



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

Appeal Number: IA/08654/2015

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 4 May 2016**

**Determination issued  
On 11 May 2016**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

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

Appellant

**and**

**E A ALAUSA**

Respondent

For the Appellant: Mrs S Saddiq, Presenting Officer

For the Respondent: Mr A Devlin, Advocate; Cardinal, Solicitors, Croydon

**DECISION AND REASONS**

1. The parties are as described above, but for continuity and ease of reference the rest of this decision describes them as they were in the First-tier Tribunal.
2. The appellant is a citizen of Nigeria, born on 21 December 1970. No anonymity order has been requested or made.
3. The case has a muddled history. This appears to be the responsibility of the appellant and of his past and present solicitors, changing the basis of the case dramatically and at short notice, and providing instructions to

Counsel who respectively appeared in the First-tier Tribunal and in the Upper Tribunal at the last moment.

4. The application which gives rise to the proceedings was made on 17 May 2014. It was for indefinite leave to remain on the basis of 10 years continuous lawful residence in the UK, within the immigration rules. That application, as later recognised by subsequent solicitors, had no merit.
5. The respondent refused the application by decision dated 19 February 2015, which runs as follows. The appellant claims to have entered the UK in July 1993, although he had previously claimed to have entered in October 1995. In September 2010 he sought indefinite leave to remain on the basis of 14 years residence, which was refused in December 2010. He cannot meet the requirement of 10 years continuous lawful residence, and fails in terms of the rules in other respects. He raised no circumstances regarding private and family life which might have warranted a grant of leave to remain outwith the requirements of the rules. He mentioned having an unmarried partner, but provided no details. He stated that he had a daughter in the UK, Lara Yoyinsola, who was British, but his representatives said that they provided no evidence in these respects because he was not applying on that basis. The respondent was aware that the appellant previously used fraudulent documents and was prepared to accept documentation now provided dating from 2002 onwards, but not earlier.
6. The appellant appealed to the First-tier Tribunal on 27 February 2015, stating the hopeless grounds that his documents proved that he had resided in the UK for 20 years and the respondent should have exercised discretion differently.
7. In a letter dated 21 May 2015 addressed to the First-tier Tribunal the appellant, through his present representatives, sought radically to amend his grounds of appeal. It was accepted that his residence in the UK had not been lawful. Although no evidence had been provided to the respondent regarding family life, the tribunal was asked to consider whether the decision was a disproportionate breach of rights under Article 8 of the ECHR on the basis that the appellant had an unmarried partner, Adebunkonola Alausa, and a daughter, Lara Yoyinsola. Contrary to the impression given by previous agents his daughter was not British, but the child's mother was unwilling to return to Nigeria due to fear that she and the child might be subjected to FGM.
8. Another matter first emerges at this stage, not mentioned in the amended grounds of appeal, but in a statement by the appellant. He says that he has an ex-wife (not named in the statement) with whom he has a child, [OEMA], born on [ ] 2004. He was "told they moved to America but it was lately I realised they are back in the UK." No further details are given.

9. Mr Devlin said that although there have been inconsistent claims about whether the appellant has a child who is either a UK citizen or entitled to become a UK citizen, that was no part of any argument now advanced.
10. Perusing the papers on file after the hearing, I find attached to the amended grounds of appeal a photocopy of the birth certificate of [EOMA] (not the order of names in the appellant's statement) born on [ ] 2004 at Croydon; mother Aderemi Adetokunbo Aramide Adejokun (if this is the appellant's former wife, she does not appear to be named anywhere else in the papers); father Olatunji Abiodun Alousa (not the name the appellant has used throughout these proceedings, which is Emmanuel Abiodun Alousa). The father's place of birth is given as Nigeria and the mother's as St Pancras (presumably in London). This might suggest a UK citizen child, but under the other circumstances of the case, the nationality of the child is ultimately irrelevant.
11. Judge Kempton allowed the appellant's appeal on human rights grounds by decision promulgated on 29 September 2015.
12. The SSHD's grounds of appeal to the Upper Tribunal make two essential points.
13. The first is based on *SS (Congo) v SSHD* [2015] EWCA Civ 387, [2015] Imm AR 5. The judge said at paragraph 28, "Ultimately, I will allow this appeal on the basis of the appellant's private life in the UK" but she did not consider matters through the lens of the rules, in particular appendix FM, and did not identify any compelling circumstances which would need to be identified to support a claim for leave to remain outside the rules (*SS* at paragraph 33).
14. The second point particularly challenges paragraph 28 where the judge said:

