Neutral Citation Number: [2023] EWHC 652 (Admin)

Case No: CO/2543/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2023

Before

MR JUSTICE SWIFT

- -

Between
The KING
on the application of

KINGSLEY KANU **Claimant**

- and –

SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS **Defendant**

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- -

Charlotte Kilroy KC and Tatyana Eatwell (instructed by **Bindmans LLP**) for the **Claimant**

Sir James Eadie KC, Malcolm Birdling and Jagoda Klimowicz (instructed by **GLD**) for the **Defendant**

Hearing date: 15 November 2022

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Approved Judgment

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MR JUSTICE SWIFT:

A. Introduction

1. The Claimant is the brother of Nnamdi Kanu (Mr Kanu). Mr Kanu is the leader of a group called the Indigenous People of Biafra ("IPOB"). IPOB was founded in 2012 and is a separatist group that aims at the restoration of a Biafran Republic. Mr Kanu holds both Nigerian and British Nationality.

(1) What has happened to Mr Kanu.

2. Since 27 June 2021 Mr Kanu has been detained in Nigeria pending trial on criminal charges. Mr Kanu's case is a matter of significant public controversy in Nigeria. He was first arrested, charged and detained in October 2015. The lawyer representing him in the criminal proceedings, Aloy Ejimakor, has made a statement in these proceedings explaining that the criminal charges all arise from Mr Kanu's activities as leader of IPOB.

3. On 28 April 2017 Mr Kanu was granted bail, and from that time lived with his parents in Abia state. On 10 September 2017 his parents' home was subject to what was later described by the High Court of Abia State as a "military invasion". In those proceedings, in a judgment given on 19 January 2022, the High Court concluded that the Nigerian state had attempted to kill Mr Kanu. Sometime after 10 September 2017 Mr Kanu fled Nigeria. In March 2018 an amended indictment was prepared in the criminal proceedings outstanding in Nigeria. Mr Kanu remained outside Nigeria, first in Israel, then in the United Kingdom. By May 2021 Mr Kanu was in Kenya.

4. The factual starting point for these proceedings is 15 June 2021. What happened then has been the subject of proceedings in Nigeria: civil proceedings determined by the Umuahia Judicial Division of the Federal High Court, in a judgment given on 26 October 2022; and criminal proceedings decided by the Abuja Judicial Division of the Court of the Appeal of Nigeria on 13 October 2022. The findings reached in those proceedings (taken together) are that on 19 June 2021 at Nairobi International Airport, Mr Kanu was abducted by agents of the Nigerian state. The kidnappers held Mr Kanu in Kenya for some 8 days. During that time, he was subject to inhuman and degrading treatment. On 27 June 2021 he was illegally moved from Kenya to Nigeria and detained in Nigeria. On 29 June 2021 Mr Kanu was taken to court and remanded. Thereafter, the indictment against him was amended on three further occasions: first on 13 October 2021 and 20 October 2021 when it expanded from 4 charges to 7 charges; and then on 17 January 2022 when it expanded again to cover 15 charges. Mr Kanu has pleaded not guilty to all charges.

5. In its judgment of 13 October 2022, the Court of Appeal ruled on preliminary objections raised by Mr Kanu. The court unanimously concluded Mr Kanu had been illegally removed from Kenya. In his judgment Oludotun Adefope-Okojie JCA said:

> "It is clear … that the Respondent, having removed [Mr Kanu] from another country without complying with the processes for his removal, was in flagrant breach of these laws and the fundamental human rights of [Mr Kanu].

> It was incumbent on the Respondent, who was the arresting authority, to prove the legality of [Mr Kanu's] arrest, abduction in this case … This has however not been done by the Respondent.
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> …
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> The consequence of [section 15 of the Nigerian law on extradition], I hold, is that [Mr Kanu] is prohibited from being detained, tried or otherwise dealt with in Nigeria for or in respect of any offence allegedly committed by him for his *extraordinary rendition* to Nigeria. The lower court thus has no jurisdiction, I further hold, to try [Mr Kanu] on Counts 1, 2, 3, 4, 5, 8 and 15 which were retained by it, being charges allegedly committed by [Mr Kanu] prior to his *extraordinary rendition*.
>
> In addition, by the forcible abduction and the *extraordinary rendition* of Mr Kanu from Kenya to this country on the 27th day of June 2021, in violation of international laws and state laws, the lower Court or indeed any Court in this country is divested of jurisdiction to entertain charges against [Mr Kanu] and I so hold."
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> [italics in the original]

The other judges of the court gave concurring judgments. On its own terms, the decision of the Court of Appeal brought the criminal proceedings against Mr Kanu to an end. However, on 18 October 2022 the prosecutor filed an appeal with the Nigerian Supreme Court against the decision of the Court of Appeal. On 28 October 2022 the Court of Appeal granted the prosecutor's application to stay the effect of its judgment pending that appeal.

