IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005887

First-tier Tribunal No: HU/53779/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16 July 2023

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

E O G
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel instructed by Rashid and Rashid Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 29 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND DIRECTIONS

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BACKGROUND

1. By a decision dated 19 March 2023, the Upper Tribunal (myself sitting with Deputy Upper Tribunal Judge Holmes) found an error of law in the decision of First-tier Tribunal Judge Hena dated 10 August 2022 dismissing the Appellant's appeal against the Respondent's decision dated 7 July 2021 refusing his human rights claim based on his private life in the UK. Our error of law decision is appended hereto for ease of reference. In consequence of the error found, we set aside Judge Hena's decision but only paragraphs [37] onwards.

2. The Tribunal gave directions for the filing of further evidence if the Appellant wished to rely on any. None was filed. Mr Melvin filed a skeleton argument setting out the issues which he said required to be determined. Otherwise, the evidence which I had was the same as before Judge Hena. I have read that evidence but refer only to that which is relevant to the issues I have to determine. Reference is made below to documents in the Appellant's bundle as [AB/xx] and documents in the Respondent's bundle as [RB/xx]. I also heard oral evidence from the Appellant, and he was cross-examined. Again, I refer only to those parts of his evidence relevant to the findings I have to make, but I have taken into account the entirety of the evidence he gave.

ISSUES AND LEGAL FRAMEWORK

3. The Appellant is a Kenyan national. The main focus of his human rights claim is his length of residence since arriving in the UK as a student in 2002. He also relies on difficulties in reintegrating in Kenya because of his long residence in the UK.

4. Judge Hena identified concerns with the medical report previously submitted on the Appellant's behalf. The Appellant's free-standing health claim was therefore rejected. That finding is preserved.

5. At the outset of the hearing, Mr Richardson raised an issue about the findings which the Tribunal had set aside which included, he said, a finding by Judge Hena as to the Appellant's length of residence. This is referred to at [6] of the error of law decision. He referred also to Mr Melvin's skeleton argument which he submitted raised for the first time a question mark over the Appellant's length of residence. He invited me in effect to reverse the earlier setting aside of [37] to [39] of Judge Hena's decision and/or to limit Mr Melvin's cross-examination on this issue. He said that the Respondent had accepted the length of the Appellant's residence.

6. During the discussion which followed, Mr Melvin rejected the suggestion that the Respondent had conceded that the Appellant had been in the UK continuously for the period he said he had. Mr Melvin pointed out that on the Appellant's own case, he had returned to Kenya on at least two occasions and that he ought to be

able to ask questions about those visits if the Appellant intended to suggest that his length of residence should entitle him to succeed. He made the valid point that the Appellant had not made an application relying under the Immigration Rules ("the Rules") based on length of residence and were he to do so, the Respondent's caseworker would and would be entitled to consider all the documentary evidence regarding continuity of residence.

7. That prompted Mr Richardson to object still further on the basis that the Appellant had not realised that he might need to submit documentary evidence on this issue. As I pointed out to him, if the Appellant claims to have been continuously resident in the UK for a lengthy period and to rely on that as reason to remain, it is and always was for him to prove. As I pointed out to Mr Richardson, however, the Appellant was present to give oral evidence and could therefore deal with the issue. It would then be for me to make findings in this regard.

8. I should add that, having considered what was said by the Respondent and Judge Hena, neither expressly accepted that the Appellant has been continuously resident in the UK for the period asserted. The Respondent accepts that the Appellant entered first in 2002 and sets out the Appellant's immigration history in the decision under appeal. However, as the Appellant did not meet the Rules based on length of residence at date of application, she did no more than conclude that the Rules were not met for that reason.

9. Although Judge Hena refers at [37] of her decision to the Respondent's position being that the Appellant had only resided in the UK for nineteen years, she does not say that the Respondent made any concession that the period was continuous. Paragraph [38] of her decision merely records the Appellant's case that he had been in the UK for nineteen years and nine months. The Judge's finding at [39] is merely that the Appellant could not meet paragraph 276ADE(1)(iii) of the Rules ("Paragraph 276ADE(1)(iii)") as he had not been in the UK for the requisite period.

10. Having taken instructions whether the Appellant wished to continue with the hearing or to seek an adjournment to provide further evidence on this issue, Mr Richardson indicated that the Appellant wished to proceed.

