



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005979
On appeal from: HU/50436/2020
IA/00202/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHRISTOPHER NNAMDI OFOEGBU
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Tony Melvin, a Senior Home Office Presenting Officer
For the Respondent: Ms Amanda Jones, Counsel instructed by Chris & Co Solicitors

Heard at Field House on 24 April 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal outside the Immigration Rules HC 395 (as amended) on grounds of exceptionality.

Background

2. The claimant came to the United Kingdom on a Tier 4 student visa on 28 January 2010, the visa being valid until 1 August 2011. It expired but the claimant did not depart nor did he submit any application to regularise his leave becoming present in the United Kingdom illegally which he continued to be up to and including these proceedings.
3. On 25 September 2019 the claimant was arrested as an overstayer and served with a RED001 liability to removal and a RED003 Statement of Additional Grounds and released on immigration bail.

4. On 1 November 2019 he submitted an application for leave to remain, relying on a non-cohabiting relationship with Ms Maria Case to whom he is now engaged to be married. Further evidence of the relationship was produced via representatives.

First-tier Tribunal

5. The appeal was heard in the First-tier Tribunal on 16 March 2022, cohabitation having begun following the Covid-19 pandemic in February 2022. The First-tier Judge found that the relationship and the surrounding facts do not bring the claimant within the Rules. I have had my attention drawn to a number of reported cases with which I will deal in more detail in the extended version of this decision.
6. The judge's reasoning on Article 8 outside the Rules begins at [55]. He found that at the date of hearing the parties had family life together which would be interfered with if the claimant were to be removed. Ms Case is a British citizen and cannot be required to go and live with the claimant in Nigeria if he returns there, but whether she chooses to do so is a matter for the couple to decide between them.
7. The core of the Judge's reasoning is at [56]-[58]. After stating that he had taken into account Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended), the Judge's reasoning was as follows:

“56. I do take into account section 117B however this must be construed to be consistent with article 8. I do take into account the [Secretary of State's] margin of appreciation in the maintenance of an effective immigration system however when all the other factors are taken into account I am satisfied that when the balance is struck between the competing public and private interests that in the [claimant's] specific case there would be no public interest in the [claimant's] removal given the family life that he has established with his partner.

57. I am also satisfied on the balance of probabilities that there would be no public interest in expecting the appellant to return to Nigeria simply to make an application which given the respondent's previous findings is likely to be granted in view of the fact that I now accept that they are and have been in a genuine and subsisting relationship since 2019.

58. After taking into account all of the evidence available before me I am satisfied that the [claimant] has shown that there are compelling circumstances which would warrant a grant of leave outside of the Rules.”

8. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

9. Permission to appeal was granted by Upper Tribunal Judge Macleman on the basis of a challenge to the adequacy of the First-tier Judge's reasons. Judge Macleman considered that the First-tier Judge had arguably failed to consider whether there were obstacles to family life outside the UK, and if so, their extent; misapplied part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended); failed to justify the assertion at [58] of 'compelling circumstances'; and in relation to the assertion at [57] that there was 'no public interest in expecting the claimant to return to Nigeria simply to make an application' failed to set out either evidence that

such an application would succeed, or any other consideration, such as the immigration history.

10. That is the basis on which the appeal came before the Upper Tribunal today.

Upper Tribunal hearing

11. The submissions at the Upper Tribunal hearing are a matter of record and need not be set out in full here. I had access to all the documents before the First-tier Tribunal.
12. For the claimant, Ms Jones accepted that the decision under challenge was ‘not a paradigm decision’ but relied on the Supreme Court’s guidance in *Jones (by Caldwell) v First-tier Tribunal and another* [2013] UKSC 19 (17 April 2013) at [25] in the opinion of Lord Hope JSC, with whom Lord Walker JSC, Lady Hale JSC and Lord Sumption JSC agreed. She also relied on the evidence in her skeleton argument as to the contribution which the claimant had made to public life in Brighton, and on the guidance of the Court of Appeal in *GM (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1630 (04 October 2019) as to the weight to be given to the rights which non-appellant family members would have to relinquish in joining the appellant family member in their country of origin.
13. Ms Jones further relied upon *Lal v The Secretary of State for the Home Department* [2019] EWCA Civ 1925 (08 November 2019) which applies the Upper Tribunal’s analysis in *Rajendran (s117B - family life)* [2016] UKUT 138 (IAC) (7 March 2016).

Discussion

14. I remind myself of the guidance in *Jones (by Caldwell)* as to judicial restraint when interfering with the First-tier Tribunal’s reasoning:

“25. ... It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it ”

15. Similar discouragement from interfering with findings of fact has been given by the Court of Appeal in *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022):

“66. I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done. The question for us is whether the judge’s finding that the money was a loan rather than a gift was rationally insupportable. In my judgment it was not. In my judgment the judge was entitled to reach the conclusion that he did. I would dismiss the appeal.”

16. I have considered whether either *Lal*, *Rajendran*, or *GM (Sri Lanka)* avail the claimant. The Court of Appeal in *GM (Sri Lanka)* was dealing with a different factual matrix and disentangling the Upper Tribunal’s handling of the different constraints of section 117B(4) and (5). This is not a section 117B(5) situation: the claimant’s

leave was not precarious, but had expired in 2011.

17. The claimant met Ms Case in 2019 on a dating app, at a time when he had no extant leave and was in the UK unlawfully. She is a British citizen, and is a qualifying partner for the purposes of section 117B(4)(b). Section 117B(4)(b) applies to requires the Judge to give little weight to any family life developed with a qualifying partner at a time when the claimant was in the UK unlawfully.
18. *GM (Sri Lanka)* has no relevance to the facts of this appeal, and neither does *Lal*, in which the Court of Appeal considered and approved the Upper Tribunal's analysis in *Rajendran*. All three cases concerned precarious family life, and involved children. The Court of Appeal was not concerned not family life with a qualifying partner established when the claimant was in the UK unlawfully.
19. In this First-tier Tribunal decision, the error of law is clear. The First-tier Judge misdirected himself in law under section 117B(1) and (4). Section 117B(1) states that the maintenance of effective immigration controls is in the public interest. Section 117B(4)(b) required him to give little weight to a private life or a relationship formed with a qualifying partner established by a person at a time when the person is in the United Kingdom unlawfully, as was undoubtedly the case.
20. I am quite unable to understand on the basis of the very brief reasoning set out above what were the compelling or exceptional circumstances justifying the grant of leave outside the Rules. The First-tier Judge's assertion that there were exceptional circumstances is unreasoned and the circumstances of this claimant and his partner are far from exceptional.
21. The First-tier Tribunal's decision is unsustainable. I set it aside and substitute a decision dismissing the appeal.

Notice of Decision

22. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. I remake the decision by dismissing the appeal.

Judith A J C Gleeson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 22 May 2023