IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004633

First-tier Tribunal No:
HU/60377/2022
LH/03378/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of April 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

LUCKY SUNDAY
[NO ANONYMITY DIRECTION MADE]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M West, Counsel instructed by Adukus Law Ltd
For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on Monday 18 March 2024

DECISION AND REASONS

BACKGROUND

1. By a decision dated 11 December 2023, the Tribunal (myself and Deputy Upper Tribunal Judge Jarvis) found an error of law in the decision of First-tier Tribunal Judge Courtney dated 14 September 2023 dismissing the Appellant's appeal against the Respondent's decision dated 19 December 2022 refusing his human rights claim. That claim was made in the context of an application to remain in

the UK based on the Appellant's long residence. The Appellant claims to have resided in the UK for over twenty years.

2. The Tribunal's error of law decision is annexed hereto for ease of reference. Although the Tribunal found an error of law in Judge Courtney's decision, that error was limited to her consideration of the period between January 2003 and February 2005. There is no challenge to the fact that the Appellant has been continuously resident since February 2005. We also preserved the finding that there are no very significant obstacles to the Appellant's integration in Nigeria which is his country of nationality.

3. For those reasons, the only issue for me to determine is whether the Appellant has demonstrated that he was resident in the UK throughout the period January 2003 to February 2005. Whatever the outcome of that consideration, and since the only issue for me to determine in the appeal is whether the Respondent's decision breaches the Appellant's human rights (relying solely on Article 8 ECHR), I have to conduct a balancing assessment between the interference with the Appellant's human rights and the public interest in removal. Mr West confirmed that the Appellant accepts that he cannot meet the Immigration Rules as he does not claim to have been present in the UK for twenty years as at the date of his application (made on 4 April 2022).

4. I had before me a consolidated bundle running to 851 pages to which I refer as necessary as [B/xx]. I have read all the evidence but refer only to that which is relevant to the issues I have to determine. I heard oral evidence from the Appellant, and he was cross-examined by Ms McKenzie. Again, I have taken into account all his evidence but refer only to that which is relevant to the findings I need to make.

FACTUAL FINDINGS

5. I begin by accepting that the Appellant has been resident in the UK since February 2005. Although at one point Ms McKenzie appeared to suggest that a P60 end of year tax certificate for the tax year 2004/5 might not be genuine, I cannot accept that submission. However, as I pointed out, that P60 (at [B/260]) indicates that the Appellant earned £1883.34 in that tax year. That is consistent with the payslip on the following page which shows monthly earnings of £941.67. £1883.34 is therefore consistent with two months' earnings in April 2005 therefore beginning in February 2005. The Appellant was in the period February to April 2005 working for an agency called Avenance. In light of the payslip at [B/261], it appears that he began work for that agency in February 2005.

6. There is no documentary evidence relating to the period prior to February 2005. The Appellant's account of his life in the UK prior to

that date is set out in his witness statement dated 6 April 2023 at [B/60-63] which he adopted as his evidence. I deal with his evidence about the period in issue in chronological order.

7. The Appellant says that he entered the UK "on a small boat at Dover on 23 January 2003 using an agent" and began to look for work "mainly blue collar jobs" ([2]).

8. The Appellant was asked about his journey to the UK. He said he had come from France. He did not know how many people had been on the boat, but he thought it was "over 20". He was not sure whether there had been a leader or agent in charge of the boat. When asked if there had been any problems on the journey, he said he had been scared because of the water and the boat was overloaded. He said that there had been problems halfway across and people were screaming but they managed to get the boat going again. None of the detail of that journey is covered in the Appellant's witness statement. He appeared from the way he gave his evidence to be making it up as he went along. At the very least, I considered this evidence to be embellishment.