6. Mr Kanu remains in detention. He is held in solitary confinement in Abuja. Mr Ejimakor explains that Mr Kanu is being held in dire conditions which are affecting his physical and mental health. Mr Ejimakor says that Mr Kanu appears increasingly frail; that the heart condition that has affected him for a number of years has got worse; and that he has been denied access to specialist medical treatment. Mr Kanu's detention is the subject of attention by the UN Working Group on Arbitrary Detention. (The Working Group is part of the Office of the UN High Commissioner for Human Rights.) On 4 April 2022 the Working Group adopted Opinion 25/2022 which concerns Mr Kanu's treatment in both Kenya and Nigeria. The Working Group had previously, on 30 December 2021, raised concerns about Mr Kanu's treatment, in particular his removal from Kenya, with the government of the Republic of Nigeria. The Opinion concluded, among other matters, that Mr Kanu was being arbitrarily detained and should be released.

7. For sake of completeness, I note that in the two sets of civil proceedings, Mr Kanu was awarded substantial damages: by the High Court of Abia State in respect of the events of 10 September 2017; and by the Federal High Court for what happened in Kenya in June 2021.

(2) The decisions challenged

8. In these proceedings the Claimant challenges decisions contained in letters from the Secretary of State dated 14 April 2022 and 9 June 2022. The Claimant's solicitors have been in correspondence with the Secretary of State since shortly after Mr Kanu's rendition. The initial focus of the correspondence was whether officials from the British High Commission could obtain permission to visit Mr Kanu. The British High Commission requested permission by a *note verbale* sent on 1 July 2021 but, for a significant period, the Nigerian authorities provided no response. On 22 July 2021 the Claimant's solicitors sent a letter before action contending that the failure to provide consular assistance, and in particular the failure to take steps to do so beyond simply asking the Nigerian authorities, was unlawful. This pre-action correspondence continued during July, August, September and October 2021.

9. In a letter dated 24 September 2021 the Government Legal Department, for the Secretary of State, summarised the steps taken with the Nigerian authorities in respect of Mr Kanu's case.

> "Our client would like to reassure you that Mr Kanu's case is regularly being raised with the Nigerian Authorities. The steps which have been taken since we last updated you on this in our letter of 26 July include:
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> a. On 28 July 2021, Mr Kanu's case was raised during a meeting between Minister Duddridge and Nigerian Foreign Minister Onyeama
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> b. On 29 July 2021, the Prime Minister raised Mr Kanu's case with President Buhari during a bilateral meeting.
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> c. On 6 August 2021, Minister Duddridge raised Mr Kanu's case in a letter to Nigerian Foreign Minister Onyeama.
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> d. On 12 August 2021, British High Commission officials met with the Nigerian Ministry of Foreign Affairs Consular Director and raised Mr Kanu's case.
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> e. On 19 August 2021, the Acting High Commissioner met Nigerian Foreign Minister Onyeama.
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> f. On 27 August 2021, British High Commission officials met with the Nigerian Ministry of Foreign Affairs Consular Director and raised Mr Kanu's case.
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> g. On 13 September 2021, the British High Commissioner raised Mr Kanu's case during a meeting with Nigerian Foreign Minister Onyeama.
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> h. On 17 September 2021, the Deputy National Security Advisor spoke with Nigerian Chief of Staff Gambari and raised Mr Kanu's case.

> i. On 23 September 2021, a *note verbale* raising concerns about Mr Kanu's solitary confinement was issued to the Nigerian Ministry of Foreign Affairs."

On 19 November 2021, with permission of the Nigerian Authorities, representatives from the British High Commission visited Mr Kanu.

10. On 8 December 2021 the Claimant's solicitors wrote asking the Secretary of State to consider a range of further steps: to consider whether those responsible for Mr Kanu's mistreatment met the requirements for imposition of sanctions under the Global Human Rights Sanctions Regulations 2020; to obtain regular consular access to Mr Kanu; to make representations to the Nigerian Authorities at ministerial level, either that Mr Kanu be released or that as a minimum he should be detained in humane conditions and should be permitted access to appropriate medical treatment; that British High Commission personal should attend the hearing then due to take place in the Nigerian Federal Courts; and that Mr Kanu's circumstances should be raised with the UN Committee Against Torture for consideration or enquiry in exercise of that Committee's powers under article 20 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

11. The Secretary of State replied by letter dated 12 January 2022 (sent by the Government Legal Department). That letter included the following:

> "3. In the period since our last update (in our letter of 24 September 2021), the action which the FCDO has taken includes the following:
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> a. On 4 October 2021, the British High Commissioner raised Mr Kanu's case during a meeting with the Attorney General of Nigeria. The British High Commission subsequently followed-up in writing, in order to provide additional information requested by the Attorney General.
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> b. On 21 October 2021 the British High Commissioner met with Nigerian Foreign Minister Onyeama and raised Mr Kanu's case with him. A representative from the High Commission also attended the court hearing on this date.
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> c. On 25 October 2021, the Minister for Africa, Latin America and the Caribbean, Vicky Ford MP, met Mr Kingsley Kanu, Mr Kanu's brother.
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> d. On 1 November 2021 the Minister for Africa, Vicky Ford MP, raised Mr Kanu's case with Nigerian Foreign Minister Onyeama.

