



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/18365/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11<sup>th</sup> September 2018

Decision and Reasons Promulgated  
On 18<sup>th</sup> September 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

The Secretary of State for the Home Department

Appellant

and

Mr Job Kefas  
(Anonymity Direction Not Made)

Respondent

**Representation:**

For the Appellant: Mr C Avery, Home Office Presenting Officer.

For the Respondent: Mr E Nicholson, instructed by Bishop and Sewell LLP

**DECISION AND REASONS**

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First Tier Tribunal that is Mr Kefas as the appellant and the Secretary of State as the respondent.
2. The respondent was granted permission to appeal a determination of First-tier Tribunal Judge Siddall, which on 28<sup>th</sup> March 2018 allowed the appellant's appeal, on human rights grounds, against a refusal decision of the Secretary of State dated 14<sup>th</sup> July 2016.

3. Judge Sidall recorded the following oral evidence. The appellant is a Nigerian national born on 21<sup>st</sup> June 1987, who visited the UK prior finally entering as a visitor, with his uncle, at the age of 15 years and remaining. On 15<sup>th</sup> April 2005 he was refused leave to remain as the dependent child of a person applying for a work permit. He made further application to remain on the basis of family and private life in 2010, 2014 and 2015. The appellant stated he had family and a girlfriend in the UK. After arriving in the UK with his uncle (who returned to Nigeria) the appellant lived with another uncle and aunt. He studied at school in the UK, obtained A levels and then applied to study at the University of Hertfordshire. He was called in by the University who advised he had no right to remain and could not continue with his studies. The appellant no longer lives with his sister or aunt. The appellant is currently co-habiting with his girlfriend and one other person. He has an uncle and sister (with whom he is close) in Nigeria who it is believed is living with his father.
4. The judge made the following key findings :
  - (i) there were no significant obstacles to his integration in Nigeria. He was educated, (in part in Belgium), he has a sister who had lived in the UK but was now successfully living in Nigeria who would be able to assist him. His Aunt Ada visited Nigeria regularly. He would be well placed to find employment and commence a new life there. [33]
  - (ii) with reference to Section 117B the appellant had no had leave to remain since his visitor visa expired in 2003. He was brought to the UK as a child [37].
  - (iii) He speaks good English but his private life was established at a time when his immigration status was precarious [38]
  - (iv) He could not meet the requirements of paragraph 276ADE of the Immigration Rules [40].
  - (iv) the public interest weighed on the side of removal [41].
  - (vi) he was no longer living with his extended family. He did not have health or other issues to make him a vulnerable young adult. His family '*relationships do not constitute family life of the type envisaged by Article 8. However these family relationships alongside a wide circle of friends do constitute an established and extensive family life in the UK*' [46].
  - (vii) the relationship with Ms Pintilli was a genuine relationship and they had been cohabiting for around twenty months [47]
  - (viii) the relationship did not meet the rules under Appendix FM and the appellant did not argue that they did so [48].
  - (ix) there was no finding to be made in relation to any rights under EU law. It was not an application as such. The judge noted and accepted '*that they have an intention for the appellant to make an application for a residence permit in a few months time, on the basis that they are in a durable relationship. I find that this is a factor for me to take into account only in weighing up the extent of the appellant's family and private life in the UK. I find that his relationship with Ms Pintilli is a significant part of that private life*' [49].

(x) the appellant was an overstayer and came as a child and had not lived in Nigeria for 20 years and had lived in the UK for only 15 years. He was in a relationship with an EEA national who is exercising treaty rights in the UK [49].

The judge concluded '*Whilst I accept that it would be possible for him to return to live in Nigeria his removal would amount to a significant disruption of his private and family life*'. His removal would be disproportionate [50]

### **Application for Permission to Appeal**

5. The application for permission to appeal contended
  - (i) the judge failed to give adequate reasons for finding that the appellant's family and private life outweighed the public interest considerations in Section 117B. The application cited the findings above and argued that the judge had failed to identify any elements of family life which could outweigh the public interests. The judge erred in the proportionality assessment. The applicant had formed a relationship at a time when his leave was precarious Section 117B(5). The judge had not considered whether the applicant and his partner could relocate to Nigeria.
6. Permission was granted on the basis that it was arguable that the proportionality assessment was flawed.

