# ASYLUM AND IMMIGRATION TRIBUNAL

## THE IMMIGRATION ACTS

Heard at: Field House
Date of Hearing: 24 October 2006

Promulgated on: 22 December 2006

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Chalkley

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr J Gillespie, Counsel instructed by D J Webb & Co.
For the Respondent: Mr M Blundell, Home Office Presenting Officer

*A person who seeks leave to enter but then breaches the terms of his temporary admission may be treated as an illegal entrant, as Akhtar v Governor of Pentonville Prison [1993] Imm AR 424 and Afunyah v SSHD [1998] Imm AR 201 show. He is not, however, entitled to demand treatment as an illegal entrant. He can still be refused or given leave to enter (as distinct from leave to remain), and cannot demand to be considered as an illegal entrant for the purposes of deportation policies.*

## DETERMINATION AND REASONS

1. This is the reconsideration of the appeal of the appellant, a citizen of Nigeria, against the decision of the respondent on 19 May 2006 refusing him leave to enter the United Kingdom.

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2. The appellant came to the United Kingdom on 27 June 1995. He presented a passport which was not his own and sought to gain entry by it. He was granted temporary admission pending a decision. A couple of days later he claimed asylum through his solicitors. He was interviewed on 31 July 1995 and on 12 June 1996 he was refused asylum and refused leave to enter. He appealed against that decision by Notice of Appeal dated 13 June 1996. The appeal came before a Special Adjudicator on 7 March 1997. The appellant was not present. Investigation revealed that he had changed his representative and that his new representative had not seen him since 19 July 1996. The appeal therefore proceeded in his absence. It was dismissed by a determination sent to the parties (including the appellant at his last known address) on 23 April 1997. It is common ground that the appellant had failed to comply with the terms of his temporary admission. It appears that subsequently the Secretary of State "treated him as an absconder", meaning in this case not a person who has absconded from custody, but a person who has disappeared from sight.

3. There was no appeal against the Special Adjudicator's determination. The appellant was next heard of by the respondent in 2002, when he submitted a form FLR(M) "Application for an Extension of Stay in the United Kingdom as the Spouse (Husband or Wife) or Unmarried Partner of a Person Present and Settled in the UK". In that form the appellant asserted that he had in October 2002 married a person present and settled in the United Kingdom. The form is signed by the appellant and his wife and is dated 24/11/2002. It was accompanied by a letter dated 12 December 2002 from his solicitors, which, so far as relevant, reads as follows:

> *"*[The appellant] *came to the United Kingdom on 25 May 1995 and applied for asylum at Gatwick airport. His application for asylum was refused in 1997 and although he brought an appeal against that decision, we are advised that the appeal was also dismissed. Unfortunately, our client then* [sic] *absconded from reporting to the Immigration Service.*
>
> [The appellant] *has continued to remain in the United Kingdom and is married to … a British citizen woman of Nigerian descent. They have been together since 1998 and married in October 2002. Clearly our client has an existing family life in the United Kingdom and on that basis we request that you regularise his status.*
>
> *As you are no doubt aware, although our client has the right respect for his family life under Article 8(1) of the European Convention on Human Rights, that right is subject to limitations placed by Article 8(2). It is our submission that our client's removal from the United Kingdom would be disproportionate for the purposes of Article 8(2), and therefore the only proper decision to arrive at with regard to this application is to grant him leave to remain."*

4. The Secretary of State appears to have allowed that application to mature. The grounds for reconsideration refer to an application on 5

February 2005, also on form FLR(M): we have not seen that application and nothing was made of it at the hearing before us; it may be that the reference was a mistake but, in any event, it does not appear to us that a further application in the same terms would make any difference to the appellant's case. The respondent's response to the application was the decision refusing leave to enter, dated 19 May 2006, to which we have already referred. It was accompanied by a letter of the same date setting out the appellant's immigration history and making reference to paragraphs 281 and 283 of the Immigration Rules, HC 395. The letter continues as follows:

