



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

Appeal Number: HU/05593/2019 (V)

**THE IMMIGRATION ACTS**

**Heard remotely from Field House  
On 16 June 2021**

**Decision & Reasons Promulgated  
On 01 July 2021**

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**ADENIYI [A]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**The hearing was conducted on Microsoft Teams**

**Representation:**

For the appellant: Ms M Chowdhury, Counsel, instructed by Daniel Aramide  
Solicitors

For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

## **DECISION AND REASONS**

### **Introduction**

1. This is the re-making of the decision in this case following my previous decision, promulgated on 24 March 2021, that the First-tier Tribunal had erred in law and that its decision should be set aside. That decision is appended to this re-making decision.
2. The appellant, a citizen of Nigeria, made a human rights claim on 10 January 2019 (by way of an application for entry clearance) on the basis that he wished to re-join his British wife (Ms O-A) and three British children in the United Kingdom. The children were born in 2001, 2006, and 2011.
3. By a decision dated 13 March 2019, the respondent refused the human rights claim. With reference only to the Immigration Rules ("the Rules") relating to Article 8 ECHR, it was said that the appellant had a very poor immigration history in respect of his previous residence in this country, that paragraphs 320(3) and 320(11) of the Rules applied, and that the appellant therefore was unable to meet the suitability requirements under Appendix FM to the Rules. In addition, it was said that the financial requirements under the Appendix could not be met.
4. The particulars of the paragraph 320(11) assertion were stated to be: that the appellant had entered United Kingdom illegally in 2004; that he had absconded in early 2005; and that he had failed to declare his "adverse previous immigration history" when making the human rights claim (described as the "current visa application"). No additional consideration was given to Article 8 on a wider basis.
5. On review by an Entry Clearance Manager, it was conceded that the financial requirements under Appendix FM had in fact been satisfied. All other aspects of the original refusal were maintained.

### **Previous decisions of the First-tier Tribunal**

6. The appellant has now had three appeals heard by the First-tier Tribunal. The first was heard and dismissed by Judge Clayton by a decision promulgated on 7 November 2014 (OA/14263/2013). The appeal had been against a refusal of human rights claim (by way of an application for entry clearance). Judge Clayton recorded Ms O-A to have stated that she had been aware that the appellant had used aliases in relation to certain offences committed whilst he was in the United Kingdom prior to his last departure in 2009. At the end of paragraph 7 of her decision, the judge recorded Ms O-A as having said that she "thought" that the appellant had used another name for "his applications" and that he had "claimed asylum in the name of Joel Magee". At paragraph 26, the judge stated that the appellant had wished to "deceive the authorities" and keep important information from his wife relating to his use of aliases. In the following paragraph, the judge described the appellant's immigration history as "very poor" and that he gave "false information on the visit

Visa Application Form.” The various identities said to have been used by the appellant were stated as being: “Ogbiji Omagbemi”, “Joel Magee”, “Joel Nagree”, and “Damilola Ola Adeniyi”, with “various dates of birth” used as well. The judge accepted that the appellant had a genuine and subsisting relationships with his family members and found that it would be unreasonable for the children to go and live in Nigeria, but concluded that the respondent’s decision was proportionate and that paragraph 320(11) of the Rules had been appropriately applied. Accordingly, she dismissed the appeal. It does not appear as though her decision was challenged.

7. The next First-tier Tribunal decision was that of Judge Foulkes-Jones, promulgated on 30 July 2018, which dismissed the appellant’s appeal against the refusal of another human rights claim, essentially made on the same basis as the first (HU/10441/2016). Again, the respondent had relied on what was said to be the appellant’s highly adverse immigration history in the United Kingdom, including the use of aliases. Paragraphs 320(3) and 320(11) of the Rules had been applied.
8. Judge Foulkes-Jones made reference to the decision of Judge Clayton and, at paragraph 8 on page 9 (the paragraph numbering had gone awry within the decision) she concluded that it was “clear from the above [referring to what Judge Clayton had said] that the Appellant had used deception in an application for entry clearance, leave to enter or remain...” She also found that the appellant had used “multiple identities”, although this appears to have been based solely on what Judge Clayton had said previously.
9. The judge noted that there had been no explanation for why the appellant had used the identities of Ogbiji Omagbemi and Joel Nagree (she believed this to be a different identity from that of Joel Magee) and for why the latter had been used when the appellant apparently claimed asylum in this country.
10. On the other side of the ledger, the judge found that the appellant had never in fact entered the United Kingdom illegally; that he had previously disclosed the identity of Damilola Ola Adeniyi (the appellant’s birth name, which had subsequently been changed by Deed Poll or the equivalent under Nigerian law); that he had never been an absconder; and that he had provided sufficient evidence of identity and nationality (with reference to paragraph 320(3) of the Rules).
11. The judge accepted, as had Judge Clayton, that the familial relationships were all genuine and subsisting, that the maintenance and accommodation requirements under the Rules were satisfied.
12. Having conducted on overall balancing exercise, the judge concluded that the adverse immigration history precluded the appellant from satisfying the suitability requirement because paragraph 320(11) of the Rules applied. The respondent’s decision was deemed to be proportionate and the appeal was dismissed. There was no successful challenge to the judge’s decision.
13. Finally, there is the decision of Judge Shore, in respect of which I found there to be errors of law and have now set aside. In summary, and in light of properly-made

concessions by Ms Everett at the hearing, I concluded that the judge had failed to take into account the favourable findings made by Judge Foulkes-Jones in her 2018 decision; had failed to provide reasons for finding that the evidence of the appellant and Ms O-A was vague; and had failed to engage with specific evidence on the issue of aliases.

