Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00764/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 10th July 2013	**on 22nd July 2013**

Before

UPPER TRIBUNAL JUDGE SPENCER
UPPER TRIBUNAL JUDGE RINTOUL

Between

OKECHUKWU INNOCENT OGIDE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Miss C Physsas, counsel, instructed by Duncan Lewis & Co Solicitors
For the respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before the Tribunal pursuant to leave granted by Upper Tribunal Judge Peter Lane, on 1st May 2013, for the following reasons:

> "1. I do not consider there is any merit at all in Ground 1. The First-tier Tribunal judge was obliged to investigate the ramifications of this unusual case, which arguably neither the appellant's representatives nor the respondent had properly done. Ground 3 is likewise devoid of merit. The learning on section 8 of the 2004 Act is not that judicial fact-finders are precluded from regarding as significant one or more credibility

issues mentioned in it; merely that they should not regard themselves as compelled to do so, merely as a result of those issues falling within the scope of that section.

2. Grounds 4 and 5 touch on what is arguably an error: namely, to examine the effect of the apparent acceptance by the respondent that the appellant is already a refugee, *qua* Nigeria. A glance of the Refugee Convention makes it plain that a refugee is entitled to expect certain treatment from third party States, not least not to be *refouled* to the country of nationality etc. Arguably, the judge could not properly determine the appeal without at least some attempt being made to ascertain (a) whether the appellant still had refugee status; and (b) on what basis he was accorded that status. If one or more of the reasons for being granted refugee status overlapped with the appellant's claimed fears of returning to Nigeria, the appellant's credibility would arguably have needed to be assessed against this background. This would, of course, be different, if there were no prospect of removing the appellant to Nigeria; but the respondent's decision indicates that this is, in fact, a possibility.

3. The parties must be prepared to assist the Tribunal by providing it with all relevant information regarding the appellant's refugee status and the reasons why such status was granted by the Italian authorities.

4. For completeness, permission is also granted on ground 2."

2. The appellant's appeal to the First-tier Tribunal was against a decision by the respondent, made on 26th June 2012, to remove him from the United Kingdom to Nigeria or Italy, following the refusal of his asylum and human rights claims. First-tier Tribunal Judge S Taylor did not believe the appellant's claim that he would suffer serious harm on return to Nigeria from members of the Ogboni cult, due to him having abandoned the cult. He did not believe his claim to fear persecution on account of his homosexuality and he did not accept that the appellant would be unable to receive appropriate medical treatment in Nigeria or Italy for his medical condition. He also took the view that the removal of the appellant from the United Kingdom would not amount to a disproportionate breach of his right to respect for his private life, there being no family life, in the United Kingdom under article 8 of the ECHR.

3. Grounds 4 and 5 of the grounds of appeal complained of the First-tier Tribunal judge's approach in relation to the assessment of the appellant's private life and also of his approach in relation to the assessment of whether the appellant was a homosexual. Upper Tribunal Judge Peter Lane granted permission on the basis that the appellant had been recognised as a refugee in Italy. The difficulty facing the appellant is that it was never his case that he had been granted refugee status in Italy. In paragraph 12 of his witness statement dated 26th February 2013, which was before the First-tier Tribunal judge he said he arrived in Italy in the middle of 1993. In paragraph 13 he said he did not seek asylum because he did not know what it was, nor did he have anyone to assist him. In paragraph 14 he said he remained in Italy from 1993 until 2005. He said in 1995/1996 the Italian government had given an amnesty for overstayers who were able to secure a sponsor. He applied and received his residence permit and in 2001 he received his permanent residence in Italy. In paragraph 15 he said thereafter he remained in Italy and continued working as a sales assistant in the local stores.

4. It is clear from the record of the appellant's asylum interview, which took place on 9th February 2012, that the appellant never claimed that he had applied for and been granted refugee status in Italy. In answer to questions about his status in Italy he said initially he was illegal after arriving there from France at the end of 1993 or in 1994. He said he obtained a working visa for 4 years and then was granted indefinite leave in 2001.

5. Moreover the appellant produced a foreigner's permit of stay dated 2nd January 2002 which indicated that he had a permanent right of residence in Italy. The form dealt with a number of details relating to the appellant. Against the word "refugee" there was the entry "niente". The form indicated that his previous stay had been as "lavoro subordinato" and his means of support was "da lavoro". Ms Physsas sought to argue that because there was an entry on the document which suggested that it was valid until 4th February 2007, the appellant no longer had indefinite leave to remain in Italy and therefore was not removable to Italy. That would, however, be a contradiction in terms. In our view the fact that the document might need to be renewed did not affect the appellant's status in Italy, just as the need for a British national to renew a passport does not affect his status. Moreover, as Mr Melvin pointed out, the appellant also produced an Italian identity card, issued on 9th May 2005, which was valid until 8th May 2010. The appellant would have been likely to have been issued with an identity card which ran beyond the limit of any leave that he had been granted to remain in Italy.

