Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02418/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22 August 2018 and 20 November 2018

Decision & Reasons Promulgated
On 7 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

OLUWASENFUNMI DARE MUDA-LAWAL
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Himself
For the Respondent: (August and November hearings respectively:
Mr S Walker (Senior Home Office Presenting Officer)
Ms K Everett (Senior Home Office Presenting Officer))

DECISION AND REASONS

1. This is the appeal of Oluwasenfunmi Dare Muda-Lawal, a citizen of Nigeria born 9 October 1989, against the decision of the First-tier tribunal of 7 December 2017 dismissing his appeal, itself brought against the decision to refuse his human rights claim of 8 January 2016.

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2. The immigration history supplied by the Secretary of State set out that the Appellant entered the UK on 1 August 2002 with a visit visa valid until 25 October 2002. He made an application outside the Rules for leave on 20 October 2009 which was subsequently rejected for want of completion of the application form; an application of February 2010 was refused in March 2010, and one of July 2012 was refused on 8 August 2013. He was encountered by a Home Office enforcement team at his home address on 26 August 2013 and served with notice of being treated as an overstayer. He submitted a statement of additional grounds on 8 September 2015 leading to the refusal letter against which the instant proceedings were launched.

3. His further grounds for remaining in the UK were based on his lengthy residence in the UK and his relationship with Barbara Agyeman-Dua, a British citizen, and with his family members here: his sister (with whom he lived), mother, aunts and cousins, whereas he had no ties in Nigeria. Theirs was a genuine and devoted relationship; the only reason they did not cohabit was because of their personal moral beliefs.

4. The Appellant was a co-founder of *7 Elohim* (together with his close friend Harry Uzoka), a creative collective of designers, event planners, artists, producers, singers, poets and rappers, which aimed to inspire a new generation of London youths to overcome gang culture, violence and disconnection. Elohim's activities included organising football tournaments and marketing clothing brands; they also helped the homeless.

5. His application was refused because it was not accepted that his relationship qualified for consideration under Appendix FM, as he did not cohabit with his partner, and in any event there was a lack of evidence confirming that the relationship was genuine. There were considered to be no very significant obstacles to his integration back in Nigeria where he could take advantage of his education to re-establish himself. Overall his case presented no exceptional circumstances warranting the grant of leave.

6. He appealed against that decision on 22 January 2016, and his appeal was duly heard by the First-tier tribunal. His evidence was supported by that of Harry Uzoka, who detailed their mutual social activities and said that they supported one another financially via the proceeds of their work with Elohim.

7. Ms Agyeman-Dua gave evidence, stating that she was born in Ghana and was an only child; she had lived in the UK since the age of eight. She worked as a Radiographer with Royal Marsden NHS Trust. She had met the Appellant four years ago and their relationship began at once; they were engaged and planned to marry, though they felt they were not quite ready to do so yet, pending achieving some degree of financial security. They were deeply in love and she was devastated at the thought of not being able to see

him. Having no siblings, she had attributed particular importance to their relationship.

8. The First-tier tribunal dismissed the Appellant's appeal. It did not accept that he had established family life with Ms Agyeman-Dua given their circumstances were more akin to a friendship or romance falling short of a durable relationship. The evidence of his friend Mr Uzoka was vague regarding the relationship; no other witness referenced their relationship. His sister had provided no witness statement evidence. The evidence regarding his mother's whereabouts was inconsistent: the Appellant said he was not in contact with her whereas Ms Agyeman-Dua had said she saw her the previous month at the sister's home. He had provided no evidence of the immigration status of his mother and sister, though the latter clearly had no such status. It was unclear as to how he was supported financially given his own evidence was that he was supported by Ms Agyeman-Dua and Mr Uzoka, yet the latter had referred to the Appellant having income of his own.

