Neutral Citation Number: [2024] EWCA Civ 315

Case No: CA-2023-001039

ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) JUDICIAL REVIEW

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 29th February 2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

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Between:

THE KING **ON THE APPLICATION OF LEONARD OGILVY** **(a.k.a. Olusegun Adedeji Alakija)**	**Claimant/ Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Respondent**

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ARFAN KHAN of counsel (instructed by **CV Brooks, Solicitors**) for the **Applicant**

MATTHEW HOWARTH of counsel (instructed by **the Treasury Solicitor**) for the **Respondent**

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JUDGMENT

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LORD JUSTICE UNDERHILL :

1. The applicant has applied for permission to appeal against a decision of Upper Tribunal Judge Kebede dated 20th March 2023 refusing him permission to apply for judicial review of the decision of the respondent Secretary of State dated 10th October 2022. That decision was to refuse to entertain a fresh human rights claim under paragraph 353 of the Immigration Rules challenging his deportation to Nigeria. The further representations which were said to constitute such a fresh claim are in a letter from the applicant dated 19th April 2022. I will refer to that as "the paragraph 353 letter" and to the Secretary of State's decision as "the decision letter".

2. I considered the application for permission to appeal on the papers on 21st December 2023. One of the applicant's criticisms of Upper Tribunal Judge Kebede's decision was that he had given only very general reasons which did not directly address the six pleaded grounds for judicial review. There is force in that criticism, and in my decision I addressed those grounds in turn. I refused permission on grounds 1 to 4 but I decided that grounds 5 and 6 should be considered at an oral *inter partes* hearing. The applicant has been represented by Mr. Arfan Khan and the Secretary of State by Mr. Matthew Howarth, both of counsel, and I am grateful to them for their assistance.

3. The applicant's immigration history is long and very complicated, and since this is only a permission hearing, I will not attempt any detailed summary. The fullest and most authoritative account is to be found in the clear and comprehensive judgment of Upper Tribunal Judge Pitt dated 9th January 2020, to which I will have to return in due course. Although the applicant has given many different accounts of his identity and nationality, she found that he is a Nigerian national called Olusegun Adedeji Alakija, born on 10th October 1985, and that he first came to this country in 1987, though for a

short interval thereafter he returned to Nigeria. He has used various aliases although for many years he has wholly or mainly used the name Leonard Ogilvy, in which he brings these proceedings. He has a long record of criminal and other dishonest conduct, including a conviction on 3rd July 2017 on three counts of wilfully pretending to be a barrister and three counts of fraud, for which he was sentenced to two years' imprisonment.

4. On the basis of that conviction, on 12th June 2018 the Secretary of State made a deportation order and refused the applicant's human rights claim challenging deportation. Among the allegations made by the applicant in support of that challenge was that he was stateless: more specifically, he denied that he had Nigerian nationality. The applicant appealed against the Secretary of State's refusal of that claim. His appeal was allowed by the First-tier Tribunal but dismissed on appeal to the Upper Tribunal by Upper Tribunal Judge Pitt in the decision already referred to. She made clear and reasoned findings about his identity and nationality to the effect which I have just summarised and held that he was not stateless. In that connection she considered a number of dealings between the applicant and the Nigerian High Commission in the 1990s in which it declined to recognise him as a Nigerian national and to issue travel documents to enable his deportation to Nigeria following an earlier decision to that effect. There was also a reiteration of the Commission's position, of which I need not give details, in 2014.

5. The applicant sought permission to appeal against Upper Tribunal Judge Pitt's decision, but that was refused by Lord Justice Dingemans on 8th April 2020 following an oral hearing.

6. On 2nd April 2020 the applicant made a formal application to the Secretary of State for leave to remain on the basis that he was stateless, supplemented by a letter dated 7th April. That application was refused on 24th May 2021. The applicant applied for an administrative review of that decision, but it was upheld by a decision dated 3rd August 2022. Neither the original decision nor the review decision has been the subject of legal challenge. Unsurprisingly, both decisions relied heavily on the findings of Upper Tribunal Judge Pitt.

7. On 6th April 2020 – that is, at almost the same time as the statelessness application – the applicant also submitted further representations to the Secretary of State again challenging the deportation decision. On 3rd August 2021 the respondent refused to accept those representations as a fresh claim. The applicant sought judicial review of that refusal, but permission was refused on the papers by Upper Tribunal Judge Hanson on 11th August 2021 and, after a hearing, by Mr. Justice Lane and Upper Tribunal Judge Pitt on 22nd February 2022.

8. It was following that refusal that the applicant on 19th April 2022 made the further further representations – what I have called the paragraph 353 application – which led to the impugned decision. These advanced various article 8 grounds of a conventional character relating to his family and private life, with which we are not now concerned. The letter said nothing whatever about statelessness, which had of course by that time been the subject not only of Upper Tribunal Judge Pitt's findings but of his statelessness application which had been refused. It did, however, contain one short paragraph, paragraph 4.2, which reads as follows:

> "Finally, and in conclusion, the prospect of removal to Nigeria is too remote, since there is no imminent removal in any event. Accordingly, I invite the SSHD to carefully consider not making any further

> decisions that may or could lead to further ordering a court, when a common sense, practical and holistic administrative decision could be taken that would leave both parties comfortable and without the need to go back to court again and again".

