



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/24452/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 5 July 2017**

**Decision & Reasons  
Promulgated  
On 13 July 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MR C B U**

**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr R Singer, Counsel, instructed by Alcott Solicitors  
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

**Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.**

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Colvin (the judge), promulgated on 18 October 2016, in which she

dismissed his appeal. That appeal had been against the Respondent's decision of 18 June 2015, refusing his human rights claim.

2. The Appellant had arrived in the United Kingdom in 2002 and had been resident here lawfully thereafter. He had previously been in what was accepted as a durable relationship with an EEA national for a number of years. This relationship ended when the EEA national returned to her native country. The application leading to the Respondent's decision was made in March of 2015. In the application the Appellant's change in circumstances were noted, and it was said that he was relying in essence on his private life under Article 8.

### **The judge's decision**

3. By the time the appeal came up for hearing in September 2016 the Appellant's circumstances had changed once more. From around the time he made his application to the Respondent (but presumably shortly after this particular event) the Appellant had begun a new relationship with a British national. Evidence of this relationship was included in a supplementary bundle which was filed and served with the Tribunal and the Respondent prior to the hearing.
4. At paragraph 3 the judge records that as a preliminary matter it was "clarified" that the appeal before her was on Article 8 grounds outside of the Immigration Rules. It is also said in that paragraph that the Appellant's new relationship fell within the scope of section 85(5) of the Nationality, Immigration and Asylum Act 2002, as amended. Therefore, concluded the judge, that issue was regarded as being in effect a "new matter", and that the judge had no jurisdiction to consider the issue. That is a conclusion of central importance in the appeal before me.
5. Having reached her conclusion on the new relationship point the judge goes on to record the evidence and submissions made in respect of the Appellant's private life. At paragraph 21 she appears to agree with the Respondent's assertion that the Appellant had failed to mention a spent conviction in his application form and that he therefore fell foul of the suitability requirements under Appendix FM, as they relate to paragraph 276ADE of the Rules.
6. At paragraphs 22 to 25 the judge goes on to consider the private life issue in detail. Having taken a number of matters into account the judge concludes that even if the Appellant had not fallen foul of the suitability requirements he was unable to show that there were "very significant obstacles" to his reintegration into Nigerian society and he could not show that there were any compelling circumstances in his case. In light of this the appeal (on the restricted basis considered by the judge) was dismissed.

### **The grounds and grant of permission**

7. The grounds assert that the issue of a new relationship was not a "new matter", as it was in fact simply an aspect of his human rights claim. The

grounds also submit that the judge's approach to the suitability issue was erroneous.

8. Permission was granted by First-tier Tribunal Judge P J M Hollingworth on 17 March 2017. That judge did not engage with the "new matter" issue, but instead concentrates on the substance of the private life considerations undertaken by the judge.

### **The hearing before me**

9. At the outset of the hearing Mr Singer made an application for anonymity in this case. The application was based in part upon the nature of the Appellant's own job but, more importantly, on the basis that his current partner's work with vulnerable children justified an anonymity direction. Mr Tarlow had no objections to this. I acceded to the application.
10. Mr Singer confirmed that evidence of the new relationship had been provided to the Tribunal and the Respondent in advance of the hearing before the judge by way of a supplementary bundle (on file). He submitted that the judge's conclusion that the new relationship constituted a "new matter" was wrong. The family life issue was simply an aspect of the overall Article 8 claim. He noted that Article 8(1) refers to "private and family life".
11. He submitted that even if (and this is unclear from the papers before me) the representatives before the judge had agreed that the new relationship did amount to a "new matter", any erroneous concessions as to the law were of no effect: the judge had to apply the law correctly, particularly when this went to the issue of jurisdiction.
12. I referred Mr Singer to the Respondent's guidance on the issue of new matters contained in a document dated 8 May 2017. I pointed out the third bullet point on page 25 in which the Respondent suggests that where an appellant initially relies on private life but then wishes to include a family life aspect, this is likely to constitute a "new matter" for the purposes of section 85(5) of the 2002 Act. Mr Singer responded to this by submitting that the guidance was not law and could not be used as a tool to interpret a statute. It was also submitted that the judge got it wrong in respect of the suitability issue. Paragraph 21 indicated that she had treated the matter as though she only had a judicial review jurisdiction on this point.
13. Mr Tarlow relied on the rule 24 response. He simply submitted that the new relationship was a "new matter" and that the judge was correct to proceed on that basis.
14. In reply Mr Singer noted that relationships could in fact form part of private life in any event, as indicated in a number of judgments in the Court of Appeal. I raised the issue of materiality to which Mr Singer responded that the judge had precluded herself from hearing any evidence about the partner's particular circumstances including her job and earnings etc. Taking matters overall, Mr Singer submitted that there

was at least an arguable case that there would be insurmountable obstacles to her going and living in Nigeria.

15. At the end of the hearing I reserved my decision on error of law.

### **Decision on error of law**

#### *The “new matter” issue*

16. I have concluded that the judge did err by concluding that the new relationship constituted a “new matter” within the meaning of sections 85(5) and 85(6) of the 2002 Act.

17. The relevant provisions of section 85 read as follows:

“(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a ‘new matter’ if -

(a) it constitutes a ground of appeal of a kind listed in Section 84, and

(b) the Secretary of State has not previously considered the matter in the context of -

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the Appellant under section 120.”