"Such an interference [removal of the appellant] would not be proportionate to the legitimate public end sought to be achieved namely immigration control taking into account the issues of relevance and Section 117B [in part 5 of the 2002 Act]. The public might, it could be argued, be somewhat dismayed if the appellant were to be returned to Nigeria, given all the letters of support and that he has a child and partner who live with him in the UK, albeit that have no right to be here either."
15. This is said to misunderstand the provision in section 117B(1) that the maintenance of effective immigration controls is in the public interest; to omit the considerations under section 117B(4) and (5), in failing to accord little weight to a relationship formed with a qualifying partner while a person is in the UK unlawfully, or to a private life established by a person at a time when his immigration status is precarious; and in terms of section 117B(3), it is perverse to benefit the appellant for illegally working in the UK.

16. Mrs Saddiq made submissions along the lines of the grounds. She referred to paragraph 26, where the judge said that the appellant had a relationship with a child who although not British might soon be able to apply for a passport. There was no evidence to justify that observation, which appeared to have been given some weight. There was no identification of compelling circumstances. The judge failed to take proper account of the fact that the appellant's partner and child have no entitlement to be in the UK and should be expected to leave. There was no evidence of any relationship with the older child. The determination should be set aside. On the facts as they had emerged before the First-tier Tribunal, it was plain that the outcome should be reversed.
17. Mr Devlin argued that on neither of the two main points in the grounds did the judge did not fall into any material error of legal approach. In view of my findings below, and with no disrespect to a well-constructed argument, I need summarise it only briefly.
18. On the first issue, the submission was that there is no need to quote law or set out formal tests so long as the substance of the jurisprudence is applied, and a decision is reached on proportionality which does, in effect, identify compelling reasons. Although this might not be the best drafted decision, there was no error of law in finding a disproportionate violation of Article 8, simply through absence of recital.
19. Mr Devlin pointed out that s. 117B is set out in full at paragraph 9 of the decision. He submitted that all the relevant factors were then given specific consideration at paragraph 24. He next sought to show that sections 117B(4) and (5) are to be interpreted consistently with the longstanding jurisprudence on "precarious" cases, and that the requirement to give little weight to private life and relationships flew off where children were involved, as in this case. He supported this in particular by reference to *SS* at p. 1047, paragraph 29, the words in parenthesis - "(where no children are involved)" - and to *Agyarko v SSHD* [2016] 1WLR 390, pp. 395 to 396, paragraphs H-A, and p. 402, paragraph A, identifying as a crucial factor regarding relationships formed in circumstances of known precariousness that there were no children.
20. I am content to take it for present purposes that Mr Devlin's argument is in both aspects correct. However, applying these principles to the present decision fails to show that it is sustainable. The decision falls into errors under both heads of the SSHD's grounds of appeal which are so fundamental that the outcome cannot stand.
21. The first error is at paragraph 24, where the judge says:

"... [the appellant] has a relationship with the child but she is not a qualifying child, as she is not British, although she may soon be able to apply for a passport. She has been having treatment in the UK for vision problems and I think it was the appellant's position that this was being paid for. "