11. The Appellant accepts that he cannot meet the strict requirements of Paragraph 276ADE(1)(iii) as he had not been resident for twenty years as at date of application. He prays in aid his length of residence as reason why he should succeed outside the Rules.

12. The Appellant also relies on Paragraph 276ADE(1)(vi) of the Rules ("Paragraph 276ADE(1)(vi)"). He claims that there would be very significant obstacles to his integration in Kenya, predominantly

because of the time he has spent outside Kenya and his lack of contacts there.

13. The test in that regard is as set out in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 ("Kamara") as follows:

> "14. … the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

Although Kamara was considering the test in the context of deportation of foreign criminals and section 117C Nationality, Immigration and Asylum Act 2002, the wording of the legislative provision and the principle which therefore applies is the same.

14. Outside the Rules, the Respondent does not suggest that the Appellant has not formed a private life, nor that removal would not interfere with it. The issue is one of proportionality. In relation to the Appellant's claim outside the Rules, it is common ground that I must have regard to the factors set out at section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") when considering the public interest.

15. As I have already indicated, the Appellant places great store on his length of residence in relation to the balance between interference with his private life and the public interest. In the course of his submissions, Mr Richardson made reference to the decision in OA and others (human rights; 'new matter', s.120) Nigeria [2019] UKUT 00065 ("OA (Nigeria)"). The relevant part of the guidance is as follows:

> "**Human rights appeals**
>
> (1) In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in

> favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.
>
> (2) The fact that P completes ten years' continuous lawful residence during the course of P's human rights appeal will generally constitute a "new matter" within the meaning of section 85 of the 2002 Act. The completion of ten years' residence will normally have a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the Secretary of State to refuse P's human rights claim is unlawful under section 6 of the Human Rights Act 1998. This is because paragraph 276B of the Immigration Rules provides that a person with such a period of residence is entitled to indefinite leave to remain in the United Kingdom, so long as the other requirements of that paragraph are met.
>
> (3) Where the judge concludes that the ten years' requirement is satisfied and there is nothing to indicate an application for indefinite leave to remain by P would be likely to be rejected by the Secretary of State, the judge should allow P's human rights appeal, unless the judge is satisfied there is a discrete public interest factor which would still make P's removal proportionate. <u>Absent such factors, it would be disproportionate to remove P or require P to leave the United Kingdom before P is reasonably able to make an application for indefinite leave to remain</u>."
>
> [my emphasis]

16. As Mr Richardson rightly accepted, that guidance is not directly on point since it concerns individuals who have lived lawfully in the UK for a continuous period and not, as Mr Melvin put it, an appellant who has made a string of unsuccessful applications and appeals over a lengthy period in order to fulfil his desire to remain in the UK. Nonetheless, I have regard to what is there said in relation to what Mr Richardson submitted was the policy behind Paragraph 276ADE(1)(iii). I deal with the application of that guidance to the facts of this case in the <u>Discussion</u> section below.

<u>**EVIDENCE AND FINDINGS**</u>

17. The Appellant has provided a witness statement dated 3 February 2022 ([AB/1-5]) which he adopted in evidence. That sets out his immigration history in some detail. Broadly, he says that he came to the UK as a student in September 2002 and has remained here continuously since, save for two visits to Kenya in 2005 and 2007.

18. Dealing first with those two visits, the Appellant was taken to a copy of his passport which is at [RB/13] and which I accept shows that the Appellant left Kenya via Uganda on 11 September 2002 and would therefore have arrived in the UK on 11 or 12 September 2002. I also accept that the copy passport shows that he entered Kenya on 18 March 2005 and left on 2 April 2005.

19. The position in relation to the 2007 visit is less clear as only one page of the passport is in evidence. The Appellant confirmed that his (now expired) passport is with the Home Office as is the replacement which he subsequently obtained.

20. The passport stamp shows that the Appellant entered Kenya on 8 February 2007. The Appellant says that at this time he was working as a teacher in the UK. That is consistent with his witness statement and the chronology provided by the Home Office which shows that the Appellant was given leave to remain as a work permit holder from 14 December 2006 to 14 December 2010. Mr Melvin did not challenge the Appellant on this point. As the Appellant said in evidence, and I accept, therefore, he would have had very little time for a long visit. He cannot remember exactly how long he stayed in Kenya but thinks that it would have been for no more than two weeks. As Mr Richardson submitted and I accept, that would be consistent with a short break for half term holidays from school.

