IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005642

First-tier Tribunal No: HU/53771/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 July 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Dr Henry Adeyemi Aluko
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A. Badar, Counsel, instructed by Connaught Law Limited
For the Respondent: Ms E. Everett, Senior Home Office Presenting Officer

Heard at Field House on 11 July 2023

DECISION AND REASONS

1. This is an appeal against a decision of the Secretary of State dated 6 July 2021 to refuse a human rights claim made in the form of an application for indefinite leave to remain under paragraph 276B of the Immigration Rules. The appeal was originally heard – and dismissed – by First-tier Tribunal Judge Cameron, by a decision promulgated on 22 August 2022. Judge Cameron heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. By a decision dated 20 March 2023 ("the Error of Law decision"), sitting with Deputy Upper Tribunal Judge Saffer, I found that the decision of Judge Cameron involved the making of an error of law, and set it aside, with certain findings of fact preserved, with directions that the decision would be remade in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and

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Enforcement Act 2007. It was against that background that the matter resumed before me, sitting alone, on 11 July 2023.

3. The Error of Law decision is annexed to this decision.

4. At the outset of the resumed hearing, I was informed by the parties that the central issue identified for resolution by the Error of Law decision, set out below, had been conceded by the Secretary of State.

5. I informed the parties that I agreed with the Secretary of State's concession and allowed the appeal at the hearing. This decision briefly records my reasons for doing so.

Issues for resolution

6. Save for a number of gaps in his residence when he was overseas, the appellant has resided lawfully in the United Kingdom since 13 January 2011, either as a student or as the dependent of his wife, who is also Nigerian. She currently holds limited leave to remain as a student.

7. The appellant's most recent grant of leave was as his wife's dependent and was valid until 9 November 2021. On 9 March 2021, he applied, in time, for indefinite leave to remain. That application was refused on 6 July 2021, and it was the refusal of that application that was under appeal before the judge. The extant leave the appellant held at the time he submitted that application has been extended by section 3C of the Immigration Act 1971. He therefore currently holds leave to remain.

8. The issues before Judge Cameron primarily related to the impact of the appellant's absences from the United Kingdom during his otherwise lengthy period of continuous, lawful residence, for the purposes of paragraph 276B of the Immigration Rules. It was common ground that the appellant had been outside the UK for longer than the permitted single absence of six months. The appellant's case had been that there were "compelling and compassionate circumstances" which merited an exercise of discretion in his favour. Judge Cameron rejected those submissions, and for the reasons given in the error of law decision, those findings have not been disturbed.

9. The appellant has three children with his wife. They were born in 2012, 2014 and 2018. Shortly before the error of law hearing, the appellant applied under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on evidence of his elder son's registration as a British citizen, and a copy of his passport. The application was granted.

10. The error of law hearing identified the sole issue to be resolved at the resumed hearing in the following terms, at paragraph 39:

> "The focus of the [resumed] hearing will be best interests of the appellant's children and whether, in the case of his eldest child, whether it would be reasonable to expect him to leave the UK."

11. Ahead of the resumed hearing, the appellant relied on a report from an independent social worker, Sally-Anne Deacon, dated 10 May 2023.

12. At the outset of the resumed hearing, I was informed by Ms Everett and Mr Badar that, in light of Ms Deacon's report, the Secretary of State accepted that it would not be reasonable to expect the two elder children to leave the UK and was conceding the appeal on that basis.

13. In my judgment, the above concession was both realistic and properly made. The best interests of the appellant's children are to remain in the UK. The "real world" context for that assessment is as follows. While the children's parents are Nigerian, both enjoy limited leave to remain in the UK. There is no present question of the appellant's wife, the children's mother being required to leave the United Kingdom, and the decision of the Secretary of State under challenge in relation to the appellant expressly stated that he was not required to leave the United Kingdom as a result of the decision (at the date of the decision, the appellant had approximately three months' remaining leave to remain). The children have only ever known life in the UK, and one is now British. The eldest child is about to start secondary education. An international move would be hugely disruptive.

14. Section 117B(6) of the 2002 Act provides:

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

15. In light of Ms Everett's concession, I agree that it would not be reasonable to expect the appellant's elder two children to leave the United Kingdom. The public interest does not, therefore, require the appellant's removal.

16. I therefore allow the appeal.

17. As I explained to the parties at the hearing, the powers of this tribunal are limited to allowing or dismissing an appeal, and it is not open to the tribunal to direct the Secretary of State to take any particular steps in order to implement this decision. That is a matter for the Secretary of State, in light of the findings of fact reached by the First-tier Tribunal, as preserved by the Error of Law decision, and in light of any additional findings of fact reached in this decision.

