Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01737/2019

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2021

Decision & Reasons Promulgated
On 13 July 2021

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

SO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Moriarty (Counsel instructed by Rashid & Rashid Solicitors)
For the Respondent: Ms J. Isherwood (Home Office Senior Presenting Officer)

DECISION AND REASONS

DIRECTION REGARDING ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify

© CROWN COPYRIGHT 2021

the Appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

INTRODUCTION

1. The Appellant is a Nigerian national, born on 17 February 1960. On 18 March 1990, the Appellant entered the United Kingdom as a visitor, overstayed the terms of that visa and was later granted Indefinite Leave to Remain on 11 August 2000. On 3 October 2008, the Appellant was sentenced to 8 years imprisonment for the attempted importation of 3.12 kgs of pure cocaine into the UK. A Deportation Order was signed against the Appellant on 18 July 2014.

2. The Appellant appealed the decision to deport made on the same date (18 July 2014). Initially his appeal to the First-tier Tribunal was allowed however that decision was later set aside by the Upper Tribunal and the substantive appeal reheard in the First-tier Tribunal. This resulted in the appeal being dismissed in a decision dated 25 May 2016.

3. Subsequently, the Appellant made further representations which resulted in the SSHD refusing the Appellant's protection and human rights claim on 6 February 2019.

4. The appeal against that decision was heard by First-tier Tribunal Judge JS Burns on 24 January 2020 which resulted in the appeal being dismissed by way of a decision promulgated on 4 February 2020. In that judgment, Judge JS Burns concluded that the Appellant had rebutted the presumption that he constituted a danger to the community by reference to ss. 72(2) and 72(6) of NIAA 2002 (exclusion from protection against refoulement under the Refugee Convention) (see para. 41) but also concluded that a 'former drug smuggler' did not constitute a member of a particular social group (para. 51). The Judge also went on to find that the Appellant had failed to establish that there was a real risk of being arrested and imprisoned by the Nigerian authorities on return and accordingly dismissed the Article 3 ECHR appeal (see paras. 42-47), as well as the humanitarian protection claim (para. 57). The FtJ also dismissed the appeal under Article 8 ECHR on the basis that there were no very compelling circumstances by reference to s. 117C of NIAA 2002, (paras. 65-73).

5. The Appellant applied for permission to appeal to the First-tier Tribunal, but permission was refused by Upper Tribunal Judge Martin on 27 March 2020. The Appellant renewed those grounds directly to the Upper Tribunal and permission was granted in brief terms by Upper Tribunal Judge Allen on 11 June 2020. In his decision Upper Tribunal Judge Allen found arguable all grounds asserted by the Appellant in the application for permission.

THE ERROR OF LAW HEARING

6. The appeal before us was an in-person hearing. We heard competing submissions from Mr Moriarty, Counsel for the Appellant and Ms Isherwood, Senior Presenting Officer. We made a written record of those submissions which is contained in the record of proceedings and will not be reproduced in this judgment. At the end of the hearing we formally reserved our decision.

7. There were three grounds of appeal raised by the Appellant:

   1) that the Judge materially erred in finding that the Appellant had not shown substantial grounds for believing that he would be prosecuted and imprisoned by reference to section 22 of the National Drug Law Enforcement Agency Act ("NDLEAA") by applying a subjective assessment of plausibility;

   2) that the Judge materially erred in expecting to see background evidence which corroborated the application of section 22 to those who had been arrested and imprisoned abroad for importation of drugs;

   3) even in the absence of such specific evidence the Judge further materially erred in failing to have regard to other background evidence which indicated that the Nigerian authorities were adopting an increasingly strict approach to drug offending and drug smuggling.

8. During the hearing, Mr Moriarty mostly focused his oral submissions on the narrow issue of the Judge's assessment of the expert evidence relating to the application of section 22 of the NDLEAA (Grounds 2 & 3). In doing so, he reminded the Tribunal that the FtJ had concluded that if the Appellant is imprisoned in Nigeria then this would constitute a breach of the Appellant's Article 3 ECHR rights based on the severe conditions in Nigerian prisons coupled with the Appellant's health vulnerabilities (see para. 60 of the FtT decision).

9. We note that, as confirmed by Ms Isherwood, the SSHD has not sought to 'cross-appeal' that conclusion through a Rule 24 response (as per the recent guidance of the UT in Binaku (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 34 (IAC) at paras. 20-63).