e. During October and November 2021, FCDO officials raised Mr Kanu's case with Nigerian Ministry of Justice and Ministry of Foreign Affairs officials and the Department of State Services.

f. On 10 November 2021, a representative from the British High Commission attended the court hearing in Abuja.

g. On 3 December 2021, the British High Commissioner met with the Chief of Staff to President Buhari and raised Mr Kanu's case.

h. On 9 December 2021, the British High Commission in Abuja delivered a letter to the Department of State Services raising specific welfare requests following our consular visit with Mr Kanu. This letter made clear the UK Government's support for Mr Kanu's transfer out of solitary confinement.

i. On 14 December 2021, a Note Verbale was sent to the Nigerian Ministry of Foreign Affairs formally requesting an explanation of how Mr Kanu was transferred to Nigeria. It also contained a request that Mr Kanu be transferred out of solitary confinement.

4. As we have explained in our previous correspondence, the FCDO agrees there are a range of diplomatic tools which could be deployed in any case where a British National is detained in another jurisdiction. As we explained in our letters of 8 and 24 September 2021, Ministers have been given specific consideration to a range of alternative options, including the possibility to which you raised at paragraph 12 of your letter of 24 August 2021. The FCDO has kept its options under review in light of developments.

5. You now raise a number of further options at paragraph 20 of your latest letter. As explained above, many of the options you suggest either have or are being pursued by the FCDO. Our client considers that the course of action which it is pursuing is the most appropriate means of assisting Mr Kanu. However (for the reasons previously explained) our client does not consider that it is neither necessary or appropriate (even if this were possible) to provide "detailed reasons" as to why any individual action will or will not be pursued. This is because what Ministers (with the advice of their officials) must do is to determine what approach is appropriate in the particular circumstances of an individual case at a particular time."

Subsequent paragraphs in the letter address the suggestions raised by the Claimant's solicitors in their 8 December 2021 letter.

12. The Claimant's solicitors wrote again on 23 March 2022, requesting the Secretary of State reconsider her policy. The letter concluded as follows:

> "11. Despite the FCDO recognising the serious breaches of international law, there has been virtually no progress in providing consular assistance to Mr Kanu and/or securing his release or transfer out of detention. Being granted access to Mr Kanu once in over 9 months does not count as progress in circumstances where no further access has since been granted and there has been no material change in Mr Kanu's situation.
>
> 12. As you are well aware, we have written to you on numerous occasions, setting out various options that the FCDO could consider pursuing to assist Mr Kanu. On each occasion, you have responded to state that the FCDO will take the action it deems appropriate and will not provide any reasons for not taking any other actions.
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> 13. However, this response is simply not good enough in circumstances where all the available evidence demonstrates that Mr Kanu, a British National, has been rendered and where he has been continued to be detained in conditions amounting to torture. Accordingly, we now request that the FCDO will commit to reconsidering its strategy to assist Mr Kanu and to setting out what alternative actions it is prepared to pursue, including steps to escalate pressure on Nigeria."

13. The response to this, the letter of 14 April 2022, is the first target in these judicial review proceedings. That letter included the following:

> "4. We turn next to your request that the FCDO reconsider its strategy for assisting Mr Kanu, and set out what alternative actions the FCDO is prepared to pursue. Here, as we have explained in our previous correspondence, the FCDO acknowledges there are a range of diplomatic tools which could be deployed in any case where a British National is detained in another jurisdiction. As we explained in our previous correspondence, Ministers have given specific consideration to a range of alternative options, including those suggested by or on behalf of your client.
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> 5. The FCDO continues to keep its options under review and officials continue to meet regularly to review Mr Kanu's case. However (for the reasons previously explained) we do not consider it is either necessary or appropriate to provide an account of which specific actions it may or may not be prepared to pursue. This is because what Ministers (with the advice of their officials) must do is to determine what approach is appropriate in the particular circumstances of an individual case at a particular time.

6. Steps which have been taken in respect of Mr Kanu's case since our letter of 12 January 2022 include the following:

6.1 On 13 January 2022, the British High Commissioner, Catriona Laing, met Foreign Minister Onyeama and raised concerns about Mr Kanu's ongoing solitary confinement; his health and welfare and also pressed for a response to HMG's Note Verbale of 14 December 2021;

6.2 On 18 January 2022, FCDO Minister Vicky Ford met with the Kenyan Cabinet for Foreign Affairs and raised concerns regarding the transfer of Mr Kanu from Kenya to Nigeria;

6.3 On 21 January 2022, the British High Commissioner, Catriona Laing met the President of Nigeria's Chief of Staff, Professor Ibrahim Gambari and raised Mr Kanu's ongoing solitary confinement and alleged illegal transfer from Kenya to Nigeria;

6.4 On 1 February 2022, FCDO Minister Vicky Ford met with the Nigerian National Security Advisor and requested further consular access to Mr Kanu, raised concerns over detention conditions and sought an explanation on his transfer from Kenya to Nigeria.

6.5 During the week commencing 21 February 2022, during an official visit to Nigeria, FCDO Minister Vicky Ford raised Mr Kanu's case during a meeting with Foreign Minister Onyeama, raising HMG's request for further consular access, concerns over the conditions in which Mr Kanu is detained, and sought an explanation on his transfer from Kenya to Nigeria.

