Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10185/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral determination given following hearing	**On 08 March 2019**
On 10 December 2018	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR MARSSAILLE MBOH ARREY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Halim, Counsel, instructed by Fadiga & Co
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Cameroon who appeals now against the decision of First-tier Tribunal Fowell which was promulgated on 28 February 2018 following a hearing at Birmingham (Priory Court) on 14 February 2018 in which the judge had dismissed the appellant's appeal against the respondent's decision refusing his application for leave to remain in the UK under Article 8 on private and family life grounds. This appeal was first before me on 12 September 2018 when I found that Judge Fowell's decision had contained a material error of law such that the decision had to be remade and I decided that it was appropriate in the circumstances of this case for the decision to be remade in the Upper Tribunal.

2. The appeal then came before me again on 2 November when for reasons I gave following that hearing I decided after an application had been made by Mr Halim, who then represented the appellant as he has before the Tribunal today, that the hearing had to be adjourned further. Much of what I said within the error of law decision which I made orally immediately following the hearing on 12 September 2018 will be incorporated into this decision as will be much of what I said immediately following the hearing on 2 November 2016.

3. As I stated in my error of law decision, although at paragraph 1 of Judge Fowell's decision it is said that the appellant arrived in this country in 2009 on a student visa it had always been his case that he in fact arrived in January 2010 but nothing turned on this and it was common ground that after graduating he was given further leave to remain as a member of the Armed Forces until January 2014. He was a reservist in the army and would have been deployed to Afghanistan but for an injury that he had sustained to his knee and in 2014 he served a tour of duty in Cyprus, apparently with the Irish Guards as part of a UN contingent returning on 10 February 2015. As I recorded in that decision again it was common ground that during that period whilst he was serving as a full-time member of the Armed Forces he was exempt from immigration control. However, he did not fulfil the requirements necessary to be exempted from immigration control thereafter under the various Armed Forces exemptions under the Rules, and accordingly he became without leave in or about February 2015. Thereafter he has remained in this country without leave. It is also the case that during an earlier period for about two or three months in 2013 he was also in this country without leave.

4. On 15 October 2015 at a time when the appellant had been in this country without leave for over 28 days he made an application for further leave to remain outside of the Rules, which application was refused on 9 March 2016 on the basis that he had requested leave to remain because of his employment at FDM Group which he had not been entitled to have. He was still apparently a member of HM Reserve Forces, but he was discharged on 31 May 2017 because at that time he did not have a right to remain in the UK.

5. The appellant appealed against the respondent's decision refusing him leave to remain and his appeal was heard before First-tier Tribunal Judge Bart-Stewart and following a hearing on 16 December 2016 in a decision promulgated on 25 January 2017 Judge Bart-Stewart allowed his appeal.

6. The respondent appealed against this decision and in a decision promulgated on 22 September 2017, following a hearing on 31 July 2017, Upper Tribunal Judge Allen allowed the respondent's appeal, set aside Judge Bart-Stewart's decision and remitted the appeal for re-hearing at the First-tier Tribunal. No findings were specifically retained and I noted following the error of law hearing that although clearly it would have been open to Judge Allen had he so chosen to go on to make a finding himself that the appeal anyway must be dismissed on the basis of the material already before him, he chose not to do so.

7. Accordingly when the appeal then came back before Judge Fowell it was on the basis that there was to be a re-hearing and the judge needed to consider all the issues himself.

8. Following this hearing Judge Fowell dismissed the appellant's appeal in a decision made on 28 February 2018 and it is this decision which has now been appealed to this Tribunal, permission to appeal having eventually been granted by Upper Tribunal Judge Coker on 12 July 2018. I will refer to Judge Coker's reasons for giving permission to appeal below.

9. In the grounds the appellant takes issue with Judge Fowell's decision for a number of reasons. It is said that he had failed to give adequate weight to material evidence but had only considered the appellant's case on the basis that having originally being a student, following the decision of the Court of Appeal in *Rhuppiah* he ought, as a student, to have been expected to leave the country at the end of his studies. It was also submitted that the judge had failed to give any or any adequate weight to the appellant's exemplary army service.

10. In giving her reasons for granting permission to appeal Judge Coker stated as follows:

> "1. Although the judge refers to the first First-tier Tribunal decision and that the facts are not in dispute, it does not appear that he has taken account of those factual findings. [This is a reference to the findings previously made by Judge Bart-Stewart.] Although he refers to the value of public service he does not appear to have factored into his assessment the service undertaken by the appellant and the evidence of Major Buchannan [who had given evidence on the appellant's behalf].
>
> 2. The grounds as pleaded are arguable. It may be that the outcome is the same namely the appeal is dismissed but it does seem that the appellant is entitled to know that the undisputed elements of his Article 8 claim have in fact been considered."

11. The submissions made to this Tribunal by Mr Hoshi, who then represented the appellant, consisted of four points. The first was that the judge had been wrong in his application of the well-known case of *Devaseelan*. At paragraph 4 of his decision, Judge Fowell stated as follows:

> "4. His situation now calls for reconsideration. The principles to be applied in such cases are as set out in [the] well-known decision in *Devaseelan* [2002] UKIAT 00702. The first Tribunal's determination [that is the decision of Judge Bart-Stewart] stands as an assessment of the claim the appellant was making at the time of the first determination; it is not binding on the second Tribunal but, there again, the second Tribunal is not hearing an appeal against it. The first decision is always the starting point; facts since then can always be considered; facts before then but not relevant to the first decision can always be considered; the second Tribunal should treat with circumspection relevant facts that had not been brought to the first

> Tribunal's attention; if issues and evidence on the first and second appeals are materially the same, the second Tribunal should treat the issues as settled by the first decision rather than allowing the matter to be relitigated."

12. Judge Fowell then went on at paragraph 5 to state that this was "not a case … in which there is any particular dispute over the facts". The only "principal difference" that he noted since the previous occasion was that the appellant had now commenced a relationship with a British citizen.

