Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00386/2013

THE IMMIGRATION ACTS

Heard at Field House
On 22 August 2013 and 28 October 2013

Determination Promulgated
On 3 December 2013

Before

UPPER TRIBUNAL JUDGE LATTER

Between

STEVEN UBI OMINI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, instructed by Peter Otto and Co, Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer (22 August 2013)
Mr R Hopkin, Home Office Presenting Officer (28 October 2013)

DETERMINATION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal issued on 20 June 2013 dismissing his appeal both under the immigration rules and under

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article 8 against the decision made by the respondent on 18 December 2012 to refuse his application for leave to remain and to give directions for his removal.

Background

2. The appellant is a citizen of Nigeria, born on 6 June 1976. He entered the UK on 22 July 1997 with leave to enter as a visitor for six months and, according to the respondent's records, he embarked on 28 August 1997 and then re-entered on 24 July 2000 with entry clearance as a visitor. He did not leave and made no applications for further leave until 6 January 2012 when he applied for indefinite leave on the grounds of long residence.

3. The appellant asserted in his application form that he last entered the UK in July 1997 and he declared no absences since that date. However, in the light of her records, the respondent was not satisfied that the appellant was able to show ten years' lawful continuous residence or fourteen years' continuous residence. The application was also considered under the provisions of the amended immigration rules but the respondent was not satisfied that the appellant was able to meet those requirements.

The Hearing before the First-tier Tribunal

4. The appellant appealed against that decision and his appeal was heard on 10 June 2013. It was accepted on his behalf that the appellant could not meet the requirements of the rules in respect of long residence and that the appeal was based solely on article 8 in respect of both family and private life [8]. The appellant based his claim that there was family life within article 8(1) on his relationship with his girlfriend, his mother and his nephew, his late sister's son, who had been adopted by his mother and was living with her.

5. When considering whether the claimed relationship between the appellant and his girlfriend amounted to family life, the judge noted that they claimed that they had known each other for four years and met about once a week. They were not living together as a couple: the appellant was living at his address in Peckham with his mother and nephew whereas she was living with her parents in Ilford. The judge said that there was no evidence before him to show that the couple had undertaken joint activities in life and she was not prepared to relocate to Nigeria with him if removed. There was no evidence of any joint bank accounts or any other documents in their joint names to corroborate their claim that they had a genuine and subsisting relationship as partners as opposed to having known each other only as boyfriend and girlfriend.

6. The judge said that having considered the evidence he was left in no doubt whatsoever that any relationship between them did not amount to a genuine and subsisting relationship as partners to satisfy EX.1(ii) of Appendix FM. He found that there was no genuine and subsisting relationship to amount to family life within article 8.

7. The judge then went on to consider the appellant's relationship with his mother. He had claimed that she depended on him for household chores such as cleaning and cooking. She was in receipt of disability living allowance but he was not aware of the level of the benefit. He found that there was no evidence to suggest that she had mobility problems although there was evidence of some health problems. He said that there was insufficient evidence before him such as a detailed medical report to establish that she was dependent upon the appellant by necessity on account of her health as opposed to choice such as to give rise to family life between them. He was not satisfied that article 8 was engaged on this basis.

8. The judge went on to consider the relationship between the appellant and his nephew, a British citizen born on 24 September 1998. He did not accept that there was family life, although he did accept that they lived in the same house and that the appellant had been doing certain things for his nephew such as taking him to school or even attending parents' meetings, but that was purely a matter of choice. He commented that his nephew had been living with his grandmother before the appellant had moved into the house some five years previously. He also noted that the appellant's sister was living in the same area and she was no doubt involved in his care. In any event, there was nothing to suggest that the appellant was solely responsible for his nephew's care and the judge did not accept that article 8 was engaged or that the nephew's welfare rights under s.55 of the Borders, Citizenship and Immigration Act 2009 would be breached if the appellant were removed.

9. In summary, the judge did not accept that the appellant had established family life in the UK with anyone or that removal would interfere with his rights in that respect. However, he did accept in the light of the length of residence that private life was engaged. It did not meet the requirements of para 276ADE. He went on to consider the issue outside the immigration rules but found that the appellant as an IT professional with no health problems would have no difficulty in resettling in Nigeria. For these reasons the appeal was dismissed under article 8.