6.6 On 28 February 2022, the British High Commission in Nairobi issued a Note Verbale requesting a response to HMG's previous Note Verbale which raised allegations of human rights violations, including torture and mistreatment and unlawful transfer.

6.7 On 1 March 2022, FCDO Minister Vicky Ford raised the case of Mr Kanu with the Kenyan High Commissioner to London, again requesting a response to our Notes Verbales

7. While the FCDO will keep its options under review in light of developments, at present it considers the approach that is currently being followed is appropriate."

14. The Claimant also challenges a decision in a further letter from the Government Legal Department dated 9 June 2022. That letter responded to a further pre-action protocol letter sent on 25 May 2022. In that letter, the Claimant's solicitors described his proposed challenge as follows:

> "1.4 The basis of this challenge is that you have failed, in your capacity as Secretary of State, to lawfully determine what further steps you should be taking to assist Mr Kanu, because you have failed to reach a view on whether Mr Kanu has been subject to extraordinary rendition, in breach of international law. Reaching a view on that central question is a legally necessary prerequisite to deciding what steps to take in such a case."

That letter ran to some 19 pages. Towards the end, under the heading "Details of the Action Required" it stated:

> "6.1 The Secretary of State is required to reach a view, based on the evidence available to her, including that summarised above, on whether or not Mr Kanu has been subject to extraordinary rendition to Nigeria, in breach of international law, and communicate her view to the Claimant by way of the pre-action response to this letter.
>
> 6.2 As far as we are aware, the FCDO is still awaiting a response to a Note Verbale sent on 14 December 2021, raising allegations in respect of Mr Kanu's unlawful transfer and a further Note Verbale sent on 28 February 2022, requesting a response to the previous Note Verbale. For the avoidance of doubt, we do not consider that any ongoing lack of response from the Nigerian Government provides a basis for Secretary of State not to now form a view on Mr Kanu's rendition, given that it has been nearly five months since the first Note Verbale was sent."

15. By way of response, the 9 June 2022 letter included the following:

> "12. In the course of the Secretary of State's consideration of what steps are appropriate, she has appraised herself (on the basis of the information available to her) as to the position in international law. That view is subject to reassessment in light of changing information and evidence available to her. There is no obligation on the Secretary of State to share that view, the Secretary of State does not consider that it would be appropriate to do so and the Claimant (or Mr Kanu) could not have had any legitimate expectation that this would occur.
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> …
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> 17. In particular, the Secretary of State has considered what steps would most assist Mr Kanu, with regard to her provisional

> view as to the legality and gravity of Mr Kanu's treatment as well as the representations submitted by your client alongside advice from the FCDO. The steps which have been taken to date have been set out in successive letters (most recently in paragraph 6 of our letter dated 14 April 2022), and include *notes verbales* and discussions at Ministerial and Prime Ministerial level. Since our previous letter, those steps have continued, with consular officials visiting Mr Kanu in detention on 29 April 2022, the Minister for Africa raising Mr Kanu's case with the Nigerian Foreign Minister Geoffrey Onyeama on 5 May 2022 and (the same day) the UK High Commissioner raising Mr Kanu's case in a meeting with Professor Gambari, Chief of Staff to the President of Nigeria, setting out concerns on a number of welfare issues including solitary confinement.
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> 18. For these reasons, the Secretary of State is satisfied she has acted appropriately and lawfully …"

(3) The Claimant's contentions

16. The Claimant's objective in bringing these proceedings is that the Secretary of State should go further than the steps taken so far. The Secretary of State should, says the Claimant, state publicly and clearly that Mr Kanu was unlawfully removed from Kenya to Nigeria in breach of international law, and he should call for Mr Kanu to be released and permitted to travel to the United Kingdom: see the Statement of Facts and Grounds at paragraph 63.

17. However, it is not the Claimant's case that this court can or should require the Secretary of State to take such steps. In these proceedings the Claimant contends first, that the Secretary of State should either reach a 'concluded' or 'formulated' view on whether Mr Kanu was unlawfully removed from Kenya and/or is unlawfully detained in Nigeria. The Claimant's case is that he has a legitimate expectation that the Secretary of State will do this, and that in any event it is irrational for the Secretary of State not to reach a concluded view on these matters. Second, the Claimant contends that a legal obligation to act fairly requires that the Secretary of State either tell him the conclusions he has reached on whether Mr Kanu has been treated unlawfully, or tell him what matters prevent such a concluded view being reached.

18. The Claimant's case on legitimate expectation and rationality rests on the conclusions reached by the Court of Appeal in *R(Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. In that case the claimant, a British national, was held by the United States government at Guantanamo Bay, in Cuba. He contended that the Secretary of State should be required either to make representations on his behalf to the United States authorities, or take "other appropriate action", or explain why such steps would not be taken. His claim too, relied on the legitimate expectation principle. The Secretary of State's position, relying on a range of previous authorities starting with the decision of the House of Lords in *Council Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, was that the court should not adjudicate on actions taken by the executive in the conduct of foreign relations.