9. Although he had been brought here as a child, he had subsequently been deliberately misleading as to the circumstances of his original entry and his mother's immigration status; his witness statement indicated that he came to join his sister and her spouse though in reality she was only a little older than him, and thus like him must have been only a youngster herself when he arrived. There was no evidence that his father was deceased.

10. He could not satisfy any of the private life routes specified under Rule 276ADE, as he was not a child or aged between 18 and 25, and had not lived here for more than 20 years; there were no very significant obstacles to integration back in Nigeria given that English was widely spoken there and he could use his qualifications including his degree and the skills from his work here on his return.

11. Considering his case outside the Rules, his working achievements were unclear, and whilst he had friends and a girlfriend here, the precariousness of his residence counted against him. He was not dependent on anyone in the UK. He had been brought here at the age of 12 under the direction and control of adults, and first applied for leave to remain aged twenty. He had qualifications and skills to use on a return. He was not dependent on anyone in the UK. Mr Uzoka and Ms Agyeman-Dua could send him money in Nigeria to help him re-establish himself there. It would be open to him to marry Ms Agyeman-Dua who could then sponsor his return via the entry clearance route. As to section 117B, precariousness aside, he spoke English though his income was not documented. Overall his departure would not represent a disproportionate interference with his family and private life.

12. Grounds of appeal submitted that the First-tier tribunal had erred in law in

(a) Assessing the relationship between the Appellant and his claimed partner without regard to their mutual evidence of the fact of their engagement and overlooking the Whatsapp messages and photographs that had been provided – Mr Uzoka in particular had given oral evidence regarding the strength of their relationship;

(b) Making unreasonable findings as to the Appellant's mother's status given he entered the UK aged 12;

(c) Making an unreasonable finding that there would be no very significant obstacles to integration back in Nigeria given the lack of social infrastructure absent any friends or family with whom he retained links;

(d) Failing to take account of his nearly qualifying under Rule 276ADE(v) as a young person who had lived here for half his life.

Error of law hearing

13. The First-tier tribunal having refused permission to appeal on 26 February 2018, permission was granted by the Upper Tribunal on 20 June 2018, recognising the force of each of the grounds of appeal summarised above.

14. Before me the Appellant appeared without a representative, as he could not afford one. I explained the limitations on the process today and that the Upper Tribunal could only overturn the decision of the First-tier Tribunal on the basis of errors of law based on evidence that had been before it.

15. The Appellant told me that since the hearing below his friend Mr Uzoka had tragically passed away. There was a special bond between him and his partner. The Judge below had been right about his mother's immigration status: she was still trying to regularise her presence in the UK. In the period leading up to the First-tier Tribunal hearing, he had been living with Mr Uzoka whilst they developed their business, having previously lived with his sister. He had no connections whatsoever in Nigeria; his father had died before the Appellant's second birthday. He saw his ongoing activities for Elohim as central to realising the ambition he had shared with Mr Uzoka to improve the life of youngsters in their community.

16. Mr Walker submitted that whilst the First-tier Tribunal had given only a brief reference to the Appellant's near-miss under the young person route, its conclusions were legally adequate. The immigration status of the Appellant's relatives were unclear on the evidence before it, and it was not established that he had any close relatives living in this country lawfully.

Findings and reasons – Error of Law Hearing

17. The Appellant relied on two significant strands of evidence to support his case to remain in the UK. There was the relationship with Ms Agyeman-Dua, and his strong private life ties with various friends and family in this

country including his establishment and pursuit of his community-focussed work with Elohim, all of which contrasted with his lack of ties in Nigeria. The First-tier Tribunal dismissed the Appellant's appeal on the basis that it did not accept that his relationship was a durable one, and the latter essentially because it considered that he had not adequately explained his asserted lack of connections with his country of origin.