FINDINGS AND REASONS

10. We therefore deal firstly with the main argument put forward by Mr Moriarty: that the Judge materially erred in his conclusion at para. 46 that there was no evidence to show that the provisions in s. 22 of the NDLEAA, which had existed in Nigerian law for over 30 years, had been particularly utilised by the Nigerian authorities.

11. Section 22 of the NDLEAA reads as follows:

"(1) Any person whose journey originates from Nigeria without being detected of carrying prohibited narcotic drugs or psychotropic substances, but is found to have imported such prohibited narcotic drugs or psychotropic substances into a foreign country, notwithstanding that such a person has been tried or convicted for any offence of unlawful importation or possession of such narcotic drugs or psychotropic substances in that foreign country, shall be guilty of exportation of narcotic drugs or psychotropic substances from Nigeria under this subsection.

(2) Any Nigerian citizen found guilty in any foreign country of an offence involving narcotic drugs or psychotropic substances and who thereby brings the name of Nigeria into disrepute shall be guilty of an offence under this subsection.

(3) Any person convicted of an offence under subsection (1) or (2) of this section shall be liable to imprisonment for a term of five years without an option of a fine and his assets and properties shall be liable to forfeiture as provided under this Act."

The report of Dr Inge Amundsen

12. In reaching the conclusion at para. 46, the Judge predominantly drew upon an expert report dated 15 October 2019 by Dr Inge Amundsen (see paras. 25, 29, 45 & 46). In his overall oral submissions, Mr Moriarty argued that the evidence cited by the expert at page 41 of the Appellant's bundle of "*several recent cases of people arrested and charged according to the export ban*" meant that it was inherently likely that there had also been arrests in respect of s. 22 NDLEAA and that this was materially relevant to the assessment of the risk to the Appellant of being arrested/detained by the Nigerian authorities on return. Mr Moriarty added to this by arguing that the Judge had failed to adequately assess the evidence at page 42 of the bundle that the Nigerian authorities were actively looking for drug traffickers "*on arrival in Nigeria*" and had failed to factor in the background evidence relating to the risk of pre-trial detention which was relevant even if the Appellant ultimately was not subject to prosecution.

13. We have considered these submissions with care and, although they were well made, we have concluded that there is no material error in respect of the Judge's conclusions.

14. Firstly, there is no suggestion that the Judge erred in looking to the expert/background evidence to assess the likelihood of the Nigerian authorities seeking to arrest the Appellant by reference to s. 22. The Judge was entitled to assess the evidence in order to understand the likelihood and potential consequences of return to Nigeria.

15. Secondly, we take the view that the FtJ was perfectly entitled to reach the view that he did at para. 46. Contrary to the Appellant's criticisms of this aspect of the decision, read in the context of the judgment as a whole, it is clear that the Judge was entitled to reach the conclusion that there was no contemporary evidence of s. 22 being applied in practice thereby meaning that there was no real risk of the Appellant being arrested and subject to prison conditions which would breach his Article 3 rights.

16. At this juncture it is apposite to have regard to the report of Dr Amundsen in more detail. Dr Amundsen stated that he is a political scientist with a PhD in Political Science from the University of Tromsø, Norway. He is a Senior researcher at the Chr. Michelsen Institute (CMI), which is an independent research institution and think tank in Norway. He states that his primary areas of research include Nigeria, Malawi, Bangladesh, Angola and Ghana. He further indicates that he has "*comprehensive experience from Country of Origin reports, with expertise on human and political rights abuse, opposition and political persecution, risk of return, brutal and degrading treatment and torture, as well as of document authentication.*" He provided the details of four publications on Nigeria including a chapter in a book on political corruption in Africa from 2019, a chapter in another book on corruption, natural resources and development from 2017, a Norwegian Peacebuilding Resource Centre (NPRC) report on 'Who Rules Nigeria?' from 2012, and a Norad discussion report on good governance, political economy and donor support from 2010.

17. We note that the summary of Dr Amundsen's expertise does not outline how long he has worked for the Chr. Michelsen Institute nor any other roles that he might have had before taking up that position. The publications indicate that he has contributed to two academic publications, both on the topic of corruption in Nigeria. He also said that he was a "*project leader on two large research projects on Nigeria*". It is unclear from the summary of his credentials whether Dr Amundsen has had direct research experience in Nigeria, and if so, to what extent and how recent it might be. The summary of his experience indicates that his field of expertise is more general in nature and appears to focus on the political situation in Nigeria, and specifically on corruption and good governance. There is nothing in the summary of his credentials to indicate that Dr Amundsen has any direct experience of the Nigerian legal system or of drug enforcement. The report itself does not seek to speak from direct experience, but conducts an academic review, properly cross-referenced, of background evidence that Dr Amundsen found on the issue of drug enforcement in Nigeria. He cross-referenced various publicly available news articles relating to the arrest of drug traffickers in Nigeria.