> *"Consideration has been given as to whether it would be right to allow him to enter exceptionally, outside of the Rules. This consideration has taken into account the United Kingdom's obligations under the European Convention on Human Right, as enshrined in the Human Rights Act 1998, with specific regard to Article 8 of the Convention."*

5. The letter goes on to indicate consideration of various matters under that Article. There is then the sentence:

> *"Careful consideration has been given as to whether your client should qualify for discretionary leave in the United Kingdom but he does not qualify for such leave."*

6. The letter concludes by indicating the rights of appeal against the decision.

7. The appellant's Grounds of Appeal may be summarised as follows. First, the refusal of leave to enter is not appropriate in his case. He did not seek leave to enter on the basis of his marriage: he sought leave to remain. He had already entered the United Kingdom by absconding from the terms of his temporary admission. A refusal of leave to enter is therefore inappropriate in his case.

8. Further, the power to refuse leave to enter is vested in Immigration Officers and the present notice was issued on behalf of the Secretary of State, not an Immigration Officer. Secondly, in making his decision the Secretary of State had failed to take into account the provisions of the deportation policy called DP3/96 which set out a process by which removals would be considered on a case-by-case basis and indicated that the matter was one of discretion to be exercised by the Secretary of State. In the absence of any reference to that policy in the letter accompanying the decision, the decision itself was bad on Abdi principles.

9. The Immigration Judge rejected the arguments relating to the validity of the Notice. He held that the mere fact that the application was in form an application not for leave to enter but for leave to remain was simply because no other application form was available, and the form which was used was that which most closely matched the appellant's position.

He also held that the Secretary of State "does have power to issue a Notice of Refusal of leave to enter under s62 of the Nationality, Immigration and Asylum Act 2002". It is fair to say that, although Mr Blundell submitted that the notice was good, he did not seek to persuade us to endorse the Immigration Judge's reasoning on either point. So far as concerns the policy, the Immigration Judge referred to its terms, and noted that the appellant sought to rely on the paragraphs headed "Marriages that pre-date enforcement action". He said that "enforcement action against the appellant would have commenced when his claim for asylum was initially refused, or at the very latest when his appeal was dismissed in March 1997. His marriage in October 2002 occurred after enforcement action commenced". He then found that the respondent did consider the criteria set out in the policy, and did so on the basis of the correct facts. He made findings of fact in respect of the appellant's wife, which we must set out:

> *"The evidence is that* [she] *was born here with Nigerian parents. She has lived in Nigeria for some time and went to school there. She still has family there. She has medical problems … . She says that these problems prevent her from conceiving the child that she and her husband badly want and that if he returns to Nigeria on his own they will have little chance of having a child. There is no evidence to indicate that the treatment* [she] *needs is not available in Nigeria, or indeed of what her current medical condition is. No evidence was produced, apart from the medical evidence and the fact that she would not have a job in Nigeria to show that it would be unreasonable to expect* [her] *to return with her husband."*

10. The Immigration Judge dismissed the appeal on all grounds.

11. The Grounds for Reconsideration reiterate the submissions about the validity of the Notice, and challenge the Immigration Judge's treatment of DP3/96. They assert that there was no basis on which the Immigration Judge could find that the Secretary of State had indeed considered the policy; and complain that the determination taken as a whole amounts to the Immigration Judge's own consideration of factors under the policy: that, it is said, is a procedure not open to him as a discretion embodied in the policy is one for the Secretary of State alone.

12. Reconsideration was ordered in the following terms:

> *"The Grounds contend with arguable merit that the decision complained of was in the wrong form and for that reason alone the decision was contrary to law. In that regard, reconsideration was ordered.*
>
> *I see no merit in the Immigration Judge's approach to the applicability of DP3/96. He decided for good reason that the appellant could not possibly come within the scope of the policy and was entitled to so conclude on the facts as he found them.*

*For these reasons, the Grounds that challenge the Immigration Judge's Article ECHR findings are misconceived."*

13. At the hearing before us Mr Gillespie again submitted that the decision refusing leave to enter was one which could not be made in respect of the appellant. He referred us to the statutory provisions and to Akhtar v Governor of Pentonville Prison [1993] Imm AR 424, CA. After the hearing, by letter (with a copy to Mr Blundell) he also drew our attention to Afunyah v SSHD [1998] Imm AR 201, CA. Dealing briefly with DP3/96, he submitted that the policy created a presumption against removal in cases to which it applied, even if the case was not "truly exceptional" in the Huang sense. Thus, in Mr Gillespie's submission, DP3/96 might benefit a person who could succeed neither under the Immigration Rules nor under Article 8.