Notice of Decision

The decision of Judge Cameron involved the making of an error of law and is set aside, with the findings of fact specified at paragraph 38 of the error of law decision.

I remake the decision, allowing the appeal.

TO THE RESPONDENT: FEE AWARD

I make no fee award. The appeal has been allowed on the basis of developments post-dating the appellant's original application to the Secretary of State, not on the basis of any error on the part of the Secretary of State.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 July 2023

Annex – Error of Law decision

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

DR HENRY ADEYEMI ALUKO
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Badar, Counsel instructed by Connaught Law Limited
For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

Heard at Field House on 6 March 2023

DECISION AND REASONS

1. By a decision dated 22 August 2022, First-tier Tribunal Judge Cameron ("the judge") dismissed an appeal brought by the appellant, a citizen of Nigeria born on 14 June 1976, against a decision of the respondent dated 6 July 2021 to refuse a human rights claim made on 9 March 2021. The claim was an application for indefinite leave to remain under paragraph 276B of the Immigration Rules. At the material time, paragraph 276B entitled those with ten years' continuous lawful residence to indefinite leave to remain. The appeal before the judge was brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The appellant now appeals against the decision of the judge to the Upper Tribunal, with the permission of First-tier Tribunal Judge Haria.

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Preliminary issue

3. At the hearing, we queried with the parties whether the appellant enjoyed a right of appeal under section 82(1) of the 2002 Act. That was because the Secretary of State's refusal decision expressly stated that the appellant was not required to leave the country as a result of the decision; at the time, the appellant held leave as a Tier 4 dependent partner, valid until 9 November 2021. Both parties requested additional time to consider this issue, and the hearing proceeded on the footing that the appellant enjoyed a right of appeal which the First-tier Tribunal (and this tribunal) had the jurisdiction to consider, subject to the parties' post-hearing submissions on the point.

4. We are grateful to Mr Badar and Mr Clarke for their written submissions dated 7 and 9 March 2023 respectively.

5. Mr Badar submitted, first, that the Secretary of State's refusal decision stated that there was a right of appeal. Secondly, he submitted that the Secretary of State's guidance *Rights of appeal*, version 13.0, dated 22 September 2022 states at page 19 that a right of appeal exists in circumstances such as the present.

6. Mr Clarke's post-hearing submissions adopted the contrary approach, relying on *Mujahid v Secretary of State for the Home Department* [2021] EWCA Civ 449 at para. 19:

> "…a right of appeal to the FTT arises where the Secretary of State's decision is that there is no lawful impediment to removing the applicant from or requiring them to leave the United Kingdom or refusing them entry. This most naturally refers to the current effect, either immediate or imminent, of the decision when made…"

Since the appellant held leave at the date of the refusal decision, submitted Mr Clarke, there was no right of appeal. Mr Clarke did not address the *Rights of appeal* guidance, or otherwise justify the Secretary of State's departure from it.

7. In our judgment, the decision of the Secretary of State amounted to the refusal of a human rights claim, as defined by section 113(1) of the 2002 Act.

8. We distinguish *Mujahid* from the present scenario. *Mujahid* concerned a challenge to a decision of the Secretary of State to grant a lesser form of leave (limited leave to remain) than that sought by that appellant (indefinite leave to remain). In those proceedings, the Secretary of State accepted that it *would* place the United Kingdom in breach of its obligations under the European Convention on Human Rights to remove Mr Mujahid, and so granted him limited (but not indefinite) leave to remain. It was in that context that the Court of Appeal made the observations relied upon by Mr Clarke.

9. The appellant in these proceedings is in a materially different position. Prior to the Secretary of State's decision of 6 July 2021, she had not addressed her mind to any human rights claim made by the appellant, still less accepted that his removal from the country would be unlawful under section 6 of the Human Rights Act 1998. While it is true that the appellant held limited leave to remain at the time of the Secretary of State's refusal decision, valid until 9 November 2021, he held that leave on account of meeting the requirements as a dependent to a student, rather than under any provision of the Immigration Rules drafted on human rights grounds.

10. In any event, while the appellant's extant leave had around six months remaining at the date of the refusal decision, it had expired (subject to extension

by section 3C of the Immigration Act 1971) by the time of the hearing before the judge on 15 March 2022. In these circumstances, any conclusion that the decision of the Secretary of State would not require the appellant to leave the country upon the expiry of his leave held under section 3C would have an air of unreality to it.