21. A further issue arises as to whether the Appellant has visited Kenya on any further occasion. At [10] of Judge Hena's decision, the Appellant is said to have given evidence that he went to Kenya in 2008 "regarding the piece of land". When I asked him about this, he said that this must have been a mistake or misunderstanding. He had not been to Kenya in 2008.

22. According to his statement, the Appellant says that in the period up to 2011/2012 his land in Kenya was seized by the authorities. Mr Melvin asked the Appellant why, since he had leave to remain until 2012, he had not returned to Kenya then to sort out the problems. The Appellant said that this would cost money and he would not have had time to sort it out. He had a conversation with the elders in his locality who had told him about the problems. He did not have any documents showing that those problems existed.

23. In relation to his passports, the Appellant said that his passport expired in around 2010 and he had renewed it. However, both passports were taken when he was detained in 2012 and had never been returned to him.

24. Whilst the Appellant provided no reason why he would seek to renew his passport after 2010 if he were not intending to return to Kenya thereafter, I accept Mr Richardson's submission that he could not have done so based on the immigration chronology and other documents.

25. The Appellant's medical records begin at [AB/185] and then appear in reverse order on the preceding pages. Those begin in May 2005. Between July 2005 and December 2007 there is a gap (but any visit to Kenya would at that time have been disclosed by the passport). Thereafter, the Appellant made very regular visits to his GP in 2008.

There is a gap between December 2008 and December 2009. The Appellant thereafter visited his GP in April, September, November and December 2010. In 2011, he visited the GP in February, April, May and October. In 2012, he attended the GP regularly between October and December. His visits thereafter became very regular (with gaps of no more than a few months at any time) until the records were produced in December 2021 (see medical records at [AB/148-185]).

26. In terms of his immigration history (as set out by the Respondent at [RB/1-2]), the Appellant had leave to remain until 14 December 2010. He was working as a teacher at that time. A further application was made as a student which was initially refused but reconsidered following an appeal in April 2011 (see [9] to [11] of the Appellant's statement). The Appellant then submitted a human rights application in October 2011 from within the UK. That was refused in January 2012 and a reconsideration request was made in the same month. The application was then refused again in April 2012. The Appellant brought a judicial review against that decision in May which was not withdrawn until December 2014.

27. Furthermore, the Appellant's passports were taken by the Home Office in 2012. He would therefore have been unable to travel after that unless he were to obtain a replacement. Even if he had done that, as Mr Richardson submitted and I accept, the Appellant would not have been able to travel outside the UK after April 2012 as he had no right to remain and would have been denied re-entry. Although Mr Melvin noted that those without leave to remain often manage to travel on false documents, there is nothing to suggest that this Appellant has done so.

28. The Appellant says that he has lived in the UK at the same address since 2012 when he was released from Home Office detention. The Appellant says that he lives in accommodation provided by Mr Gwaro who is his cousin. Judge Hena accepted that Mr Gwaro is the Appellant's distant cousin ([33] of the decision). Mr Gwaro confirms in his letter dated November 2018 at [AB/60] that this is the case but, as Mr Melvin was able to point out, Mr Gwaro does not confirm the period during which the Appellant has lived at the address where he currently resides. I note that Ms Ngomat, Ms Chemtai and Mr Nyamato who provided letters dated November 2018 at [AB/56, 58 and 62] all say that they are either responsible for or contribute to the Appellant's accommodation and maintenance.

29. Whilst there are some inconsistencies about who is responsible for the Appellant's maintenance and accommodation, the medical records and other documents relating to the Appellant's medical treatment are consistent with him having lived at the same address for a considerable period since 2012. He also apparently lived at

that address in the past for a period before he appears to have lived in college as a teacher.

30. That the Appellant has lived at the same address for a long while does not of course confirm that the Appellant has been living continuously in the UK for the whole of that period. However, taking all that evidence together, and in spite of the lack of corroboration from the Appellant's friends, I am satisfied to the standard of the balance of probabilities which applies and on the evidence I have before me that the Appellant has, as he says, been living in the UK continuously since September 2002 save for two short visits to Kenya in 2005 and 2007 neither of which taken singly or together exceed the period of permitted absences during the twenty years which the Appellant would have to establish if he were to apply under Paragraph 276ADE(1)(iii).

31. I can deal more shortly with the evidence about the Appellant's circumstances in Kenya. The Appellant does not cover this in his witness statement save in relation to his medical conditions which he says cannot be treated in Kenya.

