



**Upper Tribunal
(Immigration and Asylum Chamber) and Asylum Appeal Number: UI-2022-000851
[HU/03742/2020]**

THE IMMIGRATION ACTS

**Heard at Field House
On the 25 August 2022**

**Decision & Reasons Promulgated
On the 05 October 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

**AMERICA NATHAN OGBENI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mavrantonis, instructed by Farani Taylor Solicitors
For the Respondent: Mr Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The outcome of this appeal was substantially agreed between the parties and the decision which follows is in short form as a result.
2. The appellant is a Nigerian national who was born on 20 June 1975. He appeals, with permission granted by Upper Tribunal Judge Grubb, against First-tier Tribunal Judge Davey's dismissal of his appeal against the respondent's refusal of his human rights claim.
3. The appellant entered the UK in 2011 and overstayed upon the expiry of his leave to enter later that year. In January 2020, he applied for leave to remain on human rights grounds, relying on his relationship with his elderly aunt and his private life in the UK. The respondent refused that application in February 2020, holding that the appellant

could not meet the Immigration Rules and that his removal would not be unlawful under section 6 of the Human Rights Act 1998.

4. The appellant appealed and his appeal was heard by the judge on 5 May 2021. He prepared the decision dismissing the appeal on 10 May 2021 but it was only issued more than five months later, on 28 October 2021.
5. The judge found that the appellant could not meet the Immigration Rules and that there were 'no circumstances which warrant looking at Article 8 ECHR outside of the Rules or on a freestanding basis'.
6. The appellant sought permission to appeal. It was contended that the judge had failed to conduct any assessment of proportionality, despite his finding that the appellant enjoyed a family life with his aunt, and that there was no assessment of s117B of the Nationality, Immigration and Asylum Act 2002. First-tier Tribunal Judge Nightingale refused permission to appeal but it was granted by Upper Tribunal Judge Grubb.
7. The respondent filed a response to the grounds of appeal, settled by Mr Lindsay, a Senior Presenting Officer. It was accepted by the respondent that the judge had erred in law in failing to undertake a balancing exercise under Article 8(2) and it was accepted that this error was material to the outcome of the appeal. The respondent did not accept that any failure to refer to s117B was material to the outcome of the appeal, citing what had been said in Rhuppiah v SSHD [2018] UKSC 58 about the 'neutral' nature of a finding that s117B(2) and (3) did not militate in favour of the public interest in removal.
8. The respondent also submitted, however, that there was a further error in the decision of the judge. Citing Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216 (IAC), she submitted that she did not require permission to appeal to raise this complaint. She submitted that there was a lack of clarity in the judge's assessment of whether family life existed between the appellant and his aunt and that this finding should be set aside.
9. Before me, therefore, it was apparent that there was significant common ground. At my invitation, Mr Mavrantonis indicated that he was unable to suggest that the respondent was not entitled to raise the complaint about the Article 8(1) finding in her rule 24 response. Nor did he seek to submit that the finding that family life exists between the appellant and his aunt was sustainable.
10. That concession was plainly correct. There is clearly confusion and conflict on that point between [14] and [16] of the judge's decision. At [14], the judge directed himself to Kugathas v SSHD [2003] EWCA Civ 31. In the same paragraph, he observed that 'it seemed on the evidence that there was a family life between the appellant and his aunt'. In the following paragraph, however, the judge observed that 'there are simply the emotional ties between the appellant and his aunt', which I take to be an indication that the judge found that the threshold considered in Kugathas (of 'beyond normal emotional ties') had not been crossed. At [16], however, the judge gave an indication that he thought that there would be 'an interference with the family life

he [the appellant] has enjoyed with his aunt'. As Mr Melvin observed before me, however, it is simply not possible to understand how any such finding can co-exist with the judge's ultimate conclusion that there was nothing which justified departure from the Immigration Rules. After all, a case in which there is a family life which cannot meet the Immigration Rules is the paradigm case in which it is necessary to consider Article 8 outside those Rules.

11. As Mr Mavrantonis accepted, therefore, the judge's decision on the engagement of Article 8(1) in its family life aspect cannot stand. And, as Mr Lindsay had accepted in his rule 24 response, there was no analysis of Article 8(2) in the decision. Those errors must suffice to set aside the decision of the First-tier Tribunal.
12. Mr Melvin tentatively sought to submit, as he had in his skeleton argument, that certain findings of the judge should be preserved and that the matter could be retained in the Upper Tribunal for disposal. He was concerned to ensure that the respondent should retain the finding at [17] of the FtT's decision, that there are no very significant obstacles to the appellant's reintegration to Nigeria. I accept that there is no legal error in that finding but, as the Upper Tribunal explained in AB (preserved FtT findings; Wisniewski principles) Iraq [2020] UKUT 268 (IAC); [2020] Imm AR 1451, it is often difficult and undesirable to draw a bright line around certain findings, which are necessarily related to the assessment of an individual's credibility.
13. Whilst I understand the respondent's anxiety to retain the benefit of those findings, it seems to me that this is a case in which the President's observations are to the fore. There will have to be a fresh consideration of the appellant's relationship with his aunt and that will necessarily involve some consideration of what ties, if any, he has retained to the country of his nationality. To preserve the finding that there are no very significant obstacles to the appellant's reintegration to Nigeria would create a certain artificiality in that exercise, and would potentially stand in the way of the necessarily holistic assessment which the next judge should undertake. In the circumstances, and having reminded myself of paragraph 7.2 of the Senior President's Practice Statement of 13 November 2014, I concluded that the proper outcome was as contended by Mr Mavrantonis: remittal to the FtT to be heard *de novo* by a different judge.

Notice of Decision

The decision of the FtT was vitiated by legal error and is set aside in full. The appeal is remitted to the FtT to be heard afresh by a judge other than Judge Davey.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal

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Immigration and Asylum Chamber

25 August 2022