for the purposes of the test in AM (Zimbabwe). The suggestion in the appellant's grounds that he did not give sufficient weight to the medical evidence is therefore clearly wrong. In any event, the weight to be given to the evidence was a matter for the judge. Judge Williams went on to consider the second limb of the test in AM (Zimbabwe) and had regard to the expert report and the CPIN background evidence in that context, and provided cogent reasons for concluding that the appellant had not demonstrated that he could not receive adequate treatment and medication in Nigeria and that the Article 3 threshold was not met. Clearly that was a conclusion he was entitled to reach.

17.With regard to the fourth and fifth grounds, the judge took full account of the medical evidence and the impact of removal on the appellant when considering whether there were very significant obstacles to his integration in Nigeria under paragraph 276ADE of the immigration rules and when considering Article 8 outside the immigration rules. The judge considered the appellant's circumstances in the UK and in Nigeria and reached a conclusion which was cogently reasoned and was entirely open to him on the evidence before him.

18.As for the challenge in the second ground to the judge's adverse credibility findings, that is essentially little more than a disagreement with the conclusions reached by the judge. The judge considered the fresh evidence that had not been before Judge Ficklin. At [14] he considered the expert report from Professor Aguilar in the context of the appellant's claim about the Buka clan and at [17] to [20] he considered the evidence relied upon by the appellant in support of his claim about his father's political activities and murder. He explained why he did not consider that that new evidence led to any different outcome to that reached by Judge Ficklin and was entitled to conclude as he did. In any event, as Mr Tan submitted, the judge found in the alternative that the appellant could access a sufficiency of protection from the Nigerian authorities and could also safely and reasonably relocate to another part of Nigeria so as to alleviate any risk that there may be, a finding that has not been challenged in the grounds.

19.The appellant's submissions raised no further issues and were simply an assertion that the evidence proved his case and that the judge had not considered the evidence properly. However, for the reasons already given, we do not accept that that is the case. On the contrary, the judge had careful regard to all the evidence and made properly reasoned findings on all aspects of the appellant's claim, in relation both to the protection issues and the medical-related and other human rights grounds. In so far as the appellant now seeks to rely upon further evidence, namely two letters from Manchester Talking Therapies to his GP dated 9 November 20023 and 12 January 2024, these both post-date the judge's decision and are therefore not relevant to the error of law issue, but in any event are essentially an extension of the evidence already considered by the judge.

20.For all these reasons the challenges made in the grounds are not made out. The judge reached a decision which was fully and properly open to him on the evidence before him. We accordingly uphold the judge's decision.

Notice of Decision

21.The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 March 2024