32. In evidence before Judge Hena, the Appellant said that he has diabetes, depression and anxiety and is taking medication for high blood pressure. He also said that he was taking anti-depressants. However, Judge Hena did not accept the evidence about the Appellant's mental health problems. I have no updated medical evidence in that regard.

33. I accept that the Appellant has the physical health conditions which he claims, and which appear to be long-standing. Those are attested to by the volume of medical records and other medical letters which the Appellant has produced. The Appellant has not however produced any evidence to show that those conditions cannot be treated in Kenya. He has not provided any evidence that he cannot afford to pay for such medication as he may require. The Respondent has referred in her decision letter ([RB/10]) to medical evidence showing that treatment is available including for mental health disorders if the Appellant does suffer from any such problems.

34. The Appellant does not deal in his witness statement with his family in Kenya. In his oral evidence, he accepted that he has eight siblings, cousins and his parents still living in Kenya. He says that he has had no contact with any of them since 2007. Given that the Appellant has relied for support on a distant cousin in the UK, I do not accept that the Appellant will have lost all contact with his family in Kenya. There is no reason why he could not re-establish contact with those family members even if he has not contacted them for some time. There is also no reason why Mr Gwaro and the Appellant's other friends cannot continue to support the Appellant from the UK if, as they say, they have been responsible for the

Appellant's accommodation and maintenance in the UK over many years. I have no evidence that they could not provide that support whether the Appellant were in the UK or in Kenya.

35. The Appellant has also obtained qualifications and work experience whilst in the UK. Those will stand him in good stead to find employment on return. He is unable to work in the UK (and has been unable to work for many years due to his immigration status). The Appellant admitted that he had not looked into the availability of work as a teacher in Kenya. He would prefer to remain in the UK and work here as a teacher. He did not rely on any argument that his skills would not be transferable. He simply said that he had not considered working in Kenya. There is no evidence that his qualifications and skills would not be accepted in Kenya.

36. I do not place great weight on the evidence that the Appellant had sought voluntary departure to Kenya in 2019. The Appellant said that he was pressurised into agreeing to this. Although I do not accept that Immigration Officers would have forced the Appellant to accept, I can understand why given his circumstances the Appellant might have considered it as an option.

37. The Appellant may well find Kenya unfamiliar given the amount of time which he has spent away from the country. However, he was already in his thirties when he first came to the UK. The letters from his friends in the UK indicate that some have links to Kenya (Ms Ngomat works for the Kenyan High Commission and Mr Gwaro is from the same clan or family as the Appellant). Having formed family, cultural and social links to Kenya in his early adulthood and preserved at least some of those links whilst in the UK, I do not accept that he would face very significant obstacles to integration in Kenya. He will understand how society there works and be able to establish or re-establish his private life in that country. He would also be able to re-establish his family ties. He would be able to work there.

38. There is no dispute as to the Appellant's immigration history. He was here with leave initially which continued from September 2002 to end September 2011. He has had no leave to remain since. Based on the foregoing findings, though, and on the evidence before me, I find that the Appellant has remained in the UK for twenty years, save for two short absences, for over twenty years as at the date of the hearing before me.

DISCUSSION AND CONCLUSIONS

39. For the reasons set out at [31] to [37] above, I find that the Appellant is unable to meet Paragraph 276ADE(1)(vi).

40. Although the Appellant has been in the UK for over twenty years, he made the application which led to the decision under appeal in July 2020. At that time, he had been in the UK for under eighteen years.

41. Paragraph 276ADE(1)(iii) requires completion of the requisite period as at date of application. The application is a fee-paid one. Mr Richardson may be correct in his assertion that the Appellant would qualify for fee waiver but that is not necessarily so (particularly since he is being financially supported by others).

42. Whilst I accept that one of the situations in which an application is not required is when the issue is raised in the course of an appeal, that is the case only where the Respondent consents to the raising of the issue as a new matter. That is consistent with the guidance in OA (Nigeria). No such consent has been sought or given in this case.

43. Mr Richardson did not suggest that the Appellant could meet Paragraph 276ADE(1)(iii). I find that the Appellant cannot meet the strict requirements of the Rules in that regard.

44. Accordingly, the Appellant cannot succeed under the Rules.

45. Turning to the situation outside the Rules, as I have already indicated the only issue is one of proportionality. In order to determine that issue, I take a balance sheet approach of weighing the interference with the Appellant's private life against the public interest.

