



IAC-FH-AR-V1

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

Appeal Number: IA/11416/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18<sup>th</sup> May 2016**

**Decision & Reasons Promulgated  
On 27<sup>th</sup> May 2016**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

**IFEANYI ONENESS ADIKWU  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Pipe, Counsel instructed by Waterstone Solicitors  
For the Respondent: Mr E Tufan, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Nigeria born on 20<sup>th</sup> November 1970. His appeal, against the Respondent's decision of 11<sup>th</sup> June 2013 to remove him from the UK, was dismissed by First-tier Tribunal Judge J H A Cooper in a decision promulgated on 30<sup>th</sup> September 2015.

2. The Appellant entered the UK as a student on 6<sup>th</sup> February 2002. His leave was subsequently extended in different categories on a number of occasions, the last being for leave to remain as a Tier 1 Highly Skilled Migrant which was valid from 4<sup>th</sup> August until 4<sup>th</sup> April 2012. The Appellant therefore had ten years' continuous lawful residence in the UK.
3. On 26<sup>th</sup> March 2012, the Appellant applied for indefinite leave to remain under the ten year long residency provisions of the Immigration Rules. Unfortunately, the application was rejected as invalid on 31<sup>st</sup> May 2012 and returned to the Appellant because there were insufficient funds in his bank account to cover the application fees. It subsequently transpired that the money had been fraudulently taken from the Appellant's bank account without his knowledge. Prior to this fraudulent withdrawal the Appellant had sufficient funds to cover the fees and the Respondent accepted that this was in fact the case.
4. The Appellant therefore submitted a further application on 8<sup>th</sup> June 2012. However, this was rejected as invalid because the Appellant had omitted to sign the cheque for his application fees.
5. The Appellant then submitted a further application on 13<sup>th</sup> December 2012. His explanation for the delay in re-submitting the application was that his Nigerian passport had expired and it took time to obtain a new one. As soon as a new one was issued, he submitted the application.
6. The application was refused on 11<sup>th</sup> June 2013 on the ground that the Appellant had not had leave since 1<sup>st</sup> June 2012 so he could not show ten years' continuous lawful residence in the UK at the date of application. The Respondent did not accept that the decision breached Article 8 under the Immigration Rules.
7. The Appellant appealed to the First-tier Tribunal and this appeal was heard by First-tier Tribunal Judge Froom on 27<sup>th</sup> November 2013. His decision dated 2<sup>nd</sup> December 2013 allowed the Appellant's appeal on the basis that the decision of the Respondent was not in accordance with the law. The Reasons for Refusal Letter gave no indication that the Respondent had applied her own policy of considering the exercise of discretion, where there were circumstances justify overlooking the fact that an application was made out of time.
8. The Respondent reconsidered her decision, but decided to maintain the refusal and the Appellant appealed against this refusal to the First-tier Tribunal. The appeal came before First-tier Tribunal Judge Majid on 31<sup>st</sup> October 2014 and was allowed on Article 8 grounds in a decision dated 6<sup>th</sup> November 2014.
9. The Respondent appealed and permission was granted by the Upper Tribunal on 5<sup>th</sup> January 2015. The appeal was heard on 20<sup>th</sup> February 2015 and Deputy Upper Tribunal Judge Murray allowed the Respondent's appeal and set aside the decision of the First-tier Tribunal on the basis that the judge had failed to make clear findings

and had not given adequate reasons for his decision. The Appellant had consequently not had a fair hearing and the case was remitted to the First-tier Tribunal for substantive hearing on all grounds.

