Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00412/2016**

THE IMMIGRATION ACTS

Heard at Field House
On 5th September 2017

Decision and Reasons Promulgated
On 21st September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR ABDIMANAAN IBRAHIM HAJI
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Mr Abdmanaan Ibrahim Haji against the decision of First-tier Tribunal Judge S Taylor, promulgated on the 18th April 2017, to dismiss the appeal against the respondent's refusal of his application for leave to remain in the United Kingdom on private and family life grounds.

2. The First-tier Tribunal judge based his decision upon the following factual matrix, which was not challenged by Mr Nath for the purposes of the instant appeal.

3. The appellant is a Kenyan national who was aged 25 years at the date of the First-tier Tribunal's decision. He entered the United Kingdom, aged 15 years, in June 2005. He came with his parents and his younger brother, Sinan, who

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was aged 9 years at that time. His parents' marriage was unhappy and his father was often violent towards both his wife and his children. This became so bad that, in early 2010, the appellant and his brother left the family home in Scotland and moved to London. In July 2010, his father persuaded the appellant that Sinan should join their parents in Kenya. However, things did not work out well, and Sinan returned to live with the appellant in the United Kingdom a few months later. Neither the appellant nor his brother has had any contact with their parents since that time. Sinan was taken into the care of the local authority in 2014 because the appellant was struggling to care for him due to losing his employment. Sinan was thereafter granted limited leave to remain, following a successful appeal on human rights grounds in September 2015. Sinan suffers from myocarditis and rheumatoid arthritis and now lives in his own accommodation, which is provided for him by the local authority. The brothers continue to have a close relationship and the appellant visits Sinan several times a week. Other than the parents from whom they continue to be estranged, they do not have any surviving family members in Kenya.

4. Permission to appeal against the decision of the First-tier Tribunal was granted on all five of the pleaded grounds following a renewed application to the Upper Tribunal. I shall consider them in turn.

5. The first ground is in two parts. Firstly, it is said that the Tribunal made an unsustainable finding by holding that there were "no more than usual familial emotional ties" between the appellant and his brother such as to "engage Article 8" [paragraph 19 of the Tribunal's decision]. Secondly, it is said that the Tribunal made an unsustainable finding by holding that "that the appellant has failed to demonstrate that he has had a private life in the UK which would engage article 8 ECHR" [paragraph 20 of the Tribunal's decision].

6. Perhaps the first point to note is that throughout the decision the judge appears to elide and confuse the first two stages of the well-known analysis of Lord Bingham in **Razgar** [2005] UKHL 27. He states, for example, that whilst Article 8 "may be engaged in view of [the appellant's] relationship with his sibling", he nevertheless is "not satisfied that the relationship is of such magnitude" as to engage it. This seemingly contradictory reasoning appears to stem from a failure to appreciate that the existence of 'private and family life' and the potential engagement of the operation of Article 8 are separate and distinct questions. Moreover, once private and family life is established, the consequences of removal will almost always be of sufficient severity to engage the potential operation of Article 8. The very fact that the judge found that the appellant's private and family life was not of the quality he considered necessary to engage the potential operation of Article 8 could, on one view of it, be taken to imply its existance. However, it is clear from the judge's repeated references to "usual familial ties" that he in fact concluded that the relationship between these particular adult siblings was not of a character that constituted family life at all. I have therefore treated the first ground as a challenge to the legality of that finding.

7. Mr Briddock relied heavily upon the difficult circumstances that the appellant and his brother shared during their childhood (summarised at paragraph 3, above) as the foundation for his submission that it was perverse not to find that the relationship between the appellant and his brother constituted 'family life'. However, the fact that the appellant had previously stood *in loco parentis* to his brother – a fact that had apparently resulted in him being granted a limited period of leave to remain at that time - does not in my judgement make it an error of law to focus upon current circumstances in the assessment of family life as at the date of the hearing. So far as current circumstances were concerned, Mr Briddock cited the evidence recorded at paragraph 12 of the judge's decision as support for his proposition that "the appellant looks after [his brother] when he is unwell including looking after his basic living needs" [paragraph 12 of the renewed grounds of appeal]. However, it seems to me that this overstates the evidence which, as it is recorded at paragraph 12, was that the appellant "looked after him during his periods in hospital" and "gave him general support". I confess that I am unclear as to how it was suggested that the appellant "looked after" his brother at times when he was under the care of healthcare professionals in a hospital. I am however in no doubt that such care as he was able to render in such circumstances could not accurately be described as "looking after his [brother's] basic living needs", and neither is it an appropriate characterisation of the reference by the judge to the appellant providing "general support". Given that the appellant's brother was now living in independent accommodation and had ceased to be financially dependent upon the appellant, I am satisfied that it was reasonably open to the judge to hold that the existence of 'family life' had not established.

8. Nevertheless, the appellant's close relationship with his brother clearly constituted 'private life'. It was accordingly an error of law for the judge to hold otherwise. I shall consider the materiality of this error at a later stage.