9. Ms McKenzie relied on a bundle of documentary evidence which was filed late but admitted without objection from Mr West. That included an extract from evidence given to Parliament in the course of legislative scrutiny of the Nationality and Borders Bill dealing with small boat crossings in the Channel. That includes the following passage:

> "16. Prior to 2016, very few people arrived in the UK in small boats having crossed the Channel. Between July 2014 and May 2016 Home Office data states that there were nine confirmed incidents of migrants reaching the UK having crossed the Channel in a small vessel. At that time a significantly larger proportion of migrants were arriving in the UK by lorry.
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> 17. By 2018 the Home Office reported that 539 migrants had attempted to travel to the UK by small boats in that year. In response to this increase the then Home Secretary declared small boat crossings a 'major incident' on 28 December 2018…"

10. Whilst I accept that Home Office data may be incomplete and the fact that "very few" people came to the UK in this way before 2016 does not mean that none came, I am extremely sceptical about the Appellant's account in this regard. If the Appellant had arrived in the UK at a small port or away from a main Channel port (on a beach say), I might have been more inclined to believe him. As this evidence shows, however, before 2016, most people making the crossing from France to the UK came on lorries. That there were only nine confirmed incidents in nearly two years from 2014 to 2016 casts significant doubt on the Appellant's account of having made this journey in this way in 2003. I do not believe his account.

11. I accept in the Appellant's favour that he has consistently said that he has resided in the UK from 2003 since his first application made in December 2012/January 2013. As Mr West pointed out, he had nothing to gain by saying that he had resided here from 2003 at that point in time as he could not have accrued a sufficient period of residence to enable him to remain. However, he did not apply on the basis of period of residence but outside the Immigration Rules ("the Rules") and he might have made that application for any number of reasons including that needed leave to remain in order to continue to work. I will come to what the Appellant says about his employment situation below.

12. The covering letter to the application made in December 2012 is at [B/96-102]. The Appellant was claiming to remain "under Legacy provisions" (it is not clear what was meant by this at that time). The Appellant is said to have been in the UK "for the best part of 9 years". The form itself gives date of residence from "2003" with no month or date. It appears to have been only in his statement in 2023 that he gave a precise date of arrival which lends support to my doubts about his account of how and exactly when he arrived.

13. Overall, and in spite of the consistency as to the date being "2003", I cannot place much weight on the Appellant's evidence in this regard.

14. The Appellant says in his statement that he then obtained employment from an agency known as May Day, "a recruitment agency with branches on Oxford Street London and Liverpool Street London" ([3]). He says that he worked for that agency from August 2003 to December 2004. The statement gives no particulars as to the work he did for that agency. He says simply that he used to drop off his timesheets with the agency. He does not say whether that was at the Oxford Street branch or the Liverpool Street branch.

15. The Appellant was asked how he had been able to work given his lack of immigration status. He gave the following account.

16. He met someone at Peckham market. He said that he wanted to work. They introduced him to an agency. He thought that the office was on Oxford Street. He went there on that day. He approached them to say that he needed a job. At that moment a person phoned saying that they needed someone urgently to provide cover. They asked him to go to do that job which he said was at Green Park. That was where the kitchen was. The agency told him to come back on the following day to sort out matters. He started work on the same day.

17. When pressed on the details (none of which appear in his written statement), the Appellant said that the agency had asked his name but had asked him to come back the next day to fill in the form. He

then said that the company for which he had gone to work on that first day asked him to come back and said that they would contact the agency. He did not therefore go to fill in the form because he did not have time. He insisted that he had worked for this agency for some time, and they had not asked him to complete an application or carried out any checks.

18. I do not believe the Appellant's evidence in this regard. Again, the Appellant appeared to make up his evidence as he went along. None of this detail appears in his written statement. Whilst there might be elements of consistency in the Appellant's oral account (that May Day had a branch in Oxford Street), the Appellant's evidence simply did not add up.

19. Mr West submitted that it might not have been unusual at that time for employers not to make checks. The agency might have been a rogue employer which did not make checks. Whilst I accept that fines against employers for hiring illegal workers were not introduced until 2006, there is no explanation why an agency providing workers to other organisations would make no checks of those it was sending whether immigration checks or otherwise.

20. Moreover, the Appellant's oral evidence is internally inconsistent and inconsistent with his witness statement. He said he was dropping off timesheets with the agency and not with the company for which he was working. If he had not completed an application form and was not therefore registered with the agency, it is difficult to see why he would be providing the agency with timesheets. He also said he was paid via a bank account. He said it was that of his friend, Constance. However, again, if he had not completed a form for the agency, how would they know where to make payment? If the agency were seeking to operate under the radar, it is also not clear why they would risk a paper trail of that nature.