10. That is how the appeal came before First-tier Tribunal Judge Cooper who found that the Appellant could not succeed in showing that he met the requirements of paragraph 276B of the Immigration Rules because his application, made in December 2012, was outside the 28 day time limit imposed for periods of overstaying. Although that provision was not in force when the Appellant made his first application in March 2012, which was rejected for non payment of fee, it was in fact in force by December 2012.
11. The judge considered paragraph 276ADE of the Immigration Rules. Appendix FM did not apply in this case. The judge rightly concluded that paragraph 276ADE did not apply and the Appellant could not meet the Article 8 requirements of the Immigration Rules.
12. The judge then went on to assess the Appellant's Article 8 claim in accordance with the five questions set out in Razgar. She accepted that the Appellant had established private life, that there would be interference and such interference was necessary in a democratic society but concluded that the decision to refuse indefinite leave to remain and remove the Appellant was proportionate in the circumstances.
13. The judge made the following findings:
  - “56. Miss Easty submitted that this was a ‘but for’ case, arguing that had the Appellant not suffered the misfortune of having his bank account raided before the Respondent had applied to draw the application fees from it, had the Respondent drawn the fees promptly from the account, and had the Appellant not made the simple mistake of omitting to sign his cheque on the second application, by now he would have been granted indefinite leave to remain that he had originally sought. She implied that these were factors that I should take into account in making the article 8 private life assessment.
  57. However, I find that submission to be misconceived, it is in effect a ‘near miss’ argument and it is well established that Article 8 cannot be used to make good the inability of an applicant to meet the requirements of the Rules.
  58. In assessing the weight to be given to any interference with the Appellant's private life I am required to take into account Section 117B of the Act, paragraph (5) of which provides that little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.

59. Although I acknowledge that the Appellant did accrue 10 years' lawful residence prior to the expiry of his leave in April 2012, since the beginning of June 2012 he had had no entitlement to remain in the United Kingdom, other than that preserved by the fact that he has appealed the Respondent's decision. Although, it is regrettable that it has taken so long to conclude his case, those further 3½ years carry little weight when assessing his private life.
60. The Appellant was indeed unfortunate that he was the victim of fraud at a time when he was maintaining a bank balance to cover his application fees (I do not consider that the Respondent can be held responsible for the consequences of the precise timing of her application to the bank for payment of the fees). However, he was the sole author of his own misfortune when he failed to sign the cheque accompanying the second application. It may have been that the Respondent would have exercised discretion in his favour had he quickly remedied that failure and submitted a further application, albeit he would still have fallen outside the 28 day time limit. However, in the event his application was well out of time.
61. Whilst the Appellant has established a private life in this country I considered it optimistic of Miss Easty to submit that in removing him the Respondent was causing 'the loss of a business of great benefit to the UK'. I conclude that the removal of the Appellant from the United Kingdom by the Respondent in pursuit of the lawful and legitimate aim of maintaining effective immigration control would not amount to a disproportionate interference with his right to enjoy private life."
14. The grounds of appeal submit that the judge made a material error of law in failing to consider material evidence. The judge accepted that Article 8(1) was engaged and therefore 'near miss' arguments could be considered as part of the proportionality assessment. The judge failed to consider the case of the Secretary of State v SS (Congo) and Others [2015] EWCA Civ 387 at paragraph 56 where Lord Justice Richards stated:

"However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of leave to enter outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the

requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater.”

15. Secondly, the judge failed to consider whether this was a case where the public interest against the Appellant should have carried little weight given that he had ten years' continuous lawful residence before his leave ran out in April 2012. The judge only took into account paragraph 117B(5) and failed to take into account the whole of the statutory scheme set out in 117A to 117D.
16. Permission to appeal was granted by First-tier Tribunal Judge McDade on the basis that the judge had arguably erred in law by not considering the 'near miss' that he found to have occurred as part of the assessment under Article 8. The judge was correct in stating that a 'near miss' cannot plug a gap such that the Immigration Rules can be satisfied, but was arguably wrong by not considering this as a factor to be considered in relation to Article 8.
17. In submissions Mr Pipe confirmed that the Appellant did not qualify for indefinite leave to remain because his current application was outside the 28 day period from the expiry of his leave and the judge had indeed been correct on that point. However, he submitted that the Appellant had been the victim of a series of unfortunate events. It was not in dispute that he had ten year's lawful residence in the UK and there were no public interest arguments relevant to the application of paragraph 276B of the Immigration Rules.
18. The Appellant had been a victim of fraud and had unfortunately failed to sign a cheque. The only reason he could not succeed under the Immigration Rules was because his application was made outside the 28 day period from the expiry of his leave and this had been because he was waiting the renewal of his passport from the Nigerian authorities.
19. Mr Pipe submitted that the judge had excluded relevant considerations from her proportionality assessment. The Appellant's representatives at the First-tier Tribunal had in effect submitted at paragraph 56 that the Appellant's private life outweighed the public interest. The judge had not categorised this case as a 'near miss'. In doing so, she excluded relevant considerations from her assessment of the public interest element of the balancing exercise in Article 8. It was accepted that a 'near miss' could not plug a gap in the Immigration Rules, but that it could be relevant to the assessment of proportionality in Article 8.
20. Mr Pipe relied on SS (Congo) and the Respondent agreed with this in the Rule 24 response. Mr Pipe accepted that the Appellant's failure to satisfy a procedural requirement of the Immigration Rules, a 'near miss', to make the application within 28 days of expiry of his leave did not create compelling circumstances but it was a factor which was relevant and could tip the balance in the proportionality exercise.