22. Plainly enough, the judge thinks that the appellant has a relationship with a child who although not presently a qualifying child in terms of Part 5A of the 2000 Act may soon become one, and that this tends in his favour.
23. At first sight this seems to relate to the older child, which is how both representatives approached this passage at the hearing. That cannot be right, however, because the child having treatment for vision problems is the younger child.
24. The appellant at one time contended through his agents that the older child was British, but has more recently said that she is not. There was nothing before the First-tier Tribunal to suggest that, if not a citizen, she was about to become one. As to that child, however, the crucial point is that the appellant did not produce any evidence of a relationship with her. He says that he has heard that she is back in the UK, but gives no address. The matter is scarcely mentioned in the witness statements. The decision records that the appellant said that he would like to establish contact but could not afford to raise proceedings. However, there was nothing to indicate that he had sought to initiate contact informally, that legal proceedings would be required, or that he has had any communication at all for several years with either mother or child.
25. A qualifying child in terms of paragraph 117D(1) is one who is a British citizen or has lived in the UK for a continuous period of 7 years or more. The evidence left it obscure whether the older child might be a qualifying child, although it was accepted on the appellant's behalf both in the First-tier Tribunal and in the Upper Tribunal that she is not. More crucially, there is no evidence that the appellant has "a genuine and subsisting parental relationship" with that child, so this aspect simply could not operate in the appellant's favour.
26. The passage at paragraph 24 is even odder if the judge had the younger child in mind. There is nothing to hint that she might be able to apply for a passport.
27. The second and more fundamental error is that the appeal could not rationally be allowed on the basis of relationships with a partner and child who have no right to be in the UK.
28. The appellant's partner, the mother of the younger child, is not a British citizen or settled in the UK. She cannot be a qualifying partner for purposes of part 5A of the 2002 Act. The judge says at paragraph 26 that the appellant's private life was inextricably linked with his family life and that they were almost one and the same thing, and although she says at paragraph 28 that she allows the appeal ultimately on the basis of private life, she says in the next sentence that his family life is based on a relationship with a person without status in the UK and their child similarly without status.

29. The appellant's partner is another long term overstayer. The evidence recorded at paragraph 16 is that she and the appellant were advised 3 years ago that an asylum application should be made, but they did not do so for lack of funds and because the appellant could deal only with his own position at the time. He did not wish her to apply while his own position was unresolved (paragraph 22). However, there is no good reason for the appellant's partner not making promptly any claim which might be open to her. There is a legal duty on her to do so, and she ought to have pursued the matter, if believed to be of any real substance, long before now. Funds are not required.
30. The correct way to take relationships with partner and child into account must be in the light that they are able freely to leave the UK and ought willingly to do so, in compliance with immigration law.
31. At best there might be a short term article 8 case against removal of someone whose partner and child have made claims to remain, which remain unresolved. That does not apply here. The relationships which led the judge to allow the appeal could not give the appellant a right to remain in the UK.
32. Mrs Saddiq's submission was that the decision should be reversed. Mr Devlin took the position that the determination should stand. He made no submission in the alternative on what the outcome should be. There has been no application to introduce further evidence, or to have any further hearing either in the First-tier Tribunal or in the Upper Tribunal. There is no suggestion of any material change of circumstances since the hearing in the FtT. I therefore proceed to make a fresh decision, based on the known facts of the appellant's family and private life, which are not in any serious dispute.
33. Examining the evidence to ensure that nothing material is overlooked in remaking the decision, I note that the certificate of birth of the younger child gives her mother's occupation as a stockbroker and her father's occupation as an estates consultant, naming him as Emmanuel Olatunji Alausa. This is a third variation, but I accept despite the discrepancies that the appellant is the father of both children.
34. The appellant does not contend that he has any right to remain in the UK within the terms of the immigration rules.
35. The appellant has been in the UK for a number of years. The respondent did not accept evidence going back beyond 2002. He variously claims to have been here since 1993 or 1995. He speaks English. There is no evidence that he has been a burden on tax payers for his subsistence, although no doubt he has caused some public expense. He has worked and paid taxes, although having no permission to work, and using a NI number which he was not entitled to have. He has obtained a mortgage, based on what representations it may be better not to inquire.

36. No doubt there are favourable things to be said about the appellant's private life, but even at their highest they must be given little weight, because that private life was established over a period when he was in the UK unlawfully.
37. The appellant has no relationship with a qualifying partner.
38. It is possible, although far from clear, that he has one child who is a qualifying child, but no evidence that he has any relationship or is likely to develop any parental relationship with that child.
39. The younger child is not a qualifying child. In any event, it would be reasonable to expect that child to leave the UK.
40. The case has only one rational answer. There are no private and family life circumstances which call for a grant of leave outside the terms of the immigration rules. It is not disproportionate to the article 8 rights of any persons concerned to expect the appellant's departure from the UK.
41. The decision of the First-tier Tribunal is **set aside**. The following decision is substituted: the appellant's appeal, as originally brought to the First-tier Tribunal, is **dismissed** on all available grounds.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

6 May 2016  
Upper Tribunal Judge Macleman