11. The following factors are also relevant. The Secretary of State refused the application on the basis that she was refusing a "human rights claim". She did so in circumstances which she considered attracted a right of appeal, thereby reflecting her ability to act as a gateway to the appellate system (see *R (oao Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and the Secretary of State for the Home Department (refusal of human rights claim)* [2020] UKUT 85 (IAC) at para. 28). She did not raise a jurisdictional objection of her own motion before the First-tier Tribunal, or, at least initially, before the Upper Tribunal. The Secretary of State's *Rights of Appeal* guidance supports the conclusion that the appellant enjoys a right of appeal. While Mr Clarke has sought to adopt the contrary approach before us, he has not addressed or otherwise distinguished the Secretary of State's position contained in the guidance. While the Secretary of State's guidance cannot confer jurisdiction on the First-tier Tribunal (or the Upper Tribunal) in circumstances where Parliament has chosen not to, it is nevertheless of significance that the guidance assumes that the appellant would enjoy a right of appeal in these circumstances.

12. We therefore find that appellant enjoyed a right of appeal under section 82(1) of the 2002 Act.

Error of law in relation to section 117B(6) of the 2002 Act

13. The primary basis upon which Judge Haria granted permission to appeal was that it was arguable that the judge failed properly to consider or apply section 117B(6) of the 2002 Act. Section 117B(6) is a public interest consideration which applies when considering the proportionality of an interference with the right to private or family life under Article 8 of the European Convention on Human Rights ("the ECHR"). It provides that, in the case of a person with a genuine and subsisting relationship with a child who has been resident in the UK for more than seven years, the public interest only requires the person's removal if it is reasonable to expect the child to leave the UK. Before us, Mr Clarke very properly conceded that the judge had erred in his application of the provision by failing properly to consider it.

14. We accept the concession. The appellant has three children who were all born in the UK, in 2012, 2014 and 2018. His partner lives in the UK, with limited leave to remain as a student. The appellant is her dependent. By the time of the hearing before the judge on 15 March 2022, the appellant's eldest child had resided in the United Kingdom for seven years. Pursuant to section 117B(6) of the 2002 Act, therefore, the question for the judge's consideration was whether it would be "reasonable" to expect the child to leave the UK. The judge did not direct himself concerning that question, or any of the authorities concerning it, but instead applied a test of whether there would be "undue hardship" for the appellant to leave the UK. That was an error, and this appeal must succeed to that extent.

15. We therefore turn to the remaining issues in the appeal.

Factual background: remaining findings of the judge

16. Dr Aluko has resided in the United Kingdom lawfully since 13 January 2011, either as a student or a dependent. Between 3 May 2016 and 20 December 2016 (230 days), he returned to Nigeria in order to conduct field research and data gathering, as part of his PhD. By doing so, he was absent from the United Kingdom for a period exceeding the six months permitted by paragraph 276A(a) of the Immigration Rules, thereby breaking the continuity of his residence for the purposes of paragraph 276B.

17. The appellant's claim to the Secretary of State, and his case before the judge, was that there were "compelling and compassionate circumstances" which should have led to discretion being exercised in his favour, as permitted by the Secretary of State's guidance, *Long residence*, version 17.0. He had been unable to return to the UK earlier due to the combined impact of Ebola and the security situation caused by Boko Haram militants, he claimed. His research required extensive travel throughout the country, which took considerably longer than envisaged. His lengthy absence from the UK was for reasons outside his control.

18. In her decision, the Secretary of State considered that the appellant's field research did not amount to a compelling or compassionate circumstance such that it would be appropriate to exercise discretion in the appellant's favour. The need to travel would have been apparent at the outset of the course.

19. The Secretary of State did not attend the hearing before the judge. The appellant attended and was represented by Mr Badar, as he was before us. It follows that the appellant was not cross-examined or otherwise challenged in relation to his claim to have been delayed in Nigeria for circumstances outside his control.

20. Before the judge Mr Badar relied on *Howlett and Howlett v Davies* [2017] EWCA Civ 1696 at para. 34, quoting *Browne v Dunn* (1894) 6 R 67, as authority for the following proposition:

> ""Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.""