Something has gone wrong with the drafting there, but the broad sense is clear. The paragraph makes no specific application but in general terms invites the Secretary of State to bear in mind what is said to be the unlikelihood of it being possible for the applicant to be removed to Nigeria.

9. The respondent's decision dated 10th October 2022 in response to those further representations deals in detail with the various article 8 grounds relied on, but it also contains a section under a separate heading "Claims of statelessness and unable to be documented". This refers to "your claim that you are stateless and that the Home Office is unable to obtain a travel document for you with the Nigerian authorities". It then sets out the core passage from Upper Tribunal Judge Pitt's judgment, making findings about the applicant's nationality and that he was not stateless. It concludes:

> "It is therefore considered that you are not stateless due to the determining of the judge at your Upper Tribunal determination and your lack of any evidence to support your claims of statelessness. This also determines that until you provide your true details and evidence to the Nigerian authorities, they are unlikely to provide you with a Nigerian travel document; this is despite being a Nigerian national".

There was of course at that stage no extant claim for leave to remain on the basis of statelessness, and I have not found it entirely easy to understand on what basis that section was included in the decision letter. Mr. Howarth said that it was included because the Secretary of State was anxious to proceed on a holistic basis and take account of all matters, whether or not directly raised in the paragraph 353 letter. That may be the case; and in any event it does appear to contain a response to the applicant's point in paragraph 4.2 of the letter, namely that the reason that the Nigerian authorities had not to date been prepared to recognise him as having

Nigerian nationality was that he had been telling them, contrary to the true position as found by Upper Tribunal Judge Pitt, that he was not Nigerian. The clear implication is that there was reason to believe that if the Nigerian authorities were given the true information, which had been sufficient to persuade Upper Tribunal Judge Pitt, they might indeed proceed to issue travel documents so that deportation could proceed.

10. Against that background, I turn to the applicant's grounds 5 and 6. These are rather diffusely pleaded, but in essence ground 5 is that it was irrational of the Secretary of State not to recognise that the applicant had an arguable fresh claim to be stateless, and ground 6 that it was irrational of him not to recognise that the applicant had an arguable fresh claim to be in practice irremovable. Statelessness and irremovability are different concepts, but they are evidently closely related and if either were definitively established it would mean that the deportation decision would have to be revoked and consideration given to the grant of an appropriate form of leave to remain.

11. I take ground 5 first. I do not believe that in the letter of 10th October 2022 the Secretary of State made any decision about statelessness as such. As I have said, nothing had been said about statelessness in the paragraph 353 letter and the applicant had made a separate statelessness application which had been refused. In any event, it seems to me that it would be wrong to allow an application for judicial review on that question when the right vehicle for a challenge on the statelessness issue would have been judicial review of the refusal of the statelessness application.

12. However, even if I were wrong about that, I do not believe that the Secretary of State could be said to have been irrational in what he said in the decision letter about statelessness and the unobtainability of travel documents: see para. 9 above. He was

entitled to take the view that, now that Upper Tribunal Judge Pitt had definitively decided that the applicant was a Nigerian national, the Nigerian High Commission might take a different view from that which it had taken to date. In accordance with the Secretary of State's policy, it was up to the applicant in the first instance to approach the Nigerian authorities, telling them the true position, and to seek to get them to change their mind and issue travel documents. Nothing in the paragraph 353 letter showed that he had done so: paragraph 4.2 was, as we have seen, in entirely general terms.

13. Mr. Khan in response relied on the fact that the applicant had on 6th March 2020 – that is, shortly after Upper Tribunal Judge Pitt's decision – emailed the Nigerian High Commission attaching a copy of various documents, including the recent judgment of the Upper Tribunal. The email itself contained no specific representations, but a letter of the same date from him to the Commission vehemently asserted that the Home Office and the Upper Tribunal were wrong to find that he had Nigerian nationality and asked a series of tendentious questions designed to elicit the response from the Commission that he was not a Nigerian national. Subsequently, on 16th February 2021, the applicant emailed the High Commission again setting out his case that he was not a Nigerian national and asking it to confirm that it remained its position, as in 1997 and 2014, that that was indeed the case. He wrote a chasing email on 19th August 2021, and on 24th November he emailed the High Commission again to record what he said was a conversation that he had had two days previously with a Mr. Wilson of the Commission in which he had been told that it did not propose to respond to any of the letters that it had received from him because it took the view that the matter had been definitively decided in the 1990s and nothing more needed to be said.