6. In any event the issue of whether the appellant could be returned to Italy was never raised at the First-tier Tribunal. The respondent had power to direct his return to Italy under section 10 of the Immigration and Asylum 1999 Act with reference to paragraph 8(1)(c) of Schedule 2 to the Immigration Act 1971 as a country in which he had obtained a document of identity, a country in which he embarked for the United Kingdom or a country where there was reason to believe that he would be admitted. Any issue as to whether the appellant could be returned to Italy would not have affected the issue which the First-tier Tribunal judge had to determine, namely whether if, hypothetically, the appellant were to be returned to Italy, he would be at a real risk of persecution for Refugee Convention.

7. We therefore take the view that the statement in paragraph 58 of the letter of refusal, dated 22nd June 2012, that it was noted that the appellant was previously granted refugee status and indefinite leave to remain in Italy was a mistake. Insofar as the statement that the appellant was previously granted refugee status in Italy is concerned, the appellant cannot possibly have been prejudiced by that statement because it contained an assertion that was directly contrary to the case that he advanced before the First-tier Tribunal judge. In these circumstances the basis upon which Upper Tribunal Judge Peter Lane granted permission to appeal in respect of grounds 4 and 5 was mistaken.

8. Ms Physsas submitted that the First-tier Tribunal judge was wrong, in paragraph 25 of his determination, to say that the background information showed that permanent residence in Italy might only be revoked after an absence of twelve years. In our view that point is immaterial because the appellant had not demonstrated at the hearing of his appeal that his right of permanent residence had been revoked, nor

had he adduced any evidence to counter that referred to by the respondent in the refusal letter.

9. Ms Physsas also sought to argue that there was ongoing litigation, as she put it, relating to whether removal to Italy of persons to Italy who had refugee status there would amount to a breach of their rights under article 3 of the ECHR, but, as she herself acknowledged, this formed no part of the appellant's case before the First-tier Tribunal and indeed permission to appeal to the Upper Tribunal was not sought on any such ground. In these circumstances it is difficult to see how it could be arguable that the First-tier Tribunal judge made an error of law in this respect.

10. Although, as we have indicated, the basis upon which Upper Tribunal Judge Lane granted permission to appeal in relation to grounds 4 and 5 has disappeared, nonetheless, Ms Physsas sought to argue that the First-tier Tribunal judge had made errors in relation to the assessment of the appellant's article 8 claim. In paragraph 23 of his determination the First-tier Tribunal judge said that the appellant had provided no evidence of employment in the United Kingdom although he stated he had previously being working. Ms Physsas pointed to payslips issued by I-Pay Limited and addressed to the appellant dated, respectively, 26th August 2007, 9th September 2007 and 23rd September 2007 which had been supplied the respondent. The first showed net payment of £213.03, the second of £171.62 and the third of £222.31, the latter being in respect of two weeks' employment. It would therefore appear that there was evidence that the appellant had been employed for a period of four weeks in August/September 2007. She also pointed out that in paragraph 23 of his determination the First-tier Tribunal judge said that the appellant had not been on a course of study in the United Kingdom. Ms Physsas drew to our attention to a letter from the LVMT Business School, dated 26th November 2007, which confirmed that the appellant had enrolled at the college on a Part 1/2 (ACCA) course. There was, however, no evidence that the appellant actually embarked upon such a course. It is significant that the appellant himself made no mention of his employment or any studies in his witness statement.

11. In paragraph 23 of his determination the First-tier Tribunal judge said that he found that when the appellant's leave expired in 2003 he made no attempt to regularise his stay in the United Kingdom until 2008 and had remained without leave since the refusal of that application. Ms Physsas submitted that that was incorrect because the appellant had arrived in the United Kingdom in 2005.

12. In paragraph 23 of his determination the First-tier tribunal judge had found that the appellant's credibility was further diminished by his vague and unsupported account of his history in the United Kingdom, in particular with regard to his documents and his alleged attempts to return to Italy. This was based on the fact that the appellant claimed that he had lost his documents when he was running away following a bomb explosion at Shepherds Bush Underground Station, after which he reported the loss to the police and was given a police incident report. The First-tier Tribunal judge, however, recorded that the Shepherds Bush bomb explosion on took place on 21st July 2005 and the police report submitted by the appellant concerning the loss of his documents was dated 12th October 2007, some two and a half years later.

13. It is apparent in the error made by the First-tier Tribunal judge as to the date the appellant's leave expired in 2003 was not material to the outcome of the appeal, because in the same paragraph it is recorded that the appellant had been in the United Kingdom for eight years, which clearly involved an acknowledgment that he had come to the United Kingdom in 2005. We share the view of Mr Melvin that even if the First-tier Tribunal judge made an error in relation to the four weeks employment of which the appellant had supporting evidence, nonetheless during a period of eight years that was the only period of employment that the appellant provided evidence of having undertaken. It was the case that the appellant made no attempt to regularise his stay in the United Kingdom until 2008, when he applied for an EU residence card. The letter of refusal recorded that on 14th January 2008 he applied for an EEA residence card but this was refused on 1st December 2008. On 27th July 2010 he applied for leave outside the immigration rules on compassionate grounds but that was refused on 10th August 2010. Following his arrest on 22nd December 2011 he claimed asylum, on 25th December 2011.