Grounds

10. In the grounds of appeal it is argued that the judge erred in his assessment of the relationship between the appellant and his girlfriend by failing to take into account the nature of that relationship and by assuming that there was a requirement for the couple to live together to engage article 8. It is further argued that he did not make any adverse credibility findings in relation to the appellant's partner and that his assessment of the evidence was flawed. It is then argued that he failed to take into account all the relevant circumstances relating to the care provided for the appellant's mother and the fact that the appellant now had responsibility for his nephew.

11. Permission to appeal was granted by the First-tier Tribunal for the following reasons:

> "... Having apparently accepted that the appellant and his girlfriend have known each other for four years, despite the fact that they each state in their prepared statements that they intend to spend the rest of their lives together, the judge made no finding of fact on that issue. It is arguable that a finding of fact on that issue may have assisted the judge in reaching a more adequately considered decision upon whether the relationship of the appellant and his girlfriend amounted to a family life for article 8 purposes. In all the circumstances it is at least arguable that the judge's consideration of and approach to article 8 was inadequate which led him to a finding which amounts to an arguable error of law."

Submissions

12. Mr Coleman adopted his grounds. He submitted that the judge had erred in law in his assessment of the relationship between the appellant and his girlfriend. It was difficult, so he argued, to see what he meant by saying that there was no evidence to show that the couple had undertaken joint activities in the light of their evidence that, although not living together as a couple, they met at least once a week. There was no requirement to show joint bank accounts but, in any event, the fact that for personal reasons they had chosen not to live together did not mean that there was no family life. The judge had failed to take into account the documentary evidence which tended to show that theirs was a close and affectionate relationship: see A26.

13. He further argued that when considering the appellant's relationship with his mother no adequate consideration was given to her statement at A11 or to his sister's statement at A8-10. The medical evidence (A17) provided support for the evidence about her medical condition. The judge had also erred by apparently requiring a dependency of necessity as opposed to choice.

14. The appellant's nephew had been adopted by the appellant's mother following the death of his own mother. The appellant had now been living in the same household for five years. The fact that he was found not to be solely responsible for his nephew's care did not without more mean that there was no family life. No adequate consideration had been given to his nephew's best interests as a minor. When these factors were looked as a whole, Mr Coleman submitted that the judge had failed to make a proper assessment of whether there was family life within article 8.

15. Mr Tarlow relied on the rule 24 reply to the effect that the judge had made a series of clear and reasoned adverse findings against the appellant and when the determination was read as a whole, it was clear that he was not satisfied that the appellant's relationship with his girlfriend was as significant as claimed or that his mother required the help as asserted. He submitted that the judge had considered the evidence and taking into account the fact that the appellant and his girlfriend were living at separate addresses and saw each other once a week, he was entitled to conclude that there was no family life. His findings could not be categorised as

perverse. So far as the appellant's relationship with his mother was concerned, the judge was entitled to take the view that there was no reason to believe that anything other than normal emotional ties were engaged. Similarly, in respect of his nephew, again it was open to the judge to find that there would be no more than the normal emotional ties to be expected from the fact that the appellant had been living in the same household for a number of years.

The Error of Law

16. The issue for me at this stage of the appeal is whether the judge has erred in law in such a way that the determination should be set aside. The appellant's grounds and the submissions made on his behalf argue that the judge erred in his assessment of the nature and extent of the family life between the appellant and his girlfriend, his mother and nephew. In so far as his relationship with his girlfriend is concerned, the thrust of the evidence was that they had been together for four years but they had not lived together. They were not engaged to be married and they had no plans to marry until the appellant sorted out his immigration status. However, his girlfriend had said that she hoped he would be able to come back as a fiancé if removed to Nigeria: see [22]. She had accepted that she had not asked the appellant about his immigration status when they met and had only discovered about it two years into the relationship and that he had not been honest with her about that: [23].

