



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/24910/2016

THE IMMIGRATION ACTS

Heard at Field House

On 11th January 2019

Decision & Reasons

Promulgated

On 4th February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

**KEMOKO [C]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Blair, Counsel

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Guinea whose date of birth is recorded as 30th June 1981.
2. On 16th June 2016 he made application for leave to remain in the United Kingdom based on Article 8 of the European Convention on Human Rights. In that application, however he made mention of his sexual orientation.
3. The Secretary of State refused the application and the Appellant appealed. His appeal was heard on 21st February 2018 by Judge Buckwell sitting at

Taylor House. Judge Buckwell had regard to paragraph 276ADE of the Immigration Rules but was unwilling to give “any weight” to the Appellant’s claimed sexual orientation in his overall assessment of the competing factors material to the proportionality assessment. Judge Buckwell went on to dismiss the appeal.

4. Not content with that decision, by Notice the Appellant made application for permission to appeal to the Upper Tribunal. The application was refused in the First-tier. However, on 16th October 2018, Upper Tribunal Judge Kebede, on a renewed application, granted permission. There were a number of grounds but within those grounds was the submission that Judge Buckwell had erred in not having regard to the Appellant’s sexual orientation in his considerations.
5. Ms Everett quite properly concedes that the judge was simply wrong not to give weight to that issue. That the Appellant might have claimed international protection was not relevant to the human rights claim. It is difficult to conceive of an international protection claim that does not have within it the contention that there has been a violation of human rights, usually Article 3, but necessarily Article 8.
6. In my judgment the decision simply cannot stand and I set it aside. In remaking the decision, I note that at paragraph 21 of the Decision the Appellant is recorded as having given evidence that he had been in the United Kingdom lawfully for ten years from 2007 to 2017. It was noted that on 21st April 2016 his leave had been curtailed but he had made an “in-time” application such that leave continued.
7. The Immigration Rules [276B] provide that where a person has lawfully been in the United Kingdom for ten years, and I paraphrase, but where there are no other sufficient factors which would make it undesirable to grant the relief, then a person is entitled to indefinite leave to remain in the United Kingdom. Clearly when considering the wider application of Article 8, the starting point has to be whether there is an Immigration Rule which is met by the Appellant; that is a factor in the proportionality assessment.
8. The judge was right to have regard to the guidance in the case of **Razgar [2004] UKHL 27** and to the five tests. So often one however is left with the proportionality assessment. In this case the Appellant is in a position where he has an entitlement to indefinite leave to remain. I so find because as Ms Everett points out she is not able to point to any factor to counter that entitlement.
9. I am required as a matter of law to have regard to Section 117B of the Nationality, Immigration and Asylum Act 2002 but there are no factors there set out material to my decision and no submissions have been made by Ms Everett that I ought not to allow the appeal, I allow the appeal.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law.

The decision is set aside and remade such that the appeal in the First-tier Tribunal is allowed on Article 8 grounds.

Signed

Date: 28 January 2019



Deputy Upper Tribunal Judge Zucker