19. The Court of Appeal concluded that justiciability should depend on the subject matter of the case in hand, leaving open the possibility that some decisions on matters concerning the conduct of foreign affairs would be justiciable. On the facts, the Court of Appeal concluded that public statements made by or on behalf of the Secretary of State on the practice of diplomatic protection could give rise to legitimate expectations. Among the matters the court relied on was an answer to a Parliamentary question given by a Foreign Office Minister that, so far as concerned British Nationals who were in prison abroad, "… The UK Government would also consider making direct representations to third governments on behalf of British citizens where [it believed] that they were in breach of their international obligations" (see, paragraph 91 of the Court's judgment). At paragraphs 92 and 99 – 100 the Court continued as follows:

> "92. Taken together, these statements indicate a clear acceptance by the government of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice. In the present case none of the avenues suggested in the last quotation is available. The words emphasised contain no more than a commitment "to consider" making representations, which will be triggered by the "belief" that there is a breach of the international obligations. This seems to imply that such consideration will at least start from a formulated view as to whether there is such a breach, and as to the gravity of the resulting denial of rights.
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> …
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> 99. What then is the nature of the expectation that a British subject in the position of Mr Abbasi can legitimately hold in relation to the response of the government to a request for assistance? The policy statements that we have cited underline the very limited nature of the expectation. They indicate that where certain criteria are satisfied, the government will "consider" making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State. That gives free play to the "balance" to which Lord Diplock referred in *GCHQ*. The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, that does not mean the whole process is immune from judicial scrutiny. The citizen's legitimate expectation is that his request will be "considered", and that in that consideration all relevant factors will be thrown into the balance.
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> 100. One vital factor, as the policy recognises, is the nature and extent of the injustice, which he claims to have suffered. Even where there has been a gross miscarriage of justice, there may perhaps be overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly conducted."

(*4*) *The evidence in this case*

20. The evidence in this case includes the Secretary of State's policy "Prisoner Policy Guidance", published on 28 August 2019 and updated on 10 January 2022. This sets out the general approach that will be taken to British nationals in prison abroad. The policy states that the

Secretary of State may "intervene" on behalf of British nationals but will not "interfere" in the internal affairs of another state. The examples given of "interfering" include "expressing an opinion on the guilt or innocence of the accused". The policy speaks in terms of intervention where there is concern for a person's health, welfare or human rights, and where there is concern that a person has been tortured or mistreated. Intervention can include "… asking the right people the right questions, to put forward our concerns about a case, or to ask for more information …", "lobbying" through notes verbales, and direct contact at official or ministerial level.

21. The Secretary of State also relies on a witness statement made by Sarah Broughton, Head of Department/Deputy Director of the FCDO Consular Directorate. Among the exhibits to that statement are 3 ministerial submissions, dated 6 July 2021, 6 September 2021, and 10 August 2022. Taken together, these submissions provide context for the steps that the Secretary of State has taken in respect of Mr Kanu's case that are listed in the correspondence referred to above.

22. The submission of 6 July 2021 set out 3 options for action to secure consular access, described respectively as "minimal intervention", "medium intervention", and "maximum intervention". The submission recommended "medium intervention" and stated the following:

> "11. We judge that we need to maintain pressure on the Nigerian government to gain consular access, but Ministers may wish to escalate quickly in public and private to make clear our concerns about the nature of Kanu's arrest and the human rights risks. The proximity of the trial dates means time is limited. We do not expect a maximalist approach to deliver more quickly on our consular request.
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> …
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> b. Medium intervention (recommended):
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> Ministers and officials raise the case in all appropriate meetings with Nigerian counterparts, including if the Prime Minister and Foreign Secretary meet their counterparts at the Global Education Summit, until we have consular access and clear information on Kanu's arrest. We do not at this time raise directly with the Department of State Services, given the risk that Ministry of Foreign Affairs officials feel side-lined and become obstructive as well as the risk of [*words redacted in original*]. This option would permit consular staff to provide assistance [*words redacted in original*]. It is likely to cause some political impact to bilateral relations, but it will allow us to continue pursuing wider UK interests in parallel. Officials will raise with third country host governments if there is credible reporting of their involvement."

23. The 6 September 2021 submission described Mr Kanu's position in this way:

> "16. Kanu has a medical condition and his medical care and welfare are paramount, though responsibility for his welfare sits with the detaining state. There are also serious allegations of human rights violations, including torture, mistreatment, and alleged unlawful transfer that we would like to seek Kanu's agreement to raise."

At paragraph 8 – 11 the submission included this:

"8. FM Onyeama's letter of 27 July demonstrated the sense of feeling amongst some of the Nigerian government and security establishment about both the UK's perceived leniency towards Kanu and IPOB, and our approach to securing consular access. We have no recent indication from Onyeama or other senior government figures that Nigeria is likely to alter its current approach. However, we assess that continued high-level engagement is our best means of maintaining pressure, raising specific concerns and demonstrating HMG's interest, which may itself mitigate the risk of harm to Kanu.