46. Mr Richardson relied heavily on the length of the Appellant's residence. He submitted that the Appellant in substance meets Paragraph 276ADE(1)(iii) even if he cannot meet that rule in form. Put another way, he submits that the policy which lays behind that rule is that, once a person has been in the UK for that period, it would generally be disproportionate to remove that person because of the links that he/she will have formed to the UK and therefore the level of interference which removal would cause.

47. I asked both representatives to address me as to how this point is to be considered in my determination of proportionality. Does it increase the weight to be given to the Appellant's private life, reduce the weight to be given to the public interest or does it have no impact? Also, how does it correspond to the factors under Section 117B to which I am bound to have regard?

48. Mr Richardson submitted that the argument either impacts on the provision that little weight should be given to the Appellant's private life or reduces the weight to be given to the maintenance of effective immigration control. As he pointed out, the Respondent has not relied upon suitability as a reason to reject the Appellant's application. If the Appellant were to make an application, therefore, and based on the findings I have made, he submitted that the Appellant would succeed. Such an application would be pointless.

He submitted that this is not akin to a "Chikwamba" type situation where those in the UK unlawfully are to be encouraged to follow the Rules by applying for entry clearance from outside the UK in order to maintain effective immigration control. As he pointed out, the Appellant is and has been for many years an overstayer but the substance of Paragraph 276ADE(1)(iii) would still permit him to stay (if he made an application).

49. Against that, the argument is that the public interest still requires an application. After all, as Mr Melvin pointed out, this Appellant has made many (often spurious) applications and appeals in an effort to remain for a sufficient period to allow him to meet the Rules. I accept that this is likely to be the case in relation to many people in the Appellant's position. However, the fact that the Respondent has adopted a "bright line" approach to the period after which removal action will no longer be pursued does not mean that she accepts that after twenty years removal will always be disproportionate. The Rules also still require a fee-paid application for strict compliance. That the Appellant does not meet the Rules is still a relevant factor weighing against him.

50. I have read with care the Tribunal's decision in OA (Nigeria). Even with Mr Richardson's caveat, I do not consider that this decision avails the Appellant. The Tribunal did not decide that it should allow the appeal on the basis that the appellants in that case would satisfy the relevant Rule in substance and that the appeal should succeed outside the Rules on the basis that they were or may be entitled to indefinite leave to remain. It decided that the appeal ought to be allowed so that the appellants could make an application as otherwise removal would be disproportionate. In the case of appellants who were relying on their period of continuous lawful residence, that is understandable because, if the appeals were dismissed, the appellants would lose their entitlement to remain. That is not this case. The Appellant was an overstayer before the decision under appeal and in the course of this appeal and will remain so whatever the outcome unless and until such time as the Appellant applies for and the Respondent grants leave to remain.

51. Generally, the extent of an individual's private life and the interference which removal will entail is to be judged by the strength of that private life as disclosed by the evidence. The burden in that regard lies with the individual appellant. It is then for the Respondent to justify the interference by reference to the public interest.

52. In this case, there is negligible evidence about the strength of the private life which the Appellant has formed in the UK. The main thrust of the Appellant's case is that his length of residence means that he has a stronger attachment to the UK than to Kenya. However, he had (and has) lived in Kenya for a greater proportion of

his life than in the UK. He has some friends here, but the larger proportion of his family (save for his distant cousin) are in Kenya. He can re-establish contact with that family even if I were to accept that he has not had contact for some time. The Appellant has worked and studied in the UK over a period of about nine years but for the longer part of his time in the UK he has not worked or studied because he has had no right to remain. I have concluded that there are no very significant obstacles to the Appellant's integration in Kenya. He can therefore re-establish his private life there. He may prefer to remain in the UK but, as Mr Melvin pointed out, the test is not one of preference. It is a question of actual interference.

53. Section 117B requires me to give little weight to a private life which is formed when an individual is in the UK unlawfully or with precarious status. That applies to the entirety of the Appellant's time in the UK. Whilst I accept that "little weight" does not mean no weight, the degree of weight which I can give to the Appellant's private life is impacted by the evidence I have which, as I say, is negligible in this case.

54. The main factor on which the Appellant relies is the length of time which he has spent here. However, as I have already indicated, the fact that the Rules refer to an applicant being able to meet those Rules after a twenty year period if an application is made does not mean that removal after that period is disproportionate when private life is assessed outside the Rules. Although I accept of course that length of residence may strengthen an individual's ties to the UK, the strength of an individual's private life is to be assessed qualitatively and not quantitively.