13. Mr Hoshi submitted that *Devaseelan* had no relevance to a case where the only previous decision was a decision which had been set aside and on behalf of the respondent, Mr Jarvis [who then represented the respondent] did not seek to suggest otherwise, although he did submit that this approach did not have a material bearing on the decision. I agreed that although the reference to principles established in *Devaseelan* was unfortunate, it did not really have any relevance to the hearing.

14. Mr Hoshi's second submission on behalf of the appellant was that the judge had failed to give any or any adequate weight to the service record of the appellant in the balancing exercise which was necessary. This was coupled with his third point which was that the judge had failed to take into account material evidence being that of Major Buchannan, who had given evidence as to the appellant's army service and how he had been an exemplary soldier. He also referred to the public interest in not wasting the resources which had been spent on his training.

15. With regard to these points, Mr Jarvis on behalf of the respondent had submitted that very little weight could now be given to this because the Rules set out the circumstances in which a person who had served in the Armed Forces should be entitled to remain and the appellant did not meet the Rules. So far as Major Buchannan's evidence was concerned, it was not for him to set out what the policy ought to be with regard to money which this country had spent on training members of the Armed Forces. That was a matter for the government and not for a serving army officer.

16. Mr Hoshi submitted that Judge Fowell had relied far too strongly on the decision of the Court of Appeal in *Rhuppiah* [2016] EWCA Civ 803 to the effect that there was a public interest in students returning to their home countries at the end of their studies (at paragraph 19) because this case was not the same (contrary to what the judge had found at paragraph 45) and was certainly not based on similar facts. The difference in this case was that this appellant it was said had amongst other factors been an exemplary soldier while he was able to be so which was a factor which he was entitled to have properly considered by the judge.

17. Mr Hoshi had a difficulty with this argument because at paragraph 47 Judge Fowell had said in terms that "I take into account [the appellant's] military service, including the tour of duty in Cyprus and his willingness to deploy to Afghanistan" but had gone on to say that "These are important considerations, and clearly carried considerable weight with the judge on the last occasion in the First-tier Tribunal".

18. The judge had however gone on to say that:

> "Nevertheless this has to be set against the important public interest, also stressed in *Rhuppiah*, for students to return to their home country on completion of their studies, having gained the skills and experiences for which they first came."

The judge then found that "The military factor in this case cannot in my view make a decisive difference where the requirements of the immigration rules are otherwise so far from met."

19. Mr Hoshi submitted that throughout the decision the appellant was regarded as being someone who was attempting to remain after the end of his studies, whereas in fact he had continued to remain in this country lawfully and indeed with an exemption from immigration control for some period after those studies were at an end, so this was not a typical student case. Regardless of the judge stating that he had given full account of the appellant's military service it was clear that he had not done so. Also if one considered the statement that this "important consideration" had "clearly carried considerable weight with the judge on the last occasion in the First-tier Tribunal", the judge did not make it clear at all whether or not he had given "considerable weight" to this factor or indeed what weight he had given to it at all. Mr Hoshi submitted that the error was material because it was at least arguable that if appropriate weight, or any weight, had been given to this factor it would have been sufficient in the balancing exercise, having regard to all the other factors (including possibly the genuine relationship now which the appellant had with a British citizen whom the judge found could not reasonably be expected to go to Cameroon with the appellant), that it would have been possible for the judge to have come to a different conclusion.

20. Mr Hoshi's final argument was that the judge had an erroneously restricted interpretation of precariousness when having regard to paragraph 117B(5) of the 2002 Act. He submitted that the judge should have considered all the factors before concluding that the appellant's private life had been established while his stay here was "precarious" and in particular that the appellant did not believe it to be so.

21. With regard to that last point, I retain the view I expressed after the error of law hearing that there was no merit in it whatsoever. The appellant's position clearly was precarious. He had leave for most of the period from 2010 to 2015 but it must have been clear to anyone that there could be no certainty that even if he behaved himself while he was here that leave would be continued, and certainly since 2015 he has not had leave at all. So far as his relationship with his current partner is concerned, to which detailed reference will be made below, it is clear that that relationship on any view was formed at a time when the appellant was not in the country lawfully and so by reason of Section 117B(4) little weight can be given to that in the proportionality exercise.

22. Having considered all the factors very carefully indeed I stated immediately following the error of law hearing that I was "just persuaded" that it was not clear from the decision that the judge had given any real weight to the evidence regarding

the appellant's military service, including the evidence given by Major Buchannan on his behalf. I echoed what was said by Judge Coker when granting permission which was that the appellant was entitled not just to know that these undisputed elements of his Article 8 claim had been considered, but they were considered as part of the proportionality exercise. Accordingly, although I considered that the appellant would still have a difficult task to persuade this Tribunal that it would not be proportionate in these circumstances for him to return to Cameroon, he was entitled to have all his arguments considered and those that were in his favour must be and must be seen to be factored into a decision.

23. I also recorded in this decision (which in light of the evidence given today and the submissions made in particular on behalf of the respondent is of some relevance) that Mr Hoshi then specifically asked me to record that on instructions from the appellant he requested that this Tribunal remake the decision without hearing further evidence, allowing the appellant's appeal. I noted that on the facts of this case that was not only an inappropriate request but the fact that it was made indicated that the appellant did not yet understand the difficulties in his case.

24. Mr Hoshi then made the submission that given the length of time that the appellant's appeal had taken, this appeal should now in any event remain in the Upper Tribunal and be remade here and as already noted I acceded to this submission.