9. Our Chargé d'Affaires met with FM Onyeama on 19 August to seek a reply to your letter of 6 August. Although he appeared to empathise with our argument, Onyeama indicated he did not have the authority to make a decision on this independently, referring to it as a "whole of government issue". BHC Abuja followed up with the MFA Director for Consular on 27 August, who said that we needed to be patient, while also suggesting that Nigeria was feeling under pressure from the UK over the case.

10. We are recommending the following next steps in this steadily escalating order:

- **Ministerial follow up with Foreign Minister Onyeama:** The High Commissioner will be seeking a meeting with FM Onyeama week commencing 6 September. A request for a ministerial phone call to follow up would reinforce the UK's urgency and provide an opportunity to set out our next steps (see below).

- **Escalate to Attorney General:** The Attorney (AG) is a powerful figure in the Buhari administration. However, sidestepping repeated Nigerian requests that we operate through the MFA risks damaging relations. We judge this risk will be mitigated by first notifying the MFA of our intention via a Note Verbale, or in a ministerial call (see above), and by asking to see the AG about a range of issues, not solely Kanu's case. We recommend the engagement with the AG take place at senior official level, escalating to ministerial if needed.

- **Raise again with Buhari's Chief of Staff:** Kanu's case was last raised with Gambari on 16 July. He was evasive. An upcoming call between HMG's Deputy NSA and Gambari (date TBC) provides an opportunity to raise again. [*words redacted in original*]. We assess that not raising it at this time would be noted in itself.

11. We have set out alternative options to these next steps for the Minister to note, at **Annex A** we do not consider that these options provide a greater prospect at securing access to Kanu and are therefore not recommending them at this stage."

The alternative options considered at Annex A included the possibility the Prime Minister could write directly to the Nigerian President, "public messaging" – i.e. a written public statement of the UK Government's position and the application of sanctions under the 2020 Regulations. However, each of these options was considered likely to be counterproductive.

24. The 10 August 2022 submission included the following under the heading "Background":

> "4. Mr Kanu is a dual UK-Nigerian national and the leader of the separatist group Indigenous People of Biafra (IPOB) … The Federal Government designated IPOB as terrorist organisation in 2017. Mr Kanu was initially arrested in Nigeria in 2015 on grounds of conspiracy and criminal intimidation. He was released on bail in 2017 and disappeared that year, and reappeared in Israel.
>
> 5. Mr Kanu was reportedly then detained on 27 June 2021 in Kenya and alleges that he was detained by Kenyan security officials, tortured and subject to rendition to Nigeria. He is currently being held in the Department of State Services detention (DSS, the Nigerian security services), and being tried for treason and terrorism, which can result in a death penalty. Nigeria initially refused consular access on the basis that he is a dual national. However, after extensive lobbying outline in the chronology (Annex A), we have been granted access twice: 19 November 2021 and 29 April 2022. We continue to lobby DSS for regular access.
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> …
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> 9. Long-standing consular policy is not to call for the release of British nationals detained abroad, as doing so might constitute interference in the judicial processes of another state. However, Ministers retain the discretion to depart from policy and call for release in exceptional circumstances, provided there is a rational basis for doing so. The principal exceptional circumstance where Minsters have previously called for release in consular cases is where the FCDO has credible evidence to suggest that the detainee is arbitrarily detained although to date that has only been done in very limited circumstances."

The section headed "Advice" stated as follows:

> "11. **Option 1 (recommended): Lobby Nigeria to address human rights concerns, including the allegations of arbitrary detention, without calling for release.** Officials have lobbied extensively on human rights concerns in the case and will continue to do so, with the addition of lobbying Nigeria to address the arbitrary detention allegations. Calling for release is an exceptional measure of last resort, where human rights violations cannot be remedied by other means and where we judge that call for release is a credible and effective step. We assess that there are still further steps that FCDO can take before consideration of this exceptional measure is appropriate. This includes further lobbying and escalation with Nigeria and Kenya on the allegations of torture, unlawful transfer and arbitrary detention, fair trial and privacy concerns as well as monitoring on-going legal proceedings in Kenya and Nigeria where the allegations are being considered.
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> 12. Nigeria's response to the UNWGAD [the UN Working Group] and the political nature of the case suggests that the court system is the most likely route through which a remedy can be sought. We will therefore monitor

proceedings and consider whether engagement from the FCDO may be appropriate, e.g. on any specific fair trial concerns. This approach would also give Nigeria and Kenya the opportunity to respond to the UNWGAD's findings, however given Nigeria has not yet substantively engaged in the process and Kenya not at all, we are not optimistic about a satisfactory response in the six months period. We will lobby Kenya's new government to respond to UNWGAD's findings once August's election – and any court petitions – have concluded. We will keep this under review as proceedings progress.