### **The issues**

14. Having regard to the previous First-tier Tribunal decisions, my error of law decision, and the respondent's stated position, the following matters are now not in dispute between the parties:
  - a) The appellant has provided adequate evidence of his identity and nationality: this aspect of the Rules is no longer in issue;
  - b) The appellant has a genuine and subsisting relationship with Ms O-A and his adult child, and a genuine and subsisting parental relationship with his two minor children;
  - c) The relevant financial requirements of Appendix FM to the Rules satisfied, as is the accommodation requirement and all other elements of that Appendix;
  - d) The appellant has never entered the United Kingdom illegally;
  - e) The appellant lawfully changed his name from Damilola Ola Adeniyi to his current name, has properly disclosed this, and has never used his birth name in a dishonest manner;
  - f) The appellant has never been an absconder in the United Kingdom;
  - g) It would not be reasonable for either of the two minor children to go and live in Nigeria.
15. The following matters remain in dispute:
  - a) the nature and extent of the use made by the appellant of the aliases "Joel Nagree" (or "Magee") and "Ogbiji Omagbemi";
  - b) Whether the respondent's decision is disproportionate and therefore unlawful under section 6 of the Human Rights Act 1998.
16. In respect of the decisions of Judges Clayton and Foulkes-Jones, the Devaseelan principles apply.

17. Paragraph 320(11) of the Rules has now become paragraph 9.8.2 of Part 9 (HC 813) and I shall refer to the latter from now on. The burden of proof remains on the respondent to show that it applies. In all other respects the burden is on the appellant to make out his case.

### **The evidence**

18. I have a bundle from the appellant, indexed and paginated 1-55. This consists of an updated witness statement from him, certain documents relating to the appeal in the Upper Tribunal, and the bundle which was before the First-tier Tribunal.
19. I have considered the respondent's bundle, which includes the refusal decision and the visa application form.
20. I am bound to say that the provision of certain other documents has not been satisfactory. The decision of Judge Clayton was only provided by the respondent at the outset of the hearing. Judge Foulkes-Jones' decision had been provided separately at an earlier stage but nonetheless not within a consolidated bundle of evidence. Further, I was also given a 2013 refusal of entry clearance at the hearing.
21. Parties need to prepare documents in a clear and timely fashion in readiness for any particular hearing. When proceedings have reached the Upper Tribunal, it may well be that there are loose documents that have accumulated during the course of the appeal before the First-tier Tribunal. Whether or not there are specific directions issued by the Upper Tribunal, consideration should in my view always be given to the preparation of a consolidated bundle (if at all possible, agreed by the parties) of all relevant evidence. It does not matter if some of the evidence in such a bundle is contested: the point is that it will all be contained in one place and this will always assist the efficient consideration of a case.
22. The respondent has not provided any evidence relating to any alleged asylum claim made by the appellant in the United Kingdom (using any identity). Nor has she provided any evidence of entry clearance applications, or any GCID case notes in respect of the appellant's immigration history. Although Mr Tufan somewhat opaquely hinted at the existence of other evidence, no application was made to adduce any. Even if such an application had been made at this exceptionally late stage in proceedings, it would have faced an uphill struggle, to say the least.
23. Both the appellant and Ms O-A gave oral evidence remotely. The appellant of course currently resides in Nigeria. At the outset of the hearing I raised the issue of whether it was appropriate for him to be giving evidence from outside the jurisdiction, in light of potential concerns raised in, for example, Nare evidence by electronic means) Zimbabwe [2011] UKUT 443 (IAC). On instructions, Ms Chowdhury informed me that her solicitors had never encountered any difficulties in respect of individuals giving evidence remotely from Nigeria. They were also aware that liaising with the

Foreign and Commonwealth Office in respect of ensuring that no objections were raised by the Nigerian authorities, was a difficult and lengthy process.