17. The judge said that he was left in no doubt whatsoever that any relationship between them did not amount a genuine and subsisting relationship as partners to satisfy para EX.1(ii) within Appendix FM. However, the fact that they did not live together and did not have joint bank accounts does not necessarily mean that there is no family life within article 8 and it is not entirely clear what the judge meant when he said that there was no evidence before him to show that the couple had undertaken joint activities in life.

18. So far as the appellant's relationship with his mother is concerned, I accept that there is force in the submission that the judge may have given undue weight to his finding that any dependency was not of necessity rather than choice, although it is difficult to say this would not be a relevant factor to take into account. However, I am not satisfied that it is clear that the judge took into account the evidence as a whole from the appellant's mother, his sister or indeed the medical evidence relating to her health problems.

19. So far as his relationship with his nephew is concerned, the judge attached weight to the fact that there was nothing to suggest that the appellant was solely responsible for his care whilst accepting that he may have been doing certain things for him, such as taking him to school and attending parents' meetings. Taking into account the fact that the appellant has been living in his mother's household since his nephew was 9, some five years ago, I am not satisfied that adequate consideration has been given to his nephew's best interests as required by s.55 of the 2009 Act.

20. In summary, when the question of family life is looked at cumulatively, I am satisfied that the judge erred in law by failing to take all relevant matters into account or by failing to give adequate reasons for his decision. I am satisfied that these errors are capable of affecting the assessment of proportionality even though there are weighty factors on the public interest side of the balance. Accordingly, the decision should be set aside and re-made.

21. After hearing submissions from the parties, I am satisfied that the proper course is for this appeal to remain in the Upper Tribunal. Mr Tarlow indicated that he was not in a position through lack of papers to deal with the re-making of the decision and Mr Coleman said that he wished to call further oral evidence. This hearing was therefore adjourned to be relisted on 28 October 2013 at 2 p.m.

22. I made further directions permitting the appellant to call further oral evidence on the issue of family life and for the filing of any further witness statements and documentary evidence, which is now set out in bundle 1A, indexed and paginated 1-164 with further documents, 2A, annexed to a letter dated 11 October 2013 including further witness statements from the appellant, his mother, his sister and his nephew and girlfriend and evidence of his mother's eligibility for community care and assessed community care needs dated 15 May 2008.

Further Evidence

(i) The appellant

23. In his further witness statement dated 7 October 2013 in 2A the appellant confirmed that he was a citizen of Nigeria born on 6 June 1976. He was born in Calabar in Nigeria. He has been living continuously in the UK since 2000. His mother, sister, nephews and nieces all reside in the UK and are British citizens. His mother suffered from ill-health and has been treated for cancer which is now in remission but she requires hospital appointments for regular checkups. She has had a stroke and is diabetic. He has been caring for her for many years, living with her and ensuring that she takes her medicine, attends her hospital appointments and meets her daily requirements including personal hygiene, cooking and shopping.

24. His nephew lives in the same household. She is his sister's son and following her death he was adopted by his grandmother (the appellant's mother). He is now 15 years old. He ensures that his physical and emotional needs are met. He does not think this nephew would be able to survive without him. He is like his best friend, his father, his mentor and, as a growing boy, needs him around. He tried to do the best by him, supporting his hobbies and studies and going out with him to the cinema and football matches.

25. The appellant is also in a committed relationship with his girlfriend and has been for five years. She is a British citizen born and resident in the UK. She is of Asian origin and it would not be reasonable for her to relocate to Nigeria. He says he has never

had recourse to public funds and has adapted to the British way of life. He does not have any family in Nigeria or social or financial ties here.

26. In cross-examination he confirmed that he first left Nigeria in 1993 when he came to England with his mother. He did not remember what visa he had but thought it might be a visit visa. He left in 1977 when he went to study computer engineering for three years in Ukraine. He returned in 2000 with a visit visa and accepted that he had overstayed since then. His family knew that he had been here illegally. He had worked; he had not been in a hospital but had been to the doctor and had prescriptions; he had not driven a car and had not been in trouble with the police. When he was working, his tax was deducted. He used a temporary national insurance number, his date of birth. He had a bank account which had not been used for anyone else. He had no children and no immediate relatives in Nigeria or Ukraine. He was referred to a letter from his nephew's school confirming that it had his number as an emergency contact number. His nephew did not know that he was here illegally, nor did the school.