21. Finally, if, as the Appellant says, he was being paid by bank transfer, it is unclear why he would not have received payslips as he did for later agencies. That would be the case even if the payments were being made into another person's bank account. There is no documentary evidence of that nature from this period. The Appellant has provided no information about the company for which he said he was working via this agency nor any evidence from those with whom he might have been working at that time. He was asked about May Day and said that they were shut down which may be the case, but it is not clear why he could not have obtained evidence about or from the companies where he was actually working.

22. For the foregoing reasons, I do not believe the Appellant's account about his employment at that time.

23. Moving on from that period, the Appellant says at [4] of his statement that he moved from May Day to "Avenance plc (Elior plc – from May 2012 -present" "[l]ater in 2004". He says he was working as a stock keeper for Linklaters in the hospitality department. Whatever the position with regards to the earlier agency, the Appellant accepts that when he moved to Avenance, he was asked for documents to prove his status. That is unsurprising since Avenance was apparently supplying staff to a major City law firm.

24. The Appellant says that he obtained a document via a friend. The friend had said that he should bring his passport and his friend would tell him how to get the document. He had paid £300 to a lawyer to get the document. He gave that to Avenance and Avenance gave him the contract.

25. I do not believe the Appellant's account that he did not realise the document was not genuine. The whole story is highly indicative of supply of a false document and however unfamiliar the Appellant was with systems in the UK, he knew he had no status and must have known that the document was not genuine. I do however accept that he may have obtained such a document since he did work for Avenance, but only from February 2005. It is notable though that the Appellant has not provided that document. Nor has he provided his national insurance card which he says he also obtained at that time. I should add that, if, as the Appellant says, he was working with documents, genuine or not, and had a national insurance card, then there ought to be records of payments of national insurance. There is no such evidence.

26. As I have already pointed out, there is evidence in the form of a P60 for the tax year 2004-5 which shows that the Appellant worked for Avenance for two months in that tax year and therefore from February 2005. The Appellant's case that this employment began in late 2004 is inconsistent with the documentary evidence.

27. The Appellant also said that he had a bank account with the Halifax when he began work with Avenance. Although the sort code appears to be that relating to Barclays Bank (beginning "20"), I accept it is possible that the Halifax was using the same sort codes if affiliated to Barclays Bank at the time. The Appellant was asked questions about this account and how he had managed to open it. On his case, he opened it in 2005 which would be consistent with him having started work with Avenance at that time and does not assist with evidence of employment before then. The Appellant mentioned when giving evidence about the opening of that account that he had showed his old passport to the bank in order to open the account. He has not produced that passport (which might give some evidence as to his whereabouts prior to 2005).

28. The Appellant was also asked about "Constance" with whom he says he lived from 2003 to 2005. That is consistent with his evidence that he used her bank account to be paid by May Day during that period. The Appellant was asked when he last saw her. His evidence about this was vague. He first said he had left the house in August 2004 and did not go to visit. He then said that the last time he went there was 2011. He went once in a while. There were different people living there who said she had moved out and was having problems with her son. He has not provided any evidence as he could have done from those living at Constance's house to say that she had moved out which might have reinforced his case.

29. The Appellant's other evidence about his living arrangements at that time was telling. He was asked whether he could have obtained evidence from others such as neighbours or the community local to Constance's house to support his case. He said that it was "not in my mind to get" and "there would be people who were there then" and he "probably could get". The Appellant has known for many years that the Respondent was taking issue with his period of residence, particularly in the early years. He has put together evidence from February 2005 onwards. If evidence could be obtained as he said from those in the area local to where he says he lived in 2003/2004, I would have expected him to have obtained it. The lack of corroborating evidence from his neighbours and local community in that period undermines his case.

30. The Appellant has however obtained some evidence from others. Three "character references" appear at [B/104, B/190, B/194] (replicated at [B/417, B/501, B/505] and again at [B/729, B/829, B/831]). They speak vaguely of having known the Appellant for a long time including in his home country or for a period after 2005. None of those persons attended to give evidence in the Appellant's support. As such, and given the vagueness of their evidence, I can place no weight on it.

31. The Appellant was also asked about his attendance at church. Since he says in his 2023 statement that he has only been attending church for five years, that evidence does not assist me in relation to the Appellant's period of residence (although that and his evidence about helping out with charity work and preventing knife crimes on two occasions may be relevant to the extent of his private life in the UK). The Appellant accepted in his evidence that he could attend church in Nigeria.