21. The thrust of Mr Badar's submission to the judge was that, in the absence of the Secretary of State at the hearing, the appellant stood to succeed on the compelling and compassionate circumstances point, because his evidence was unchallenged. The judge rejected that submission, noting that there was no allegation of dishonesty against the appellant (in contrast to *Howlett and Howlett*), and that the position adopted by the Secretary of State was simply a question of judgment as to whether there had been "compelling or compassionate circumstances". The judge assessed that question for himself in the following terms:

> "37. There is no doubt that Africa, including Nigeria has suffered from Ebola for a number of years and that Nigeria was suffering from issues from Boko Haram. The State has not however stopped functioning as a state because of these two issues although clearly there were difficulties.
>
> 38. The appellant had made a number of visits to Nigeria to obtain the information from 2014. Although the appellant states that it was difficult to obtain information in 2016 because of problems there is nothing within the evidence before me which would indicate that he

> could not have returned to his country within the six-month period and then gone back to Nigeria which he had done in the past in order to maintain his leave."

22. The judge concluded that there had been nothing preventing the appellant from returning to the UK within the six-month period. There were no compelling or compassionate circumstances. The appellant did not meet the requirements of paragraph 276B. Further, he would not face "very significant obstacles" to his integration in Nigeria. Having found that the appellant's children would not face "undue hardship" were they to remain here in his absence, his removal would be proportionate.

Issues in the appeal

23. There is a degree of overlap in the remaining grounds of appeal, particularly grounds 1 and 2. On a fair reading, the issues for us to consider relate to, first, the judge's findings on the "compelling and compassionate circumstances" issue, and, secondly, the judge's broader Article 8 ECHR assessment.

24. As to the first issue, Mr Badar contends that the judge reached irrational and contradictory findings. The judge accepted that Ebola and Boka Haram had significantly affected parts of Nigeria, yet inconsistently and irrationally found that it was nevertheless open to the appellant to have left the country. Further, since the Secretary of State had not challenged the evidence, pursuant to *Howlett*, the appellant's evidence should have been accepted.

25. As to the second issue, the appellant contends that there were a number of positive Article 8 factors that were put to the judge which he failed to consider in the eventual Article 8 proportionality assessment.

The judge's findings were open to him and were not procedurally unfair (issue 1)

26. The judge was not satisfied that the issues in Nigeria in 2016 prevented the appellant from returning to the UK within the six month single absence period permitted by paragraph 276B. That was a finding of fact. The authorities on when an appellate tribunal or court may interfere with a finding of fact reached by a first instance trial judge are extensive. As Lady Hale PSC said in *Perry v Raleys Solicitors* [2019] UKSC 5 at [52], the constraints to which appellate judges are subject in relation to reviewing first instance judges' findings of fact may be summarised as:

> "…requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

27. Mr Badar's case is that, having accepted that Nigeria had "suffered" from issues with Ebola and Boko Haram, it was not open to the judge to find that the appellant could nevertheless have returned to England within six months of departure. We reject this submission. The judge realistically recognised that Nigeria had experienced a number of significant public health and security challenges in recent years. But there was no evidence before the judge that all travel into and out of the country was put on hold for the six month period in question. The appellant's written evidence was that the delay to his departure was caused by in-country factors prolonging the time it took to complete his research, not that his physical exit from the country was impossible until after he had exceeded the permitted 180 day absence. See, for example, para. 13 of his statement dated 7 December 2021:

a. At the first bullet point, the appellant wrote that the threat from Boko Haram "prolonged my research…" This suggests that the reason he did not leave the country within 180 days was because he wanted to make sure he got the research done before leaving. We observe that the appellant had previously encountered major setbacks in his field research, including the theft of devices and the loss of significant amounts of data. He plainly wanted to make significant progress on this occasion.

b. In the second bullet, the appellant wrote that Ebola "affected" his ability to move within Nigeria. He said nothing about being unable to leave the country to return to the UK within the permitted 180 days.

c. In the third bullet point, the appellant said that he had to "ensure all interviews were conducted in order to finalise my data, which would then allow me to finalise PHD in the UK."

28. At para. 15, the appellant expressly stated that it was the interruptions from Ebola and Boko Haram that meant his research was prolonged. The picture that emerges is one of the appellant choosing to stay in Nigeria to finish his research having encountered frustrating delays, rather than him physically being unable to return to the UK in order to meet the 180 day deadline to preserve the continuity of his residence.

29. Against that background, we find that the judge was plainly entitled to conclude that, notwithstanding the in-country disruption, there was nothing in the evidence to indicate that the appellant could not have returned to the UK within the six month period, in order to return to Nigeria at a later date.

30. We now turn to whether it was procedurally unfair for the judge to reach findings that rejected the appellant's evidence in the absence of the Secretary of State.