21. However, there were clear compelling circumstances in this case. The Appellant had ten years' lawful residence and as a result of an unfortunate series of events the Appellant was unable to satisfy the Immigration Rules. The Immigration Rules were an expression of where the balance should lie in terms of Article 8. The judge had failed to consider material matters in his proportionality assessment. The little weight provisions in Section 117B did not contain all Article 8 considerations and the judge had in fact erred in finding that little weight should be given to the Appellant's private life, particularly where the Appellant met the substantive provisions for indefinite leave to remain and, but for the unfortunate series of events, he would have obtained it.
22. The judge failed to properly assess the public interest question in the balancing exercise. Prima facie the Appellant met the Rules. The judge had erred in law and the decision should be set aside. This was not a case where the Appellant was trying to evade compliance with the Immigration Rules, but a case where his private life outweighed the limited public interest. The decision should be set aside, remade and allowed.
23. Mr Tufan submitted Home Office guidance on the issues which stated "Once an applicant has built up a period of ten years' continuous lawful residence there is no limit on the length of time afterwards when they can apply. This means they could leave the UK, re-enter on any lawful basis and apply for settlement from within the UK based on the ten year period of continuous lawful residence they built up in the past."
24. There is nothing to prevent a person relying on a ten year period that they may have relied on in a previous application or grant. Therefore, the Appellant could re-enter the UK at any time and apply for indefinite leave to remain.
25. Mr Tufan submitted that the judge had in fact erred in law in considering Article 8 outside the Immigration Rules. There were no compelling or exceptional circumstances to warrant such a consideration. On the facts of this case the circumstances were not compelling. He relied on paragraph 55 of SS (Congo) and the Appellant's 'near miss' argument could not be sustained.
26. In response, Mr Pipe submitted that the judge had properly considered Article 8 having first assessed the Appellant's claim under paragraph 276ADE and then Article 8 outside the Immigration Rules. There was no gateway test to Article 8 and the Rules did not amount to an exhaustive consideration in this particular case because of the special compelling circumstances. These had not been created by the 'near miss' but by other factors. The Appellant had been a victim of fraud and, but for that unfortunate incident, his original application would have succeeded.
27. The Appellant met the substantive provisions of the Immigration Rules, but not the procedural issue. The delay in making the application was not the fault of the Appellant, but the Nigerian passport authorities.

28. Although, there was no 'near miss' provision in the Rules it was relevant to proportionality and Miah was still good law according to paragraph 55 of SS (Congo). It was quite clear from paragraph 66 that a 'near miss' can tip the balance in favour of the Appellant. The guidance, to which Mr Tufan referred, was before the judge, but the point raised by Mr Tufan was not argued. The guidance was relied on in respect of the point in relation to the application being made 28 days from the expiry of leave.
29. Therefore, looking at the guidance it would appear that the Appellant would have to go through some sort of legal fiction to secure indefinite leave to remain in returning to his country of origin, obtaining leave on another basis and then applying for settlement. This situation was disproportionate when the Appellant quite clearly satisfied all the substantive requirements of the Rules. The Appellant was not attempting to avoid compliance with the Rules, but had a private life which commanded respect because he met the substantive requirements of the Rules which reflected where the proportionality balance should lie. Paragraph 276ADE of the Immigration Rules did not exhaust it. The Appellant had ten years' lawful residence, enough to establish a private life here which tipped the balance in his favour.