18. It seemed to me that there were material errors of law in both of these findings.

19. I considered the First-tier Tribunal was wrong to categorise the evidence of the Appellant and Ms Agyeman-Dua regarding their engagement to be unreliable. They had both given clear oral and witness statement evidence to such effect. No reason was given for doubting their evidence. So far as I could make out from the record of proceedings, it did appear that Harry Uzoka had at least mentioned the relationship (sadly of course his death means that the available evidence from him cannot be improved upon). Furthermore, the Tribunal's ultimate conclusion appeared to be that the relationship was less strong than claimed, rather than being one that was concocted. However, it was difficult to see any basis for rejecting the clear evidence of both parties to the relationship, other than a perceived lack of corroboration, that they had become engaged. It seemed to me that a rather firmer evidential basis would be needed for doubting the fact of their engagement than this.

20. The Immigration Rules give particular attention to whether or not a couple is engaged to be married in the entry clearance context, though not in the context of an application for leave to remain. This nevertheless demonstrates that there is a real difference drawn by the executive and endorsed by Parliament via the negative resolution procedure which reviews those Rules between different kinds of relationship.

21. Then there is the question of the Appellant's private life ties in the UK. The Appellant entered the UK on 1 August 2002 aged twelve years and eight months. He made his application for leave (when taking up the opportunity to submit grounds for leave in response to a section 120 notice), on 8 September 2015, aged twenty five and eleven months. At that date he had lived in the UK for thirteen years and one month. He has accordingly lived for more than half his life in this country. Because his application was made at a time when he had reached his twenty-sixth year, he was excluded from the benefit of Rule 276ADE(v), though of course he had previously made applications seeking to regularise his status, including one in July 2012, around the time that that Rule first sought to encapsulate the appropriate public policy response to the situation of a young person who had lived for much of their life in this country.

22. As stated in *MM (Lebanon)* [2017] UKSC 10, “although the tribunal must make its own judgment, it should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy.” Lord Carnwath in the Supreme Court makes the same point in *Patel* [2013] UKSC 72, stating at [55] that “the balance drawn by the rules may be relevant to the consideration of proportionality”. So whilst it would be quite wrong to credit an individual with the fact they only just miss out on qualifying under a particular Rule, it is important to identify whether their circumstances are such ta the policy considerations that the Rules generally promote are enlivened.

23. The First-tier Tribunal concentrated heavily on the Appellant's assumed ties with Nigeria (whatever they might be - the evidential basis for presuming such ties to be extant is very slight). However, it did not have any tangible regard to the extent to which the Appellant's circumstances equated to a position where in general public policy is to regularise rather than deny immigration status. That policy position reflects the considerations identified in *Maslov v Austria* [2008] ECHR 546, which recognises that even for a foreign national offender, “the solidity of social, cultural and family ties with the host country” must be contrasted and with those retained in the country of origin.

24. I accordingly found that the decision of the First-tier tribunal was flawed by material errors of law. As the remaining issues essentially turned on proportionality, it was appropriate to retain the matter for final determination in the Upper Tribunal.

Continuation hearing – Proceedings

25. The Appellant continued to represent himself at the continuation hearing. No further documents were supplied. He and his partner Barbara gave evidence. He stated that his sister had now been granted a residence card which he understood recognised EEA residence rights. Barbara stated that she now earned £25,000 annually (there were a number of payslips showing earnings exceeding £22,000 from the First-tier Tribunal proceedings, around a year ago).

26. Ms Everett submitted that, notwithstanding the Appellant’s lengthy residence for nearly half his life, and his attempts to regularise his status, he did not meet the letter of the Rules and thus had to show very significant obstacles to integration under the private life route or a compelling case outside the Rules. Given his immigration history, it would be proportionate for the Appellant to return abroad and make an application under the Rules, because there was no significant obstacle to him so doing.

27. The Appellant submitted, on his own behalf, that his life was in this country, his fiancée and niece were here, and now his sister had been granted a residence card; he felt his life would be incomplete if he was unable to

complete the mission that he and Harry had begun, building up youth capacity to stand up to gang life, he knew nobody there, and this was the only country he had known all his life.

