Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU066502015

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 20 June 2017	**On 17 August 2017**

Before

DR H H STOREY, JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE GRUBB

Between

MR AB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E McKenzie, Counsel
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Nigeria, has permission to challenge the decision of First-tier Tribunal (FtT) Judge O'Brien sent on 15 September 2016 dismissing his appeal against a decision made by the respondent communicated on 22 September 2015 refusing to grant indefinite leave to remain on the basis of long residence.

2. The appellant arrived in the UK on 1 June 2004 on a student visa. He was granted extensions in this capacity. On 2 October 2006, he was granted leave to remain until 31 October 2009. On 29 October 2009, he applied for leave to remain as a Tier 4 (General) Student. In response, the respondent sent a letter dated 19 November informing him that his "attempted application" had been rejected as invalid as he had used the wrong form. This letter contained what it said was the correct form.

3. On 4 December 2009, the appellant applied for leave to remain as a Tier 4 (General) Student. On 5 February 2010, his application was rejected with no right of appeal. On 19 February 2010, he applied for leave to remain as a Tier 4 (General) Student. On 1 February 2011 leave to remain was granted until 3 October 2011. On 26 August 2010, he applied for leave to remain as a Tier 4 (General) Student. This was rejected on 9 September 2010 whereupon on 22 September 2011 the appellant applied for Tier 1 post-study leave to remain. This he was granted until 25 October 2013. On 11 October 2013, he applied for leave to remain as a Tier 4 (General) Student. When this was refused on 6 November 2013 he lodged an appeal on 15 November 2013. This led to the respondent reconsidering his application on 9 April 2014 and then refusing it on 27 June 2014. The appellant appealed on 15 July 2014. On 27 October 2014, his appeal was dismissed and on 15 April 2015 he was appeal rights exhausted.

4. On 12 May 2015, the appellant applied for ILR. When refusing this application in September 2015 the respondent stated that his immigration history confirmed that he had been in the UK without any valid leave from 19 November 2009 until 31 January 2011 and that he had been without valid leave since 16 April 2015. On this basis he was refused under paragraph 276B(i)(a) and 276B(v) of the Immigration Rules. Paragraph 276B provides:

> "**Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom**
>
> 276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
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> (i)(a) he has had at least 10 years' continuous lawful residence in the United Kingdom.
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
>
> (a) age; and
>
> (b) strength of connections in the United Kingdom; and
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> (c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period."

5. The respondent also refused the appellant under the private and family life provisions of the Rules and found that he had not submitted details of any exceptional circumstances warranting a grant of leave outside the Rules.

6. At the hearing before the FtT Judge the appellant submitted that when he applied for leave to remain on 29 October 2009 he still had leave to remain (valid until 31 October 2009). When applying he had used the form he downloaded from the Home Office website. Not long after he received a notification from the Home Office that he had completed the wrong form. The notification form enclosed what the Home Office said was the correct form and stated that they would use his application fee towards the resubmitted application. He returned this form promptly on 4 December 2009. The appellant said he should therefore have benefitted from the provisions of paragraph 34C(b), 34I and 34Y of the Immigration Rules. Paragraph 34I, we note, has been in force since 29 February 2008 and remained in force at the relevant date. It provides:

"34I. Where an application or claim is made no more than 21 days after the date on which a form is specified under the immigration rules and on a form that was permitted for such application or claim immediately prior to the date of such specification, the application or claim shall be deemed to have been made on the specified form."

7. In relation to his Article 8 circumstances, the appellant stated that his family comprised an 8 year old daughter and a 4 year old son, both of whom had been born in the UK. Although he and the children's mother were no longer in a relationship,

they shared the children's upbringing. He was of no fixed abode but stayed with his wife two or three times a week and helped with the children. He took the children to school and brought them home when necessary. He did not wish his children to be removed to Nigeria. He was particularly concerned he would not be able to protect his daughter from FGM.