24. Having considered the matter and satisfied myself that he was giving evidence from his private residence in Lagos and that this case did not involve issues relating to international protection, I decided that it was appropriate for me to hear evidence from the appellant.
25. A full note of the oral evidence is contained in the record of proceedings. In summary, the appellant adopted his most recent witness statement and that from 2019. The last time he saw his children was in 2016 or 2017 when they visited Nigeria. When asked by Mr Tufan about his use of aliases, the appellant said that he had never claimed asylum in 2014, as he had left this country 2009 and had not been back since. He accepted that he had used the names Joel Magee and Ogbiji Ogambemi in relation to driving matters in the past, but denied using them in respect of any immigration applications. He told me that he had used the driving licence of Mr Ogambemi for approximately four years in this country, but had only shown this to the police on one occasion, in 2005. He explained that there has been a misunderstanding in respect of the names "Nagree" and "Magee": they have always been one and the same person and the correct spelling is "Magee". There had been two driving matters in this country, the first in 2005 when he was convicted of going through an amber traffic light. He said that he had then been using his wife's car, although he then corrected that and said that it was Mr Magee's car. The second incident related to a police check. The appellant was adamant that he had never, as far as he could remember, claimed asylum in the United Kingdom, whether it was 2014 or 2004.
26. Ms O-A adopted her 2019 witness statement. She did not believe that her husband had claimed asylum in the United Kingdom. She denied stating at the 2014 appeal hearing that the appellant had in fact claimed asylum using the identity of Joel Magee. She confirmed that the appellant had used her car and that of a friend whilst in the United Kingdom. She told me that she currently worked as a specialist nurse at Homerton Hospital dealing with sickle-cell thalassaemia and oncology. She felt overstretched and stressed, and was having financial troubles. All three children were missing their father, particularly the youngest.

### **The parties' submissions**

27. Mr Tufan submitted that there was insufficient evidence to go behind the findings made by Judges Clayton and Foulkes-Jones. He relied on the appellant's answer to question 3 of the visa application form, where he denied ever having used other names. In fact, other names had been used in respect of at least the driving matters. It was submitted that paragraph 9.8.2 of the Rules did apply. On a wider Article 8 basis, it was submitted that although there was family life with Ms O-A and the children, the refusal of human rights claim was nonetheless proportionate.

28. Ms Chowdhury submitted that the factual matters were relatively narrow, in light of the error of law decision in the matters set out therein. An adequate explanation had been provided on the use of the two names. The appellant's answer to question 3 on the visa application form should be read in context of his likely understanding of the term "used". She suggested that this would have referred to use in an immigration context and not in respect of driving matters involving the police. There was no reliable evidence from the respondent to show that the appellant had ever claimed asylum. The immigration history was not "very poor" and the passage of time was now relevant. The best interests of the two minor children were highly relevant.

### **Findings**

29. I begin by stating my findings of fact on the uncontentious matters which referred to earlier in this decision.
30. I find that the appellant has provided sufficient evidence to establish his nationality and true identity. I find that he lawfully changed his birth name to that he currently uses, that this was disclosed to the respondent previously, and that he has never used his birth name in any dishonest manner whether in respect of this dealings with the respondent or otherwise.
31. I find that the appellant has never absconded whilst in the United Kingdom. The finding made by Judge Foulkes-Jones has not been undermined by any evidence provided subsequently by the respondent. Indeed, there is been no evidence from respondent on this matter at all.
32. On the same basis, I find that the appellant has never entered the United Kingdom illegally.
33. I find that the appellant has, notwithstanding the geographical separation since his last departure from the United Kingdom in 2009, maintained a genuine and subsisting relationship with his wife and his eldest child, and a genuine and subsisting parental relationship with his two younger children. I accept that he last saw them all on a face-to-face basis in 2016 or 2017 when they visited Nigeria. I accept that there is frequent communication between them all. I have no doubt that all three children miss their father and it is more likely than not that this applies particularly to the youngest, as stated by Ms O-A in her oral evidence.
34. I also have no doubt that the link the separation will have placed a significant strain on Ms O-A, both emotionally and financially.
35. I find that the financial and accommodation requirements under Appendix FM have been and continue to be met.
36. I now turn to contentious matters. As these all relate to the appellant's alleged adverse immigration history, and therefore in turn the application of paragraph 9.8.2

of the Rules, the legal burden of proof rests with the respondent. In saying that, she is of course entitled to rely on the application of the Devaseelan principles.

37. Did the appellant in fact claim asylum in the United Kingdom in any identity? This question involves consideration of three matters: the findings of Judges Clayton and Foulkes-Jones; the evidence before me; and the lack of evidence from the respondent.
38. As far as I can see from the brief decision of Judge Clayton, there is in fact *no* clear finding that an asylum claim had ever been made. I acknowledge that there is a reference to Ms O-A having apparently stated in her evidence that such a claim was made, but that is not the same as a finding of fact. The references in paragraph 7 and 8 can only have related to second-hand information acquired by Ms O-A. The record of the evidence says nothing about what the appellant himself said in any written evidence. There is no reference to any evidence about an asylum claim having been provided by the respondent.
39. Turning to the decision of Judge Foulkes-Jones, there is no reference to the respondent having provided any evidence of an asylum claim in those proceedings either. Nor can I see an express admission by the appellant that he had in fact claimed asylum. It is clear that the judge's belief that an asylum claim had been made was based entirely on what had been set out in Judge Clayton's decision. However, if Judge Clayton had not made a finding of fact that such a claim had been made, then the premise upon which Judge Foulkes-Jones proceeded would appear to be flawed, or at least open to scrutiny now.
40. For the sake of completeness, the decision of Judge Shore has of course been set aside. He had relied on the decisions of Judges Clayton and Foulkes-Jones. Given that neither of his predecessors had made an express finding of fact that the same claim had been made, nothing in his decision assists the respondent.
41. Both the appellant and Ms O-A have denied that the former made an asylum claim in this country. I treat that evidence with circumspection, but do not discount it.
42. It is a simple fact that, notwithstanding the multiple appeals and the length of time since Judge Shore's was promulgated in early December 2019, the respondent has failed to provide *any* evidence as to an alleged asylum claim made by the appellant in the United Kingdom.
43. Taking all the circumstances into account, and applying the Devaseelan principles, I find that it has not been shown by the respondent that an asylum claim was in fact made by the appellant in any identity. To put it another way, the assertion that he did is predicated entirely on Judge Clayton's 2014 decision and, for the reasons set out above, that premise is flawed and does not in fact represent a sustainable starting point.
44. The next question is whether the appellant used deception when making one or more applications for entry clearance or leave to remain over the course of time (I shall deal with the question of whether he was dishonest in respect of any dealings with