### **Discussion and Conclusion**

30. I find that the judge erred in law at paragraph 57 of the decision in finding that a 'near miss' argument was irrelevant to the assessment of Article 8 and that Article 8 could not be used to make good the inability of an applicant to meet the requirements of the Immigration Rules. This was contrary to paragraph 56 of SS (Congo) and it was accepted by the Respondent that such an argument was indeed relevant to the assessment of proportionality.
31. I also find that the judge erred in law in relying solely on Section 117B(5) of the 2002 Act and attaching little weight to the Appellant's private life. This clearly ignores the other factors in Section 117A-D and also fails to attach the appropriate weight to the Appellant's private life given that it was accepted that he had obtained ten years' continuous lawful residence in the UK.
32. Accordingly, I find that the judge has erred in law in his assessment of proportionality under Article 8 and I set aside his conclusions at paragraphs 57, 58, 59, 60 and 61. I remake them as follows.
33. The Appellant cannot satisfy the Article 8 requirements of the Immigration Rules. However, I find that he has established private life in the UK having lived here lawfully for a period of ten years. He initially applied for indefinite leave to remain during the currency of his leave and it would appear that he has only overstayed his leave due to what has been termed in this appeal as a 'series of unfortunate events', some of which were out of his control.

34. I find that the Appellant's circumstances in this case are compelling and justify an assessment of Article 8 outside the Immigration Rules and that the relevant Immigration Rule in this case is paragraph 276B because it is accepted that the Appellant has ten years' continuous lawful residence. His private life should be assessed on that basis, not only the basis of paragraph 276ADE, which is relevant to those who remain in the UK without leave.
35. Paragraph 276B states: "The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the UK are that
- (1) He has at least ten years continuous' lawful residence in the UK;
  - (2) 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 grounds of long residence taking into account various factors including age, strength of connections, personal history, character, domestic circumstances, compassionate circumstances and any representations;
  - (3) The applicant does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974;
  - (4) The applicant has sufficient knowledge of English and sufficient knowledge about life in the UK;
  - (5) The Appellant must not be in the UK in breach of UK 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 or leave to enter or leave to remain within 28 days."
36. This paragraph represents where the balance lies in granting leave to remain for a person who has ten years' lawful residence. It is quite clear that the Appellant satisfies all of the substantive requirements, but that he fails on subparagraph (5) in that he has overstayed his current leave for a period exceeding 28 days.
37. I find that the reason for overstaying was not entirely within the Appellant's control. His original application was made in time, but unfortunately he was a victim of fraud and the funds were not available when the Respondent sought to obtain them from the Appellant's bank account. The Respondent has accepted that the failure to provide a fee was no fault of the Appellant and the Appellant was invited to resubmit his application. It is unfortunate that he failed to sign the cheque in this second application and it is also unfortunate that no one realised that, when he made his application, his passport has in fact expired which meant that he had to obtain a new passport before he was able to make a further application.



38. The Appellant has not contrived to frustrate the Immigration Rules and has done all in his power indeed to comply with them. Given those findings, and the fact that the Appellant speaks good English and is not a drain on resources in the UK, I find that the weight to be attached to the public interest is somewhat limited. The only matter weighing in the balance is the fact that the Appellant has overstayed his leave for a short period of time.
39. However, he has a reasonable explanation for why this is the case and, therefore, there would be a limited public interest in removing him when it is quite clear from the Home Office guidance that he is perfectly at liberty to return and make the same application on re-entering the country on a lawful basis. It seems to me disproportionate to expect him to do so when he in fact satisfies the substantive requirements of the Immigration Rules.
40. Accordingly, I find that the Appellant's private life, in this particular case and on these particular facts, outweighs the public interest such that the decision to refuse him indefinite leave is disproportionate.
41. I therefore allow the Appellant's appeal. I set aside the decision of the First-tier Tribunal dated 30<sup>th</sup> September 2015 and I remake it, allowing the appeal on Article 8 grounds.

**Notice of Decision**

**Appeal allowed.**

**No anonymity direction is made.**

*J Frances*

Signed

Date: 26<sup>th</sup> May 2016

Upper Tribunal Judge Frances

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal, I have decided to make a fee award of any fee which has been paid by the Appellant.

*J Frances*

Signed

Date: 26<sup>th</sup> May 2016

Upper Tribunal Judge Frances