Continuation hearing – Findings and Reasons

28. I accept that the Appellant and Sponsor have established family life. No aspect of their evidence was challenged by Ms Everett. They have now been together for some five years and they have been engaged to marry for well over a year. Barbara continues to stand by the Appellant notwithstanding that a further year has passed since the First-tier Tribunal hearing, and will have inevitably been a significant source of emotional support to him during difficult times that have included the death of his closest friend. Although they do not cohabit (I accept, for reasons of genuine personal belief) they are clearly devoted to one another. Their ties transcend a temporary relationship of the kind that might sometimes be labelled as that between "boyfriend and girlfriend".

29. Additionally of course the Appellant has very strong private life ties in the UK. He has lived here since the age of twelve, an age when the circumstances of his entry cannot be held against him. Although he has not lived in the UK for precisely half his life, he has lived for a very significant period, and in terms of that portion of his life which he can realistically be expected to remember, it has been wholly in the UK, including the period over which he has made the kind of friendships that can be expected to endure and over which time he has developed as a young adult. He has very close community ties as shown by the *7 Elohim* project that he has pursued, with his friend Harry and since the latter's demise on his own. I accept that in the circumstances the Appellant will see this project as a very significant part of his own identity; it is a mission that gives his life a central and meaningful purpose.

30. In *Niemietz v Germany* [1992] ECHR 80 at [29] the ECtHR recognised that private life goes beyond one's "inner circle" of relationships without regard to the "outside world" which one inhabits: one's "private life must also comprise to a certain degree the right to establish and develop relationships with other human beings." As was stated for example in *Karako v Hungary* 39311/05 [2009] ECHR 712, "'private life' includes personal identity (*Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004–VI). The Court further observes that the Convention, as interpreted in the *Von Hannover* judgment regarding the individual's image, extends the protection of private life to the protection of personal integrity. This approach itself results from a broad interpretation of Article 8 to encompass notions of personal integrity and the free development of the personality. It seems to me that the Appellant has developed very strong private life ties with the UK in this sense.

31. Given the length and substance of the Appellant's relationship with his partner and the strength of his UK ties, I accept his private and family life would be the subject of serious interference were he to have to depart the UK.

32. That leaves the question of proportionality. Of course there are negative factors here. The Appellant has overstayed his original leave to enter the UK by a very significant period, and he has not succeeded in regularising his status as an adult. He poses some risk of being a burden on public funds as he has no lengthy lawful employment history. He does not qualify for the private life route given that his qualifications would make it difficult for him to show that he faced very significant obstacles to integration in Nigeria and he has not lived in the UK for half his life.

33. However, these factors are to my mind outweighed by other considerations, including the statutory criteria identified in section 117B of the Nationality Immigration and Asylum Act 2002:

    (a) He has a very strong combination of private and family life ties in the UK;

    (b) His partner does important work for the community;

    (c) He speaks fluent English and has strong prospects of finding work in the future and thus achieving financial independence, given he has already supported himself without recourse to public funds for an extended period;

    (d) He has lived in the UK for a very significant period, almost half his life, and has repeatedly sought to engage with immigration control by making applications with a view to regularising his status;

    (e) He cannot reasonably be presumed to have any real connections left in Nigeria; his evidence denying connections is uncontroverted, he left before he would have developed the kind of friendships that might reasonably be expected to endure, and any family links must be extremely attenuated given that he has been in the UK for well over a decade.

34. Of course, his private life was established on a precarious basis given he has never held indefinite leave to remain. In *Rhuppiah* [2016] EWCA Civ 803 §45, Sales LJ noted that "the starting point for consideration of the proper construction of Part 5A of the 2002 Act is that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with, and not in violation of, Article 8"; and §53 "Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by

particularly strong features of the private life in question …" That thinking was subsequently endorsed by the Supreme Court in *Rhuppiah* [2018] UKSC 58 §36, §42-44, and particularly §49), accepting that cases which are compelling outside the Rules and must be approached via the "need for a degree, no doubt limited, of flexibility in the application of Part 5A of the 2002 Act" *Rhuppiah* §42. It seems to me that the flexibility that the legislation requires demands recognition of the strength of the private life ties here.