8. As regards paragraph 276B, at paragraphs 45 – 49 the judge held:

> "45. The form sent to the Respondent by the Appellant states on the front page that it is specified for applications made on or after 5 October 2009. Therefore, had the Appellant sent his application on the day he downloaded the form in question from the Home Office website, his application would have been deemed to have been made on the specified form pursuant to paragraph 34I. As it is, the application was correctly assessed to be invalid.
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> 46. Had the Appellant made a renewed application immediately on receipt of the Respondent's rejection dated 19 November 2009, it might well have been submitted within the 28-day window provided by paragraph 276B(v). Instead, when he made his application on the specified form on 4 December 2009, his continuous lawful residence was interrupted. In any event, the application was refused because he only had £211 in funds on the date of the application, and had not provided evidence of sponsorship from a prescribed source.
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> 47. The Appellant suggests today that the Respondent eventually reviewed this decision under 'Pankina' and granted leave to remain from until 3 October 2011; however, his grounds of appeal assert that it was in fact the February 2010 application was eventually reconsidered. The GCID record dated 3 September 2010, shows that the Appellant qualified for a 'Pankina' remedy because his bank statement showed a balance of £1,962.82 on 26 February 2010. Thus, it is clear to me that the reconsideration must have been of his application made in February 2010, which was refused on 11 May 2010.
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> 48. Therefore, even if I were to accept that the Appellant's presence in the United Kingdom should be considered lawful from the date on which leave ought to have been granted (which I take to be the date on which the application was refused), it remains the case that the Appellant was unlawfully present in the United Kingdom from 1 November 2009 until 10 May 2010.
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> 49. It follows that the Appellant does not satisfy the requirements of paragraph 276B."

9. As regards the appellant's Article 8 circumstances, the judge held that the appellant could not meet the requirements based on private life as set out in paragraph 276ADE(1)(iv) as "I heard no evidence of any significant obstacles to the appellant's integration to Nigeria". He noted that it was not argued that the appellant could qualify for leave to remain under any of the categories prescribed in Appendix FM as "[h]is entire family is Nigerian with presently no lawful basis to remain in the UK". He then turned to consider Article 8 outside the Rules concluding at [52] – [55] as follows:

> "52. I am not persuaded that the Appellant's case discloses any compelling reasons to consider his Article 8 rights outside the Rules. None of his family have leave to remain in the United Kingdom. Although the Appellant's daughter has lived for 9 years since birth in the United Kingdom, she is Nigerian and could reasonably return with her mother and brother to Nigeria. Certainly, I am unpersuaded that she would be at risk of female genital mutilation from persons unknown; I am not told of any extended family who would take any interest in the family, let alone seek to mutilate the Appellant's daughter. I have heard no evidence that moving with their mother to Nigeria would be contrary to either child's best interests.
>
> 53. Even if it were appropriate to consider the Appellant's Article 8 rights outside the Rules, I remind myself that the maintenance of immigration controls is in the public interest. It is relevant that, contrary to his submissions on appeal, the Appellant has never qualified for indefinite leave to remain in the United Kingdom.
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> 54. Therefore, the Appellant's removal would be in accordance with the law and in furtherance of a legitimate aim. I further remind myself that I must place little weight on the Appellant's private life in the United Kingdom, given that his presence here has been precarious for much of the time and unlawful for other shorter periods. Similarly, I place little weight on the Appellant's family's private lives and also their combined family life.
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> 55. Ultimately, the Appellant's and his family's right to respect of private and life is significantly outweighed by the public interest. Accordingly, this appeal is dismissed on human rights grounds."

10. The appellant's grounds of appeal were lengthy but in essence asserted that (1) the respondent was wrong to say he did not have valid leave between the periods 19 November 2009 -31 January 2011 as he was covered by Section 3C leave from 31 October 2009 when his leave expired until leave was granted to him on 2 February 2011; (2) the FtT Judge wrongly declined to hear oral evidence from his wife, who attended the hearing; (3) the judge erred in failing to assess the best interests of his children or to address his concern that his daughter would be subjected to FGM.

Submissions

11. At the hearing before us Ms McKenzie requested that we admit into evidence a further witness statement from the appellant. We agreed to do so. This stated, inter alia, that he had requested at the outset of the hearing that his wife be allowed to give oral evidence.

12. Ms McKenzie said that her primary submission was that the judge erred in considering the appellant did not satisfy the requirements of paragraph 276B as the application he made in 29 October 2009 should have been treated as a valid application instead of being responded to by a notification stating that the appellant had used the wrong form and needed to submit a different one. If it was unlawful of the respondent to reject the application as invalid, it must still be outstanding. There was no evidence to show that there was another form available on the Home Office website at the time the appellant submitted his application. The only form available bears the date 5 October 2009. Given that paragraph 34I was in force at the time the respondent should have treated the form the appellant applied on as valid because he had submitted it within the 21 day period permitted by this Rule.