32. The Appellant was also asked about his family in Nigeria and previous employment. He said he used to work in his father's shop. His father has since been killed. He has a sister with whom he remains in contact. He last spoke to her at Christmas. She is married and remains in Nigeria. He did not know her situation (despite admitting that he had spoken to her recently). It would not

be easy to stay with her. He also admitted he had an uncle still living in Nigeria, but he had not spoken to him or seen him.

DISCUSSION

33. It is for the Appellant to show on a balance of probabilities that he has been in the UK for the period he says. I have to determine the position at the date of the hearing before me.

34. Mr West for the Appellant accepted that the Appellant could not meet the strict requirements of the Immigration Rules in relation to his private life as he had not been in the UK for twenty years as at the date of his application. He submitted however that, if I were to accept that the Appellant had been here for twenty years, that was an indication that he should be allowed to remain given the Respondent's acceptance that after twenty years an individual would have formed a private life with which it would be disproportionate to interfere (see now rule PL.5.1 of Appendix Private Life to the Rules).

35. Although I understood Mr West to accept that the strength of an individual's private life was to be assessed qualitatively, he submitted that the period of twenty years meant that the rule was quantitative and therefore that period should be given significant weight when assessing the balance between the Appellant's private life and the public interest.

36. Since the Appellant's case is based on the position outside the Rules, I have to have regard to section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B")

37. Although accepting that I have to consider the position as at the date of the hearing before me, Mr West suggested that I should take into account that the Appellant now has one year less to prove. However, the issue is whether he has shown that he has been in the UK for twenty years and not nineteen years. His case is that he arrived in January 2003. It is now accepted based on the documents that he arrived by February 2005 but the issue for me to decide is between the two dates and not between February 2005 and some other date.

38. Nor do I accept that I should speculate about what might occur after the date of the hearing before me. At one stage, Mr West suggested that I should take into account that, if the Appellant were to make a further application immediately after the hearing, he would be permitted to remain whilst a decision was taken, and an appeal pursued which would extend time beyond February 2025. However, first, it is not for me to speculate about what might happen in the future. Second, if the Appellant were to make an application tomorrow, and the Respondent were to decide that timeously, I do not accept that the Appellant would be given another right of

appeal. It is highly likely that the Respondent would apply paragraph 353 of the Rules and would deny a further right of appeal.

39. Mr West also drew my attention to the case of R (oao Khan) v Secretary of State for the Home Department [2016] EWCA Civ 416. I have regard to what is said at [61] of the judgment that "[i]t is likely that those in the United Kingdom without leave, and therefore without status, will have no official documentation, particularly in the early period of their residence". That is the point urged upon me by Mr West. However, cases turn on their own facts.

40. It is notable in this case that the Appellant has been able to provide copious documentation supporting his residence from February 2005 but none at all for the period before then. Yet, on the Appellant's own case, he was working in that earlier period on a basis which was not dissimilar to that after February 2005 (that is to say he says he was being paid by bank transfer and not cash which ought to have generated payslips and for an agency, much as he was doing after February 2005). There is, I accept, some distinction in that the Appellant had procured a false document permitting him to work from February 2005. However, I cannot accept that this would affect the sort of documentation which would be available to him. If he was working under a false name, he need only have said so. That is not his case. As such, he would have had at the very least pay slips and probably a P60 for the period shortly after January 2003 and up to February 2005.

41. As I have found when dealing with the Appellant's evidence, I did not find his case to be credible as regards the period prior to February 2005. Whilst I recognise that he has been consistent in his assertion that he arrived in January 2003, I do not place weight on this. One can be consistent about a lie. It is not difficult to maintain consistency when one is only dealing with a single date.

42. I therefore find that the Appellant has been in the UK only since February 2005 and not prior to that date. It follows that I do not accept that he has been in the UK for twenty years as at the date of the hearing before me.

43. The finding that the Appellant does not face very significant obstacles to his integration in Nigeria was preserved by the error of law decision. I would in any event have reached the same view as did Judge Courtney. Although the Appellant has been out of Nigeria for some time, he grew up there and lived there until his late twenties. As Ms McKenzie pointed out, even on the Appellant's own case, he lived in Nigeria for longer than he has lived in the UK. He has a sister there with whom he retains contact. There is no suggestion that he is not able-bodied nor evidence that he would be unable to work on return. He has demonstrated his willingness to work by finding employment when he came to the UK (on my finding

in February 2005) notwithstanding the difficulties in doing so due to his lack of status.