25. Accordingly the hearing was then relisted before me on 2 November 2016 by which time, following directions I had given, I was provided with, amongst other evidence, a statement from the appellant's fiancée, Ms Nwosu, in which at paragraphs 11 and 12 she had stated as follows:

> "11. In 2014, I suffered a sudden ruptured pulmonary artery which damaged the upper lobe of my left lung. As a result, the upper lobe of my left lung had to be removed and the lower lobe does not function at all. As a result of this, I was critically ill and was hospitalised from November 2014 until February 2015. My doctors have advised that I must stay away from places with a high incidence of illness and infection as I have a greatly reduced immune system and am susceptible to picking up diseases easily. I therefore cannot travel to countries where infection and tropical illnesses are high as this may put my health and even my life at risk. I can therefore only travel for very short times and I have to take extra precautions to avoid problems.
>
> 12. As a result, it is not possible for me to leave the UK to live in a place like Nigeria or Cameroon as this would put my health at immediate risk. I continue to be monitored by the Respiratory Team at St George's Hospital twice a year or more depending on my health situation and I also keep in close contact with my GP."

26. I had regard to the consolidated bundle which had been prepared on behalf of the appellant but noted that the medical evidence although present was briefer than I would have liked. There was a one page letter from Dr Dunleavy, Consultant in Respiratory Medicine, St George's Hospital, which confirmed that Ms Nwosu had

indeed suffered a massive pulmonary haemorrhage, as was consistent with her statement, but the medical evidence did not in turn set out the advice which Ms Nwosu claimed in her statement that she had had and nor was there any evidence adduced at that stage as to what the risk would be were she to live in Cameroon.

27. At the outset of the hearing I had indicated to the parties that it was the view of this Tribunal that such evidence might well be critical when the Tribunal was to consider whether or not, having regard to EX.1 of Appendix FM, there would be insurmountable obstacles (as defined within EX.2 as very significant difficulties) which would make the continuation of family life between the appellant and his fiancée very difficult in Cameroon. In these circumstances I invited Mr Halim, who by this stage was representing the appellant, as he has today, to seek instructions from the appellant as to whether he wished the opportunity of obtaining further evidence with regard to this issue.

28. Having sought instructions, Mr Halim addressed the Tribunal as follows (and I recorded this submission verbatim and set it out in my note of hearing which I gave immediately following the hearing on 2 November 2016) as follows;

> "Further to matters raised, we seek an adjournment because of matters arising out of the appellant's fiancée's evidence, especially at paragraphs 11 and 12 [of her witness statement].
>
> She suffered a ruptured pulmonary artery which has damaged the upper lobe of her left lung.
>
> This has had to be removed and the consequence is that the lower lobe does not function at all.
>
> This caused the appellant's fiancée to become critically ill and be hospitalised for four months between November 2014 to February 2015 and the consequent medical advice provided to her is that she must stay away from any foreign area with a high incidence of illness and infection. This is because she has a greatly diminished immune system, which means she is susceptible to picking up diseases easily (especially with infection with tropical diseases).
>
> That raises the very important question so far as EX.1 of Appendix FM of the Immigration Rules is concerned as to whether or not there is an exception in this case and the appellant's fiancée's health could create very significant obstacles preventing their integration into Cameroon.
>
> As things stand, there is no objective or expert evidence to assist the Tribunal as to what is plainly a highly material consideration.
>
> Given the long procedural history in this case and in the interests of justice, we respectfully submit that the prudent course to take would be to seek a short adjournment in order to obtain a discrete and focused evidence on this particular point.

> In light of the history of this case, it will benefit all parties to have all matters fully resolved and for these reasons we would seek an adjournment."

29. On behalf of the respondent Mr Bramble accepted that it would be fair to allow such an adjournment and that the respondent would not seek to argue that this was technically a "new" matter; there was a relationship already in play and what the Tribunal would be doing was looking to factors within the Article 8 ambit which were either within or outside the Rules. If and to the extent that this could be regarded as a new matter, the respondent would have plenty of time to consider it before the resumed hearing.

30. Accordingly I gave directions at that hearing. The appeal was to be adjourned to today's date, and the appellant was given permission to file further evidence so long as this evidence was lodged with the Tribunal and served on the respondent by no later than Friday 30 November 2018. In terms I stated as follows:

> "…
>
> (3) This evidence should be directed to the issue of the extent of any health risks there would be if the appellant's fiancée, Ms Nwosu, was to live in Cameroon, with particular regard to paragraphs 11 and 12 of her witness statement dated 19 September 2018 [referred to above] …
>
> (4) I record that these directions were given orally to the parties immediately following the hearing and have been noted by the parties, and take effect regardless of when these directions are communicated in writing to the parties."

31. Unfortunately, there was a small delay in the service of this further evidence because although dated 28 November 2018 it appears that it was not sent to the respondent until 3 December of this year by first class post. Also, unfortunately, it was sent to the wrong address, because it was sent to the Presenting Officers' Unit rather than the Specialist Appeals Team to which in fact it should have been sent. Whatever the reason the unfortunate consequence was that Mr Lindsay, who has been representing the respondent at the hearing before this Tribunal today, did not have sight of the supplementary bundle which had been produced until today and accordingly had the respondent wished to put in any evidence in response, he was not able to do so, because he had not had advanced notice of this evidence.

32. A minor difficulty arose within the hearing because as a result of Mr Lindsay not having had an opportunity to read the evidence in detail before the hearing, he had initially chosen not to ask any questions of the appellant's cousin, Mr Ogu, but that statement had contained one matter which on reflection Mr Lindsay on behalf of the respondent wished to challenge. However, that was dealt with by the Tribunal permitting Mr Lindsay to change his mind and cross-examine Mr Ogu on the particular point in issue, to which reference will be made below.

33. Although Mr Lindsay in his closing submissions submitted that less weight should be given to the material contained within the supplementary bundle because the

respondent had not had an opportunity of considering this earlier and that the respondent had been prejudiced as a result, the Tribunal indicated to Mr Lindsay that if he considered that there was any prejudice to the respondent because of the late service of this bundle, the Tribunal would grant an adjournment in order to enable the respondent to consider whether or not he wished to either submit further evidence to counter such evidence as was contained within this bundle or to consider further any submissions which the respondent might wish to make regarding this evidence. However, the Tribunal also made it clear to Mr Lindsay that in the event that he did not seek an adjournment, it would be on the basis that the Tribunal would not consider there to have been any prejudice to the respondent, because the respondent would not thereby have been deprived of an opportunity of considering this material further but would have chosen to go ahead in any event.

