



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/33403/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10 August 2017

Determination Promulgated
On 14 August 2017

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

**BABATUNDE OLUWABAMIGBE ADETUYI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Corben of Counsel, instructed by St Valchikwe Solicitors

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant challenges the determination of First-tier Tribunal Judge Plumptre dismissing his appeal against the respondent's refusal on 6 August 2014 to grant further leave to remain on article 8 grounds. The appeal was dismissed by way of a determination promulgated on 10 January 2017 following a hearing at Hatton Cross on 3 January

2017 at which the appellant and his representatives declined to participate.

2. The appellant is a Nigerian national born on 22 November 1966 who last entered the UK on a false passport in March 2006 but obtained discretionary leave in July 2009 because he married a British national of Nigerian origin in a customary ceremony. An extension of his leave was granted in May 2011 until 26 May 2016 but his application for further leave was refused because the respondent was not satisfied that there was evidence to show the relationship was subsisting or that the appellant's presence was conducive to the public good because he had multiple unspent convictions.

Procedural Background

3. There is a long and unsatisfactory history to these proceedings. Following the refusal of his application, the appellant lodged an appeal and that was heard by First-tier Tribunal Judge Owens at Hatton Cross on 7 September 2015 and dismissed under the rules and on article 8 grounds on 29 September 2015. At that hearing the appellant claimed that he had experienced problems in Nigeria but confirmed he was not pursuing a protection claim.
4. The appellant challenged the decision on the basis the judge had made no adverse credibility findings with respect to the problems he claimed to have experienced in Nigeria, that those problems were relevant to the obstacles he would face if he had to re-integrate into Nigerian society and that the judge confused them with an asylum claim. It is also argued that the judge failed to consider the submission that the appellant would face significant harm on return. Permission to appeal was refused by First-tier Tribunal Judge Ford on 28 April 2016 but renewed to the Upper Tribunal where it was additionally argued that the appeal had been presented under articles 2, 3 and humanitarian protection grounds and that the appeal in that respect had not been properly considered. It is maintained that Judges Owen and Ford had been biased against the appellant because he had not claimed asylum. It was further argued that the proportionality assessment was flawed (although no further clarification is provided). On 25 May 2016, Upper Tribunal Judge Reeds granted permission to appeal on the basis that Judge Owens had failed to make findings on the claim of serious harm and that her observation that the representative did not make submissions that the appellant would be at risk of serious harm on return was arguably inconsistent with the appellant's evidence that he would be at risk.
5. The matter then came before Deputy Upper Tribunal Judge Shaerf at Field House on 4 July 2016. Having heard submissions, Judge Shaerf agreed with the appellant's representative that the appellant had

indeed raised article 2 and 3 issues in his evidence and that no findings on these matters had been made by the judge. He found that to be an error of law. He concluded, however, that there was no reason to disturb the findings on article 8. He allowed the appeal to the extent that it contained an error of law such that elements of the appellant's claim under articles 2 and 3 remained to be decided. His determination was promulgated on 12 July 2016.

- 6.** The appellant then filed an application for permission to appeal to the Court of Appeal on 18 July 2016. There appear to have been problems with the fax machine at Field House during this period and the application was not processed. On request from the Tribunal on 22 September 2016, the application was re-served on 26 September and on 3 October 2016 the Upper Tribunal acknowledged receipt of the application with the confirmation: *"You will be notified of the results in writing"*. To date, no decision has been made. Meanwhile, it appears that the file was transferred to Hatton Cross on 16 July 2016 following Judge Shaerf's decision. On 18 July 2016, a notice of hearing was issued by the First-tier Tribunal listing the appeal for a hearing on 3 January 2017.
- 7.** On 13 September 2016 appellant's representatives contacted the Upper Tribunal to enquire about the progress of the application for permission to appeal to the Court of Appeal. No reply appears to have been issued.
- 8.** On 3 October 2016, the First-tier Tribunal issued directions in support of the appeal hearing on 3 January 2017.
- 9.** On 11 November 2016, the representatives contacted the First-tier Tribunal requesting that the hearing be vacated until the permission application was decided by the Court of Appeal (sic). On 16 November 2017, the application for an adjournment was refused. It was pointed out that there was no evidence that an application had been made and that the Upper Tribunal had to decide the application before it proceeded to the Court of Appeal.
- 10.** On 18 November 2016, the representatives clarified that the application for permission to appeal was before the Upper Tribunal and repeated the request that the hearing be vacated until that application was decided. A copy of the Upper Tribunal's acknowledgment of receipt of the application for permission to appeal was attached as evidence that an application had been made. On 7 December 2016, the adjournment request was refused. The appellant was informed that as his application had been pending since October,

he “*should hear shortly*”. He was directed to notify the Tribunal of the position no later than 20 December 2016.

