



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-002380**  
**First-tier Tribunal No:**  
**PA/52495/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 15 June 2023**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**AW**  
**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer  
For the Respondent: Mr M Allison of Counsel, instructed by Rahman & Co Solicitors

**Heard at Field House by remote video means on 6 February 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Respondent (*and/or any member of his family*) is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the Respondent, likely to lead members of the public to identify the Respondent (*and/or any member of his family*). Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Bunting promulgated on 12 May 2022, in which the Appellant's appeal against the decision to refuse his protection and human rights claims dated 11 May 2021 was dismissed on protection grounds and allowed on human rights grounds under Article 8. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with AW as the Appellant and the Secretary of State as the Respondent.
3. The Appellant is a national of the DRC, born on 5 January 2000, who first entered the United Kingdom and claimed asylum on 27 October 2016. His claim was that he was at risk from the authorities on return for deviating anti-government documents and his human rights claim was on the basis that he had immediate family members in the United Kingdom comprising of his mother and step-family.
4. The Respondent refused the application the basis that it was not accepted that the Appellant would be at risk on return to the DRC due to inconsistencies and discrepancies in his claim and because the Appellant could not identify who it was he feared on return, his claim being based on what his grandmother had told him and there was no objective risk on return in accordance with background country information. For the same reasons the Appellant was not entitled to humanitarian protection. In the United Kingdom, the Appellant did not have a partner or any children such that he could not satisfy the requirements of Appendix FM and he had continuing ties to the DRC such that he could reintegrate there and did not satisfy the requirements of paragraph 276ADE of the Immigration Rules. There were no exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules.
5. Judge Bunting dismissed the appeal on protection grounds and allowed it on human rights grounds in a decision promulgated on 12 May 2022. There is no appeal by the Appellant against the dismissal of his protection claim, this appeal is only against the human rights part of that decision, such that no more needs to be said about the protection claim or appeal, save that the Appellant was found to be credible but his account was based on hearsay and there was in any event no objective risk on return. In relation to the Immigration Rules, the Judge found that there would be no very significant obstacles to the Appellant's reintegration in the DRC such that he did not meet the requirements of paragraph 276ADE of the Immigration Rules. The Appellant had established family life with his mother and step-family, a close family who lived together and given that the Appellant was not permitted to work or study, the focus of his life was within the family unit and he helped care for his younger step-siblings while his mum worked. When assessing the proportionality of the decision, the Judge noted that the Appellant speaks English, he arrived in the United Kingdom as a child with at best precarious status but it was not his choice to come to the United Kingdom in his teens/as a young adult and he had a strong family life. Overall, the Appellant's removal was found to be a disproportionate interference with his right to respect for private and family life pursuant to Article 8 of the European Convention on Human Rights.

### **The appeal**

6. The Respondent appeals on three grounds. First, that the First-tier Tribunal materially erred in law in failing to consider whether family life existed between the Appellant and his mother and/or step-siblings by reference to whether there were more than normal emotional ties; secondly, that the First-tier Tribunal materially erred in law in failing to consider or count against the Appellant that

the majority of the Appellant's time in the United Kingdom was as an adult and here unlawfully; and thirdly, that the First-tier Tribunal materially erred in law in paragraph 79 of the decision by not giving adequate reasons as to why the fact that the Appellant was not the instigator of his journey to the United Kingdom was an 'extremely significant factor' in assessing the public interest when the Appellant had spent the majority of his time in the United Kingdom as an adult. Overall, the Respondent's position was that the First-tier Tribunal had failed to give cogent reasons for weighing family life against the public interest in this way.

7. At the oral hearing, on behalf of the Respondent, Mr Tufan focused the appeal on two main findings, first the finding that Article 8 was engaged in this case and secondly, the findings on proportionality. As to the first, Mr Tufan noted the references in paragraph 27 and 28 of the decision in Rai v Entry Clearance Officer [2017] EWCA Civ 320 which incorporated reference to Singh v Secretary of State for the Home Department [2015] EWCA Civ 630, followed by a conclusion that family life exists on the basis that the Appellant lives with his mother and step-family with some caring of a young child along with others. Mr Tufan submitted that more is required to establish family life.
8. In relation to the proportionality balancing exercise, there was a consideration of the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 with neutral factors and a strong public interest in immigration control and with what appears to be a balancing of all of the Appellant's time in the United Kingdom being unlawful with the fact that he arrived as a child. However no such distinction is made in section 117B. The Judge further relied on the significance of the Appellant having a subjective fear of persecution, but it is not clear as to why this was relevant. The Appellant's precarious immigration status is relevant to his private life, but the Judge appears to give significant weight to family life. There was however no independent social work report as to the younger children or the role the Appellant plays and no suggestion of any particular vulnerability or reliance on the Appellant, but weight placed on the family members relying on the Appellant who makes a valuable contribution to family life in paragraph 77(v) of the decision. Finally Mr Tufan noted that there was no mention in the balancing exercise of the Appellant not meeting any of the requirements of the Immigration Rules for a grant of leave to remain.
9. On behalf of the Appellant, Mr Allison, at my request, focused on the proportionality assessment in the decision rather than on the issue of whether Article 8(1) was engaged. Mr Allison submitted that there was no inconsistency between paragraphs 69 and 79 of the decision, where it was stated that the Appellant's time unlawfully in the United Kingdom, particularly since he turned 18 must count against him and the fact that the Appellant was not the instigator of the journey being an extremely significant factor in assessing the public interest. The Judge has considered the factors in section 117B to which he only had a duty to have regard and there was no inconsistency or irrationality in the final balancing exercise undertaken. The decision could be described as generous, but that is not an error of law and it does not meet the high threshold of perversity. It is primarily a matter for the Judge as to what weight should be attached to different factors and that will vary from case to case. In this case, the public interest in immigration control was negated because the Appellant was sent to the United Kingdom by his grandmother when he was a child and he had a subjective fear of persecution. Although he claimed asylum as a child, the Appellant waited many years for the decision on his claim and his appeal, by which time he was an adult. On those facts, it was entirely rational for the Judge