44. That leaves a balancing assessment between the interference with the Appellant's private life and the public interest.

45. Although accepting that, outside the Rules, I should give little weight to the Appellant's private life, formed as it was unlawfully (Section 117B(4)), Mr West submitted by reference to Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 that little weight did not mean that I should give it no weight.

46. However, the weight which I can give to the Appellant's private life depends on the evidence about the quality of that private life.

47. I have some very limited evidence that the Appellant has friends in the UK. He has worked here. The high point of his case is that he has lived here for a long time. That in itself is not enough (certainly where, as I have found, the period is less than that provided for by the Rules). The Appellant attends church in the UK. He helps out at the church and with other organisations on a voluntary basis. I take that into account as a positive contribution to the community. Although there is no evidence beyond the Appellant's own statement, I am also prepared to accept what is said at [11] and [12] of his statement (which was not challenged) that he has intervened in two cases during the commission of a crime to prevent that crime. That also shows that he is community minded.

48. I give some weight to the Appellant's private life but, on the evidence, I do not give it more than little weight. I take into account that it has all been formed unlawfully.

49. Against that, I take into account that the Appellant does not meet the Rules. He has been here unlawfully now for over nineteen years. I do not accept Mr West's submission that the Appellant did not go to ground. He did not make his first application to remain until 2013. I do not accept that this was made because he realised that the documents which he had used to work were not genuine. I have found that he knew that they were not from the outset. It may be that he did so because others discovered that they were not genuine. There is also evidence that the Appellant absconded after that and his 2015 application were refused. The public interest in the maintenance of effective immigration control is undermined by the Appellant's actions. I give significant weight to the public interest.

50. Balancing the factors in favour of the Appellant against the public interest, I conclude that the public interest outweighs the interference with the Appellant's private life. The Respondent's decision is proportionate. There is no breach of Article 8 ECHR.

CONCLUSION

51. The Respondent's decision is a proportionate interference with the Appellant's private life. It does not breach the Appellant's Article 8 rights. There is no breach of the Human Rights Act 1998. I therefore dismiss the appeal.

NOTICE OF DECISION

The Appellant's appeal is dismissed on human rights grounds. The Respondent's decision does not breach section 6 Human Rights Act 1998.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 April 2024

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004633

First-tier Tribunal No:
HU/60377/2022
LH/03378/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

.....11/12/23.....

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

LUCKY SUNDAY
[NO ANONYMITY DIRECTION MADE]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M West, Counsel instructed by Adukus Law Ltd
For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on Thursday 30 November 2023

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Courtney dated 14 September 2023 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 19 December 2022 refusing his human rights claim. That claim was made

in the context of an application to remain in the UK based on the Appellant's long residence. The Appellant claims to have resided in the UK for over twenty years.

2. The Appellant says that he arrived in the UK illegally with the help of an agent on 21 January 2003. He made an application to remain on private life grounds on 23 January 2013 which was refused on 12 December 2013. On 2 February 2015, the Appellant was given notice of his liability to removal. He made a second application on 5 March 2015 which was refused and his claim certified as clearly unfounded by a decision dated 29 April 2015. On 4 April 2022 the Appellant made the application to remain which led to the decision under appeal.

3. The Respondent did not accept that the Appellant had resided in the UK prior to 2005 nor that he had lived here continuously for twenty years. The Judge, at [19] of the Decision, was prepared to accept that the Appellant had been in the UK continuously since February 2005 but did not accept that he was in the UK between January 2003 and February 2005.

4. As is accepted on behalf of the Appellant, he cannot meet paragraph 276ADE(1) of the Immigration Rules ("the Rules") (now paragraph PL 5.1. of Appendix Private Life to the Rules) on the basis of his long residence as he does not claim to have resided in the UK for twenty years at the date of his application. However, he says that, if he might meet the Rules in principle on the basis that he had at the date of hearing before Judge Courtney been resident for over twenty years then that might have made a material difference to the Judge's assessment of his human rights claim.

5. As it was, the Judge considered the claim on the basis of the Appellant's private life and family life in Nigeria and the UK. The Judge assessed the claim outside the Rules, taking into account section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") (as she was bound to do). She concluded that removal would not be disproportionate. She therefore dismissed the appeal on the human rights ground (which was the only one available to the Appellant).