55. Turning then to the public interest, no issue is taken in relation to the Appellant's ability to speak English. He gave evidence in that language. Although Mr Melvin did make mention of the use which the Appellant appears to have made of the NHS whilst he has been in the UK (and which I acknowledge), there is no evidence that he is not financially independent. Even though he is reliant on others for his accommodation and maintenance, the Appellant is not reliant on the State in that regard. Those factors though are neutral.

56. I turn to the public interest in the maintenance of effective immigration control. Of course, were it not for my finding that the Appellant's period of residence could meet Paragraph 276ADE(1)(iii) were he to make an application, it could never sensibly be suggested that the Appellant could benefit from the length of his residence in the UK. The public interest would heavily outweigh his private life because the Appellant's residence has all been unlawful and/or precarious.

57. What difference then does it make that the Appellant can (or could if he made an application) meet Paragraph 276ADE(1)(iii)? Whilst I

accept that the substance of this rule is that a person should not be required to leave if he/she has completed the requisite period (absent other countervailing factors), there is nonetheless a requirement for a paid application except in limited circumstances which do not apply here. It remains the position that an applicant is required to make a paid application in order to meet the rule. Without such an application, the fact remains that the Appellant does not meet the Rules and the public interest weighs against him for that reason.

58. I have dealt above with the decision in OA (Nigeria). As I indicated, in those cases, the appellants were at risk of losing their continuous lawful status if their appeals had been dismissed. The Tribunal's allowing of the appeals was on the basis that it would be disproportionate to remove the appellants until they had the opportunity to make an application under the Rules and no more. I recognise that paragraph 276B of the Rules is somewhat different from Paragraph 276ADE(1)(iii) as there are other factors which have to be determined by the Respondent (because an application under paragraph 276B gives rise to an entitlement to indefinite leave to remain). On the other hand, the policy basis for the entitlement to remain is itself stronger because those who can (on the face of it) meet paragraph 276B have remained in the UK lawfully.

59. In conclusion, I am unable to accept that simply because the Appellant can (on the basis of my finding) show that he has been in the UK for over twenty years and would therefore satisfy Paragraph 276ADE(1)(iii) if he made the appropriate application is sufficient to diminish the public interest in requiring him to comply with the Rules by making that application. The fact remains that the Appellant does not meet the Rules. That remains a factor relevant to the public interest in the maintenance of effective immigration control.

60. For those reasons, balancing the interference with the Appellant's private life in the UK as disclosed by the evidence and taking into account his length of residence, against the public interest in the maintenance of effective immigration control, I am satisfied that removal of the Appellant remains proportionate.

61. I therefore dismiss the appeal. As the Tribunal observed in the error of law decision, it remains open to the Appellant to make an application to the Respondent based on his length of residence.

NOTICE OF DECISION

The Appellant's appeal is dismissed.

L K Smith

Upper Tribunal Judge Lesley Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 July 2023

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

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DEPUTY UPPER TRIBUNAL JUDGE HOLMES

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SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms I Ramnundun, Solicitor, Rashid and Rashid solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 14 March 2023

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Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

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DECISION AND DIRECTIONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Hena dated 10 August 2022 ("the Decision") dismissing his appeal against the Respondent's decision dated 7 July 2021 refusing his human rights claim based on his private life in the UK.

2. The Appellant is a Kenyan national. The main focus of his human rights claim is his length of residence since arriving in the UK as a student in 2002. He also relies on difficulties in reintegrating in Kenya as a result of that long residence in the UK and mental health problems.

3. The Judge accepted that the Appellant had been in the UK for nineteen years and nine months at the date of hearing (in June 2022). That fell short of the period required under paragraph 276ADE (1) (iii) of the Immigration Rules ("Paragraph 276ADE(1)(iii)" of "the Rules"). She was critical of the medical report produced in support of the Appellant's claim to be mentally ill. She went on to consider the position on return to Kenya. Relying on a test whether the Appellant had social, cultural and family ties to Kenya (which she found he did), she rejected reliance on paragraph 276ADE(1)(vi) of the Rules ("Paragraph 276ADE(1)(vi)"). The Judge conducted an assessment of Article 8 ECHR outside the Rules. She rejected the Appellant's claim that he would not receive support and treatment in Kenya for any mental health conditions. She gave the Appellant's private life little weight. Having found that the Appellant could not satisfy the Rules, she also found that the public interest in the maintenance of effective immigration control outweighed interference with the Appellant's private life. She therefore dismissed the appeal.