13. As regards Article 8, the judge failed to carry out any proportionality assessment, failed to carry out a best interests of the child assessment and failed to consider relevant oral evidence available at the hearing, failed to address the risk of FGM to the daughter.

14. Ms McKenzie urged us to find that the judge had been procedurally unfair in rejecting the appellant's request that his wife be allowed to give oral evidence.

15. Mr Kotas submitted that the GCID record showed that the appellant's T4 application had been rejected as invalid because he had applied on an old form. He accepted, however, that the form the appellant used appeared to be one stated as being a new version dated 5 October 2009. In any event, by resubmitting his application on the new form sent to him the appellant must be taken to have abandoned his original application and when he made this further application he no longer had leave.

16. In relation to Article 8, Mr Kotas submitted that there had been no procedural unfairness as both the judge's record of proceedings and his decision showed that the appellant's application to call his wife had only been made in his closing submissions. It was entirely proper of the judge to reject his application at that stage when evidence had closed. The appellant was an intelligent man who had made a number of applications for leave to remain and must have been aware that if he wanted his wife to give evidence he should have requested this at the outset.

17. Mr Kotas accepted that the judge only gave brief findings in relation to Article 8 but he had no assistance from the appellant so there was no error of law.

18. After hearing submissions from the parties on the issue of the validity or otherwise of the appellant's application sent on 29 October 2009, we stated that we required further evidence from the respondent on two matters:

    1) when in the October-4 December 2009 did the TW application forms change

    2) whether paragraph 34I or an equivalent was in force at the time.

19. Ms McKenzie objected that the respondent had had ample opportunity to submit further evidence and should not be given a further opportunity to defend the appeal. Deciding against Ms McKenzie, we stated that our oral directions concerned two discrete matters only, both capable of objective verification in a straightforward fashion. We needed to have this evidence in order to decide whether the appellant had ten years' continuous lawful residence as a matter of law.

20. On 23 June 2017 Mr Kotas sent written submissions together with a Rule 15(2A) application.

21. In these submissions Mr Kotas produced an archived copy of the Immigration Rules in force from 1 October – 31 December 2009. This showed, he submitted, that there was no Rule 34Y in force then and that the provisions of 34C were markedly different to the Rules the appellant had sought to rely on in his grounds.

22. As regards the issue of the T4 application form, enquiries had revealed that records of the various versions of this form were not kept that far back:

> "The SSHD for present purposes accepts that in the interim period between the 5 October 2009 when the T4(G) version 10/09 came into effect and the 19 November 2009 which was the date of the letter rejecting the application sent on 29 October, it was extremely unlikely that a new T4 application form came into effect."

23. In subsequent paragraphs Mr Kotas submitted that even the assumption that the 29 October 2009 application was valid, it still did not follow that the appellant had Section 3C leave. That was because this application was 'decided' with reference to Section 3C(2)(a) when it was rejected on 19 November 2019. In the alternative, if it was a valid in time application not decided on that date, it was quite clear from Section 3C(4) that the appellant was precluded from applying to vary his leave to remain whilst this application was outstanding:

> "His resubmitted application of 4 December 2009 must therefore have been a variation of that original 29 October application subsequently 'decided' on 5 February 2010 when it was refused."

24. In respect of his concomitant Rule 15(2A) application, Mr Kotas submitted that the validity of the application must be construed with reference to the Rules in force at the relevant date in 2009.

25. The respondent still maintained that the application was invalid because the appellant used the wrong form in October 2009 – namely the old 06/09 form. Mr Kotas also averred that the appellant's grounds of appeal as advanced in the reformulated skeleton argument were at odds with the appellant's own grounds which had argued that the application was valid by reference to newer Rules, namely paragraph 34Y. It had never been his position that he submitted the right form all along. The respondent objected to the appellant pursuing this allegation of a mistake of fact.