other agencies of the state later in my decision). Again, this must be assessed in the context of the Devaseelan principles.

45. Judge Clayton found that he had (see paragraph 27 of her decision), although she made no reference to when the applications were made, what the “false information” was, and what, if any, evidence had been provided and relied on to support that finding. This last point is particularly striking, given the seriousness of a finding of deception and that the burden of proof rested with the respondent.
46. Judge Foulkes-Jones relied on what Judge Clayton had said and found that there was no evidence to disturb that finding. To that extent, she did not make a free-standing finding based on any further evidence adduced by the appellant. Once again, she did not set out when the applications in question had been made, nor said anything about what evidence, if any, had been relied on by her or Judge Clayton.
47. I have considered the evidence now before me. This has come entirely from the appellant’s side. I am satisfied that there has been a consistent denial by the appellant over the course of time that he ever employed deception (by virtue of using false identities) when making any applications for entry clearance or any other form of leave. I base this on the oral evidence, the 2019 witness statement, and the most recent witness statement.
48. In essence, the explanation provided relates to the use of the two names Joel Magee and Ogbiji Ogambemi, and I note that this had not been provided to Judge Foulkes-Jones in 2018. I treat the appellant’s evidence with circumspection, given the Devaseelan principles and the other findings I make in respect of his use of aliases in the driving-related matters (see below).
49. Ms O-A was not asked in cross-examination about any knowledge she had concerning alleged deception by her husband when making previous entry clearance applications. Having read through the decisions of Judges Clayton and Foulkes-Jones, I cannot see any specific references to Ms O-A expressly stating that she in fact knew that deception had been practiced.
50. I adopt the stated finding of Judge Clayton, subsequently followed by Judge Foulkes-Jones, as a starting point. However, in light of what I have said in paragraphs 45-49, above, I regard that starting point as significantly undermined by the absence of any reasoning by the judge and/or any evidence provided by the respondent in support, whether then or at any time thereafter. Taking all relevant matters into account, I find that the appellant did not in fact practise deception in one or more entry clearance applications (or any other applications) prior to that made on 10 January 2019.
51. With regards to that 2019 application, it is the case that the appellant answered “no” to the question of whether he had ever “used, or be known by, any other names”. As a matter of fact, that was incorrect, as the appellant has admitted to using the names of two other individuals whilst in the United Kingdom and has changed his birth name.

52. With some hesitation, I find that the respondent has not shown that the appellant was dishonest when he provided that incorrect answer. I say this for the following reasons.
53. First, it is common ground that the appellant had changed his birth name and had disclosed this to the respondent previously. It is also accepted by the respondent that the appellant had never used his birth name in a dishonest manner. It would therefore be odd, to say the least, if the appellant had dishonestly sought to conceal his change in name when completing the 2019 application form.
54. Second, it has not been disputed by the respondent that the appellant had, when making previous entry clearance applications, disclosed his use of aliases. Again, it would have been entirely self-defeating to the latest application if he had deliberately sought to conceal the use of aliases when he had already told the respondent about them before.
55. Third, I appreciate that the question in the form does not restrict the use of other names to the making of immigration applications only. Having said that, I see some force in Ms Chowdhury's submission that he might have regarded the question as being directed at such applications, rather than to any type of dealings with the United Kingdom authorities (such as, for example, the police).
56. Fourth, I have already found that the appellant did not practise deception in respect of previous immigration applications. Whilst in no way decisive, this lack of previous dishonesty is an indicator that he would not now have sought to employ deception.
57. All of this is not to say that the appellant is innocent of any misconduct. I find that he used two aliases when last in the United Kingdom. I find that the two names were Ogbiji Ogambemi and Joel Magee.
58. I am prepared to accept that Joel Magee and Joel Nagree were one and the same person, and that there had been a misspelling the name some point in time which was then carried through into the decisions of the First-tier Tribunal. The respondent has not provided any evidence to show that there were two separate people (actual or invented) with the different spelling of the surnames and different dates of birth.
59. I find that the appellant in fact used the driving licence of a friend called Ogbiji Ogambemi for a period of approximately four years whilst in the United Kingdom. That conduct was, of itself, dishonest and reprehensible. I find that he adopted the alias in relation to a driving matter which occurred in 2005 or 2006 when he was prosecuted and convicted of going through an amber traffic light. Although there was some confusion as to the car he was driving on that occasion, it makes little difference and I am prepared to accept that it was that of Mr Magee.
60. There is no evidence before me that the identity of Ogbiji Ogambemi was ever used for other purposes, such as obtaining benefits, employment, or other services to which the appellant was not entitled.