34. Having considered this further, Mr Lindsay informed the Tribunal that he did not seek a further adjournment and the hearing accordingly proceeded on the basis of the evidence which was now before the Tribunal.

The Hearing on 10 December 2018

35. Accordingly, in addition to the original consolidated bundle, the Tribunal now had the benefit of the supplementary bundle which had been prepared on behalf of the appellant. This included a witness statement from Mr Ogu, the appellant's cousin, and Mr Anyanwu, a friend of the appellant whom the appellant had known through their joint service in the Armed Forces. As already indicated Mr Ogu was cross-examined.

36. Both the appellant and Ms Nwosu gave evidence and affirmed the statements they had previously made. Both were cross-examined.

37. In cross-examination, the appellant was asked first whether he could recall when was the last time that Ms Nwosu had travelled to Africa to which he had originally stated that although he could not recall the dates, briefly, he thought it was "last year I think for a wedding". He continued that she had "stayed for a couple of days and came back because she can't stay too long". He said that this had been a visit to Nigeria.

38. He was then asked whether he was sure that it was "only for a couple of days", to which he replied "yes. Roughly about seven days".

39. The appellant continued by saying it was "definitely not more than seven days" and then he added "I am sorry, it was not last year but earlier this year" but he could not remember the month.

40. He was then asked as to the current status of his relationship with Ms Nwosu to which he said that at the moment they were engaged, and when asked when they had become engaged, he replied "February 2017". As a matter of record, in both the

appellant's and Ms Nwosu's written witness statements, the date had been given as February 2018.

41. The appellant was then asked whether "since becoming engaged" there had been any other occasions when Ms Nwosu had travelled to Africa to which the appellant had replied that there had just been the one. In answer to a question from the Tribunal as to whether the Tribunal could be clear that the appellant was saying that after they had been engaged (which at this stage the Tribunal understood the appellant to be saying had been February 2017) Ms Nwosu had not travelled to Africa other than the one occasion, for no more than seven days, the appellant replied that that was correct.

42. The appellant was then asked whether when Ms Nwosu had travelled to Nigeria this year she had been able to take some medication to prevent her from being sick while she was away to which the appellant had replied that "she is very cautious of her environment and who she mixes with, because she is very susceptible to picking up infection. Every day she picks up phlegm and that puts her in a vulnerable position".

43. He was then asked whether to his knowledge she would take medication to stop her being sick in Nigeria to which he replied that "she is on vitamins, to the best of my knowledge". This Tribunal did not record any more detailed answer than this and the appellant was not asked any more detailed questions as to precisely what medication he understood Ms Nwosu to be taking. There was no other cross-examination.

44. Ms Nwosu then gave evidence, and again as the appellant had done, she affirmed that her earlier witness statement had been truthful and accurate. She confirmed that she had suffered a ruptured pulmonary artery so that her left lung did not work and that she had been advised to stay away from places where there was a lot of illness because of reduced immunity. She said that the effect of the rupture was that part of her left lung had been taken out. Originally the hospital had thought that the lower lobe would get better but it had not done so yet and because it was left there she had sputum phlegm. The hospital liked to monitor this every so often to see if there was any infection which would compromise her immune system internally, as she was liable to get ill. She described her condition as being like "a second class citizen" because her immune system did not work. She regularly had x-rays and blood tests and the doctors preferred to use MRI scans because these were less damaging.

45. In cross-examination Ms Nwosu was asked if she had her passport with her. By chance (because this had not been pre-planned) she had her British passport with her because she had been to see Reeds, the employment agency, recently and had needed her passport and so it was still in her handbag. However, she confirmed that she still had a Nigerian passport and that when she went to Nigeria she needed to show both passports. There were stamps in her passport for Turkey and the USA, but she had used her Nigerian passport when she had visited Nigeria.

46. In evidence she said that she had indeed been to Nigeria this year for seven days (she had not been present in the Tribunal when the appellant had given his evidence).

She showed the court on her mobile phone the communication from a travel agent which confirmed that she had left London on 22 April 2018 and had returned a week later on 29 April 2018. This was consistent with that part of the appellant's evidence to the effect that she had been to Nigeria for seven days this year. She was however also asked whether she had had any other visit to Africa and what was the last time before then that she had travelled to which she replied that she thought it was in March last year (that is 2017) when she had gone to Nigeria for about 60 days.

47. Ms Nwosu was asked when she had become engaged to the appellant to which she replied (consistently with what was contained in her witness statement, and also the witness statement of the appellant, but not as already indicated with the appellant's oral evidence) that it was in February this year. It was accordingly put to her that the appellant had given evidence that they had become engaged in February last year and had made only one trip since then and was asked whether she could explain why the appellant had not been aware of her trip last year, to which Ms Nwosu replied simply that she could not.

48. She confirmed that she had attended the appellant's hearing before the Tribunal in February of this year and was asked if she could recall when in February (this year) she and the appellant had become engaged, to which she said that it was at the start of the month, just before Valentine's Day. She was referred to paragraph 32 of the decision of Judge Fowell (at the hearing which had in fact taken place on Valentine's Day this year) where Judge Fowell had stated as follows, regarding the relationship between the appellant and Ms Nwosu:

> "To recite the obvious points, the couple are not living together and have no children. There has been no formal engagement."

49. Given that the evidence of Ms Nwosu was that the couple have become engaged prior to this hearing Mr Lindsay asked how it was that the judge had stated this, whereas in fact she was saying that they had been engaged before the hearing. Ms Nwosu replied that the appellant had not thought that this was relevant. It had not been in the statement because the appellant had not thought it was necessary.