- 11.** On 16 December 2016, the representatives contacted the First-tier Tribunal again. They maintained that even if the Upper Tribunal refused permission to appeal, a further application would be made direct to the Court of Appeal and so the process would not be completed by 3 January 2017. The request for an adjournment was repeated. On 20 December 2016, the First-tier Tribunal refused the adjournment on the basis that the appellant had not asked the Upper Tribunal to “*expedite their onward appeal*”.
- 12.** On 3 January 2017, the appellant’s representative attended the hearing and renewed the application for an adjournment. The respondent was unrepresented. The matter came before First-tier Tribunal Judge Plumptre who refused the adjournment on the basis that she was obliged to follow the instructions of the Upper Tribunal as regards the remittal. The appellant and his representative then refused to participate in the proceedings. Judge Plumptre proceeded in their absence and dismissed the appeal under articles 2 and 3 on 10 January 2017.
- 13.** On 19 January 2017, the applicant filed an application for permission to appeal. Essentially he maintained that the First-tier Tribunal had no jurisdiction to hear the appeal whilst there was an outstanding application for permission to appeal to the Court of Appeal before the Upper Tribunal. Permission was granted on 24 July 2017 by First-tier Tribunal Judge Brunnen. The matter then came before me on 10 August 2017.

The hearing

- 14.** At the hearing, I heard submissions from the parties. Mr Corben criticized Judge Plumptre for proceeding whilst the application for permission to appeal was still outstanding and submitted that she had erred in only considering the matter of delay rather than justice as an over-riding objective. He submitted that allowing her decision to stand would mean that the appellant’s right to challenge Judge Shaerf’s decision would be extinguished through no fault of his own. Ms Willocks-Briscoe agreed that the application appeared to be outstanding but submitted that the appellant had had the opportunity to present his case on articles 2 and 3 and had declined to particulate in the proceedings. She was unable to comment on the procedural matter. Mr Corben submitted that any delay in the proceedings was due to procedures in the Tribunal and the appellant should not be deprived of his rights because of that.

15. Conclusions

- 16.** Having heard the submissions and considered the documentary evidence before me, I am satisfied that an application for permission to appeal to the Court of Appeal was made in a timely fashion to the Upper Tribunal by the appellant and that the delay in its receipt and need for it to be re-served was due to a fault with the fax machine of the Upper Tribunal at the time. Correspondence on file from the Upper Tribunal confirms that. I am also satisfied that due to what appears to be a most unfortunate oversight by the Upper Tribunal, the application for permission to appeal was not placed before a judge for consideration. It did not assist matters that all the letters from the representatives asking for an update on the permission application were simply forwarded to the First-tier Tribunal at Hatton Cross where it seems no action was taken. Of course, it is unusual for an appellant who succeeds in his appeal to make an application for permission to appeal however the procedure rules allow for either party to raise a challenge and the appellant was within his rights to make his application. He is also entitled to have that application decided and it is regrettable that the paper applications for adjournments were refused without any action being taken to chase up the permission application. I am satisfied that Judge Plumptre erred in law. She had no jurisdiction to proceed with the appeal hearing when there was an outstanding challenge before the Upper Tribunal to Judge Shaerf's decision to remit the appeal for re-hearing. I conclude, therefore, that her decision is void.
- 17.** It follows that Judge's Shaerf's decision on remittal shall be dependent upon the outcome of the application for permission to appeal to the Court of Appeal which shall now be decided.

18. Decision

- 19.** The First-tier Tribunal had no jurisdiction to hear and determine the appeal. The decision is void.

20. Anonymity

- 21.** No request for an anonymity order was made and I see no reason to make one.

Signed

A handwritten signature in black ink, appearing to read "R. K. K. E." with a period at the end. The letters are cursive and somewhat stylized.

Upper Tribunal Judge

Date: 10 August 2017