9. The second and third grounds may be taken together. The second ground of appeal is that, for the purposes of calculating whether the appellant met the threshold for engagement of paragraph 276B of the Immigration Rules, the judge erred in attaching reduced weight to periods of residence in the United Kingdom that were deemed lawful by section 3C of the Immigration Act 1971. This was clearly an error of law given that residence is either lawful or it is unlawful. There is nothing in between. The third ground is that the judge failed to have regard to the appellant's explanation for why he was unable to meet the requirement of paragraph 276B to pass an English language test. The judge was clearly wrong to state the appellant had not provided such an explanation given that he had stated in evidence that he could not afford to required fee. The extent to which these errors were material to the outcome of the appeal is considered at paragraph 12 (below).

10. The fourth ground is also in two parts. Firstly, it is said that the Tribunal erred in assuming that there was an intermediate threshold of "exceptional circumstances" prior to consideration outside the scope of the Immigration Rules. Secondly, it is said that the Tribunal erred in failing "properly" to

consider the factors listed in section 117B of the Nationality, Immigration, and Asylum Act 2002. So far as the first part is concerned, as I read the judgments in SS (Congo) [2015] EWCA Civ 387, the requirement is for “compelling” rather than “exceptional” circumstances and so, to that extent, the Tribunal made an error of law. It was however an immaterial error given that the second part of the fourth ground is predicated upon the Tribunal having considered the appeal outside the Rules in any event. In this regard, it is said that the Tribunal, at paragraph 20 of its decision, did not consider the factors in section 117B “properly”. I cannot however see any justification for this complaint given that the judge correctly noted that he was enjoined by the subsection to attach little weight to private life that was established at a time when the appellant’s immigration status was (as the judge put it) “limited or uncertain”, and any facility that the appellant may possess in the English language did not have the effect of enhancing his human rights and was thus a neutral factor.

11. The fifth and final ground is that the judge erred in failing to have regard to the fact that the appellant had come to the United Kingdom as a child. However, whilst Mr Briddock is undoubtedly correct in his submission that children cannot be held accountable for their immigration status (or lack of it) in the assessment of their best interests, this ground is once again dependent upon historical fact rather than current circumstance. It thus suffers from the same weakness as I have found to be inherent in the submission that the existence of family life in the past should inform the question of whether it continues to exist in the present (see paragraph 7, above). Moreover, to the extent that time spent as a child is relevant in considering the proportionality of removing a young adult from the UK, this is specifically catered for by paragraph 276ADE(v) of the Immigration Rules. The judge specifically considered this subparagraph at paragraph 16 of his decision and correctly concluded the appellant was unable to meet its requirements.

12. I turn now to consider the materiality of the errors that I identified at paragraphs 8 and 9 (above). As I have previously noted, the combination of the period of the appellant’s lawful residence in the UK and his relationship with his brother sufficed to establish a ‘private life’ upon which the adverse impact of removal was clearly such as to engage the potential operation of Article 8. However, unless the undoubted affect upon his private life also outweighed the legitimate public interest in the consistent application of immigration controls, this appeal would in any event have been bound to fail. In my judgement, the fact that the appellant may have been in a position to make a successful application for leave to remain under paragraph 276B had he had sufficient funds to take an English language test was of very limited relevance to the proportionality exercise under Article 8. This is for two reasons. Firstly - by contrast with paragraph 276ADE and Appendix FM of the Immigration Rules, which are expressed to represent the Secretary of State’s view of the operation of Article 8 (see, especially, the statement of purpose as GEN.1.1 of Appendix FM) – paragraph 276B merely sets out threshold criteria for the potential exercise of discretion in favour of an applicant who has lawfully resided in the UK for a period of 10 years. It does not purport to have any relevance to the operation of Article 8. Thus,

whilst it is capable of being a factor that carries weight in the assessment of a person's rights under Article 8, it cannot be considered to be determinative of them. Secondly, the question of whether the appellant would have passed the required English language test, had he had the funds to sit it, is a matter of a pure speculation. The question of the proportionality of the appellant's removal therefore fell to be considered, at least in the first instance, under paragraph 276ADE of the Immigration Rules; that is to say, by reference to the existence or otherwise of "very significant obstacles to the applicant's integration into the country to which he would have to g if required to leave the UK". That question was considered in detail by the judge at paragraph 16 of his decision wherein he gave cogent and sustainable reasons for answering it adversely to the appellant. I am also satisfied that it was reasonably open to the judge to conclude that there were no additional factors that were sufficiently compelling to merit consideration outside the Rules. I therefore conclude that the errors of law that I have identified in the decision of the First-tier Tribunal were immaterial to the outcome of the appeal, and I therefore exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 not to set it aside.

Notice of Decision

The appeal is dismissed.

Signed Date: 18th September 2017

Judge Kelly

Deputy Judge of the Upper Tribunal