61. I find that the name of Joel Magee was probably used by the appellant on another occasion (I have not been provided with even an approximate date) one which he was stopped by the police as part of a general vehicle check. Again, this was an example of poor conduct by the appellant. I find that it was dishonest. As with the other alias, there is no evidence the appellant used this name to obtain any other advantage.
62. There is one final matter. The appellant has stated that he left United Kingdom in 2009. He has not provided any evidence to show that he was still lawfully in this country at that point in time. As far as I can see, he had last entered as a visitor and, in the absence of evidence to the contrary, I find that he must have been an overstayer at the point of departure. I am willing to find that he left voluntarily. The respondent has not provided any evidence to show that he was removed.

### **Conclusions**

63. There is plainly family life as between the appellant and his family members in the United Kingdom. The respondent's refusal of his human rights claim is plainly an interference with that family life. The refusal is in accordance with the law and it pursues the legitimate aim of maintaining effective immigration control, which is itself an aspect of preserving the economic well-being of the United Kingdom.
64. The core issue here is that of proportionality.
65. I begin by making an assessment of the two minor children's best interests. There is no dispute that it would be in their best interests to be reunited with their father, albeit that number of visits to Nigeria have taken place over the years. I have accepted that the children are missing their father. In particular, the youngest one has felt separation most keenly: he has never been able to reside with the appellant. In all the circumstances, I conclude that it is plainly in the children's best interests to live with both of their parents. This is a primary consideration in the Article 8 balancing exercise.
66. It is common ground that the United Kingdom-based family unit cannot be expected to relocate to Nigeria. It would be unreasonable for the two minor children to go and this in turn would preclude the ability of Ms O-A to leave this country. This has the effect of preventing reunification anywhere other than the United Kingdom.
67. I now turn to the Rules. I am of course not simply deciding whether or not the appellant can satisfy the relevant Rules. This is an appeal based on Article 8. The Rules laid down by the respondent reflect her view as to where the balance lies between the public interest and the rights of individuals. That is a relevant consideration. If an individual can show that they satisfy the Rules, it is very likely indeed that their appeal will succeed on Article 8 grounds. The converse does not apply, however: a wider point proportionality exercise must be carried out even if the Rules are not met.

68. As at the date of the respondent's decision, paragraph 320(11) of the Rules read as follows:

"Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused

...

(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:

(i) overstaying; or

(ii) breaching a condition attached to his leave; or

(iii) being an illegal entrant; or

(iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not); and

there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process."

69. The equivalent discretionary ground for refusal is now set out in paragraph 9.8.2 of Part 9 of the Rules:

"9.8.2. An application for entry clearance or permission to enter may be refused where:

(a) the applicant has previously breached immigration laws; and

(b) the application was made outside the relevant time period in paragraph 9.8.7; and

(c) the applicant has previously contrived in a significant way to frustrate the intention of the rules, **or** there are other aggravating circumstances (in addition to the immigration breach), such as a failure to cooperate with the redocumentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding."

(emphasis added)

The mandatory ground under paragraph 9.8.1 does not apply here because of the lengthy period spent by the appellant outside the United Kingdom.

70. On my findings, the appellant has previously breached immigration laws by overstaying his last period of leave granted as a visitor.

71. Has he previously contrived in a significant way to frustrate the intention of the Rules?
72. I have found that he has not practised deception in respect of previous immigration applications. I have found that he has not entered the United Kingdom illegally, nor has he been an absconder.
73. I have found that he was not dishonest when answering “no” to question 3 in the latest application form, although this matter does not relate to previous applications.
74. Overall, I conclude that the appellant has not previously contrived in a significant way to frustrate the intentions of the Rules. The Rules are the respondent’s statement of practice as to the regulation of immigration control. The matters which are adverse to the appellant’s history relate not to immigration applications, enforcement action, or other related matters, but rather to dealings with other agencies of the state, specifically the police.
75. This brings me onto the alternative limb of paragraph 9.8.2 (the word “or” is used in sub-paragraph (c)): are there aggravating circumstances here?
76. The current guidance published by the respondent is entitled “Suitability: previous breach of UK immigration laws”, version 3.0, dated 23 April 2021. Unfortunately, I was not provided with this document by either party. It is plainly appropriate for me to nonetheless consider it in the context of this case.
77. On page 11 of 20, there appears a non-exhaustive list of matters which may be considered to constitute “aggravating circumstances”:
  - absconding
  - not meeting temporary admission/reporting restrictions or bail conditions
  - failing to meet the terms of removal directions after port refusal of leave to enter or illegal entry
  - previous working in breach on visitor conditions within short time of arrival in UK (indicating a deliberate intention to work)
  - receiving benefits, goods or services when not entitled
  - using an assumed identity or multiple identities
  - getting NHS care to which they are not entitled
  - attempting to prevent removal from the UK, arrest or detention by Home Office or police
  - escaping from Home Office detention

- switching nationality
- troublesome or frivolous applications
- not meeting the terms of the re-documentation process
- taking part, attempting to take part, or facilitating, in a sham marriage or marriage of convenience
- harbouring an immigration offender
- people smuggling or helping in people smuggling.”