26. In the alternative the respondent sought leave under Rule 15(2)(a) to adduce further evidence supporting her contention that the appellant did indeed submit the old wrong form on 29 October 2009. The respondent then identified four sets of materials which included admissions by the appellant that he had used the wrong form. The two GCID notes, this application outlined, clearly demonstrated the appellant used the old form since the words used on the GCID only created on 19 November were clear: "Tier 4 (G) version 06/09 posted 29/10/2009". Consequently, Mr Kotas stated, the appellant's reliance on Rule 34I as in force in 2009 did not rescue the appellant, as he submitted the old application form more than 21 days after the new one came into force and so he was three days out of time.

27. Mr Kotas submitted that although the FtT Judge dismissed the appeal on long residency grounds albeit on a slightly erroneous basis, any error of law was immaterial.

Ms McKenzie's written response to the respondent's further submissions was to maintain (1) that Mr Kotas' response confirmed that paragraph 34I was in force on 29 October 2017; and confirmed that it was "extremely unlikely" that another form was introduced in the critical period; and (2) that Mr Kotas had gone beyond the confines of the UT directions and that in any event his further submissions did not succeed in disproving the appellant's case. As regards the respondent's request to submit 120 pages of evidence pursuant to Rule 15(2A), to accede to that request would defeat the UT reassurance given at the hearing that the scope of the further directions was strictly limited. It would also represent an improper use of this Rule whose purpose was to ensure evidence was submitted or identified prior to a UT hearing. Even if the UT did not agree about that, the new evidence breached Rule 15(2A)(b) as the delay in adducing it was unreasonable. Even if the respondent was correct that it was not clear until the appellant's skeleton argument for the UT served six days before the hearing what the revised challenge comprised, that meant he respondent had had ample time to produce the evidence now relied on.

28. Ms McKenzie's written response also averred that it was incorrect of the respondent to allege that the appellant had changed his position as regards the application form

from what it was in his grounds of appeal as the appellant's grounds clearly stated that the appellant believed that the form he had downloaded from the Home Office website on 19 October 2009 was "the same form … still in use at the time I sent off my application on 29th October …"

29. Without prejudice to the above responses, Ms McKenzie's written response went on to dispute Mr Kotas' contention that returning an invalid form was tantamount to "deciding" it. Further and in any event, Section 3C(5) would still apply as the 4 December 2009 application was in effect a variation of the 29 October application.

30. Ms McKenzie submitted it would be wrong to use previous statements by the appellant that he had used the wrong form as probative that he had, since it simply showed he believed the Home Office when it told him it was the wrong form. Further, there was no way of telling if the form submitted on 4 December is in fact the same form the appellant submitted on 29 October: the cover page of the 4 December form is missing and it contains the unexplained handwritten annotation "Valid 26/11/10" on the first page.

31. Finally, in her written response Ms McKenzie submitted that the GCID notes took the case no further: it was common ground that the respondent asserted at the time it was the wrong form. There was therefore no direct evidence as to what form the appellant submitted other than the evidence he gave at the UT hearing which was that it was the form with the cover page that appeared at 8/92 of the bundle.

Our analysis

The respondent's further submissions and Rule 15(2) application

32. We concur with Ms McKenzie that the respondent's further submissions go well beyond the very confined scope of the direction we gave at the hearing which was limited to the respondent producing an archived copy of the Immigration Rules in force in October – December 2009 and any existing information about when during the October-4 December 2009 period the application form had changed (if at all). We also agree with her that the respondent's Rule 15(2) application comes too late. Even if the respondent is taken to have no notice of the challenge to the invalidity of the form issue until receipt of the appellant's skeleton argument, the respondent received that six days before the hearing, which was sufficient time to at least alert the UT to her wish to adduce further evidence. In any event, one of the main new materials the respondent sought to submit, the GCID record, was referred to - and its relevant text read out to us - by Mr Kotas at the hearing with our permission.

33. Nevertheless, we shall reach our decision on the entirety of the evidence now before us, including the appellant's response to the respondent's further submissions, as nothing submitted or produced by Mr Kotas alters the essential facts so far as they can be established.

The invalidity issue

34. Before going further, we set out the relevant provisions of s3C at the material time:

> "3C Continuation of leave pending variation decision
>
> (1) This section applies if—
> a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
> the application for variation is made before the leave expires, and
> the leave expires without the application for variation having been decided.
>
> (2) The leave is extended by virtue of this section during any period when—
> the application for variation is neither decided nor withdrawn, ...
>
> (3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.
>
> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
>
> (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).
>
> (6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section;…."