4. The Appellant appeals on two grounds which can be summarised as follows:

   Ground 1: the Appellant had, by the time of the application for permission to appeal been in the UK for twenty years and therefore satisfied Paragraph 276ADE(1)(iii).

   Ground 2: although it was accepted that the Judge had conducted a balancing assessment outside the Rules, it is asserted that the Judge had ignored particular evidence, again amounting to a failure to consider the Appellant's length of residence.

5. Permission to appeal was granted by First-tier Tribunal Judge Hatton on 6 October 2022 in the following terms so far as relevant:

   > "..3. I am mindful that in ***Patel and others v Secretary of State for the Home Department* [2013] UKSC 72**, the Supreme Court expressly rejected at [55] the existence of a 'near miss' principle. Accordingly, I take no issue with the Judge's finding at [39] that the Appellant failed to satisfy

paragraph 276ADE(1)(iii), because as at the date of hearing, he had plainly not amassed 20 years' continuous residence in this country.

4. I do however consider it arguable the Judge erred in asserting at [40] that to alternatively succeed under paragraph 276ADE(1)(vi), the Appellant was required to demonstrate that he has no social ties in Kenya. Plainly, this is not the applicable test, which alternatively requires that 'there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK'.

5. I consider that in applying the wrong threshold test, the Judge arguably erred in finding the Appellant was unable to succeed under paragraph 276ADE(1)(vi), specially because the Judge took no discernible issue with the Appellant's overriding contention that as at the date of hearing, he had been resident in the UK for a continuous period of 19 years and 9 months. It thereby follows that if the Judge's consideration of paragraph 276ADE(1)(vi) is arguably flawed, then it is also arguable that the Judge's subsequent finding that Article 8 is not engaged in the Appellant's favour is correspondingly flawed.

6. Having regard to the above circumstances, permission is granted on all grounds."

6. The Respondent filed a Rule 24 Reply on 12 October 2022 seeking to uphold the Decision. She submits that the Judge had regard to the correct test when citing the Respondent's decision under appeal at [3] of the Decision. She suggests that the Judge when finding that the Appellant retained social, cultural and family ties to Kenya was simply concluding that there would be no very significant obstacles to integration there. The Respondent also pointed out that this issue was not raised in the grounds of appeal.

7. The appeal therefore came before us to determine whether the Decision contains an error of law. If we conclude that it does, we then have to decide whether the Decision ought to be set aside in whole or in part depending on the error found. If we set aside the Decision, we must either remit the appeal to the First-tier Tribunal for re-hearing or re-make the decision in this Tribunal.

8. We had before us a core bundle of documents relevant to the appeal, and the Respondent's and Appellant's bundles as before the First-tier Tribunal. Given the nature of the grounds, we do not need to refer to the documents.

9. At the outset of the hearing, Ms Ramnundun indicated that she would be seeking an adjournment of the hearing in order to instruct Counsel. She said that the Appellant had completed twenty years' residence. As we pointed out, that was not a reason for an adjournment. As we come to below, Paragraph 276ADE(1)(iii) requires that an applicant complete twenty years' residence at date of application not date of hearing. The Appellant, if unsuccessful in his appeal, could therefore simply make a new application. It certainly was not a reason for an adjournment.

Further, this appeal is currently at error of law stage. The Appellant had submitted pleaded grounds and had a grant of permission to appeal, on both of which Ms Ramnundun could rely. We did not need to make a decision whether to adjourn since, following discussion, Ms Ramnundun did not formally seek one. We would in any event have refused that application for the reasons we have given.

10. Having heard submissions from Ms Ramnundun and Mr Melvin, we indicated that we found the Decision to contain an error of law and that we set aside [37] onwards of the Decision. We retained the appeal in this Tribunal and gave directions for a resumed hearing which are set out at the end of this decision.

DISCUSSION AND CONCLUSIONS

11. We do not need to deal with the grounds as pleaded. The error which is disclosed is that set out in the grant of permission to appeal. We accept that this is not expressly pleaded. However, as Judge Hatton pointed out when granting permission, if the wrong test is applied when assessing the claim within the Rules (as we find is the case here) that has potential implications for the assessment outside the Rules. Judge Hena did not go so far as to find that Article 8 was not engaged (as the grant of permission suggests). We anticipate that what Judge Hatton meant was that the Judge might have erred in her conclusion that Article 8 was not breached having regard to the length of residence and the implications of that length of residence in the UK to the Appellant's reintegration in Kenya.

