



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/21939/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre  
On 10<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 12<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SEGUN EMMANUEL OKOGBE  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Brown (Counsel), instructed by TM Fortis Solicitors Ltd  
For the Respondent: Mr A McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Alis, promulgated on 4<sup>th</sup> September 2017, following a hearing at Manchester on 21<sup>st</sup> August 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 20<sup>th</sup> January 1976. He appealed against the decision of the Respondent dated 9<sup>th</sup> September 2016, refusing his application for indefinite leave to remain on the basis of paragraph 276B of HC 395, placing reliance upon his private life rights.

### The Appellant's Claim

3. The essence of the Appellant's claim is that he entered the UK lawfully with entry clearance as a student with leave to remain from 12<sup>th</sup> October 2005 until 30<sup>th</sup> November 2007. He had various extensions of his stay. On 30<sup>th</sup> April 2011 he applied as a Tier 4 (General) Student but this was refused because he was unable to produce a CAS certificate, as he applied for a new passport and the Nigerian Embassy were unable to issue this to him in time. The Appellant then applied, out of time, for leave to remain as a Tier 1 (post-study) migrant and was granted leave interestingly on 6<sup>th</sup> October 2011 which was valid until 6<sup>th</sup> October 2013. He then incorporated his own business and applied to remain as an entrepreneur. This was refused on 7<sup>th</sup> April 2014. He appealed. The appeal was dismissed by Judge Foudy, although he was given permission to appeal. His Section 3C leave then ended on 16<sup>th</sup> March 2016. He accepts that he did not have leave between 17<sup>th</sup> May 2011 and 6<sup>th</sup> October 2011, because his lawful residence had been broken on 30<sup>th</sup> April 2011. However, he argued that there were exceptional and compelling circumstances which should have led the Secretary of State to exercise discretion in his favour. These were that he had tried, having realised that his Nigerian passport had expired, to renew his passport online on 15<sup>th</sup> March 2011, which was more than a month before his leave to remain in the UK was to expire. He had been given an interview by the Nigerian Embassy but this was after his leave to remain in the UK would have expired, namely on 13<sup>th</sup> September 2011. The result was that by the time he required a Nigerian passport, his valid leave to remain in this country had expired. This was through no fault of his own. He had always been lawfully in this country. He had not engaged in unlawful activities or had a bad immigration record. It was simply that his Nigerian passport had expired.

### The Judge's Findings

4. In his determination Judge Alis on 4<sup>th</sup> September 2017 considered these arguments. He considered the submission by the Respondent that the responsibility for ensuring that the Appellant had a valid passport lay with the Appellant. He had allowed it to expire. He had realised this only when his leave to remain in the UK was about to come to an end. He had brought it upon himself. No blame could be attached either to the Secretary of State or the Nigerian Embassy. It was up to the Appellant to ensure his passport was valid at all times (see paragraph 29(ii)).
5. On this basis the judge held that, "the Respondent reached a decision that was open to her and the consequence of that decision is that the Appellant was correctly refused under paragraph 276B HC 395" (see paragraph 30). The judge then went on to refer to the correct approach to Article 8 claims, setting out the principles in **Razgar**, and noting that the Appellant had studied and worked in the UK for twelve years, and had established a private life, but the Appellant's refusal was in accordance with the law because he had failed to meet the Immigration Rules (paragraph 34). The judge considered proportionality and found against the Appellant (paragraph 35). The judge observed that this was despite the fact that there was a valid private claim, but the Appellant had also set out to make claim as an entrepreneur which was unsustainable, as found by Judge Foudy, who was unimpressed with the application in this category, noting that the Appellant was not a genuine entrepreneur (paragraph

36). Finally, the judge held that the Appellant had remained in the UK lawfully but the decision against him was sustainable (paragraph 39).

6. The appeal was dismissed.

### **Grant of Application**

7. The grant of application states that the Appellant made his application in time on 30<sup>th</sup> April 2011. It was rejected on 17<sup>th</sup> May 2011. This is because he had not ticked box B25 of the application and he had not provided a CAS or SLN form or a letter (as noted in the decision letter by the judge at paragraph 25). The Respondent had accepted that the Appellant had provided an expired passport. Judge Alis had noted that he did not challenge the decision of 17<sup>th</sup> May 2011 refusing his application but had waited until a new passport had been issued to him. He had made his application out of time. The grounds had stated that the judge was wrong in saying that the Appellant had a right of appeal. There was no refusal decision against him. Therefore, there was no effective right of appeal. The Appellant had submitted an invalid application and this had resulted in a break in his continuous residence. Secondly, the judge had made “no clear findings in respect of the discretion that was properly or otherwise improperly implied by the Secretary of State”, it was contended. The application for permission was initially rejected by the First-tier Tribunal on 5<sup>th</sup> February 2018. However, the Upper Tribunal on 19<sup>th</sup> March 2018 granted permission without specifying exactly upon what basis.