50. Ms Nwosu was then asked about what medication she was given when she travelled abroad to stop her getting sick on those occasions, to which she replied that she was given some medication but she could not say what the name was because she got it from the nurse when she travelled. She was asked whether it was a medicine and not a vitamin, to which she replied that it was a medicine and not a vitamin. She was asked in terms whether the appellant would know that this was something she took when she travelled, to which Ms Nwosu replied that the appellant should know.

51. In re-examination Ms Nwosu said that the medicine she took was "to stop me from being sick". However, it had very strong side effects so she did not take it for long. It made her get very hot. Her body got very sensitive, particularly when she was in the sun and she did not take these drugs except when she travelled.

52. The Tribunal was concerned that even though there was an inconsistency between what the appellant had said in evidence (that is that he had got engaged in February

2017 whereas in his statement he had said this was the year later) this had not been put to him in cross-examination and so I recalled the appellant to allow Mr Lindsay the opportunity of cross-examining him further. He was asked if he could explain the discrepancy between the dates he gave, to which the appellant replied that this had been a mistake on his part. He originally stated that when Mr Lindsay had suggested the date he had said "yes" to that suggestion, at which point the Tribunal referred to the note of that evidence from which it was clear that Mr Lindsay had not in fact suggested a date but had asked what the date was and it was in answer to that question that the appellant had replied "February 2017". The appellant then added that he had been through a lot of stress and trauma over this case and he got lost in it. It was a mistake. He also asked the Tribunal to remember that he had made a mistake about the dates on which Ms Nwosu had travelled as well, but that he had corrected the initial evidence he had given on that point (he had originally said that he believed she had gone to Nigeria for seven days in 2017 but then corrected that evidence to say that it was this year).

53. At this point Mr Lindsay put on behalf of the respondent that it was now the respondent's position that "you are not really engaged, but are just making it up to help your case". This is of course the first time in which the respondent had sought to suggest that that relationship between the appellant and Ms Nwosu was anything other than genuine. The appellant replied to this as follows:

> "This was never disputed. I did not want to get her involved in this. I did not want her to get involved at all. The case was about my military service. It happened that it became relevant when we were in court. I did not want to use her status to help me. I have always been confident that I have served this country. That was the reason I have been confident."

54. The appellant then continued that this had gone out of his mind. His relationship with Ms Nwosu had only become very strong in the latter part of 2017 and the early part of 2018. There were some things about her at the earlier time that he had not known and the relationship had only become strong in the later part of 2018.

55. The appellant was then asked why it was that he had asked whether why it was that he had said that she had only been out of the country once since they had become engaged in February 2017 to which the appellant merely repeated his original answer to this. It is of course the case that the question had actually been how often Ms Nwosu had gone to Africa since the couple have been engaged, and as a matter of fact that was only once, although if the question was as it appeared to be understood as to how often she had left the country after February 2017, she had also been on another occasion. It is also the case that Ms Nwosu's evidence that she had visited Nigeria for some two months in March 2017 was inconsistent or appeared possibly inconsistent with the evidence of the appellant and Mr Nwosu that the relationship had begun in February or March 2017, because at that time she was in Nigeria.

56. As indicated earlier, there was one aspect of Mr Ogu's evidence which was contrary to the case which Mr Lindsay now was putting on behalf of the respondent, and that

is contained at paragraph 2 of his witness statement which is contained in the supplementary bundle. At paragraph 2 Mr Ogu states as follows:

> "2. I write to confirm that [the appellant] is my cousin and has been my house mate for the last three years. I confirm that during this period, his partner Onyi [Ms Nwosu] has moved in with us for most of the week and I can confirm that they enjoy a close and loving relationship. I have known and look up to him for most of my adult life and he has been of great support to me both morally and academically."

57. In cross-examination, Mr Lindsay asked whether or not Mr Ogu knew when the couple had become engaged, to which Mr Ogu replied that he did not know when, and he could not even remember which year. Mr Lindsay put to him in terms that it was the respondent's position, "having heard the evidence" that they are not in a real relationship at all, and invited Mr Ogu to comment with regard to this position. Having thought about this, Mr Ogu replied simply that this suggestion was "ludicrous". The couple had been together for a while and the suggestion now being advanced on behalf of the respondent "doesn't make any sense".

Submissions

58. On behalf of the respondent Mr Lindsay's primary submission was that none of the witnesses were credible. So far as the appellant's credibility was concerned, the Tribunal was "aware that the appellant had received the warning to tell the truth". I indicated that that was putting a gloss on the Tribunal's opening remarks to the appellant, before he gave evidence, which had not been intended. The appellant had been advised by the Tribunal at the outset that like any other witness it was important that he thought carefully about the answers he gave and if he found he had any difficulty in understanding the questions, he should reflect before answering, because it was important that the appellant gave his evidence effectively and truthfully. The Tribunal would not describe this as a "warning".

59. Mr Lindsay then referred as an inconsistency to the appellant having said "several times" that his "claimed partner" (that is Ms Nwosu) had travelled to Nigeria for only a "couple of days", whereas it had transpired that that was not truthful, because in response to continued questioning he had changed it to "one week".

60. Mr Lindsay also asked the Tribunal to note that he had had to object at one time because the appellant had been "coaching the witness" while she was giving her evidence, in that he had been indicating to her the answer that she should give, and this did not rebound to his credit either.

61. The Tribunal should note that Ms Nwosu had stated that the appellant knew that when she travelled overseas she took medication which was not vitamins which stopped her getting sick. In contrast, the appellant's evidence was that she only took vitamins, which was inconsistent with Ms Nwosu's evidence that he was aware that she took other medication.

62. It is sensible for the Tribunal to deal with these particular submissions at this stage. Although it is right that the appellant initially used the phrase a "couple of days" to describe the length of time that Ms Nwosu had visited Nigeria originally last year but then after correction, which had not been in response to cross-examination, he said had been this year, when he was asked to define what he meant by a "couple of days" he had stated quite openly that this was about seven days, which in the event was consistent with what Ms Nwosu had told the Tribunal. I do not consider realistically that this was an inconsistency in his evidence.