18. We have looked carefully at the recent cases cited by Dr Amundsen at page 41 of the Appellant's bundle but in our view none of these examples assist the Appellant in disturbing the findings of the FtT:

    a. Unhelpfully, neither the expert nor the Appellant's solicitors provided the Tribunal with the full reports of the examples quoted and thereby prevented the Judge assessing the context of the summary of those stories. It was not for the Judge to research the full articles himself and so he was entitled to proceed on the basis of the summaries of those articles in the report;

    b. None of the examples given are of situations in which a person returning to Nigeria has been arrested on the basis of having been imprisoned for exporting drugs into another country. All four examples relate to people who have been

arrested whilst attempting to export drugs from Nigeria and we agree with the FtJ's conclusion on this part of the evidence at para. 28;

c. The three examples at page 42 relate to: 1) a person attempting to smuggle 6.5kgs of cocaine into Nigeria; 2) a Nigerian drug lord arrested after deportation from Kenya – there is no detail of what the arrest related to or what the consequences of the arrest were; 3) a number of people arrested for attempting to bring illegal drugs into Nigeria. Again, in our view, none of these examples can, on proper analysis of the narrow issue in this case, undermine the finding of the Judge.

19. Additionally, as the FtJ also factored in, Dr Amundsen expressly noted that there was no evidence of prosecution of those who had been convicted of a drugs offence abroad since before 2001 (page 41).

20. Whilst we note Mr Moriarty's further submission that the expert was, in this paragraph of the report, referring to convictions under s. 22(2) of the NDLEAA ('*bringing the name of Nigeria into disrepute*') and not those under s. 22(1), it is our view that nothing particularly turns on this. As is clear, even in the context of s. 22(2) of the Act, the evidence quoted by the expert did not show any prosecutions or attempted prosecutions since 2001 and there was no evidence at all of convictions or attempted prosecutions under s. 22(1). In reality, Mr Moriarty's submission on this point, merely highlights the absence of evidence as properly identified by the FtJ.

21. The Judge also, lawfully in our view, made reference to a letter from the Appellant's former solicitors (dated 10 August 2016) which expressly accepted that: "*Whilst there are no published examples of the Nigerian authorities prosecuting under this legislation it does not mean that it does not happen*" (see para. 28).

22. Our findings so far dispose of Grounds 2 & 3.

23. For completeness, even though Mr Moriarty's point in respect of the evidence of pre-trial detention was not part of the Grounds of Appeal to the UT (via the FtT) or the UT itself, we have concluded that there is, with respect, no merit in this point either. As Mr Moriarty was constrained to accept during the hearing, the pre-trial detention evidence only becomes relevant if the Appellant could show, at the lower standard of proof, that there was a real risk of the Nigerian authorities arresting/detaining him in the first place. As we have explained, we have concluded that the Judge made findings which were plainly open to him, and the Appellant has failed to show that there was any material error of law applying the guidance in R (Iran) & Ors v Secretary of State for the Home Department [2005] EWCA Civ 982.

24. We should also formally dispose of the Appellant's complaint in Ground 1, that the Judge impermissibly applied his own subjective view of whether or not it was plausible that the Nigerian authorities would take an adverse interest in the Appellant (see para. 47) contrary to HK v Secretary of State for the Home Department [2006]

EWCA Civ 1037. In our view this point does not have material relevance on the basis that we have already decided that the predicate finding at para. 46, that the Judge lawfully concluded that there was no real risk of the Appellant being arrested/detained, is a lawful one.

25. In any event, for our part, we conclude that the Judge did not err in assessing the likelihood of the Nigerian authorities arresting the Appellant based on his own individual characteristics, this was inherently the legal duty upon the Judge. The Judge's findings relating to risk on return were within a range of reasonable responses to the evidence. For the reasons given above it was open to him to conclude that the evidence did not show that there was a reasonable degree of likelihood that the Appellant would be arrested or prosecuted under s. 22 NDLEAA and he would not therefore be at risk of Article 3 ill-treatment on return.

DECISION

26. We therefore conclude that the making of the decision by the First-tier Tribunal did not involve any error on a point of law by reference to s. 12(1) of the Tribunal, Courts and Enforcement Act 2007 and the appeal is therefore dismissed.

Signed *I.P. Jarvis* Date 02 July 2021

Deputy Upper Tribunal Judge Jarvis

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email