27. He said that he had tried not to contemplate having to go back to Nigeria. His family life was here and he would be very worried about his mother and his nephew and did not want to be without his girlfriend. His sister had three children, was not "100%" and had her own worries. He confirmed that the family did not know his nephew's father: his sister had been a single parent.

(ii) The appellant's mother

28. She adopted her witness statement in the form of the letter dated 2 March 2013 at 1A13 and her statement in 2A dated 10 October 2013. She is the appellant's mother. She has a daughter in this country who, because of her own medical condition, is unable to look after her. The only family member who is able to is the appellant. There is a strong emotional attachment between them as a result of the appellant's deformity (a hunchback) since childhood. As a result of his condition he was very weak and vulnerable and required extra care and protection from her. She has been residing in the UK since 1989. She suffers from a number of illness including sleep apnoea, diabetes, and has had cancer and a stroke. The appellant has lived with her and been caring for her for the past ten years. He ensures that she takes her medicine, attends her hospital appointments and meets her daily requirements. She does not think that she can survive, particularly emotionally, without him because he is the only one who knows everything about her. She is now 75 and depends heavily on him. Her husband died ten years ago. The appellant has no one in Nigeria to stay with and she cannot think of any close family in Nigeria. The appellant also looks after her grandson whom she adopted following the death of his mother.

29. In her oral evidence she confirmed that her daughter suffered from epilepsy. She has three children and lives in a two bedroom flat. The appellant took complete responsibility providing for his nephew. He played the role of father, looking out for him, advising him and checking things like whether he had done his homework.

30. In cross-examination she said that she had been a staff and psychiatric nurse. She had had indefinite leave to remain and later took British citizenship. She was asked about a visit to the United States and remembered going on a church visit but was unsure about the date. She had last returned to Nigeria in 2009 for her mother's burial. Her grandson was a minor and needed to be looked after. She used to receive help from social services and had someone to clean the house, but after a while she thought this was a waste because her son was living with her and doing most things and so she told them that she did not need them anymore.

(iii) The appellant's nephew

31. The appellant's nephew confirmed that his witness statement of 10 October 2013 in 2A was true. He was born on 24 September 1998 and his mother had died on 31 January 2000. His grandmother formally adopted him and has looked after and been responsible for him since then. However, now she is old and suffers from some medical problems and it is the appellant who in fact looks after his physical and emotional needs. He lives with them, attends his school meetings and takes him to the doctor. He said that although the appellant is his uncle, he regards him as his father as he has no memories of his own father. The appellant attends his school functions and keeps up with his academic progress. He is in the top set at school due to his uncle's support. They went together to his football matches and his uncle is there to cheer and support him. He said that it took him a lot to cope with the loss of his mother thirteen years ago and he cannot afford to lose the only father he has known.

32. He confirmed that the appellant was always there at their home. He described him as like a father. In cross-examination he confirmed that he was a British citizen and that his grandmother had formally adopted him. He had never had any contact with his natural father or any member of his family. He had seen his birth certificate and his father was not named.

(iv) The appellant's sister

33. She confirmed that her statement dated 7 October 2013 in 2A was true and that she was the real sister of the appellant. Their elder sister died thirteen years ago in Nigeria, leaving behind her son who was currently looked after by the appellant and her mother.

34. She has been living in the UK since 1989 and suffers from epilepsy. Her mother suffers from sleep apnoea and has just recovered from cancer and a stroke. She described the appellant as an integral part of their lives, keeping them going. He was the rock that held them together. He was hardworking and would never be a burden on the state. She confirmed that she had three children and her home was crowded. It would not be safe for her mother to be there. She had never met her nephew's natural father and described the appellant as being like a father figure to him. She

worked at St. Thomas's Hospital as a nursing assistant. She took tablets for her epilepsy and knew when she was going to get a fit. Her condition was reasonably well managed. She had two sons and one daughter and lived with her partner who was not working at present but was studying. She has no other siblings in this country. She became British through her mother. She accepted that people like her mother could get help from the state and in the past she had had a lady to do the hoovering, but there were problems as she was not always punctual and the appellant was not satisfied with her. There were problems looking after their mother, as she had sometimes locked herself out and there had been occasions when she had tried to cook something but had then fallen asleep.