35. Decisions such as *Chikwamba*, *Hayat* [2012] EWCA Civ 1054 and *Chen* (IJR) [2015] UKUT 189 (IAC) all demonstrate that there needs to be a "sensible reason" for separating family members; this principle is not necessarily limited to scenarios involving children but to my mind reasonably extends to the circumstances of partners who are emotionally very close simply to ensure compliance with the normal procedures. Indeed Sales LJ in *Agyarko* considered this scenario at [31]:

> "It is possible to envisage a *Chikwamba* type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. But in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion."

36. This is further explained by Hickinbottom LJ in *Tikka* [2018] EWCA Civ 642 §25-26:

> "The Secretary of State has already considered her discretion in that regard, and determined that the Appellant should not remain in the United Kingdom. There is no reason to suppose that, on the same material and applying the same criteria, an Entry Clearance Officer on her behalf will come to a different view; indeed, there is every reason to consider that he will come to the same view. That refusal will be the subject of an appeal that will raise exactly the same issues as the appeal to the tribunal in this case, i.e. whether the interference with the article 8 rights of the Appellant and his wife that a permanent separation would entail is justified … That … only underscores the futility of removing the Appellant without determining, once and for all, the underlying article 8 issue …"

37. There is evidence that the Sponsor earns a salary that exceeds the amount required by the Rules endorsed by Parliament. I appreciate that that evidence does not meet every aspect of the Appendix FM–SE strictures; but the credibility of the Sponsor's occupation and earnings stands unchallenged, and her work as a radiographer will clearly be in demand for the foreseeable future. She has spent over a year in the same role and it would seem that if anything her earnings (her evidence on the point again having been unchallenged by the Respondent) have increased since the First-tier Tribunal hearing. So I accept that the policy objectives which the Rules serve are here satisfied.

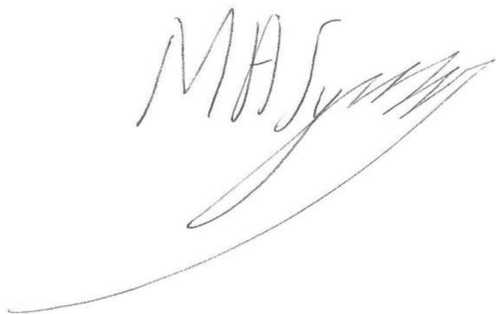
38. I cannot detect any sensible reason to expect the Appellant to return abroad and seek entry clearance as suggested by Ms Everett. Were his partner to feel obliged to accompany him, that would require her to live in a country where she has no links (she is of Ghanaian heritage) and would interrupt the important public service she provides in the UK. To demand the Appellant's departure for an uncertain period would simply interrupt his work for the *7 Elohim* project, which I accept has some value to the community, and postpone the date at which he can begin to make more of a contribution to UK society by finding durable employment. Ms Everett identified no difference in the likely criteria against which a future entry clearance application would be assessed than were already found within the decision already made refusing his application that led to the instant appeal. In these circumstances it seems to me that the reasoning in *Tikka* applies, and that it would be futile to expect the Appellant to have to re-argue the same case in the future as he has already put in the present proceedings. In any event, it is difficult to see that the public policy in discouraging entry clearance queue-jumping is threatened in circumstances where the Appellant was brought to the UK as a minor under the control of adults.

39. Overall I find the Appellant's departure from the UK would be disproportionate to the public interest it aims to serve.

Decision:

The appeal is allowed.

Signed: Date: 20 November 2018



Deputy Upper Tribunal Judge Symes