78. The only factor appearing in list which might apply to the appellant is the use of assumed or multiple identities. It is not entirely clear whether this factor must relate to immigration matters, as opposed to use for any other purpose. Three considerations lead me to conclude that the former is the better view.
79. First, whilst the word “or” is used in sub-paragraph (c) of paragraph 9.8.2, the guidance clearly connects the intention to frustrate the Rules with aggravating circumstances. This would suggest that the latter should be connected to the former.
80. Second, whilst acknowledging that the list is non-exhaustive, all the other aggravating circumstances set out are immigration-related in one form or another.
81. Third, the use of assumed or multiple identities is often related to immigration matters.
82. I conclude that there is a sufficient connection between the appellant’s use of aliases when interacting with the police in this country and the aggravating circumstance of using assumed or multiple identities. After all, whilst the conduct did not involve the making of immigration applications in other identities, it did prevent the authorities of this country (in the form of the police) from knowing the true identity of an individual who was at that time a foreign national with either limited leave or none at all. Whatever his status was, the police and any other arm of the state were entitled to be informed of the appellant’s true identity.
83. I therefore conclude that the respondent has shown she is entitled to rely on paragraph 9.8.2 as a relevant consideration on her side of the balance sheet in the overall Article 8 assessment. Having said that, in light of my findings of fact in this case, the strength of this consideration is rather more limited than it otherwise might be.
84. Further, the ground of refusal under paragraph 9.8.2 is discretionary. Two things flow from that. First, whilst clearly its application is a relevant factor in the overall Article 8 balancing exercise, it might not carry the same weight as a mandatory ground of refusal under the Rules. Second, the issue of discretion is bound up with

my overall evaluative assessment in accordance with the balancing exercise. I will return to this, below.

85. I note that the respondent has never relied on what is now paragraph 9.7.1 of Part 9 of the Rules (relating to the making of false representations and the non-disclosure of relevant facts). Thus, the appellant's answer to question 3 of the visa application form could not have been a basis for refusing the human rights claim, even if I had found that answer to be dishonest.
86. As mentioned earlier in my decision, it is agreed that the other elements of Appendix FM to the Rules are met.
87. In more general terms, there is, by virtue of section 117B(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), a strong public interest in the maintenance of immigration control. Where, as in this case, an additional factor is placed into the equation (that being the aggravating circumstance referred to above), the public interest is only enhanced.
88. The appellant can speak very good English, as was demonstrated in the course of his oral evidence. Thus, the mandatory consideration in section 117B(2) of the 2002 Act remains of neutral value.
89. It is been accepted throughout these proceedings that the financial requirements under Appendix FM to the Rules have been met. It follows that the mandatory consideration in section 117B of the 2002 Act adds nothing to the respondent's side of the balance sheet.
90. This appeal does not relate to private life under Article 8. The appellant's relationship with Ms O-A was established prior to him residing in the United Kingdom unlawfully. Further, their marriage took place in 2010 in Nigeria. In these circumstances, I do not regard section 117B(4) of the 2002 Act as requiring little weight to be placed on the relationship.
91. Section 117B(5) of the 2002 Act does not apply in the context of this case.
92. I take into account and place due weight on the appellant's driving conviction in 2005 or 2006. I have considered this factor in conjunction with the appellant's use of an alias. I have also balanced this against the nature of the offence itself (in effect, jumping and amber traffic light - there being no evidence from the respondent to contradict the appellant's account) and the passage of time since the incident.
93. A factor weighing in the appellant's favour is the length of the period of separation from his wife and, in particular, his children. He was last living with them as part of the family unit in 2009, now some 11 years ago. The middle child has only been able to live with his father for, at most, three years of his life. The youngest child has never been able to live with his father. The eldest whilst now an adult, was separated from his father during all of his teenage years. This lengthy period of separation is

also to be seen in the context of the impossibility of re-establishing the family unit in Nigeria, for the reasons I have set out above.