(v) The evidence of the appellant's girlfriend

35. She confirmed that her witness statements of 13 March 2013 (IA6-7) and 20 October 2013 (2A) were true. She is a British citizen, a trainee dispensing option and a final year student at university. She met the appellant in 2008 and they have been together for four years. They intend to spend the rest of their lives together. Their families approved of the relationship and supported their intention to get married when his immigration status was resolved. She described the appellant as an honest and sincere person loved and respected by everyone. In her oral evidence she confirmed that she was deeply committed to the relationship and looked to the time when they would get married and have their own place. He was someone who cared for his family, and in particular tended to the needs of his mother.

36. In cross-examination she confirmed that the appellant was working. She first knew that he did not have the right to live here a couple of years ago when he made this application. So far as she was aware had no other nationalities; her mother was born here and her father in India but had left the family when she was one or two. She had never lived abroad and she confirmed that her father had come over from India to join her mother here.

Submissions

37. Mr Hopkins submitted that the public interest outweighed the interference with the appellant's private and family life. He had remained unlawfully in the UK since about 1990 when he returned from the Ukraine. He had been working unlawfully and the public interest required an element of deterrence in these circumstances. He accepted that the impact of removing the appellant on other family members should be taken into account but the appellant's mother would be able to receive help from the state and from the appellant's sister. So far as the appellant's relationship with his girlfriend was concerned, there was no reason why, when they decided to get married, that an application could not be made in accordance with the rules. He accepted that if the account of the relationship between the appellant and his nephew was correct then there would be an interference with his nephew's right to family life but not such as to outweigh the public interest in maintaining effective immigration control.

38. Mr Coleman submitted that the appellant was a de facto father to his nephew. He had not been able to meet the fourteen year requirement in the pre-July 2012 rules but nonetheless he had a long period of residence in the UK which should be taken into account. He had lived in the UK for seventeen out of the last twenty years and continually for the last thirteen years. He now had no family connection with Nigeria and removing him would lead to a disproportionate interference with the family life of his mother, girlfriend and in particular his nephew. He submitted that this was a case, when the circumstances were looked at as a whole, where removal would be disproportionate to the impact it would have on the lives of the appellant and his family in the UK, and in particular his nephew.

Assessment of the Issues

39. This appeal has been argued on article 8 grounds only. The application was made on 6 January 2012 and the respondent's decision on 18 December 2012. Mr Hopkin did not concede that the matter was not covered by the rules in force since June 2012 but in any event, it was not argued on behalf of the appellant that he could meet the requirements of the rules either before or after the June 2012 amendments. Although I have not heard full argument on this point, as the appellant did not have extant leave when the human rights application was made, my view is that no question arises of this being a transitional case and the application was covered by the rules. The proper approach should be to consider the rules first and only go on to consider article 8 if there appear to be compelling circumstances not recognised by them rather than simply undertaking an article 8 analysis separately from the rules.

40. I will deal firstly with my assessment of the witnesses who gave evidence. There is no real dispute about the chronology of events. I am satisfied that the appellant's immigration history is as he describes. He first came to the UK in 1997 when he overstayed after being granted leave to enter but there is no clear evidence about the capacity in which he was granted leave but in all probability it was as a visitor. He left the UK and went to study in Ukraine but then returned as a visitor. Again he overstayed and has continued to live and work in this country with his family. He has lived for a number of years with his mother and his nephew in one household. I accept the evidence that the appellant's nephew lost his mother in 2000 and since then has been brought up by his grandmother who adopted him and that she now has a number of medical conditions which require her to receive help and support. She is 75 and has become increasingly dependent on the appellant.