12. We concur with Judge Hatton's view that the application of the correct test might make a difference. Mr Melvin sought to persuade us (as per the Rule 24 Reply) either that the Judge had in substance applied the correct test or that the application of the wrong test could make no difference to the conclusion.

13. Although we accept that, at [3] of the Decision, the Judge set out the Respondent's decision under appeal in full and that this included a statement of the correct test under Paragraph 276ADE(1)(vi), we are unable to accept that she applied that test in substance.

14. The Judge dealt with the Paragraph 276ADE(1)(vi) issue at [40] to [44] of the Decision as follows:

> "40. The remaining applicable limb of 276ADE(1) requires the appellant to demonstrate that he has no social ties to Kenya. Whilst the appellant's cousin, whom he lives with, attended the hearing I note no other friend attended to give evidence as to the strength of his ties in the UK.]
>
> 41. I note that at 56-59 of the appellant's bundle there [are] two letters of support from a Ms Betty Ngomat and Ms Violet Chemtai, both say they financially support the appellant but neither attended the hearing. I find I can place little weight on their letters of support given they failed to attend

the hearing and both letters are vague as to exactly the nature of the ties they have to the appellant.

42. By failing to receive evidence about the strength of his ties in the UK there was a lack of evidence to demonstrate how distant he had become from Kenya. Whilst I accept a period of over 19 ½ years is a significant period to be away from your country of birth, I do not find on the evidence before me that the appellant has made significant ties and relationships in the UK to demonstrate he has lost ties with Kenya.

43. In fact, in evidence the appellant documented the number of his immediate family members who are in Kenya. Whilst I can accept, he has become distant from his sisters due to them being married, he had both parents in Kenya as well as six brothers near where his parents live.

44. I find the appellant has failed to demonstrate on a balance of probabilities that he no longer has social, cultural and family ties to Kenya. I find it probable his ties to Kenya remain culturally, socially, and familial."

15. Whilst we accept that the issue whether there are very significant obstacles to the Appellant's integration in Kenya includes the issue whether he retains ties with that country, the test is a different one. It might be said that there is in fact a higher threshold which now applies. However, the test is more nuanced and does not include only the ties which an individual has but whether he or she will be able to live as an insider in the community in his or her home country.

16. For that reason, we are satisfied that the Judge cannot be said to have applied the right test in substance. She clearly had in mind the previous test as it is cited at both [40] and [44] of the Decision.

17. Whilst an assessment of the position on return to Kenya applying the right test might well lead to the same outcome (particularly if the threshold is a higher one) we have concluded that it would not necessarily be so on the facts here. Although, as we pointed out to Ms Ramnundun, the Appellant cannot succeed under Paragraph 276ADE(1)(iii) on any view since the twenty years' requirement is at date of application, that is an additional factor which has to be weighed in the balance outside the Rules in any re-making.

18. The Appellant should however consider whether the making of a further application rather than continuation of this appeal would be the more cost-effective option. That comment notwithstanding, we conclude for the foregoing reasons that the Decision contains a material error of law.

19. As we pointed out to the parties, the grounds and grant of permission challenge only the Judge's assessment of Article 8 based on the Appellant's private life. There is no challenge to the findings of the Judge at [32] to [36] of the Decision which deal with the medical evidence before her. The sections of the Decision prior to the findings record the evidence given to the Judge and the background facts. We

see no reason to interfere with those paragraphs. We therefore set aside only [37] onwards of the Decision. As the assessment of Article 8 which must be considered afresh involves limited findings of fact, and there is little dispute as to the facts, we see no reason to remit this appeal to the First-tier Tribunal.

20. Although the Appellant has made no application pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce additional evidence, since the Tribunal has to reassess the position as at the date of next hearing, we have given a direction permitting the Appellant to file and serve any further evidence on which he relies prior to the resumed hearing.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Hena dated 10 August 2022 involves the making of an error of law. We set aside paragraphs [37] onwards of the Decision. We preserve the remaining paragraphs. We retain the appeal for re-making of the decision in this Tribunal. We make the following directions:

DIRECTIONS

1. **Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which he wishes to rely.**

2. **The appeal will be listed for a face-to-face hearing to re-make the decision on the first available date after 6 weeks from the date when the decision is sent. Time estimate ½ day. No interpreter required.**

L K Smith

Upper Tribunal Judge Lesley Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 March 2023