14. Mr Blundell submitted that the Secretary of State remained entitled to treat the appellant as a person seeking leave to enter and was entitled to refuse him leave. On DP3/96, he submitted, in general terms, that the law had moved on since the issue of that policy.

15. Section 3 of the Immigration Act 1971 is headed "General Provisions for Regulation and Control". It provides as follows:

> *"3(1) Except as otherwise provided by or under this Act, where a person is not a British citizen:-*
> *(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;*
> *(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited period or for an indefinite period;*
> *... ."*

Section 4 of the same Act is headed "Administration of Control" and provides in s1 that "the power under this Act to give or refuse leave to enter the United Kingdom should be exercised by Immigration Officers". Section 3A of the same Act, headed "Further Provision as to Leave to Enter", provides, so far as relevant, as follows:

> *"(1) The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom*
>
> *...*
>
> *(7) The Secretary of State may, in such circumstances as may be prescribed in an order made by him, give or refuse leave to enter the United Kingdom.*
>
> *...*

*(12) An order under this Section must be made by Statutory Instrument."*

The Immigration (Leave to Enter) Order 2001 (SI 2590/2001) provides in part as follows:

*"2(1) Where this Article applies to a person, the Secretary of State may give or refuse him leave to enter the United Kingdom.*

*(2) This Article applies to a person who seeks leave to enter the United Kingdom and who -*

*(a) has made a claim for asylum; or*

*(b) has made a claim that it would be contrary to the United Kingdom's obligations under the Human Rights Convention for him to be removed from, or required to leave, the United Kingdom.*

*(3) This Article also applies to a person who seeks leave to enter the United Kingdom for a purpose not covered by the Immigration Rules or otherwise on the grounds that those Rules should be departed from in his case.*

*... ."*

16. In Akhtar's case, the appellant was interviewed on arrival on 5 September 1991 and was granted temporary admission pending further examination, subject to conditions including a condition of residence at a particular address, a prohibition on employment and an obligation to report back on 23 September. On 9 September he breached the conditions of his temporary admission by leaving the nominated address. He then applied for asylum. He failed to report on 23 September as required, and it then emerged that he might have engaged in some form of employment.

17. He was in due course interviewed in connection with his asylum claim. The person who dealt with him on that occasion took the view that he was an illegal entrant for the purposes of s33 of the 1971 Act both because he had attempted to obtain entry to the United Kingdom by deceiving the Immigration Officer as to his true intentions when he first arrived, and because he had failed to comply with the terms of his temporary admission. He was given notice that he was regarded as an illegal entrant and was liable to detention; but was given further temporary admission. The Secretary of State decided to refuse his application for asylum and asked his solicitors to make arrangements for him to attend in order to be notified of this decision. It then emerged that he had again changed address, had again apparently been engaged in employment; there was suspicion that he had been claiming Social Security benefits and he had been convicted of an offence of theft, for which he had been fined. He was eventually located, and said that he had married a person settled in the United Kingdom. The Immigration Officer dealing with him on that occasion concluded that he was an

illegal entrant for both the earlier reasons and also because he had again broken the conditions of his second temporary admission by changing address. Authority was given to the respondent governor of Pentonville Prison to detain him under the Immigration Acts.

18. The appellant challenged his detention by way of habeas corpus, asserting that he was not an illegal entrant. His submission was that the provisions of the 1971 Act relating to illegal entry were directed to clandestine entry and did not apply to a person who had presented himself to an Immigration Officer on arrival, or to a person who had merely breached the terms of temporary admission. Owen J refused his application. He appealed to the Court of Appeal.