63. With regard to the suggestion that the appellant had been "coaching" Ms Nwosu, it is right to record that Mr Lindsay did raise an objection to the appellant trying to indicate to Ms Nwosu what her answer ought to be, although neither the Tribunal nor Mr Halim actually saw it. However, I have no reason to doubt that Mr Lindsay clearly believed that this is what happened and it may very well have been the case that at part of the evidence when Ms Nwosu could not remember what had happened on a particular occasion the appellant was attempting to remind her of what he believed had happened. The Tribunal at this stage pointed out to the appellant that this was not appropriate if that is what he had been doing because it was important that Ms Nwosu gave whatever her recollection was without any reminders from anyone else but in the judgment of this Tribunal that is very far removed from a case where an appellant is deliberately coaching a witness. It is very common indeed in cases such as this where a genuine couple is giving evidence and one of them cannot remember what occurred for the other party in that couple to seek to remind their partner of what the position was, not appreciating precisely what the rules are with regard to such evidence. I certainly did not draw the conclusion that this was in any way deliberate improper behaviour on the part of the appellant.

64. Similarly, with regard to the evidence regarding the medication that Ms Nwosu takes, she did not know herself what it was, and the highest that the appellant could be said to have put his evidence was that he was not aware of medication other than vitamins. He certainly did not say at all that she did not take any medication other than vitamins, and again I do not consider there is anything in this point either.

65. Mr Lindsay then referred to the discrepancy between when the appellant had said in oral evidence that the couple had got engaged and what was said in the witness statement and also asked the Tribunal to note which the Tribunal does that the evidence in the witness statement that they had started their relationship in February or March 2017 was inconsistent with the evidence which Ms Nwosu had given to the Tribunal that in March 2017 she had gone to Nigeria for 60 days. It was the respondent's submission that clearly the relationship had not started on that date.

66. That may be correct, but the Tribunal does not accept the inference which Mr Lindsay invited the Tribunal to take from this which was that it was "clear that all the witnesses have come here to lie". The primary submission which Mr Lindsay then made was that given the clear credibility issues the appellant had not established on the balance of probabilities that he was in a genuine relationship. So

far as the third witness was concerned, Mr Ogu, he had not even known in what year the relationship had begun.

67. Mr Lindsay also asked the Tribunal to accept that the evidence given by the appellant that he was not aware that his relationship would be an important factor in this appeal hearing was not credible because this is something that he must have been advised about by his previous legal advisors.

68. With regard to this point, I refer back to the observations that I made immediately following the error of law hearing when I indicated that it was quite clear from the submission which the appellant had insisted that Mr Hoshi make on his behalf, which was to invite the Tribunal to proceed to remake the decision without further hearing allowing the appeal, that the appellant clearly had no real understanding of what the legal issues were in this case. I also take account of the fact that it was not until Ms Nwosu made her subsequent statement prior to the hearing which had been due to take place on 2 November this year that it was clear that the issue of whether or not there would be insurmountable obstacles to family life continuing in Cameroon, such that EX.1 would apply, became an issue.

69. I also have in mind with regard to the suggestion that all the witnesses, that is the appellant, Ms Nwosu and the appellant's cousin Mr Ogu, are deliberately lying, that this evidence has remained on all the main parts consistent throughout the various hearings there have been in this appeal. Ms Nwosu has no reason so far as this Tribunal is aware as to why she should support the appellant throughout all these hearings if indeed she is not in a relationship with him as claimed. Her evidence has been entirely consistent and although on some matters the appellant's evidence has been inconsistent, hers has not and Mr Ogu does not pretend to know precisely when they became engaged, but I see no reason to doubt his honesty when he told the court when asked that in his opinion the respondent's present position, that everyone had come to court to lie, was "ludicrous" and made no sense at all. I have no hesitation at all in finding on the basis of the evidence I have heard to the standard of proof necessary, which is the balance of probabilities, that the relationship between the appellant and Ms Nwosu is an entirely genuine one and is subsisting and that they intend to marry. The position that they are in at the moment is that everything is on hold pending the resolution one way or the other of this appeal.

70. The next submission made on behalf of the respondent by Mr Lindsay is that in the alternative, even if the appellant and his "claimed partner" are in a relationship, it had not been established that this relationship was sufficiently durable such that they could properly be said to be "partners". Put at its highest, they were "going out".

71. Again I reject this submission. I am entirely satisfied to the standard of proof necessary that the appellant and Ms Nwosu are engaged as claimed and they are in a durable permanent relationship.

72. So far as the overall Article 8 claim (leaving aside EX.1 for the moment) is concerned the respondent relies on the decision of the Supreme Court in *Rhuppiah*, and he maintains that the appellant must have expected throughout his time here that he would have to return. Although there is supporting evidence of the appellant's

military service in this country, which deserves respect, this was not a legal basis on which this appeal was capable of succeeding. The Immigration Rules set out the circumstances in which a person serving in the forces should be entitled to remain. The appellant does not meet those Rules which is a matter to be weighed in the balance. Furthermore, not only was the appellant's position in this country precarious throughout his time here but it has also been unlawful since 2005. On that basis all of his private life accrued in the UK would have little weight under Section 117B(4) and (5) of the 2002 Act, and furthermore, his relationship with Ms Nwosu will have little weight under 117B(5) because it accrued whilst he was in this country unlawfully.

73. It is quite clear, as I indicated in the error of law decision that I gave, that throughout his time in this country the appellant's immigration position has been precarious and it is also correct that he was here unlawfully certainly since 2015, but these are matters which I will consider below.