31. In our judgment, there was no unfairness in the judge's approach. He was plainly entitled to reject the appellant's reliance on *Howlett*, which related to allegations of dishonesty and was of no application here. This was not a case where the respondent had alleged dishonesty, or the implication of the judge's findings is that the appellant had been dishonest. The issue before the judge was whether, in objective terms, there were "compelling and compassionate circumstances" to merit an exercise of discretion in order to disregard his otherwise broken continuity of residence. Naturally and understandably, in the appellant's opinion, there were. The Secretary of State and the judge took a different view. This was a disagreement on a question of judgment, not an allegation of dishonesty. The principle enunciated at para. 34 of *Howlett* was simply not engaged.

32. The situation faced by the judge was catered for by the *Surendran* guidelines, which are annexed to *MNM (Surendran guidelines for Adjudicators) Kenya* * [2000] UKIAT 00005. In our judgment, the guidelines apply equally to the refusal of a human rights claim by a judge of the First-tier Tribunal as they did to a special adjudicator considering an asylum appeal. The second guideline is relevant:

> "The function of the adjudicator is to review the reasons given by the Home Office for refusing asylum within the context of the evidence before him and the submissions made on behalf of the appellant, and then come to his own conclusions as to whether or

> not the appeal should be allowed or dismissed. In doing so he must, of course, observe the correct burden and standard of proof."

33. The appellant knew the case he had to meet; it was set out in the Secretary of State's refusal letter and maintained in the Respondent's Review. The judge heard the appellant's evidence, considered the reasons relied on by the Secretary of State for refusing the application, and reached his own conclusion. That was a conclusion he was entitled to reach.

34. In summary, the judge reached findings of fact he was entitled to reach, and in doing so reached a procedurally fair conclusion that was open to him.

Judge did not err in assessing the proportionality of the appellant's prospective removal (issue 2)

35. By this ground of appeal, Mr Badar submits that the judge failed expressly to consider the factors relied upon by the appellant to demonstrate that his removal would be disproportionate. In summary, the appellant is highly educated, owns property, works in academia, is teaching others, and is a credit to society.

36. While the judge did not expressly consider the submissions, he did say at he had taken into account the appellant's qualifications and experience (para. 58) and the appellant's "specific circumstances" (para. 60). There is no requirement for a judge expressly to deal with all submissions raised especially where, with respect to the appellant, these are factors which statutorily attract little weight. As a person without indefinite leave to remain, his immigration status is, by definition, precarious. That being so, it attracts little weight: see section 117B(5) of the 2002 Act. Those factors could not have had the determinative impact on the Article 8 balancing exercise for which the appellant contends. Moreover, the fact that a judge does not expressly address each submission made does not reveal an error of law (see, e.g., *Volpi v Volpi* [2022] EWCA Civ 464 at para. 2(iii)). It was not, therefore, an error for the judge to approach matters in this way.

Conclusion on the remaining grounds of appeal

37. The remaining grounds of appeal do not disclose an error of law in the judge's decision.

Setting aside the decision

38. We set aside the judge's decision on account of the section 117B(6) issue, preserving all findings save for those in relation to the best interests of the appellant's son and the proportionality of the appellant's removal. The decision will be remade in this tribunal, having regard to the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal* at para. 7.2. The scope of the fact finding required upon the decision being remade is not such that it is appropriate to remit the appeal to the First-tier Tribunal.

Remaking the decision: directions

39. The appeal will be remade in the Upper Tribunal, with a time estimate of 1½ hours. The focus of the hearing will be best interests of the appellant's children and whether, in the case of his eldest child, whether it would be reasonable to expect him to leave the UK.

40. The appellant has applied under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce a certificate of registration as a British citizen in relation to his elder son, dated 4 November 2022, and his British passport, issued on 30 November 2022. We admit the new evidence ahead of the remaking hearing.

41. Within 14 days of being sent these directions, the appellant may apply to rely on any additional evidence under rule 15(2A) of the Rules.

Notice of Decision

The decision of Judge Cameron involved the making of an error of law such that it must be set aside, subject to the savings identified at para. 38, above. The appeal is allowed to that extent.

The appeal will be remade in the Upper Tribunal, with a time estimate of 1½ hours. No interpreter required (unless either party requests an interpreter within 14 days of being sent this decision).

Within 14 days of being sent this decision, the appellant may apply to rely on any additional evidence under rule 15(2A) of the Rules.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 March 2023