### **Submissions**

8. At the hearing before me on 10<sup>th</sup> August 2018, Mr Brown, in his customary measured and careful submissions, stated that there were two reasons for this appeal.
9. First, the Appellant had established a private life. This was accepted by the judge below and was not in contention. He had only failed to succeed under the Rules because his lawful period of leave had been broken after his expiry of valid leave (in circumstances where he had not been able to apply for an extension because his passport had expired, and this expiry of leave was on 30<sup>th</sup> April 2011). However, what the Secretary of State had to consider was what the public interest considerations under Section 117B were, insofar as they militated against the Appellant, which Mr Brown submitted they did not because the Appellant was a person with lawful stay in the UK over a period of nearly a decade, and had no adverse immigration history, had not overstayed, and had not engaged in any criminality. Therefore, the public interest did not require his removal. He, moreover, was financially stable and spoke English fluently.
10. Second, there was the issue of discretion. Discretion did not exist to find in favour of the Appellant in circumstances where he failed to comply with the Rules at the time of the decision of the Secretary of State on 9<sup>th</sup> September 2016. However, by the time that the appeal had arisen before Judge Alis, there was a nuanced discretion, enabling the Secretary of State to overlook the kind of technical difficulty that the Appellant had found himself in, which the Secretary of State ought to have done, given that this was a human rights appeal. The facts of this case did not show the Appellant in any way setting out to hoodwink the British immigration authorities. Where he genuinely made his application for an extension, he had done so before the expiry of his leave on

30<sup>th</sup> April 2011, by attempting to renew his passport online on 15<sup>th</sup> March 2011, so as to put him in a position of being able to do so. The fact that there was some delay on the part of the Nigerian authorities meant that he was disadvantaged, but this was not a case where the balance of considerations fell against him.

11. Mr Brown said that there were no public interest considerations against him when he was not an overstayer. There were no public interest considerations when he had attempted to renew his passport and to apply to extend his leave to remain. There were no public interest considerations when the passport had expired in circumstances which were not known to him. He had after all been in the UK since 2005 and he was applying in 2017. That was a great many number of years during which time he had been in the UK lawfully.
12. For his part, Mr McVeety submitted that unfortunately the consequences were what they were in the failure of the Appellant to make a valid application. This was a case where at the time that the Secretary of State made the decision there was no discretion to overlook a difficulty such as this. Therefore, it cannot be said that the Secretary of State had acted "not in accordance with the law" because he had done precisely that. The question was whether the appeal judge should have then done so. The appeal judge could not do so because the discretion was not for him to exercise. As against that background, one had a scenario whereby the Appellant was not completely free of blemish because, as the judge have pointed out, the Appellant was now referring to problems with his family which "were not something he mentioned in his statement" (paragraph 32). The Appellant had made an entrepreneur migrant application on the basis that he worked between October 2011 and October 2013, which Judge Foudy had found was in circumstances when he was not a genuine entrepreneur (paragraph 36). The judge had then applied the **Razgar** considerations (paragraph 34) and come to the conclusion that the Appellant could not succeed. The case of **AM (Malawi)** made it quite clear that the fact that the Appellant spoke the English language fluently was only a neutral consideration.
13. In reply, Mr Brown submitted that if discretion had not existed at the time of the Secretary of State's decision but did exist at the time that the human rights appeal came before Judge Alis, then the important point was that the manner of the evaluation of the balance of proportionality considerations fell to be looked at in an entirely different respect to what they would otherwise have been had such a discretion not existed.
14. Put shortly, submitted Mr Brown, the view could have been taken that the private life of the Appellant over nearly a decade was sufficiently compelling to outweigh the public interest in his removal, and this is a position that could realistically have been taken because of the existence of the very discretion at the time of the hearing of the appeal. The Appellant had, after all, Section 3C leave.

### **No Error of Law**

15. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision. My reasons are quite simply that the judge was correct in effectively concluding that the Secretary of State had not acted in a manner that was "not in

accordance with the law”, because at the time of the decision by the Secretary of State no discretion existed to do anything otherwise than what the Secretary of State did.

16. Secondly, in any event, the fact that discretion existed at the time of the appeal hearing did not necessarily mean that the discretion would then have been exercised in favour of the Appellant, in circumstances where he himself was singularly in fault in allowing his passport to expire. What is notable in its omission in the determination, and in the submissions that have been made before me, is precisely the time at which the passport had expired. It appears to have expired a number of months before the Appellant came around to making his application and renewing his passport online on 15<sup>th</sup> March 2011. The degree of culpability, therefore, on the part of the Appellant may well have suggested that discretion will not have been exercised in his favour had it fallen to be so exercised, which was not the case at the time that the Secretary of State made his decision.
17. Nevertheless, I cannot leave this decision without making a strong recommendation that if the Appellant were to now apply again to the Secretary of State, then in circumstances where he has had lawful leave in this country, and he has not conducted himself in any manner which goes against him, that against the background of the existing discretion that falls to be applied currently under the Rules, that his private life should be considered in any new application by the Secretary of State in that context.
18. There is no question that there are valid private life considerations here and the public interest may well suggest that his removal in the circumstances is not warranted, particularly if discretion is invoked in a manner that gives consideration to why he had failed to make a timeous application, in circumstances where his Nigerian passport had expired, when he came around to making an application for an extension a month before his valid leave to remain in the UK was to expire on 30<sup>th</sup> April 2011.

### **Decision**

There is no material error of law in the original judge’s decision. The determination shall stand.

The appeal is dismissed.

No anonymity order is made.

Signed  
Deputy Upper Tribunal Judge Juss

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