74. So far as EX.1 is in issue, which would only arise if the Tribunal was against him on his primary or alternative submissions, Mr Lindsay submitted that the question was whether or not the appellant, together with Ms Nwosu, could relocate to Cameroon. His first position on that was the evidence was not served in accordance with the directions but I have already dealt with that matter above, and having not applied for an adjournment, Mr Lindsay, as I made clear to him during the evidence, has to deal with the evidence as it is now before the Tribunal.

75. Mr Lindsay reminded the Tribunal that the evidence was that Ms Nwosu had been able to travel to countries including and in particular Nigeria for longer than a very brief period of time. In particular she had gone to Nigeria for a period of some two months in March 2017 and thereabouts; the Tribunal has heard evidence that she could take medicine to supress her symptoms and there was no evidence other than anecdotal from Ms Nwosu that this medicine had significant side effects. In any event there were not significant difficulties to her relocating within Cameroon.

76. I then heard detailed submissions on behalf of the appellant from Mr Halim. He dealt first of all with the Article 8 claim in general. The appellant's case was that the Tribunal would have to look through the lens of the Rules but should conduct its own assessment. The Tribunal must still ask itself the five questions in *Razgar* and the Section 117B factors were not exhaustive. So the Tribunal would have to take into account additional factors so long as they were relevant and so long as they bore on public interest considerations. We get assistance from statute and common law also.

77. So far as issues with credibility were concerned, Mr Halim then made submissions with regard to these issues. I have already indicated that so far as the issue of whether or not there is a genuine relationship between the parties is concerned I am entirely satisfied that there is, and so I do not need to deal with that issue in this context. One issue which is however or may become significant is that the appellant "missed" the 60 day trip which Ms Nwosu made to Nigeria. It matters not for these purposes whether or not the appellant was motivated by a desire to ignore a factor

which might suggest that Ms Nwosu was in fact capable of visiting Africa for longer than was originally thought or not; the issue that this Tribunal would have to consider is whether that is indicative of her ability to remain in Cameroon permanently without undue hardship which is the issue to which I shall have to return in due course.

78. I deal now before turning to EX.1 with the Article 8 claim in general. In the judgment of this Tribunal absent EX.1 the appeal cannot succeed on this basis. In light of my findings as to the genuine relationship between the couple, assuming that Ms Nwosu were to remain in this country, there would be an interference with the appellant's Article 8 rights which are sufficiently large to engage Article 8. That interference is however clearly lawful because it would be for the purposes of maintaining effective immigration control and the real issue which the Tribunal would have to consider is whether or not it is proportionate. Even giving full account to the evidence of Major Buchannan and the other evidence and allowing that the appellant is not a bad immigration offender albeit that he has remained since 2015 without leave, nonetheless he does not qualify for leave to remain under the Rules and nor is there anything so compelling about his circumstances as could exceptionally outweigh the large public interest in enforcing those Rules. As is clear from Section 117B(4) and (5) as already referred to above, only little weight can be given either to the appellant's private life or to his family life with his partner for the purposes of the Immigration Rules in general, when considering whether exceptionally leave should be given outside the Rules, and such little weight as can be given is not sufficient to outweigh the large public interest in maintaining effective immigration control. Accordingly, this appeal stands or falls on whether or not EX.1 could be said to apply.

79. With this in mind, Mr Halim referred the Tribunal to the evidence with regard to Cameroon and also with regard to the precise medical difficulties from which Ms Nwosu was suffering.

80. The medical evidence appears clear. Ms Nwosu suffered a major haemorrhage of her left lung as a result of which she has effectively, certainly at the moment, lost the use of one of her lungs. Although she retains part of that lung, that part which remains is not effective which causes her to cough up phlegm. The effect on her is that her immune system is damaged and she is at risk if she goes anywhere for a long period of time where she is at increased risk if contracting an illness and this risk is increased yet further if the medical treatment she is likely to receive would be inadequate.

81. Currently she gets, as she is entitled as a British citizen, excellent treatment on the National Health Service where her condition is monitored regularly and if anything goes wrong with her lungs, it can be put right. The Tribunal accordingly has to look at the situation in Cameroon and determine whether realistically, having regard to the precise wording set out within EX.1 of Appendix FM of the Rules, she could be expected to go and spend the rest of her life with the appellant in Cameroon.

82. I must have in mind throughout this decision precisely what is said within EX.1, which applies to this appellant, because it is not suggested that he does not meet the suitability requirements set out within the Rules.

83. The relevant parts of Section EX of Appendix FM provide as follows:

> "Section EX, exceptions to certain eligibility requirements for leave to remain as a partner or parent
>
> EX.1. This paragraph applies if
>
> …
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen … and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

84. I have already found that the applicant does have a genuine and subsisting relationship with Ms Nwosu, and she is in the UK and is a British citizen, and accordingly the question that has to be answered is whether or not there would be "insurmountable obstacles" to family life continuing within Cameroon for which purpose the definition of EX.2 must apply which is whether or not there would be "very significant difficulties" which would be faced by Ms Nwosu "which could not be overcome or would entail very serious hardship" for her. Against this background and definition, I now turn to the evidence relied upon by the appellant.

85. Mr Halim relies first of all upon the diagnosis which is set out at page 14 of the supplementary bundle, to which reference has already been made above, in which Dr Dunleavy, in her letter of October 2016 had said that:

> "I believe that it is important at this point given the severity of this lady's illness and given the left upper lobectomy and the damage to the rest of her left lung, that we should continue … to follow up at present."

86. This is now supported by evidence from a doctor in Cameroon which is as follows:

> "Since her situation makes her more vulnerable to any slightest infection, she requires a regular and perfect medical monitoring to guard against any unpredictable health hazard that may occur due to her medical history.
>
> In case she gets sick, here in Cameroon, I definitely cannot guarantee she will have the best possible care and medical attention due to a lack of proper medical facilities and expertise to contain her situation during her lifetime.