to accept that the Appellant was not to blame and for the public interest to be reduced given the need for fairness and there being no issue of deterrence. The Appellant was found to have a strong family life and has spent his late teenage and early adult years in the United Kingdom.

### **Findings and reasons**

10. There is no error of law in the First-tier Tribunal's decision that the Appellant's relationships with his mother and step-family in the United Kingdom engaged Article 8(1) of the European Convention on Human Rights. The decision includes an appropriate self-direction as to the relevant case law on this and makes clear findings of factors over and above normal emotional ties to establish family life, including that the Appellant lives with those family members, has a strong relationship with them, his focus being within the family due to restrictions on him preventing work or study and his contribution to the family including care for a younger step-sibling. On those facts, the only rational conclusion was that Article 8(1) was engaged.
11. The second ground of appeal requires more careful consideration of the reasoning of the First-tier Tribunal. The statutory factors in section 117B of the Nationality, Immigration and Asylum Act 2002 were considered in paragraphs 64 to 71 of the decision, with some neutral factors and in relation to the Appellant's unlawful status in the United Kingdom, it was noted that whilst all of it was unlawful, the Appellant was a child when he arrived and although not well-founded, he had a subjective fear of persecution, although these points must count against him once he turned 18.
12. The decision goes on to note that the Appellant has been law-abiding (although not a significant factor), was not affected by any particular medical conditions or other factors and although he provides assistance to his family including of childcare, there was no social worker report or suggestion that any of his family were particularly vulnerable or particularly reliant on him. The decision then sets out the factors for and against removal as follows:

*"77. On the appellant's side is the following:*

- (i) The appellant has now been in the United Kingdom since 2016 (some 5 ½ years). Whilst this is not an especially long period of time in general, given his age at the time it is a significant period.*
- (ii) This time period includes his late teenage years and early twenties, which are of great significance in the creation of a person's identity.*
- (iii) The appellant's grandmother, and not the appellant, was the person directly responsible for arranging the appellant to come to the United Kingdom. The appellant had a genuine subjective (but not objectively well-founded) fear of persecution.*
- (iv) The appellant has formed strong bonds with his family, which would be lost if he were to return.*
- (v) The appellant's family members rely on the appellant, and he makes a valuable contribution to the family life.*

*78. Against that, there is the following:*

- (i) *There is a strong public interest in maintaining confidence in the immigration system.*
- (ii) *The appellant has previously applied to come to the United Kingdom, which was refused. Instead of making a further application, he came in an irregular manner.*
- (iii) *The appellant cannot point to any medical or other difficulties that would cause additional disruption (to him or his family) on removal."*

13. The final conclusions are given as follows:

*"79. Whilst the principle of maintaining immigration control is an extremely strong one, I consider that, in particular, the fact that he was not the instigator of the journey to the United Kingdom is an extremely significant factor in assessing the public interest.*

*80. That, combined with the strong family life he enjoys and contributes to, and the fact that his time here is the late teenage and earlier years of adulthood that is so important, combine to overcome the points above.*

*81. Therefore, in the particular set of circumstances of the appellant, I find that it would be disproportionate to refuse the appellant leave to remain in the United Kingdom. ..."*

14. The only part of the analysis set out above which is not expressly mentioned is the fact that the Appellant does not meet any of the requirements of the Immigration Rules for a grant of leave to remain and in particular, would not face very significant obstacles to reintegration on return to the DRC. The other relevant points are covered and the question in essence is whether there was an error of law in the weight to be attached to different factors or whether the decision overall is perverse.

15. Whilst the First-tier Tribunal's decision can be described as an extremely generous one on the facts of this case, in circumstances where there is little evidence of anything in particular about this Appellant's family or personal life such that removal would result in unjustifiably harsh consequences for any of them and where he has spent all of his time unlawfully in the United Kingdom (having previously failed in an application for entry clearance) the majority of which was as an adult, I do not find that the conclusion meets the high threshold for perversity and failing which, the weight to be attached to different matters is primarily for the Judge who heard the evidence. I remind myself of the Court of Appeal's guidance to show judicial restraint in interfering with decisions of the First-tier Tribunal, which should be applied in this particular appeal. Although this is a case in which it is a little difficult to understand how the Appellant's right to respect for private life outweighed the public interest in removal and is not necessarily a conclusion that I or others may have reached, that is not sufficient to show an error of law in the decision nor in the adequacy of reasons given for it. The conclusion was one which was rationally open to the Judge to reach.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to allow the appeal on human rights grounds is therefore confirmed.

**Case No: UI-2022-002380**  
**First-tier Tribunal No: PA/52495/2021**

G Jackson

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**14<sup>th</sup> March 2023**