35. We are in no doubt that if we can be satisfied that the form submitted by the appellant on 29 October 2009 was still the correct form to use, then his application was wrongly rejected as invalid: s3C((1) and (2) would then apply so as to extend his leave. If it was wrongly rejected as invalid, then the legal consequence is that he had made a valid application. If he made a valid application then either: (i) it remains outstanding; or (ii) the resubmitted application he made on 4 December was a variation of the 29 October application; as such the appellant had continuing leave under Section 3C(5). Either way, his residence during the disputed period would thereby be unbroken.

36. Mr Kotas has sought to submit that the above analysis cannot be right because when the respondent wrote back to the appellant on 16 November 2009 saying that he had made an invalid application, that amounted to a 'decision' for the purposes of s3C. That argument, however, has been roundly rejected by the Court of Appeal in **Iqbal & Ors, R (on the application of) v The Secretary of State for the Home Departmen**t [2015] EWCA Civ 838 (per Elias LJ) at [31]-[22] and nothing subsequently decided by the Supreme Court in **Mirza and Others** [2016] UKSC 63 calls into question anything said by the Court of Appeal on this matter. Mr Kotas also submitted that the making by the appellant of an application on 4 December on the form he was told was the one he should have used amounted to an implied abandonment by him of his original application. We cannot accept this submission either. It was only because he

was told that he used the wrong form that the appellant submitted another. If the respondent was wrong about his original form being the incorrect form, then the application is one that should have been treated as valid; the appellant did not abandon it because it was valid but because he had been told it was invalid.

The correctness or otherwise of the form used originally

37. So far as concerns whether the form submitted by the appellant on 29 October 2009 was still the correct form, we consider that this is a simple question of fact. We concur with Ms McKenzie that the appellant's own and his solicitor's acceptance in correspondence that they used the wrong form was simply a reaction to what the Home Office had told him about this. It cannot be taken as an acknowledgement that he in fact used the wrong form.

38. As regards whether the appellant used the correct form when submitting his application on 29 October, we find the state of the evidence quite unsatisfactory. On the one hand, the case owner who received his application clearly thought he had used the wrong form: the GCID record refers to the form as a "6/09 version" (June 2009); and the letter then sent to the appellant states that he used the wrong form. On the other hand,(i) Mr Kotas said at the hearing before us that he accepted the appellant appeared to have used the form 10/09 when he applied in October: see above at paragraph 16; this demonstrates in our view how uncertain the state of the evidence is (and remains); (ii) the respondent has been unable to produce the form the appellant first submitted; (iii) the respondent accepts (in Mr Kotas' response to the UT directions) that in the period between 5 October when the T4(G) version 10/09 came into effect and the 16 November (which was the date of the letter rejecting the application sent on 29 October 2009), it was "extremely unlikely that a new T4 application form came into effect". The respondent's reference to the 5 October 2009 is significant because it has been the appellant's consistent evidence that he had downloaded the form from the Home Office website on 19 October 2009. Mr Kotas has not sought to challenge that evidence and in our view it would be surprising if someone were to download such a form over three weeks before submitting it.

39. We accept that the matter is not free of doubt. The appellant's evidence has consistently been that the document at 8/92 of the appellant's bundle is a copy of the front page of the form he submitted on 29 October. This clearly refers to TG(4) version 10/09. However, he has not been able to produce a full copy of his original application or any other electronic evidence as to when he downloaded the form. Equally (as already noted), Mr Kotas was prepared to say in submissions before us that this appeared to be the form the appellant used and Mr Kotas's further submissions do not state in terms that he now rejects this.

40. The respondent has been afforded every opportunity to demonstrate that the appellant sent the wrong form, but has not been able to do so. In our view, the appellant's account regarding the form is a credible one and from the surrounding

circumstances we think it right to infer that he downloaded the form after 5 October 2009. Since it is the respondent's evidence that as from 5 October 2009 there was a new form and it was most unlikely yet another new form came into use between 5 October – 29 October, we conclude that the appellant applied on the correct form and that, accordingly, his period of lawful residence was not broken by his making this application.