6. The Appellant sought permission to appeal on one ground only, namely that the Judge had erred in her approach to the assessment of the Appellant's residence in the UK in 2003 to 2005 by requiring documentation in support of this claim when none was needed, failing to make a finding whether the Appellant's own evidence on this aspect was credible or not and rejecting the Appellant's case in this regard absent cross-examination by the Respondent (who was not represented at the hearing). It is also submitted that the Judge failed to give adequate reasons for her conclusion that the Appellant had not shown that he was residing in the UK between 2003 and 2005.

7. Permission to appeal was granted by First-tier Tribunal Dainty on 17 October 2023 in the following terms so far as relevant:

> "..3. It is arguable that the judge made an error of law either by requiring documentary evidence as in effect an absolute requirement of demonstrating the pre-2005 residence and/or didn't apply the relevant case law in that area and/or didn't confirm if it was the case that she disbelieved the Appellant's account and if so what the reasons were in view of the fact that the account hadn't been challenged by cross examination and/or the judge was arguably internally inconsistent having accepted for some purposes that the early period of residence is difficult to evidence by documents. Having arguably made that error as to the date of entry to the UK this infects the article 8 analysis as a whole."

8. The matter comes before us to decide whether the Decision contains an error of law. If we conclude that it does, we must then decide whether to set aside the Decision in consequence. If we do so, we must then go to on re-make the decision or remit the appeal to the First-tier Tribunal for re-making.

9. Before we turn to the substance of the Appellant's challenge, it is necessary for us to say something about the preparation of the appeal before this Tribunal by the Appellant's representatives.

10. On 30 October 2023, the Tribunal sent an email to the Appellant's representatives acknowledging that the First-tier Tribunal's grant of permission had been received by the Upper Tribunal. With that email were sent standard directions which required the Appellant's representatives to prepare a composite bundle of relevant documents for the error of law hearing. That bundle was to be provided to the Tribunal and Respondent no later than ten working days prior to the hearing. The clear intention of the directions and covering email was to require the representatives to upload the bundle to CE-file. Guidance was given about how that could be done. Directions were also given for a skeleton argument to be provided no later than five working days before the hearing (if the Appellant intended to rely on one) and for the Respondent to provide and serve the Appellant with any skeleton argument on which he proposed to rely.

11. On 17 November, no bundle having been received for the hearing on 30 November, the representatives were chased for a response.

12. Notwithstanding those emails, the Appellant's representatives failed to provide a bundle as directed either to the Tribunal or to the Respondent. It was therefore left to us to put together a bundle of relevant documents from the documents we had on CE-file and the documents on the First-tier Tribunal's system. Ms McKenzie had done likewise.

13. When we queried with Mr West why a bundle had not been produced, he was unable to tell us as he had no instructions. He did make the point that he had received an indexed and paginated bundle for the hearing which was sent to him on 19 November. He surmised that the Appellant's representatives may have tried but failed to upload it. They may also have tried to send it to the Respondent but failed. That is however pure speculation.

14. We therefore indicated to Mr West that we would raise this matter in our decision and make a direction, irrespective of the substantive outcome, requiring the Appellant's representatives to explain in writing the failure to provide the bundle. It is entirely unsatisfactory for the judiciary to be expected to put together a bundle for the parties. It is also unsatisfactory for the parties and Judges to work from different bundles. Fortunately, on this occasion the failure did not lead to the need for an adjournment as it was not necessary for Mr West to take us to the documentation save in relation to the errors asserted. The standard directions are however there to be followed and not ignored. The Appellant's representatives are therefore ordered to provide a written explanation in accordance with the first of the directions below.

15. Turning back to the substance of the hearing before us, having heard submissions from Mr West and Ms McKenzie, we indicated that we intended to reserve our decision and provide that with reasons in writing which we now turn to do.

DISCUSSION

16. As was pointed out in the grant of permission, Judge Courtney at [11] of the Decision directed herself in accordance with the Court of Appeal's judgment in R (on the application of Khan) v Secretary of State for the Home Department [2016] EWCA Civ 416 ("Khan"). She there recognised that those who have resided in the UK without status often do not have official documentation, particularly in the early years of their residence.