13. **Option 2 (not recommended): Call for Mr Kanu's release, publicly or privately.** This would be in line with the UNWGAD recommendations and [*words redacted in original*]. However, we do not assess that lobbying has been exhausted, nor that all legal remedies available to Mr Kanu have been exhausted. Nor is it clear that a call for release would be credible or effective. Mr Kanu has brought civil proceedings in Kenya and Nigeria against the respective governments related to the allegations of torture and rendition, and his criminal case in Nigeria remains ongoing. There will therefore be opportunities for the courts in Kenya and Nigeria to consider the allegations and potentially provide remedy to alleged rights violations. BHC Abuja and Nairobi can also escalate lobbying on the allegations to try and obtain a response from both Governments. To call for release at this stage, before it is a measure of last resort, could set an unmanageable precedent and expose FCDO to legal risk in other consular cases.

14. Post also assess that calling for release would not be effective given: the Nigerian Government's stance on Biafran separatism and the likelihood of any decision being politicised in the run up to the 2023 elections; the strength of their and the Nigerian public's security concerns about the activities of IBOP and Mr Kanu; their frustration that the UK did not take action to address these concerns while Mr Kanu was conducting these activities from the UK; the extreme steps they appear to have taken to detain him; and the seriousness of the charges. Furthermore, the Nigerians are likely to view any such calls as interference with an ongoing legal process in an independent country, and that the UK does not believe the courts in Nigeria are independent. This option could have a negative impact on our own ability to provide consular assistance as we assess that the Nigerian authorities would be likely to curtail our already limited access."

25. In her statement, Miss Broughton explains the Secretary of State's position in this way:

"39. When considering what further steps are necessary, the FCDO will often (as it has done in this case) reach a preliminary view as to the credibility of the allegations based on material available. In conducting this assessment, the weight that is accorded to various pieces of evidence varies depending on the circumstances of the individual case. In particular, while the government is supportive of expert opinions and reports, such as that of the UN Special Rapporteurs, and takes such reports into account, the Secretary of State does not consider that these either could or should be treated as a binding determination of the matters under consideration.

> 40. The FCDO may in such cases consider making public statements to exert pressure. The circumstances of each case are carefully reviewed to determine whether this action would be appropriate and whether it would further our objectives. In any event, it is extremely rare that a statement would take a definitive view on the legality of the acts of a foreign state. The factors taken into account include the credibility of the available evidence, the nature of the bilateral relationship and the likely impact that a statement would have upon it, the impact on multilateral relations, and the wider strategic implications, including the impact on other specific cases.
>
> 41. In Mr Kanu's case, as discussed above, the Secretary of State has considered and rejected the option of making his view public, taking into account an assessment of the political climate in Nigeria and a range of other factors and determining that such a statement would be counterproductive to Mr Kanu's interests.
>
> 42. In Mr Kanu's case there has been a constant inflow of new information. To form a concluded view in the case of evolving evidence would not be appropriate or aid Mr Kanu. Ultimately, the Secretary of State has concluded that reaching or publishing a concluded view as to the legality of Mr Kanu's treatment would not change our objectives or how we have approached his case."

B. Decision

26. The Claimant does not seek orders directing what the Secretary of State should do, but contends that he must reach a "concluded" view on whether and it what ways Mr Kanu has been mistreated, because without such a view there is no possibility that the Secretary of State could discharge the legitimate expectation that (in the words of the Court in *Abbasi*, at §99) the Claimant's "… request will be 'considered' and that in that consideration all relevant factors will be thrown into the balance".

27. Notwithstanding the apparent modesty of the way the case is put I consider it relies on a significant over-reading of the judgment of *Abbasi*. *Abassi* itself, was a modest approach to judicial intervention in the conduct of the United Kingdom's foreign relations. The Court's summary at paragraph 106 of the judgment, included the following:

> "(iv) It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.
>
> (v) The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case."

Paragraphs 104 and 105 of the judgment also emphasised the importance of the facts of the case in hand. Of the facts before it in *Abbasi*, the Court of Appeal concluded that any expectation that Mr Abbasi's request for assistance would be considered had been met.

28. It is important to have well in mind that the relevant expectation is that requests for assistance will be considered. Even though the policy in issue in this case differs from the policy identified by the Court of Appeal in *Abbasi*, it was not part of the Claimant's case that the present policy gave rise to any expectation in any other form[1]. This provides context for the Court of Appeal's references to "… a formulated view" and "… formed some judgment as to the gravity of the miscarriage". These references do no more than make it clear that the Secretary of State's consideration of any request of assistance must rest on an appreciation of relevant considerations. There is no 'first step' that Secretary of State must form, let alone publish his 'concluded view' on the circumstances affecting the relevant British national. Rather, he must be sufficiently informed (by reference to relevant and reasonably available information) to undertake the consideration required of him. In practice what is required will be akin to the standard referred to by the House of Lords in the *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 per Lord Diplock, at page 1065 A – B: "… did the Secretary of State take reasonable steps to acquaint himself with the relevant information …?".