41. Thus, in our view the judge materially erred in law in concluding that the appellant did not meet the requirements of paragraph 276B(1)(i) of the Immigration Rules. We set aside the decision of FtT Judge O'Brien for this reason.

42. In light of our conclusion on the invalidity issue, it is not strictly necessary for us to address the appellant's other grounds, but given the lengthy submissions we received regarding them, we shall outline our conclusions.

Whether the appellant received a fair hearing

43. We turn first to the issue of whether the judge conducted the hearing fairly in refusing the appellant's application to call his wife to give evidence. In his witness statement the appellant has claimed that he made known to the judge and the Presenting Officer at the outset of the hearing that he wished to call his wife to give evidence. We find this claim impossible to square with both the judge's Record of Proceedings and the judge's written decision. In neither is there any mention of the appellant making any such submission. The first time he is recorded as making any such application is at the commencement of his own closing submissions: that is what is shown both by the record of proceedings and paragraph 22 of the judge's decision. Mr Kotas submits that this late timing is fatal to the appellant's challenge and in support he makes the valid point that closing submissions are not formally supposed to start until all the evidence in the case has been heard. However, in this case there are a number of factors which outweigh the formal position. First, the appellant was unrepresented. Second, during oral evidence he was specifically cross-examined by the Presenting Officer about his relationship with his wife. The Presenting Officer specifically put to him that he was lying about his relationship with her having broken down. Given this direct challenge it would have been of great relevance to have heard from the wife. Even if the Presenting Officer did not realise his wife was actually in attendance at the outset of the hearing, he clearly became aware of it shortly before he put to the appellant that his relationship had not broken down. This is clear from the judge's ROP which at this point reads:

> "Why no letter from [the wife] to explain the relationship
>
> I didn't realise that she needed to produce one. She is here
>
> Why no evidence from [the wife] or friend
>
> I provided sol with all info to handle case

They did not represent me properly

Trying to persuade the Tribunal you are not together with partner so could not be relocated as a family unit."

44. Once the Presenting Officer was made aware of the appellant's wife's presence, he should in our view have addressed the judge as to the feasibility of the wife being asked to give oral evidence. He should have done so immediately or at least straight after the end of the appellant's oral evidence. If perhaps he doubted that was efficacious, given that she had been present in the hearing room up to then, he should have raised this doubt with the judge straightaway. Instead his very next question after he learnt she was present was to suggest to the appellant he was lying about the relationship.

45. Thirdly, the judge's own reason for refusing the appellant's application did not take sufficient account of the Presenting Officer's decision to challenge the appellant's evidence regarding his relationship with his wife even after he too learnt of her presence. At paragraph 22 the judge read out:

> "22. After Mrs Williams concluded her submissions on behalf of the Respondent, the Appellant applied for his wife to give evidence as to the state of their relationship. The Appellant claimed that he was unfamiliar with the process, was representing himself and it was only fair that he be given an opportunity to lead evidence to rebut the Respondent's suggestion that he and his wife were still together and seeking to mislead the tribunal. The Respondent objected. I concluded that it would be materially unfair to permit the Appellant to call his wife, given that she had been present whilst the Appellant had given evidence and had even heard the Respondent's closing submissions. In the circumstances, I refused the application and proceeded to hear the Appellant's submissions."

46. The effect of this decision was that the appellant was denied an opportunity to rebut the Presenting Officer's allegation of falsehood by calling evidence.

47. Fourth, in addition to challenging the respondent's decision refusing ILR under the long residence Rules, the appellant's grounds of appeal had raised Article 8 and submissions at the hearing addressed his family life circumstances. Yet, despite concluding at paragraphs 54 and 55 that he could attach little weight to the appellant's and his family's "combined family life" and finding it outweighed by public interest considerations, the judge's decision refusing the appellant permission to call his wife as a witness (when he knew there was no witness statement from her) meant the appellant was denied any opportunity to identify the factual content to that family life.

48. As well as being the appellant's wife, his wife was also the mother of the two children whose best interests the judge said he had to evaluate. At paragraph 52 the judge said "I have heard no evidence that moving with their mother to Nigeria would be contrary to either child's best interests". The judge's decision refusing permission for the mother to give evidence made this conclusion a self-fulfilling prophesy.

