



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA041512015

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	Decision	&	Reasons
On 22 February 2016	Promulgated		
	On 23 May 2016		

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

**MR TEMITAYO ADEMOLA FAKUNLE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Singer, Counsel

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. The appellant has been granted permission to appeal the determination of First-tier Tribunal Judge Moore dismissing his appeal against the decision of the respondent to refuse him indefinite leave to remain in the United

Kingdom on the basis of ten years' continuous lawful residence in the UK and to refuse him leave to remain under Article 8 of the ECHR.

2. At the hearing below Mr Singer conceded that the appellant now realised that due to the short breaks in his lawful residence in the UK, he was unable to satisfy the Immigration Rules, and therefore the basis of his claim relied on consideration of Article 8 outside the Immigration Rules, and in those circumstances, whether the decision of the respondent was a disproportionate one.
3. In respect of Mr. Singer's first argument, I find that the judge failed to factor into his decision the explanation given by the appellant, which is recorded at paragraph 15 of the decision, for the first gap in his lawful residence from 31 August 2005 to 21 November 2005, recorded at paragraph 15 of the decision. Likewise, the explanation the appellant gave for the second gap in his leave between 31 August 2006 and 3 November 2006, recorded at paragraph 16. I find that these were material considerations in the balancing exercise under Article 8 of the ECHR. They were relevant to the assessment of proportionality. The judge's failure to consider these explanations and factor them into his proportionality assessment was an error of law.
4. Mr. Singer's second argument was that the judge erred in law in finding that there was no family life between the appellant and his uncle. I accept that the case law in this area has moved on since **Kugathas** was decided. However, the case law relied on by Mr Singer were case involving relationships between an adult child and a parent, as was the case in **Kugathas**. In any event as the appellant has lived with his uncle since arriving in the United Kingdom and continues to live with him, it was incumbent on the judge to give detailed reasons why he thought that there was no family life between the appellant and his uncle.
5. I accept Mr Singer's third argument that as this was not a deportation case, the judge erred in law by imposing a requirement of exceptionality for the appellant to succeed under Article 8 of the ECHR. He argued, which I accepted, that the approach should be one of whether the circumstances of the appellant were compelling and that if the judge had factored into his assessment the appellant's explanations for the gaps in his leave to remain, the judge could have found that there were compelling reasons for those gaps and that these compelling circumstances could have made a material difference to the judge's decision.
6. It is also accepted Mr. Singer's argument that the judge failed to consider whether the appellant's return to Nigeria would have an impact on his uncle and his family.

7. In the light of the above reasons I found that the judge erred in his findings on the appellant's appeal under Article 8 of the ECHR. The judge's decision cannot stand.
8. The judge's decision is set aside and is to be remade by a judge other than First-tier Tribunal Judge Moore.
9. The appeal is remitted to Taylor house for rehearing on Article 8 issues only.

Signed

Date 23 May 2016

Upper Tribunal Judge Eshun