41. More significantly, I accept that the appellant has been playing an increasingly significant role in his nephew's life. The appellant has also entered into a relationship with his girlfriend, but this is a boyfriend/girlfriend relationship. They are not engaged but I accept their evidence that they do see their life as being together, and when and if the appellant's immigration status and other family matters are resolved, they intend to marry.

42. Removing the appellant would be an interference with his right to respect for his private and family life and would impact on the lives of his mother, his girlfriend and his nephew. The interference with their respective family lives is of such significance as to engage article 8(1). The interference would be in accordance with the law and would be for a legitimate aim, the maintenance of an efficient and fair system of immigration control.

43. The issue is whether the appellant's removal is necessary and proportionate to that legitimate aim. When making this assessment I must take into account the best interests of the appellant's nephew as a primary consideration in accordance with the provisions of s55 of the Borders, Citizenship and Immigration Act 2009. The impact of removal on the appellant and his family must be balanced against the public interest in maintaining an effective system of immigration control. Mr Hopkin was right to emphasise the importance of removing those who deliberately overstay in breach of the immigration rules. However, there comes a point at which long residence, even when unlawful, is capable of making removal disproportionate. The rules in force until 9 July 2012, provided that indefinite leave to remain could, subject to there being no contrary public interest factors, be granted to someone who had fourteen years' continuous residence. These provisions have been replaced by para 276ADE, which sets out a more nuanced approach to the requirements to be met by an applicant for leave to remain on the grounds of private life based on residence.

44. I do not find that the length of the appellant's residence by itself would make his removal disproportionate. I accept that he is in a relationship with his girlfriend, but this is not a case where they have yet made a firm commitment to marriage, although I accept that this is their current intention. I also accept that there is a close relationship between the appellant and his mother. I am not satisfied this by itself amounts to family life within article 8, but it clearly counts as private life. The appellant's mother does need help and support which is being provided by the appellant, but some support could be provided by the local authority and some limited support from her daughter, the appellant's sister. These further factors taken together would not satisfy me that removal would be disproportionate. However, I must give proper weight to the best interests of the appellant's nephew. Having seen the appellant's mother give evidence and considered the medical evidence relating to her state of health, I am satisfied that she is increasingly unable to provide the care that her nephew needs, and she has become increasingly dependent upon the appellant to carry out the role of parent.

45. The appellant has now become the main carer and can now properly be regarded as his primary carer. The appellant says in his statement he regards his uncle as his father and that he has no memories of his own father. He sets out what the appellant does for him and says that due to his grandmother's age and health the burden of the family rests on his shoulders. On the evidence before me, I believe this to be the case.

46. It has not been argued that the provisions of Appendix FM EX.1 apply. This is an exception applying in circumstances where some of the rules for leave to remain as a

partner are not met. They apply in circumstances where "the applicant has a genuine and subsisting parental relationship with a child who is under the age of 18, is in the UK and is a British citizen and it would not be reasonable to expect the child to leave the UK". I am satisfied that the appellant's relationship with his nephew is in substance a parental relationship: he does not have legal parental responsibility for his nephew, that rests with his grandmother but the phraseology used in EX.1 refers to the nature of the relationship. The appellant has satisfied me that he has been in effect in a parental relationship which is genuine and subsisting with his nephew for a number of years, having lived in the same household. His nephew is under the age of 18, is in the UK and is a British citizen, and it would clearly not be reasonable to expect him to leave the UK. I am satisfied that there are compelling circumstances not covered by the rules.

47. I also remind myself of the guidance of Lord Bingham in Razgar [2004] UKHL 27 that the number of applicants not covered by the rules or supplementary directions who were otherwise entitled to succeed under article 8 would be a very small minority. However, I am satisfied that there are exceptional circumstances in the present appeal arising primarily from the appellant's relationship with and responsibility for his nephew. The requirement to treat his nephew's interests as a primary consideration means that on the facts of this particular case the public interest is outweighed by the exceptional family circumstances I have described and that removal would be disproportionate to a legitimate aim.

Decision

48. The First-tier Tribunal erred in law and the decision has been set aside. I re-make the decision by allowing the appeal on article 8 grounds.

Signed   Date: 28 November 2013

Upper Tribunal Judge Latter