29. In the present case it is clear – evidenced by the ministerial submissions and by the steps that had been taken in practice since July 2021 – that the Secretary of State has considered what steps to take to assist Mr Kanu on the basis of a proper appreciation of his circumstances. It is apparent from Miss Broughton's witness statement that the 'provisional view' (as the Claimant describes it) is a properly informed opinion. While the Secretary of State has declined the Claimant's request to state an 'unequivocal view' either privately or publicly, this does no more than reflect the Secretary of State's opinion on how best to conduct his affairs with the Nigerian authorities, to secure the greatest chance of providing practical assistance to Mr Kanu. In other words, this is part of the conduct of international relations – an exercise that is pre-eminently the responsibility of the executive, and is rarely likely to be amenable to judicial direction. No doubt the Secretary of State's approach will now also be informed by the conclusion set out in the judgments of the Court of Appeal of Nigeria, given on 13 October 2022, post-dating the evidence filed in these proceedings. I have seen reference in correspondence to a note verbale sent on 24 October 2022, presumably sent in light of the Court of Appeal's conclusions. But here too, it is not for this court to direct how or when or in what way, the significant conclusions contained in those judgments should be utilised.

30. For these reasons the Claimant's legitimate expectation claim fails.

31. The rationality challenge must also fail, for essentially the same reasons. In this regard, the Claimant points to evidence filed by the Attorney General of Nigeria in the civil proceedings in the Nigerian Federal High Court to the effect that Mr Kanu was not "entitled as of right to

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[1] Part of the Claimant's evidence – a statement dated 21 October 2022, made by Shirin Marker, one of the solicitors who acts for him – provided a narrative of steps taken by different Foreign Secretaries in different cases, and identifies occasions when public statements have been made that persons have been treated unlawfully, and when public calls have been made for others detained abroad to be released. The Claimant did not submit that any of these matters gave rise to any further or different legitimate expectation, and was plainly right not to seek to make such a case. What was or was not done in those other cases, reflects judgements made in those contexts and on those occasions – that is in the nature of the conduct of foreign affairs. What happened in those other cases is not be capable of establishing any form of settled practice or expectation of how an unknown future different situation would be approached. In this case, as in *Abbasi*, the more likely source of any expectation will be the Secretary of State's statements of policy.

be accorded extradition hearing or proceedings before he could be taken back to Nigeria" because he had "jumped bail", and points also to the conclusion of the UN Working Group that Mr Kanu has been subject to extraordinary rendition. The Claimant's submission is to the effect that this renders it irrational for the Secretary of State to fail to state unequivocally, that Nigeria has acted in breach of international law.

32. This submission fails because whether or not the Secretary of State states such a view is not any reflection of the degree of consideration he has given to Mr Kanu's case, rather it reflects his opinion on what steps should be taken best to assist him in his situation. In this regard, the distinction the Claimant seeks to draw between the Secretary of State 'reaching a firm view' (which he submits the court can and should require), and the Secretary of State stating that view publicly (which in this case, the Claimant accepts is not a matter for the court to require) is an artificial distinction. Since, as I am satisfied, there has been no want of consideration by the Secretary of State of Mr Kanu's circumstances, the way in which the Secretary of State chooses to express his position, and when and to whom it is expressed, is part and parcel of his assessment of how best to conduct this aspect of the United Kingdom's foreign relations. The fact that others – even in evidence in Nigeria, the Attorney General of Nigeria – may choose to take a different path is not to the point. The Secretary of State is undertaking a task that is materially different both from that of the Attorney General of Nigeria in the civil proceedings before the Federal High Court, and from the task of the UN Working Group. These matters do not begin to make the case that the Secretary of State has acted irrationally.

33. The final part of the Claimant's case is that a legal obligation to act fairly requires the Secretary of State to tell the Claimant his opinion on whether Mr Kanu was the subject of extraordinary rendition or explain why he is in unable to reach a 'firm view' on the matter (Claimant's Skeleton Argument, at paragraph 62).

34. In the support of this claim the Claimant relies on a passage in the Prisoner Policy Guidance under the heading "Intervention Toolkit: What we can do" which says:

> "The effectiveness, benefits and risks of different options should be considered regularly in the case conference calls and decisions recorded.
>
> *It is important that we can explain to individuals and families what we are doing, or not doing, and why.*"

(emphasis added)

The correspondence referred to above (at paragraphs 8 - 15) demonstrates that in this case the Claimant has been told what has been done, and why other steps have not been taken. The Secretary of State has acted consistently with his policy.

35. So far as concerns the submission that there is an obligation of fairness that requires the Secretary of State to go further, I accept the Secretary of State's submission that in this instance he is not exercising a power that attracts an obligation to act fairly – in the sense of an obligation of procedural fairness. To the extent the Claimant relies on the label of fairness to describe a requirement to explain, no such requirement should, in this context, extend beyond what is said in the Prisoner Policy Guidance – i.e. that the Secretary of State should explain to individuals and families what is being done, what is not being done, and why. A judicial requirement to go further would amount to the court taking control of how the Secretary of State should conduct a delicate diplomatic exercise. Were the Secretary of State to be required to provide the

explanation the Claimant seeks that would leave his opinion on the conduct of those matters, that it is not yet time for a public statement, at risk of being undermined at any time. It is not plausible that it would be open to the Secretary of State either to provide the explanation the Claimant contends for on terms that it remained confidential, or that if he attempted to do so, he could have any realistic expectation that such a condition could be enforced.

36. This part of the Claimant's case also fails.

C. Disposal

37. The Claimant's application for judicial review is dismissed.