> Most disheartening and [because of] fear of [the] current situation of constant … civil and political unrest, many hospitals here are shut down, hospitals are vandalised and many health workers [are] leaving … and fleeing the country.
>
> It is my sincere expertise and professional opinion to recommend her to stay in a developed country like UK where decent facilities and expertise will handle and treat any health uncertainties which may occur without fear, emotional, psychological and physical disturbances."

87. This is perhaps not the most detailed medical advice which can be given, but in essence what the doctor here is saying is that in generic terms the difficulty with obtaining medical treatment within Cameroon is that the hospitals are in a very poor position which is exacerbated by the political situation within that country.

88. This is supported by the various country guidance information which is also contained within the supplementary bundle. At paragraph 32 of the supplementary bundle for example, there is a report from Voice of America News dated 25 November 2018 (that is only two or three weeks ago), which refers to Cameroon doctors being "overwhelmed with patients" from which reference is made to reports "that medical staff were fleeing hospitals in the tribal English speaking regions after attacks left several nurses dead and others wounded". On the following page an earlier report of 16 August 2017 also from Voice of America News refers to medical staff fleeing from the volatile regions.

89. Then at page 35 there is reference to a World Health Organisation Country Cooperation Strategy brief for Cameroon which, in a paragraph headed "health policies and system", states as follows:

> "The health system still suffers from a quantitative and qualitative shortage of human resources, despite recruitment efforts in recent years; lack of technical and managerial expertise and unethical behaviour among personnel; information deficiencies, that would otherwise facilitate improvements in the management of health services; a weak legal framework for the effective regulation of pharmaceuticals, which is essential to ensure the availability of quality medical products (including vaccines); lack of funds and low absorption of available funds." (This was taken from the World Health Organisation (May 2014) Country Cooperation Strategy – Cameroon.)

90. Effectively it is the appellant's case that Ms Nwosu effectively is susceptible to any illness and more vulnerable to it because of her now very weakened immune system and realistically it would not be sensible for her to relocate to a third-world country like Cameroon. The evidence regarding Cameroon paints a bleak picture. Clearly she would be unlikely to receive the regular checks she needs following the massive pulmonary haemorrhage including CT scans, MRI scans, treatment with antibiotics for infection and a yearly flu vaccine, also the monitoring of vitamin B deficiencies which would be required to restore normal levels of immunity. The evidence arguably showed that she would not in Cameroon receive anything close to the treatment she would require and this is exacerbated by political turmoil where the health services are in conflict with the armed militants. Effectively the appellant's

case with regard to Ms Nwosu could be summarised as saying that she does not have a lung and therefore is susceptible to disease, and to go to a country to live forever which has a volatile political situation and an antiquated health system is simply untenable.

91. In further support of this submission Mr Halim refers to the background evidence on Cameroon which is contained within the main bundle, in addition to the evidence contained within the supplementary bundle. So for example at page 279 of the main bundle there is reference to the report from the US State Department 2017 Country Report on Cameroon which is dated 20 April 2018, and which begins as follows:

> "Disappearance
>
> There continued to be reports of arrests and disappearances of individuals by security forces, particularly in the northern and Anglophone regions [and of course it is the Anglophone region to which Ms Nwosu and the appellant would certainly go initially]. According to nongovernmental organisations, some activists arrested in the context of the crisis fuelled by perceptions of marginalisation in the northwest and southwest Anglophone regions could not be accounted for as of November. Family members and friends of detained persons were frequently unaware of the missing individual's location in detention until after a month or more of attempting to locate the missing individual."

92. Then at page 281 is an extract from the European Council on Refugees and Exiles on Cameroon dated 12 October 2018 (that is just only two months ago) in which it is stated that "the UN has said the situation is <u>becoming increasingly desperate</u>".

93. Then at page 283 there is an extract from a report of the International Crisis Group on Cameroon, dated 3 October 2018, which refers to the dangers in the Anglophone region as follows:

> "The danger of violence around the vote in Anglophone regions is high. But other parts of the country could also be affected, even if the postponement of the parliamentary and municipal elections to October 2019, which carried their own danger of localised friction, has mitigated some risks. As election day approaches, tensions are growing and the government has become harder-line, opting for repression and peddling conspiracy theories in response to demands for social and political reform. Embryonic movements are emerging across the country, which reject the election. Some of them call for a popular insurrection to unseat Cameroonian President Paul Biya. In the Anglophone regions and parts of the Far North, insecurity may hinder the smooth conduct of the vote."

94. In other words, the position would be that Ms Nwosu, who has a serious medical condition, would have to take her chances in a country where at best the health services on offer are antiquated against the background of instability so severe as might require her to move from place to place.

95. In my judgment, it would be quite obvious folly for Ms Nwosu now, given her current state of health, to move to a country where the medical treatment available to her would at best be patchy and where it would be made more difficult by the political turmoil which so exists within that country. This is not an Article 3 case, and this Tribunal is not required to consider merely whether or not there is some treatment available to her. The test which has to be applied is precisely what is stated within EX.1 and EX.2 which is whether or not obliging Ms Nwosu to go with the appellant to Cameroon (which would be necessary if family life was to continue in this country) "would entail very serious hardship" for her. In the judgment of this Tribunal it would require her to take a risk with her health which a sensible person would not lightly take. Her medical condition is potentially life threatening; at the moment it is under control in this country. If she were to go to Cameroon there is a very real risk first that she would become ill, because absent regular treatment that is much more likely, and secondly if she did she would not be able to obtain sufficient treatment to enable her to deal adequately with that illness. In the judgment of this Tribunal to require her to go to Cameroon now would entail serious hardship because it would require her to take risks with her health which she should not be required to take.

96. It follows that EX.1 applies and accordingly for this reason the public interest does not require the removal of this appellant. Absent this requirement, the decision to remove the appellant is a disproportionate interference with his article 8 rights.

97. For this reason the appellant's appeal must be allowed and I will so order.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Fowell as containing a material error of law and substitute the following decision:

The appellant's appeal is allowed, under Article 8.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 27 February 2019