94. There are, however, three aspects to this factor which, to a limited extent at least, mitigate what might otherwise be thought of as a decisive feature of the case. First, it was the appellant's failure to have regularised his status in United Kingdom when he was last here which initiated the lengthy separation. Second, there have been a number of visits by Ms O-A and the children to Nigeria over the course of time. Third, the appellant's use of aliases (to the extent I have found this to have occurred) have undoubtedly made his attempts to apply to re-join his family in this country over time very much more difficult indeed, as evidenced by the previous decisions of the First-tier Tribunal.
95. Before bringing all of the relevant factors together and stating my overall conclusion on the balancing exercise, I must comment to the respondent's decision in this case. The basis on which the application was refused on suitability grounds under the Rules is seriously flawed. It is clear that significant reliance was placed on the assertion that the appellant entered the United Kingdom illegally, having given a false name to immigration officers, and that he absconded in January 2005. Quite apart from a failure to have provided any evidence to support these assertions, Judge Foulkes-Jones had specifically found in her 2018 decision that neither were correct. It is of concern that the author of the respondent's refusal decision appeared to be unaware of the previous First-tier Tribunal decision. This is not to say that there were no other reasons for refusing the application (whether or not be proved to be sustainable on appeal), but that is not really the point.
96. In arriving at my conclusion on proportionality I bear in mind the authoritative guidance provided by the Supreme Court in *Agyarko* [2017] UKSC 11; [2017] 1 WLR 823, at paragraphs 59 and 60:

"59. As was explained in para 8 above, the case of *Huang* was decided at a time when the Rules had not been revised to reflect the requirements of article 8. Instead, the Secretary of State operated arrangements under which effect was given to article 8 outside the Rules. Lord Bingham, giving the opinion of the Committee, observed that the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added:

"It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* [R (*Razgar*) v Secretary of State for the Home Department] [2004] UKHL 27; [2004] 2 AC 368, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to



succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test." (para 20)

60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above."

97. With this in mind and having full regard to the importance of the public interest in maintaining effective immigration control, both generally and in relation to the facts of this case, I have concluded that the respondent's decision has not struck a fair balance between that public interest and the appellant's family life rights under Article 8.
98. In relation to the Rules, I have found that although paragraph 9.8.2 of Part 9 is engaged, the particular factual matrix on which that engagement is premised is limited to the use of the aliases in the manner I have set out previously. The discretionary aspect of this general ground of refusal forms part and parcel of my overall evaluative judgment under the balancing exercise.
99. Here, the best interests of the two minor children are a significant factor in his favour. The lengthy period of time that the appellant has been out of the United Kingdom, and thereby prevented from living with his family members, is also deserving of real weight. When these two factors are combined with the appellant's ability to satisfy all other aspects of the relevant Rules, my consideration of the mandatory factors set out in section 117B of the 2002 Act, and the inability to pursue family life elsewhere elsewhere, the balance comes down in the appellant's favour, notwithstanding the important factors sitting on the respondent's side of the balance sheet. That may not be by a significant margin, but such is often the nature of these types of case.
100. I conclude that the respondent's decision of 13 March 2019 is a disproportionate interference with the appellant's right the family life under Article 8 and is therefore unlawful under section 6 of the Human Rights Act 1998.

**Anonymity**

101. No anonymity direction has been made so far in these proceedings and no application has been made by the appellant.
102. In any event, there is no reason for one to be made at this stage.

**Notice of Decision**

103. **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.**
104. **I re-make the decision by allowing the appeal on Article 8 ECHR grounds.**

Signed: *H Norton-Taylor*

Date: 23 June 2021

Upper Tribunal Judge Norton-Taylor

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

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. Whilst I have found the original decision to be flawed, the success of the appeal has very much depended on additional evidence being provided during the course of the appellate proceedings.

Signed: *H Norton-Taylor*

Date: 23 June 2021

Upper Tribunal Judge Norton-Taylor

**APPENDIX: ERROR OF LAW DECISION**

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

Appeal Number: HU/05593/2019 (V)

**THE IMMIGRATION ACTS**

**Heard remotely from Field House  
On 15 March 2021**

**Decision & Reasons Promulgated**

.....

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MR ADENIYI [A]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms M Chowdhury, Counsel, instructed by Daniel Aramide  
Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Shore ("the judge"), promulgated on 4 December 2019, by which he dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim, a claim made in the context of an application for entry clearance in order to join his wife and three children in the United Kingdom.

2. The Appellant had already had two appeals before the First-tier Tribunal dismissed, the first in 2014 and the second in 2018. The previous findings featured heavily in the judge's consideration of the Appellant's appeal.
3. My decision on error of law can be stated relatively briefly given Ms Everett's concession at the hearing.
4. In essence, she accepted that the judge had failed to take account of relevant matters and had failed to undertake an adequately detailed independent assessment of the matters before him, in particular those relating to paragraph 320(11) of the Immigration Rules and the wider proportionality exercise required by Article 8.
5. Ms Everett accepted that in 2018 the First-tier Tribunal had found in the Appellant's favour as regards certain matters, including:
  - (1) that he had never entered the United Kingdom illegally;
  - (2) that he had disclosed the use of at least one other identity and had been granted entry clearance as a visitor on two occasions since then;
  - (3) that he had never been an absconder; and
  - (4) that he had provided sufficient evidence of his identity and nationality.
6. The first problem with the judge's decision, as acknowledged by Ms Everett, was that it was not sufficiently clear that these favourable matters had been factored into the overall assessment under paragraph 320(11) or the wider proportionality exercise.
7. The second problem was the lack of adequate reasoning accompanying the judge's description of the evidence of the Appellant and his wife as "vague and lacking in detail".
8. The third difficulty, which in the circumstances is perhaps of most significance, is the judge's failure to have considered the specific issues and evidence relating to the use of multiple identities. This point was clearly held against the Appellant in the two previous appeals and again by the judge.
9. Three names have been cited and relied on over the course of time. The first of these, Damola Adeniyi, was, it transpires, in fact the Appellant's birth name, a name which he changed quite legitimately by way of Deed Poll. The judge failed to have regard to the context in which the use of this identity had been used. There is no suggestion that it was either false or was used in any dishonest way. It is accepted that the changed name had been disclosed to the Respondent back in 2005 (there was no evidence before the judge to indicate that it had only come to the Respondent's attention in 2013, as alleged in the rule 24 response).
10. In respect of the second and third names used, Joel Nagree and Ogbiji Omagbemi, these had been disclosed previously. In any event, the name Joel Nagree had never been used for the purposes of obtaining leave to remain: it was used by the