17. The Judge then went on to consider the evidence about the Appellant's residence in the UK.

18. Having considered some of the evidence which does not relate to the period under challenge, the Judge dealt at [14] of the Decision with the Respondent's position. It was argued by Mr West before Judge Courtney that the Respondent had accepted that the Appellant entered the UK in 2003. That acceptance is said to emerge from the Respondent's decision dated 29 April 2015. As Judge Courtney there pointed out, however, the Respondent indicated that this was because he had to take the Appellant's claim at its highest.

19. The April 2015 decision included a certification of the Appellant's human rights claim as clearly unfounded. In order to certify the claim,

the Respondent was bound to take the claim at its highest. That did not reflect an acceptance of the Appellant's claimed date of entry.

20. It was also said that the Respondent had not disputed the claimed date of arrival in the decision under appeal. We disagree. The immigration history begins with the words "[y]ou claim to have entered the UK illegally via an agent on 23 January 2003" (our emphasis). The Respondent also did not accept that the Appellant had lived in the UK continuously for at least twenty years. Whilst that may have been in part because the Appellant claimed to have been in the UK for only nineteen years and two months at date of application, when the decision is read as a whole, and with the Respondent's review, it is clear that the Respondent did not accept the date of entry. The Judge was entitled therefore to conclude that this was an issue which she had to determine.

21. The Judge dealt with the evidence about the period 2003 to 2005 at [15] to [19] of the Decision as follows:

> "15. The Appellant states that between August 2003 and December 2004 he had a job as a kitchen assistant, having obtained this via a recruitment agency called Mayday. In 2004 he obtained a job via another agency, Avenance plc, working as a porter with the law firm Linklaters. The Appellant's earnings in the tax year to 5 April 2005 were only £1,883.34 [see P60 at AB page 201]. This contrasts with pay of over £13,000 in the following tax year.
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> 16. In July 2017 Mr Sunday was laid off when it was discovered that he did not have a right to work in the UK [WS § 5]. When I inquired at the hearing as to whether Linklaters had asked about his immigration status it transpired that the Appellant had provided them with a letter, ostensibly from the Home Office, saying that he had permission to work. Mr Sunday gave evidence that he had paid an agent for this letter and claimed that it was not until 2013 that he became aware that it was in fact a fraudulent document.
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> 17. The Appellant gave evidence at the hearing that upon arrival in the UK he telephoned his friend Constance, who lived in South London. A man gave him £25 for the train fare and he went to stay with Constance at her home in the Old Kent Road 'for a few months'. Mr Sunday said that he had not been in touch with Constance 'for six or seven years now'. Subsequently he said that they had last spoken in 2017. She was no longer living in the same area, having moved because her son was experiencing problems. The Appellant said that he had tried to call Constance's number in advance of the hearing but had been unable to make contact with her. On his own timescale Mr Sunday was still in touch with Constance when he submitted his applications in January 2013 and March 2015. However, there is nothing to indicate that he obtained any evidence from her at either juncture

> to support his claim to have arrived in this country in January 2003.
>
> 18. The Appellant states that he does not have a passport and so there is no way that he would have been able to leave the UK [WS § 14]. In oral evidence he said that he had lost his passport when he was living on the streets.
>
> 19. Drawing all those threads together, I am prepared to accept that the Appellant has been in the UK continuously since February 2005. However, save for Mr Sunday's own testimony there is no evidence supporting his presence in the UK between January 2003 and February 2005. In my judgment the Appellant does not meet the requirements of paragraph PL 5.1. of Appendix Private Life [previously paragraph 276ADE (1)(iv)]."

22. We explored with Mr West in the course of his submissions whether this passage might be interpreted as the Judge considering what documentation there was, making a finding that there were documents which might have been produced, finding that there was no explanation by the Appellant for not having produced them and concluding for that reason that the Appellant was not to be believed in relation to this period.

23. Ultimately, though, we were persuaded by Mr West that the passage we have cited cannot be read in that way, certainly not without incorporating reasoning and findings which are not readily apparent on the face of the Decision.

24. We would not go so far as to conclude that the Judge was requiring there to be documentation. For that reason, we do not consider there to be an inconsistency between the Judge's reasoning and her reference to Khan. In this passage, the Judge was considering what documentation there was. She was also considering what documentation might be available but was not in evidence. She made some points about what the existing documentation showed (for example in the last sentence of [15]). Such points might have been relevant to an overall finding that she could not rely on the Appellant's testimony as to his date of entry. However, there is no express finding to that effect nor reasons given as to why the Appellant was not to be believed, particularly when his evidence was not challenged by cross-examination.