14. Ms Physsas submitted that the First-tier Tribunal judge had made an error in not taking account of the appellant's medical problems in the United Kingdom as a reason for his failure to seek to regularise his stay here. It appears from the medical evidence before the First-tier Tribunal judge that the appellant had a problem with his kidneys for which he first received medical treatment in 2006. In paragraph 22 of his determination the First-tier Tribunal judge recorded that the appellant claimed he had been unable to obtain new documents until 2007 due to hospital appointments. He observed that if, indeed, the appellant had lost his documents in July 2005 he had offered no reason why he could not have obtained replacement documents by October 2005. He said after the appellant left hospital in 2006 he was monitored once a month and then once in three months, but again he offered no reason why he could not have resolved his position during that period. He found the appellant's account with regard to his lost documents and his attempts to return to Italy totally lacked credibility.

15. Ms Physsas also submitted that the First-tier Tribunal judge did not expressly find that the appellant's removal to Nigeria would not breach his article 8 rights but it is clear by reason of his finding that the appellant could continue with his activities of helping the youth in a church in Italy or Nigeria in paragraph 23 of his determination and his finding that he had submitted no evidence that he could not receive appropriate (medical) treatment in Italy and he had not demonstrated that treatment would not be available in Nigeria in paragraph 24, that he took the view that removal whether to Italy or Nigeria would not breach the appellant's article 8 rights.

16. Ground 4 asserted the First-tier Tribunal judge had failed to assess the supporting evidence relating to the appellant's private life but in our view it is clear that he took into account the whole of the evidence in reaching his conclusions. As he observed in paragraph 23 of his determination having a job and friends would be insufficient to create a private life for the purposes of article 8 as they could be recreated elsewhere, in reliance upon the determination of the Tribunal in MG (Serbia and Montenegro) [2005] UKAIT 113. It was also said that the First-tier Tribunal judge failed to take account of the risk of suicide, the basis for which was an email, dated 7th December 2012, from the appellant to UKBA, in which he complained of being

depressed, made reference to his asylum claim and said he was even thinking of giving up his life. In our view the appellant had not laid the necessary evidential basis upon which it could be said that he remotely approached satisfying the necessary criteria in order to demonstrate a risk of suicide if he were to be removed from the United Kingdom.

17. In the light of these matters we take the view that there is nothing to the complaints about the First-tier Tribunal judge's assessment of the appellant's private life and nothing in the evidence to demonstrate that the appellant's return to Nigeria or Italy would amount to a breach of his right to respect for his private life in the United Kingdom under article 8 of the ECHR.

18. Ground 2, a ground in respect of which permission was granted, asserted that the First-tier Tribunal judge failed to give appropriate weight to the oral evidence of Mr Sampson Essien. The appellant had confided in him that he was gay in 2009. In paragraph 14 of his determination the First-tier Tribunal judge recorded his evidence at the hearing, in which he made reference to his letter of support. The First-tier Tribunal judge said that in summary the letter stated the appellant had told him in 2009 that he was gay. He believed the appellant because he came round with his partner and confirmed their relationship.

19. In paragraph 16 of his determination, in dealing with the appellant's claimed fear of the Ogboni cult, the First-tier Tribunal judge recorded that the appellant felt he was able to return to Nigeria not only at least three or four times but for one to three months at a time up to 2004. He said the appellant did not just go back for clandestine visits, but he returned to marry in 1998 and returned on a sufficient number of occasions to have four children, including a set of twins. In paragraph 19 he recorded that the appellant claimed that he realised he was homosexual in 2008 or 2009 but he failed to claim asylum at that stage and did not claim asylum until some three years later, at the end of 2011 and only after he had been arrested on immigration matters at his place of work. In addition, when he wrote a letter outlining his asylum claim, on 24th December 2011, he made no mention of his sexuality or his relationships with men. In paragraph 20 he said the appellant claimed to have had three homosexual relationships in the United Kingdom since 2008, but had submitted very little evidence in support of his claim. None of his claimed partners attended the hearing or provided a statement in support of the appeal. In paragraph 21 he said the supporting witness was only able to say that the appellant attended his barber shop in the company of someone who the appellant told him was his partner. That in our view dealt sufficiently with the evidence of Mr Essien because it involved an acknowledgment by the First-tier Tribunal Judge that Mr Essien had said that he had been told by the appellant that he was homosexual and also that a person had been introduced to him as the appellant's partner. The weight of that evidence was a matter for the First-tier Tribunal judge in the light of the evidence as a whole and in our view it cannot be said that he gave it inappropriate weight.

20. In these circumstances we are not satisfied that the First-tier Tribunal judge made a material error of law on a point of law in his determination of the appeal and

therefore his appeal to the Upper Tribunal is dismissed, so that the decision of the First-tier Tribunal shall stand.

Signed Dated

P A Spencer
Judge of the Upper Tribunal