49. Finally, we would add that although to allow evidence to be called even at the stage of closing submissions is in general contrary to proper procedure, the Tribunal Procedure Rules 2014 do not prohibit it and the judge should have recognised that he had an overriding duty under the Procedure Rules to deal with cases fairly and justly, which includes (r2(2)(b) "avoiding unnecessary formality and seeking flexibility in the proceedings…"

50. Mr Kotas submitted that even if we found that the judge's refusal to allow the wife to give evidence was unfair, it did not give rise to any material error because the appellant's Article 8 case clearly stood to be rejected. We cannot agree. The judge's treatment of the appellant's Article 8 circumstances outside the Rules and the best interests of the children is markedly lacking in any clear reasoning – e.g. it is simply asserted at paragraph 52 that the appellant's daughter (who had been in the UK for nine years) "could reasonably return with her mother and brother to Nigeria". The only reason then given for this assertion is that she would not be at risk of FGM. These shortcomings were in themselves errors of law and given the fact that one of the children had been in the UK for nine years, they were errors capable of affecting the outcome of the appeal.

51. For the above reasons the FtT Judge's decision is set aside for material error of law.

Re-making of the decision

52. We consider we are in a position to re-make the decision without a further hearing. We have already explained why we have declined to admit the further evidence produced by Mr Kotas in the form of a Rule 15(2)(a) application. Even taking that new evidence fully into account, however, we remain of the same view as regards the core issue of whether or not the appellant met the requirements of paragraph 276B(1)(a) by virtue of having accrued ten years' continuous lawful residence from 1 June 2004 to 1 June 2014. The only alleged break in this period according to the respondent arose as a result of the appellant submitting an application for ILR on 29 October 2009 on what she alleged was the wrong form. We have found it more likely than not that the appellant used a form that was still in use. By virtue of our findings as regards the lawfulness of the appellant's period of residence during the period 29 October 2009-31 January 2011, paragraph 276B(v) has no application to him.

53. Accordingly, it is not necessary for us to consider whether or not the appellant could alternatively rely on paragraph 34I (although if the appellant used the incorrect form then it seems to us that we would have had to conclude that the First-tier judge was

correct to say he was three days outside the 21-day time limit set out in this rule). For completeness, we should also note that we have not engaged with the appellant's attempted reliance on paragraph 34Y, as this only came into force from 20 October 2014 and is concerned with forms for "administrative review" (see crossheading before paragraph 34L). It is therefore irrelevant to the case, which is concerned with the application form on which the appellant sought further leave.

54. In order to meet the requirements of paragraph 276B in full, an appellant must also show, pursuant to paragraph 276B(ii), that there are no reasons, having regard to the public interest, why it would be undesirable for him to be given ILR to remain on the grounds of long residence. That was not addressed by the respondent in the refusal letter. At the hearing before us Mr Kotas did not seek to argue that the appellant would fall foul of 276B(ii). We note that even after the respondent took the view (mistakenly we have found) that he had become an overstayer by virtue of applying in October 2009 on the incorrect form and applying afresh too late, she later (in October 2013) granted him leave as a Tier 1 post-study work applicant and there is no indication in the file that the appellant has a criminal record or is otherwise to be considered of bad character. However, we are not in a position to decide whether he has fully meets the remaining requirement of paragraph 276B(iv) regarding whether he has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom in accordance with Appendix KoLL.

55. We have given consideration to whether the uncertain position as regards paragraph 276B((iv) affects our decision, given that we only have jurisdiction to consider whether the appellant is entitled to succeed in his appeal on human rights grounds. In light of our findings on his immigration history, we cannot see that there remain any significant public interest considerations to be weighed against him in relation to the application that he made for ILR on the basis of long residence. In our view he is entitled to succeed on the basis that the decision appealed against constituted a disproportionate interference in his private life. We do not need, therefore, to address whether his family life provides a separate factual content to his Article 8(1) right or affords a further basis for considering the respondent's decision disproportionate.

56. For the above reasons the decision we re-make is to allow the appellant's appeal on Article 8 grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The appellant has made an application for anonymity and in light of the history of the case and the children's circumstances we accede to that request. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This

direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 16 August 2017

Dr H H Storey
Judge of the Upper Tribunal