19. The Court noted, amongst other things, the definition of illegal entrant in s33 of the 1971 Act as "a person unlawfully entering or seeking to enter in breach of … the Immigration Laws, … and includes also a person who has entered", and s11(1), which provides that a person who "has not otherwise entered the United Kingdom shall be deemed not to do so so long as he is … temporarily admitted". The Court also reviewed existing authority. All three members of the Court took the view that the appellant became an illegal entrant when he lied to the Immigration Officer on or soon after his arrival. On the question whether he became an illegal entrant by breaching the terms of his temporary admission, Kennedy LJ, apparently on the basis of previous authority, held that the appellant's breach of the terms of his temporary admission was also sufficient to make him an illegal entrant. Sir Thomas Bingham MR took the same view. He said this:

> *"The first point depends primarily on s11 of the Immigration Act 1971, and the curious position of a person who has been temporarily admitted to this country subject to conditions. Such a person enters the country physically but is deemed not to so for immigration purposes. So long as he obeys the conditions he is not an illegal entrant; indeed he is not an entrant at all. But his right to be here is conditional, and a breach of conditions, in my view, destroys the statutory presumption that such a person has not physically entered. That in turn has the result that he has entered at a time when he has not received leave to do so, and in those circumstances, as I understand the Act, he becomes an illegal entrant within the meaning of the Act and liable to be treated as such".*

20. Evans LJ doubted whether that was right. He said as to this ground:

> *"I admit to some reservations and express no concluded opinion. If it is correct that the detention is justified on this ground, it follows that persons who are granted temporary admission become illegal immigrants on breach of any restriction and, by virtue of that failure to comply with the restrictions, liable to detention and even to removal from this country, even if the failure was accidental or was temporary or even due to circumstances beyond their control."*

21. Mr Gillespie's submission was the s3 of the Act draws a clear distinction between those who seek leave to enter and those who have entered. Akhtar's case shows that a person who breaches the terms of temporary admission indeed has entered illegally. Therefore the appellant in the present case is a person who has entered and, under s3, he may be granted (or refused) leave to remain, but he cannot be granted (or refused) leave to enter.

22. It appears to us that those submissions go beyond what is required in the judgments in Akhtar. In that case the question was whether the appellant's detention was lawful, which was the same as asking whether the Secretary of State was *entitled* to treat the appellant as an illegal entrant. The Court of Appeal held that he was so entitled. Despite Evans LJ's reservations, the effect of that decision is that a person who breaches the terms of his temporary admission is *liable* to be detained as an illegal entrant. Nothing in Akhtar's case, as we read it, suggests that in such circumstances that the Secretary of State is *bound* to treat such a person as an illegal entrant. Nor, as we understand them, do the judgments in that case prevent the Secretary of State from regarding a person who is in breach of the terms of temporary admission as a person who still seeks leave to enter. Indeed it appears to be inherent in the facts of Akhtar's case itself that such may indeed be the position. In the view of all three members of the Court of Appeal the appellant became an illegal entrant very soon after his arrival; but there is no suggestion in the judgments that the Secretary of State was not entitled to continue consideration of his application for leave to enter on the various bases on which he made that application.

23. Mr Gillespie's submission can succeed only if he is right in saying that the word "or" in s3(1)(b) of the 1971 Act is disjunctive; that is to say that it separates two circumstances which cannot co-exist. If he is right about that, then the effect of Akhtar's case is, as Evans LJ said, that a person who commits any breach of the terms of his temporary admission, however minor, automatically becomes a person who has entered illegally, and, because he has entered, can no longer be treated as a person who is seeking leave to enter. It appears to us that that is wrong in principle and also unrealistic. It is unrealistic for exactly the reasons indicated by Evans LJ. In the context of Akhtar he was only concerned with liability to detention, but if Mr Gillespie is right, the consequences are much more severe. An accidental breach of the terms of temporary admission would automatically have the effect we have indicated, and would forever deprive the appellant of the possibility of entering legally on the present occasion. What is even more alarming is that the breach would have that effect even if the Secretary of State did not notice it at the time. This takes us on to another point. If Mr Gillespie is right, it follows that although in the present case the appellant was refused leave to enter, a *grant* of leave to enter would have been void. We think that that is an unrealistic position for Mr Gillespie to have to take; but, again, if he is right, any grant of leave to

enter would be void if it turned out to have been made to a person who had in fact breached the terms of his temporary admission. It is difficult to see that the legislator could have so intended.

