Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12757/2015**

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On: 20th September 2017	**On: 25th September 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

KEHINDE AYOMIPO OGUNNEYE

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Singh, Greater Manchester Immigration Aid Unit
For the Respondent: Mr McVeety , Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Nigeria born on the 22nd May 1994. He appeals with permission the decision of the First-tier Tribunal (Judge EMM Smith) to dismiss his appeal on human rights grounds.

2. The Appellant's case before the First-tier Tribunal was that he had an established family and private life in the United Kingdom. He has lived in this country since he was 11 years old, having been brought here as a visitor on the 25th August 2005. Although it was conceded that

this had not been so at the date of application, it was asserted that as of the date of *hearing* he had lived in this country over half of his life; the Respondent had not cited any grounds for refusal under the 'suitability' criteria and so he *prima facie* now met the requirements for leave to remain under paragraph 276ADE(1)(v). Although other grounds were relied upon, it was submitted that the appeal should be allowed on Article 8 grounds for that reason alone. Reliance was placed on the *ratio* of the decisions in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 and R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM -*Chikwamba*-temporary separation-proportionality) IJR [2015] UKUT 00189 (IAC).

3. The First-tier Tribunal dismissed the appeal on two grounds. Finding that a fresh application would today be successful the Tribunal could find no justification for allowing the appeal on human rights grounds. Second, as the Appellant's removal was not imminent there was no breach to his Article 8 rights.

4. Principle Resident Judge Martins granted permission on the 29th June 2017. She considered it arguable that the First-tier Tribunal had erred in law in respect of both grounds of dismissal.

Discussion and Findings

5. The accepted facts are that this young man arrived in the UK on the 25th August 2005. On that day he was aged 11 years, 3 months and 4 days. He has lived continuously in the UK ever since. On the day that he made the application for leave to remain on human rights grounds (30th September 2015) he was aged 21 years, 4 months and 9 days. At the date of the appeal before the First-tier Tribunal he was 22 years and 7 months old.

6. The relevant parts of paragraph 276ADE of the Immigration Rules are as follows:

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that **at the date of application**, the applicant:
>
> (i) **does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and**
>
> **(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and**
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

> **(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or**
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

7. In her refusal letter dated the 19th November 2015 the Respondent expressly accepts that the Appellant meets all of the suitability criteria mentioned at (i). It was accepted that he had made a valid application pursuant to (ii). It is accepted that the Appellant is aged between 18 and 25. The sticking point was that at the date of application he had not yet spent over half of his life in the UK. By the date of appeal that line had been crossed, and the Appellant met the substantive requirements of 276ADE(1)(v).

8. What then was the First-tier Tribunal to do?

9. First, the Tribunal was obliged to consider the relevant rule. This the Tribunal did, noting that the Appellant's representative had already conceded that the rule could not be met, because the requisite period of long residence had not been accrued at the *date of application*, the relevant criteria for success under the rule.

10. Second, the Tribunal had to consider whether there were good reasons to proceed to consider Article 8 outwith the framework of the Rules. This it did, at paragraph 22. The reasoning is, with respect, difficult to follow. The Tribunal directs itself to various cases dealing with the 'near miss' principle and concludes that since the Appellant could simply submit a new application, there would be no justification for considering the case outside of the Rules. This wasn't a case based on a 'near miss'. It was case based on a direct hit. The question to be addressed by the Tribunal was simply whether the decision was one of such gravity that Article 8 rights were engaged: MM (Lebanon) [2017] UKSC 10. The answer to that question is obvious. The Respondent herself recognises that someone of this age, who has lived in this country as long as the Appellant has, will have a very well established private life: that is implicit in paragraph 276ADE(1)(v). It is long established that a refusal to grant or vary leave is a decision capable of engaging Article 8, even in the absence of any imminent removal: JM (Liberia) [2006] EWCA Civ 1402. For those reasons I am satisfied that the Tribunal erred in its approach to whether Article 8 was engaged, and whether the decision, at the date of this in-country human rights appeal, could be said to be proportionate. The decision is set aside.

11. It was accepted by the Secretary of State that the Appellant has a private life worthy of protection under Article 8. It must be accepted, in line with caselaw, that a decision to refuse him further leave to

remain would amount to an interference with it. The only questions left would be whether the decision was lawful, taken in pursuit of a legitimate aim and proportionate to that aim, taking all relevant factors into account. Since it is accepted by the Respondent that the Appellant meets all of the requirements to be granted leave to remain under the published immigration rules, it would follow that there is nothing on the Respondent's side of the scales in the balancing exercise. The most that could be said would be that good administration would require the Appellant to make a fresh application. In the circumstances the point of that, causing further unnecessary work for both parties, is difficult to discern[1].

Decision

12. The determination of the First-tier Tribunal contains an error of law such that it must be set aside.

13. The decision is remade as follows: "the appeal is allowed on human rights grounds".

14. There is no order for anonymity.

Upper Tribunal Judge Bruce
22nd September 2017

[1] As it happens the Appellant has made a fresh application which, unusually, has been accepted as valid and the fee processed (ordinarily UKVI will not consider applications where there is an outstanding appeal). He was properly advised to do this in order to protect his position but given the terms of this decision the Secretary of State will no doubt exercise her discretion with fairness and pragmatism: I understand that the Appellant will be withdrawing that application and requesting that the Secretary of State exercise her discretion and refund the fee.