### **The Hearing**

7. At the hearing, Mr Avery submitted that the judge erred in approach to proportionality, had failed to consider the appeal through the lens of the Immigration Rules and had found that the appellant had no very significant obstacles in re-integrating in Nigeria. In all the balancing exercise and test applied was flawed.
8. Mr Nicholson submitted a Rule 24 response to the appellant's notice of appeal. He put forward a series of arguments in his Rule 24 response in an attempt to uphold the decision of Judge Siddall. He argued that the judge had directed herself in accordance with the domestic authorities endorsed by the Supreme court in **Agyarko & Ors v SSHD** [2017] UKSC 11 and **Hesham Ali** [2016] UKSC 60.
9. Further, the judge had found that the appellant had established protected rights and was justified in her conclusions. The Secretary of State had not sought to challenge those facts. The judge weighed the public interest in the balancing exercise and applied Section 117 of the Nationality Immigration and Asylum Act 2002. It was unsurprising that the appellant had not realised he was without immigration status until the age of 23 years old having been brought to the UK as a minor. The judge accepted that fact. The judge had identified the appellant's absence from Nigeria for more than 20 years and had resided in the UK for 15 years, and recognised his relationship with the Romanian national who was exercising treaty rights. Following **R (Iran) v SSHD** [2005] Imm AR 535 a decision should not be set aside for inadequacy of reasons unless the judge had failed to identify and record the matters that were critical to his or her decision. There was an unchallenged finding that the appellant did not know he was

without leave to remain when he 'put down roots'. Even if the judge were not permitted to take the approach she did in that regard, Deelah (section 117B) [2015] UKUT 00515 confirmed that Section 117B(4) and (5) did not 'give rise to a constitutionally impermissible encroachment on the independent adjudicative function'. The appellant, realised that his status was precarious only at the age of 23 years when he had been absent from Nigeria for more than half his life.

## Conclusions

10. The supreme court authorities of Hesham Ali and Agyarko explain that the immigration rules are relevant in that they set out the position of the public interest as viewed by the Secretary of State. Thus in an Article 8 balancing exercise the rules are relevant. Those rules are not definitive but there must be an analysis of an appeal through the prism of those rules. Where an appellant cannot comply with the rules there must be some compelling reason or rather unjustifiably harsh consequence of refusal or return to outweigh the public interest in the maintenance of immigration control.
11. That the judge accepted that the appellant did not realise that his leave was precarious until he was 23 years old and when he had been absent from Nigeria for more than half his life does not assist him. He had only spent 8 years *in* the UK by that point and the rule requirement is that the residence must be living continuously in the UK. Nonetheless, the judge accepted that the appellant could not meet the Rules either under Appendix FM or under Paragraph 276ADE. Simply the appellant had made no application on the basis of his relationship with his said partner and had not lived in the UK by the date of his application for more than 20 years. Further the judge found there were no very significant obstacles to the appellant's return to Nigeria.
12. When making an analysis 'outside the rules' the judge made no further reference to the immigration rules. She failed to direct herself properly and in line with the supreme court authorities. She simply found that the public interest was outweighed because the appellant's *private life would be disrupted*. That conclusion, and the facts to found it, does not approach the relevant threshold or make the necessary finding of removal resulting in unjustifiably harsh consequences. It is not that the judge failed to identify relevant facts but she failed to apply the correct legal test to those facts. Had she done so the outcome would have been different. R (Iran) identifies that making a material misdirection of law on any material matter is an error of law.
13. There was also confusion on the findings of family life. On the one hand the judge appeared to find the relationships with his immediate family or indeed his partner not to constitute family life but the number of his wider extended relationship accumulated to found family life. That I consider to be unsustainable. The fact is that the appellant had entered the UK on a visit visa, albeit as a minor some 15 years beforehand, and overstayed. Section 117B considerations are just that considerations but they must be given due weight and it is surprising that the judge found that someone over the age of 18 would not know his immigration status. The appellant had in fact been living in the UK *unlawfully* despite his attempts at regularising his stay and he formed a relationship in that knowledge. Three years ago in 2015 when the

appellant was 28 years old the girlfriend did not feature in his statement. That said, the fact that judge gave less weight to those sections, still does not counter the flawed legal approach to the appeal decision overall, in terms of article 8. It was unclear whether the judge was concluding that the appellant had family life with his partner or private life. The judge also stated that he had not considered the appeal on the basis of EU law - and indeed the application was not made on or responded to on that basis by the respondent - but the judge appeared to rule that they had a 'durable' relationship.

14. I find there was confusion in the test applied in relation to Article 8 and there was a failure to consider the appeal through the prism of the Immigration Rules. The judge made some confused findings with regards the status of the relationships and whether they constituted family life or not. I find that these were material errors of law and in view of my conclusions on the findings the matter should be remitted to the First-tier Tribunal. I do not preserve any of the findings. In the meantime it is open to the appellant to make a formal application to the respondent on the basis of being in a durable relationship.
15. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed

*Helen Rimington*

Date 17<sup>th</sup> September 2018

Upper Tribunal Judge Rimington