14. However, even if that evidence can be taken at face value, which I ought to do at a hearing of this kind, none of the emails in question were supplied to the Secretary of State with the paragraph 353 letter. There is no reason to suppose that the Home Office was aware of them or of the Nigerian authorities' lack of response, still less of the conversation with Mr. Wilson. The only exception that I should make is that the email of 16th February 2021 had been cc'd to the statelessness section of the Home Office; but that by itself would not be enough to require that the email be considered as part of the putative fresh claim, which made no reference to it.

15. Mr. Khan submitted that all that mattered under the Secretary of State's policy was that the applicant had not been able to persuade the Nigerian authorities and that it was accordingly the Home Office's duty to seek to do so themselves, and that it was acknowledged in the Secretary of State's skeleton argument for this hearing that they had not done so. However, I do not read the policy as obliging the Home Office to take any steps themselves unless and until the applicant had himself given a true and good faith account to the Nigerian authorities: the point of the policy is that in some cases an attempt by an applicant to obtain travel documents may need support or reinforcement by the UK authorities providing arguments and information that they would be peculiarly well-placed to advance. In other words, it is in support of an attempt by the applicant to get the necessary documentation. The applicant had not, to the Secretary of State's knowledge, made any such attempt. Even if the Home Office was aware of the email of 16th February 2021, which had been cc'd to it, that email (like the applicant's other communications with the High Commission) was not an attempt to put the true position to the High Commission – rather the reverse.

16. I turn to ground 6. I accept that paragraph 4.2 of the paragraph 353 letter did, albeit obliquely, raise the question of irremovability. However, my reasoning in the preceding paragraph applies here equally. The Secretary of State was reasonably entitled, subject to what I will say shortly, to take the view that it was for the applicant now to give a true account to the Nigerian authorities, supported by Upper Tribunal Judge Pitt's judgment; and that he had not yet, so far as they were aware, done so.

17. I can accordingly see no arguable error of law in the decision letter of 10th October 2022, which responded reasonably to the material supplied to it in the paragraph 353 letter. I would refuse permission to appeal against Upper Tribunal Judge Kebede's refusal of permission to apply for judicial review.

18. However, I should say that I would be very concerned if the present impasse were to continue indefinitely. Even in a case where a person liable to deportation is refusing to co-operate with his national authorities, a time may come when, if the Secretary of State wishes to continue to maintain that they are removable, he must take the initiative with the authorities of the foreign state in question and himself try to persuade them to issue emergency travel documents. If he succeeds, well and good, and deportation can proceed. But if he fails, he may have to face up to realities and consider whether to revoke the deportation order and grant some form of leave.

19. Mr. Khan says that that time has already arrived. In this case the Secretary of State told Lord Justice Dingemans as long ago as March 2020 that the Home Office was assembling a submission to be made to the Nigerian High Commission and it appears that he has since done nothing. As to that Mr. Howarth submitted to the court that it was not realistic to persuade the Nigerian High Commission that the applicant had Nigerian nationality on the basis of Upper Tribunal Judge Pitt's decision, as long as

that issue was still being fought in the courts. He produced the CID notes on the appellant's file which, although they do not make that point explicitly, are entirely consistent with that being the Secretary of State's approach. I am satisfied that that is likely to have been the position and it does not seem to me to be unreasonable.

20. Having said that, the effect of my decision on this application is, and I hereby make clear, that the English courts have dismissed all challenges, direct and indirect, to Upper Tribunal Judge Pitt's decision on the issue of the applicant's nationality and that should be regarded as the settled position of the UK authorities. On that basis the Home Office is in a position now to make whatever representations they wish to the Nigerian High Commission in order to seek to persuade it to issue travel documents. I would expect it to do so, if it is going to do so at all, with all reasonable expedition. If it does not, or if such representations are made but fail to persuade the Nigerian authorities, the Secretary of State will have to consider his position very carefully. I do not understand that Mr. Howarth has any representative of his clients with him in court, but I will expect that message to get back to the decision-takers in the Home Office. In due course a transcript will be available, but counsel will be able to communicate it now on the basis of his own note.

21. I should say that I have given consideration to whether to certify the application for permission to appeal as totally without merit. I have been very tempted to do so, because I do not think there is anything substantively in the appeal, for the reasons I have given. However, because the reasoning of Upper Tribunal Judge Kebede was not as full as it might have been, albeit consistent with the overall merits, I do not think it would be appropriate to make such a certification. Logically, that does not rule out my making a civil restraint order, as I had adumbrated in the initial decision

on the papers, since there have been previous certifications of totally without merit. However, it makes it a little more awkward to do so. Also, a time may come where the Secretary of State has clearly failed to persuade the Nigerian High Commission to issue the applicant with travel documents; and if at that stage the Secretary of State fails to take a decision reflecting that reality it would not be right to have restricted the applicant from bringing proceedings. However, I wish to emphasise that that time has not come yet; and the applicant should desist from bringing any further proceedings going over ground – and in particular ground relating to his nationality – that has long been definitively decided.

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