18. I note the lack of clarity from the papers before me as to what was actually said at the hearing before the judge in relation to section 85(5). There is nothing to suggest that the point was canvassed in any detail by the representatives or the judge. There is simply what is stated in paragraph 3 of the judge’s decision. It may be, for the sake of argument, that both representatives agreed that the new relationship was a “new matter”. However, as Mr Singer correctly pointed out, it was incumbent upon the judge to apply the law correctly. Any concessions purportedly made as to the law would be of no consequence if that law was applied erroneously. This would be so particularly in relation to matters relating to the jurisdiction of the Tribunal.

19. My reasons for concluding that the judge was wrong in her interpretation of the law are as follows.

20. First, the effect of section 85(5) is to limit the jurisdiction of the Tribunal. Therefore, in my view, it is necessary to interpret the meaning of the phrase, “a new matter” with caution and narrowly.

21. Second, the “matter” which constitutes the second element of the term, “new matter” clearly means that it is one of the grounds of appeal under

section 84. In the present appeal, the ground of appeal in question is that contained in section 84(2): that the refusal of the human rights claim is unlawful under section 6 of the Human Rights Act 1998. The ground of appeal does not specify “an Article 8 claim”, and certainly not “a private life claim” or “a family life claim”.

22. In this case the Appellant’s original application was made on the basis of Article 8. The specific facet of the Article 8 claim related initially to private life. As time moved on there was a change of circumstances and the Appellant sought to bring into his Article 8 claim a family life dimension. The change in emphasis has not taken the claim outwith the boundaries of “a human rights claim”, nor has it changed in a substantive way the basis upon which the Appellant resists removal: a removal in consequence of the refusal of the claim is unlawful under section 6 of the 1998 Act.

23. Third, in this regard I note the wording of Article 8(1) itself:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

24. In my view, Article 8(1) encompasses what may be described as a ‘composite right’, comprising two elements of the same protected fundamental right. They are, in effect, part and parcel of the same protected right. I note that the Court of Appeal has stated that there is no substantive difference between the assessment of the two facets of this right where removal is proposed (see, for example, Singh [2015] EWCA Civ 630, at paragraph 25). Relationships are part of an individual’s private life, just as they are part of family life (as confirmed in Strasbourg on numerous occasions: see, for example, Petty v UK [2002] 35 EHRR 1 and Niemietz v Germany App No. 13710/88). In other words, any distinction to be drawn is one without a material difference.

25. Fourth, if any distinction is to be made within the ambit of a human rights claim (and the right of appeal attached to the refusal thereof), it would lie as between an Article 8 case on the one hand, and an Article 3 protection case on the other. There is an easy line to draw here.

26. Fifth, I have borne in mind the Respondent’s guidance, but it is just that: guidance. It is of no assistance in interpreting the correct meaning of the section 85(5) and (6). I have not been provided with any other materials to aid with the issue of construction. I have been able to look at the explanatory memorandum which accompanied the introduction of the amendments through the Immigration Act 2014, but could find nothing of any value therein.

27. Sixth, aside from the error in the interpretation of what constituted a “new matter” (on the basis that she regarded the relationship as being a family life issue), the judge should have considered all of these issues as particular of the Appellant’s private life case in any event. As alluded to above, the relationship was clearly part and parcel of the private life.

28. Seventh, I had queried whether any error by the judge would have been material. I am persuaded that the error was material. Although there clearly would be a number of factors counting against the Appellant (including his precarious status during the time of the new relationship), the fact is that the judge did not engage with any of the evidence relating to this matter. There is no consideration of the partner's particular circumstances, including the nature of her job (one which is clearly of value to British society), her personal circumstances, and the earnings of the couple (as that factor may go to any consideration of a Chikwamba argument). There is sufficient merit in the relationship issue to make the judge's error material.

*The suitability issue*

29. Insofar as the second ground of appeal is concerned, I find that the judge erred in her approach to the suitability issue. On the face of paragraph 21 that the judge appears to have regarded her role as being one of review only. That is incorrect. It was incumbent upon her to make her own decision, an exercise of her discretion on the suitability issue.
30. In addition, it is unclear from the final sentence of that paragraph as to what the judge was actually finding by way of facts and/or concluding in relation to the exercise of any discretion.
31. On either basis the judge has erred.

**Disposal**

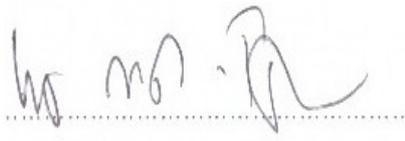
32. Both representatives were agreed that if I concluded the judge was in error, this matter should be remitted to the First-tier Tribunal. I have had regard to paragraph 7.2 of the Practice Statement. In this case there is an absence of findings and conclusions on what is now the central plank of the Appellant's case, namely his relationship.
33. In my view, remittal is appropriate. I would note that it is my understanding that the Upper Tribunal will be issuing an authoritative decision on the meaning of what constitutes a "new matter" in the near future. I do not have any concrete timeframe for this and for this reason have not adjourned the current appeal. However, both parties will no doubt keep a careful out on relevant developments.
34. In respect of the remitted appeal, there are no preserved findings or conclusions. The judge's decision is set aside in full. There is no power to set aside part of a decision only (at least not if the decision relates to a single ground of appeal).

**Notice of Decision**

**The First-tier Tribunal's decision contained a material error of law.**

**I set aside that decision.**

**I remit the appeal to the First-tier Tribunal.**

A handwritten signature in black ink, appearing to read 'Ms Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 11 July 2017

Deputy Upper Tribunal Judge Norton-Taylor