25. As Ms McKenzie pointed out by reference to [21] of the Decision, the Judge had some concerns regarding the credibility of the Appellant's evidence. However, that passage does not relate to this issue and it cannot be said that the Judge has made a finding at [19] of the Decision that the Appellant's testimony was not credible due to inconsistencies in his evidence on this aspect of his case.

26. We therefore accept Mr West's submission that it was incumbent on the Judge to make a finding regarding the credibility of the

Appellant's evidence, particularly [3] and [4] of his witness statement. That she failed to do. Although some of the points made about lack of other evidence might have been relevant to that consideration, we accept that on a fair reading of [15] to [19] of the Decision that cannot be said to be the Judge's reason for reaching the conclusion she did at [19] of the Decision that the Appellant was not residing in the UK between 2003 and 2005.

27. In relation to whether the error might make a difference, Mr West very fairly accepted that it might not as the issue for the Judge to determine was whether the Appellant's removal would be a breach of section 6 Human Rights Act 1998. As we pointed out to him, the Judge was bound to have regard to Section 117B which includes giving little weight to private life formed when an appellant has been in the UK unlawfully as here.

28. However, we also accept that the error might make a difference. As Mr West submitted, little weight does not mean no weight. Further, the long residence rule is underpinned by a policy suggesting that twenty years residence in the UK is likely to justify leave to remain even where an individual has been resident throughout on an unlawful basis.

29. Whilst Mr West also very fairly accepted that the Appellant could not meet the Rules because he had not met the twenty years requirement by date of application, we accept that this is a factor which might impact on the balance between interference with the Appellant's private life and the public interest when the Appellant's claim is considered outside the Rules.

30. For those reasons, we are satisfied that there are errors disclosed by the Appellant's grounds and that those might make a difference to the outcome. Accordingly, we set aside the Decision.

31. However, there has been no challenge to the Judge's assessment at [20] to [24] of the Decision in relation to whether there are very significant obstacles to the Appellant's integration in Nigeria. Those findings can therefore be preserved. We set aside however [25] onwards of the Decision as the balancing assessment must be carried out afresh once the period of residence is re-determined. We preserve the Judge's finding at [19] of the Decision that the Appellant has been in the UK continuously since February 2005. The issue concerns only whether he was resident from January 2003 to February 2005.

32. The parties agreed that we could retain the appeal in this Tribunal for re-making. The extent of fact-finding required is very limited, particularly in light of the preservation of findings as above.

CONCLUSION

33. The Judge has made an error of law when determining the issue of the Appellant's residence between January 2003 and February 2005. We set aside the findings at [15] to [19] and [25] onwards of the Decision. We preserve the Judge's finding at [19] that the Appellant has been continuously resident in the UK from February 2005. We also preserve the findings at [20] to [24] of the Decision that there are no very significant obstacles to the Appellant's integration in Nigeria.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Courtney dated 14 September 2023 involves the making of an error of law. We set aside [15] to [19] and [25] onwards of the Decision. We preserve the finding at [19] of the Decision that the Appellant has been continuously resident in the UK from February 2005. We also preserve the findings at [20] to [24] of the Decision that there are no very significant obstacles to the Appellant's integration in Nigeria. We make the following directions for the rehearing of this appeal:

DIRECTIONS

34. Within 14 days from the date when this decision is sent, the Appellant's representatives shall provide the Tribunal with an explanation in writing for their failure to comply with the standard directions emailed to them on 30 October 2023 and chased up by an email on 17 November 2023. The Tribunal will thereafter consider whether and what action should be taken in that regard.

35. Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which he wishes to rely at the resumed hearing.

36. Also within 28 days from the date when this decision is sent, the Appellant's representatives shall upload to CE-file a composite bundle in accordance with the standard directions previously emailed to them (so far as the documents remain relevant for the resumed hearing) and shall include also any further evidence filed and served in accordance with [2] above.

37. The re-hearing of this appeal is to be listed before UTJ Smith for a face-to-face hearing on the first available date after 35 days from the date when this decision is sent, time estimate ½ day. If an interpreter is required for that hearing, the Appellant's representatives are to notify the Tribunal within 14 days from the date when this decision is sent.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal

Immigration and Asylum Chamber

5 December 2023