Appellant in respect of a parking offence only. The point here is that whilst the judge was entitled to take account of the previous First-tier Tribunal decisions by virtue of the well-known Devaseelan principles, he was also obliged to undertake his own assessment of all relevant matters in light of the evidence before him. Whether or not the previous judges had undertaken a detailed analysis of the multiple identities issue, the judge was bound to do so.

11. Ms Everett's overall concession acknowledged (in my view quite rightly) that the judge's reliance on what had been said in the previous First-tier Tribunal decisions without more was, in all the circumstances, inadequate in respect of the assessment of paragraph 320(11) and the wider proportionality exercise. This is particularly so given that that ground of refusal is discretionary in nature and that the consideration of proportionality in paragraph 38 of the decision is, with respect, extremely brief and lacking in detailed analysis.
12. For these reasons, and in light of Ms Everett's properly made concession, I conclude that the judge has materially erred in law and that his decision must be set aside.
13. I would add a further observation and one with which Ms Everett expressed her agreement at the hearing. In paragraphs 38.5 and 39, the judge uses the phrase "exceptional circumstances" in a manner giving rise to a real danger that he was imposing a threshold test in the Appellant's case, rather than simply describing the nature of the outcome of any Article 8 claim in which the relevant Immigration Rules could not be satisfied. There is no need for me to consider whether this constituted a material error of law, but it does raise a concern as to the approach adopted.
14. In terms of disposal, I conclude that this appeal should be retained in the Upper Tribunal for a resumed hearing in due course. Some fact-finding will be required, but the Upper Tribunal is fully equipped to undertake this task. To assist with the remaking decision I set out those matters which the parties have confirmed are now common ground:
  - (a) the Appellant has never entered the United Kingdom illegally;
  - (b) the Appellant has never been an absconder;
  - (c) the Appellant disclosed his change of name from Damola Adeniyi to his present name to the Respondent and he was granted visit visas in 2005 and 2007 in his current identity;
  - (d) that the Appellant never used his birth name in a dishonest manner;
  - (e) that the Appellant has provided adequate evidence of his identity and nationality (with reference to paragraph 320(3) of the Immigration Rules);
  - (f) that the minimum income requirement has been and is met by his wife;

- (g) that the Appellant has a genuine and subsisting relationship with his wife and a genuine and subsisting parental relationship with his three children in the United Kingdom.
15. The two specific matters which remain live are the particular use of the identities used by the Appellant in the past, namely Noel Nagree and Ogbiji Omagbemi and whether there had been a failure by the Appellant to disclose his full immigration history (whether or not relevant to the making of any applications for leave to enter or remain) in his most recent visa application form. The Respondent maintains her reliance on paragraph 320(11) of the Rules.
16. My provisional view is that the re-making of the decision in this case can be facilitated by way of a remote resumed hearing.
17. I issue further directions to the parties below.

### **Notice of Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

**I adjourn this appeal for a resumed hearing in the Upper Tribunal.**

**No anonymity direction is made.**

### **Directions to the parties**

- (1) **No later than 7 days** after this decision is sent out, the Appellant is to confirm in writing with the Tribunal and the Respondent whether it is intended to call oral evidence at the resumed hearing and, if it is, indicate who will be giving such evidence. If it is proposed to call the Appellant himself, this must be made clear;
- (2) **At the same time**, the Appellant shall confirm whether he has any objections to the resumed hearing being conducted remotely ;
- (3) **No later than 14 days** after this decision is sent out, the Respondent is to confirm in writing whether she has any objections to the resumed hearing being conducted remotely ;
- (4) **No later than 28 days** after this decision is sent out, the Appellant is to file and serve a consolidated bundle of all evidence now relied on, including any updated witness statements; no

- (5) **No later than 35 days** after this decision is sent out, the Respondent may file and serve any further evidence relied on;
- (6) **No later than 10 days** before the resumed hearing, the Appellant shall file and serve a skeleton argument;
- (7) With liberty to apply.

Signed *H Norton-Taylor*

Date: 23 March 2021

Upper Tribunal Judge Norton-Taylor