24. So far as concerns principle, the position in this appeal is that the appellant depends on his own wrong, that is to say his absconding in breach of the terms of his temporary admission, to claim that the decision made by the Secretary of State, which would have been appropriate in his case if he had not broken the law, is one which is invalid. It does not appear to us that an immigration offender is entitled to dictate to the Secretary of State in that way, or is entitled to require that his offence be taken into account for what in the present circumstances would be his own benefit.

25. For the foregoing reasons we reject Mr Gillespie's submission that the word "or" in s3(1)(b) of the 1971 Act is to be read disjunctively. The effect of that paragraph is to give a power in respect of those who have already entered the United Kingdom which is additional to the power available in respect of all those who are not British citizens. Akhtar's case shows that a person who breaches the terms of temporary admission can properly be treated as an illegal entrant. But if the breach is minor, or if there is some other factor to be taken into account, there is no obligation to treat him as an illegal entrant. He can properly continue to be treated as a person seeking leave to enter. In those circumstances the appropriate decision in this case will be one granting or refusing him leave to enter. An appellant is not entitled to succeed in an appeal by claiming that, as he had already entered illegally, he cannot be granted leave to enter.

26. As we have indicated, after the hearing, Mr Gillespie drew our attention to Afunyah v SSHD. That was a case in which the applicant arrived in the United Kingdom in an advanced state of pregnancy, bearing in her passport a forged leave stamp. She was refused leave to enter, but granted temporary admission so as to enable her not to have to travel again when she was in the advanced state of pregnancy. Following the birth of the child, it appears that the Secretary of State proposed to remove the applicant in pursuance of the decision to refuse her leave to enter; by that time she was in breach of the terms of her temporary admission. The present proceedings were an application for leave to apply for Judicial Review of the removal directions, based on an assertion by the appellant that the Secretary of State had failed to take into account a policy called DP2/93. That policy applied, on its face, to "deportation and illegal entry cases".

27. In his covering letter, Mr Gillespie wrote as follows:

> *"The Court of Appeal found that the Secretary of State was not obliged to treat the appellant who had absconded from temporary admission as an illegal entrant where she had previously been refused entry. I do not understand there to have been any fresh refusal of entry in the Afunyah*

*case (or at least none is referred to); rather it appears to be a case of removal directions being given based on the original refusal of entry. The case, therefore, sheds no light, in my submission, on whether an illegal entrant can, subsequent to entry, be refused entry.*

*I have to accept, based on Afunyah, that in principle the Secretary of State has power to give removal directions based on a refusal of entry from some time past. Whether it would be right to do so in the particular circumstances of any case, is a different matter, and one that the Tribunal is not concerned with; the giving of removal directions is not an appealable immigration decision. The appellant maintains that he cannot be the subject of a refusal of entry once he has entered the UK"*

28. It is clear therefore that counsel took the view that Afunyah's case was sufficiently relevant that he ought to refer us to it, but that it ought to have no impact on our decision. We beg to differ.

29. The policy DP2/93 applied only to those threatened with deportation or removal as illegal entrants. The applicant in that case claimed that the policy applied to her. She could do so only by claiming to be an illegal entrant. Laws J, before whom the matter originally came, had said this:

> *"It is entirely plain that if this applicant were in the position to insist the Secretary of State treated her as an illegal entrant so that policy DP2/93 might be applied to her she would be building rights on an edifice consisting of nothing but her own wrongdoing. I do not think that is the law. The Secretary of State was entitled to treat this case as a port refusal case which in substance it was."*

30. Lord Woolf MR set that passage out in his judgment and expressed his complete agreement with it. Aldous LJ and Mummery LJ also agreed, Aldous LJ adding this:

> *"In this case the applicant was a person seeking leave to enter and was so treated by the Secretary of State. That being so policy DP2/93 does not apply. The fact that also in law she was an illegal entrant does not make the policy apply. The policy only applies when action is taken against an illegal entrant as an illegal entrant."*

31. It seems to us that the Court in Afunyah was making its decision on precisely the same grounds on those which we had already adopted for the decision in this case. The appellant is not entitled to rely on her own wrong and to require the Secretary of State to treat her as an illegal entrant; and the Secretary of State has the choice of treating her as other than an illegal entrant, even if she has breached the terms of temporary admission. Afunyah's case therefore merely fortifies us in our views.

32. (For completeness, although the matter was not mentioned before us, we should add that s11(5) of the 1971 Act provides that, where a person enters the United Kingdom lawfully as a person exempt from

immigration control, and seeks to remain beyond the time during which he is exempt, he is to be treated for the purposes of the Act as seeking to enter the United Kingdom. We read that section as excluding the possibility that such a person be treated as seeking to remain. We do not read it as excluding the possibility that a person who enters the United Kingdom unlawfully be treated as seeking leave to enter.)

33. Given, then, that a refusal of leave to enter was permissible official action in the appellant's case, is the refusal against which the appellant appeals bad for being signed on behalf of the Secretary of State rather than on behalf of an Immigration Officer? In our view nothing turns on the fact that the decision was in response to an application for leave to remain. What is important, however, is that the application was accompanied by the letter whose terms we have set out above, making it absolutely clear that the appellant claimed that his removal would breach rights protected by Article 8. Given that the appellant has never had entry clearance or leave to enter as a spouse, it is also clear that the appellant's application was for leave other than in accordance with the Immigration Rules. There can in our view be no doubt that under the Immigration (Leave to Enter) Order the Secretary of State had power to give or refuse leave to enter.

34. We turn now to the grounds based on DP3/96, which was the successor to the policy mentioned in Afunyah. As we have said, Mr Gillespie's submissions on this issue at the hearing were brief, no doubt in deference to the terms in which reconsideration had been ordered. We suppose they would have been briefer still if he had then been aware of the decision in Afunyah. DP3/96, like DP2/93, applies only to "those persons liable to be removed as illegal entrants or deported". For precisely the reasons indicated in Afunyah, the policy does not apply to the appellant, and he is not entitled to insist on being treated as an illegal entrant so that it does. Even if he could overcome that difficulty, however, he would face a further one. Mr Gillespie's submission was that the policy creates a presumption against removal in cases to which it applies, but, as the policy makes clear, that presumption applies only where "it is unreasonable to expect the settled spouse to accompany his/her spouse on removal", on which point "the onus rests with the settled spouse to make out a case with supporting evidence as to why it is unreasonable for him/her to live outside the United Kingdom". As the Immigration Judge's determination shows, that case has never been satisfactorily made. In those circumstances, even if this were a deportation or illegal entry case, the policy would not have been shown to apply to it.

35. The Immigration Judge erred in law. He erred in his conclusion that the Secretary of State's power to grant or refuse leave to enter depended on s62 of the 2002 Act. That error was not material, because in the circumstances of this case, he could not have reached any different conclusion if he had been pointed to the statutory provisions that were in

fact applicable. It does not appear that he was asked to give any very lengthy consideration to the particular question of whether a refusal of leave to enter was in any event apposite in the present case. The Immigration Judge also erred in considering that the appellant's marriage post-dated enforcement action, which he thought had begun on the dismissal of his asylum appeal. It is clear from the terms of the policy, (in particular note (iii) to paragraph 5), that this is not a case in which enforcement action had begun before the marriage. In this respect we consider that the Immigration Judge's error was material, because it caused him to deal with the arguments on the policy in an entirely different way from the way he would have dealt with them if he had appreciated that the marriage did not post-date enforcement action.

36. For the foregoing reasons we set aside the Immigration Judge's decision and we substitute a determination dismissing the appeal on all the grounds advanced before us.

C M G OCKELTON
DEPUTY PRESIDENT
Date: