Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001941
First-tier Tribunal: HU/05812/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 3 May 2023	**On 4 June 2023**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR AGBENYIGAN AYI GBONAONTO MENSAH
(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Claimant: Mr Chakmakjian, counsel
For the Respondent: Mr E Terrell, Home Office Presenting Officer

DECISION AND REASONS

The Claimant

1. The claimant is a citizen of Togo born on 17 April 1942. He appealed against a decision of the Respondent dated 15th May 2020 to refuse to grant him indefinite leave to remain. Judge of the First-tier Tribunal Adio

sitting at Hatton Cross on 16th February 2021 allowed the claimant's appeal against the respondent's decision. The respondent appeals with leave against the decision of Judge Adio. Although the respondent was therefore the appellant before us, in order to avoid confusion we shall refer in this determination to the appellant at first instance, Mr Mensah, as the claimant and the Secretary of State as the respondent.

The Claimants' Case

2. Before Judge Adio, the claimant relied on three main grounds. Firstly, under the provisions of paragraph 276B of the Immigration Rules, he argued that he had been in the United Kingdom lawfully for more than 10 years. Secondly, he would face significant obstacles to his reintegration in Togo under paragraph 276ADE of the Rules. Thirdly, the Respondent's decision was disproportionate under Article 8.

3. The claimant was lawfully in the United Kingdom between 2002 and 2008 as a student when he claimed to have made a further application for leave (which was disputed by the respondent). He contended that whilst this application was being considered, his leave was continued by virtue of Section 3C of the Immigration Act 1971. As he had heard nothing from the respondent for several years he applied for leave on 26 October 2019 on the grounds of ten years long residence. It was the refusal of that application that led to the present proceedings. He had not been absent from the United Kingdom for more than six months since arriving here. There were only two short absences in 2000 and 2005. He only went back once to Togo, in 2005 to apply for a passport. He was culturally integrated into the United Kingdom and had no social or economic ties to Togo. His father passed away when he was a minor. He had no ties to his biological mother who had delegated her responsibility to his aunt. His adoptive mother was presently in Ethiopia.

The Decision at First Instance

4. The judge did not accept that the claimant had made any application for leave in 2008. The claimant made no application until the present application in 2019 now before the court and he could thus not show that he had stayed in the United Kingdom with continuous leave for ten years. Section 3C leave was not available to him and the absence of enforcement actions made no difference to the case. The claimant failed under paragraph 276B.

5. At [17] of the determination the judge said : "Moving on to paragraph 276ADE(1)(vi) the [claimant] must show that there are significant obstacles to his integration into the country to which he would have to go if required to leave." We pause to note here that the paragraph in fact refers to "very significant obstacles" a distinction which will become important later on in our decision.

6. The judge continued at [19]: “I find [the claimant] has culturally and socially integrated into the UK. The supporting letters that have been written both from charities and the church add weight to this. He does not have the ability to participate and have a reasonable opportunity to be accepted in Togo based on only having lived there for only twelve years. Most of his life has been spent in the UK….. His limited residence in Togo would make return and integration there extremely difficult. He would have to start all over again both economically and culturally and these would be significant obstacles for him. The delegation and doing away with her responsibility raises the question whether his ties to his biological mother are strong enough to assist him in settling in Togo. It is true that the [claimant] is now an adult, but he would need assistance in settling down and his biological mother lives an independent life with her own husband. The [claimant] would have to find an economic status in the country. This is asking a lot from him for someone who has not lived there for over eighteen years and does not have a solid base there. His friends and those he has known are based in the UK except for his aunt who is based in Ethiopia…. The [claimant] cannot within a very reasonable time build up a variety of human relationships to give substance to his individual private or family life despite his biological mother being there as she has her own responsibility. The [claimant] would have to find his own identity which would not be realistic. I find that the [claimant] satisfies the requirements of paragraph 276ADE(1)(vi) on a balance of probability”

7. Although there was no right of appeal under the Immigration Rules as the judge was satisfied that the claimant could satisfy the rules, the appeal was allowed on human rights grounds, Article 8.

The Onward Appeal

8. The respondent appealed against the decision arguing that it was unclear what significant obstacles would prevent the claimant’s re-integration to Togo. The claimant may not have a close relationship with his mother but that was insufficient to amount to a significant obstacle when considering the return of an adult. The claimant was by his own admission, a healthy adult male who was capable of work, it was unclear why he would be unable to re-establish himself in Togo in a similar manner as he did when he arrived in the United Kingdom. The judge had failed to consider whether the claimant could rely on his Aunt for financial support upon return until he found work. The judge had failed to give adequate reasons for his conclusion.

9. The application for permission to appeal came before Judge of the First-tier Tribunal Chohan on 6 April 2021. In granting permission he noted that the judge may have erred in applying an incorrect test under paragraph 276ADE(1)(VI). At paragraph 17 of the decision, the judge had referred to the test as ‘significant obstacles’, whereas the test in the paragraph was ‘very significant obstacles’.

The Hearing Before Us

10. In consequence of the grant of permission the matter came before us to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then we would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

11. The presenting officer accepted that the judge had referred to the leading case on ability to reintegrate, Kamara [2016] EWCA Civ 813. Although the claimant had not been in Togo since 2005 it was not the case he would be rejected upon return and he had lived in Togo until the age of 12. He could work and support himself. The language used by the judge was of concern. He had used the expression "significant obstacles" on three occasions in the determination. The question was whether the judge had misapplied the law and mis-directed himself. If there was some doubt about that the respondent as the appellant before us should be given the benefit of that doubt.

12. In response, counsel for the claimant argued that the respondent's grounds for permission to appeal were not reflected in the grant by judge Chohan. The respondent's original grounds were merely an attempt to argue with what the judge had found. The judge had taken into account the relevant difficulties which the claimant would face upon return to Togo. Given that the majority of the claimant's life had been spent in the United Kingdom the respondent should acknowledge that there would be very significant obstacles to the claimant's reintegration. The case of Kamara referred to whether it was possible within a reasonable period of time to build up a life in the country to which a claimant was returned.

13. The judge was fully aware that there was a heightened test to be applied in this case and must have been aware that the test was one of very significant obstacles because [3] of the determination included a recital of the respondent's refusal letter which referred to very significant obstacles. The judge was using a shorthand version of the paragraph. The claimant had built up a very strong life in the United Kingdom. It could not be argued that the judge had allowed the appeal on the basis of some obstacles rather he had applied the test of very significant obstacles. The judge had made clear that the claimant satisfied the requirements of 276 ADE.

14. In conclusion the presenting officer argued that the issue in the case was: what was the test which the judge had applied? The addition of the word "very" in the wording of the rule must have some importance. Significant obstacles and very significant obstacles were two different tests. The question was what was the correct test at the date of the hearing. That there was a test in Appendix PL (20 years continuous residence) did not affect the outcome in this case.

Discussion and Findings

15. In summarising at [3] the respondent's reasons for refusing the claimant's application (to the effect that that there were no very significant obstacles to the claimants reintegration into Togo), the judge demonstrated that he was aware that that was the test under the paragraph. Subsequently when he came to give his own reasons for his decision to allow the claimants appeal the judge used the expression "significant obstacles" on three occasions at [17] and one each at [18] and [19]. The respondent's appeal against the judges decision was predicated on the assumption that the obstacles identified by the judge did not amount to significant obstacles (as the judge had found them to be).

16. We do not agree with that assessment. The obstacles set out by the judge (which we have quoted above) were significant ones and to that extent the respondent's grounds of onward appeal were misconceived. The judge gave his reasons for finding significant obstacles, citing a number of them, the lack of support for the claimant in Togo, his lack of familiarity with the country that he had not seen for very many years. That another judge might have taken the view that such obstacles to reintegration were not even significant let alone very significant is beside the point. The judge did give reasons for his findings and to that extent the wording of the respondent's grounds of onward appeal are indeed a mere disagreement.

17. The problem in this case is that significant obstacles is not the test. The obstacles have to be very significant. The addition of the word "very" in the rules has some meaning over and above requiring that obstacles are significant. In Kamara it was said (quoting with approval the earlier Upper Tribunal decision appealed against) "the use of the word "very" showed that the threshold was a high one". There must be a heightened difficulty which prevents reintegration. Before us it was argued by the claimant's counsel that the judge was aware that there was a heightened test not just because the judge had cited the reasons for refusal but also because he had used in his determination expressions such as that it would be "extremely difficult" for the claimant to reintegrate.

18. If the judge believed that the test was merely significant obstacles and applied the test in that way, that was an error. It is clear however from the determination that the judge was of the view that the obstacles in this case were of a heightened nature. Although he did not express himself correctly, the implication of the words he used in his determination was that these were very significant obstacles even if he did not refer to them in terms. If they were merely significant obstacles it would not mean that "a lot needed to be asked of the claimant upon return" or that there would be "extreme difficulty" in reintegrating. The use of those two expressions indicates that the judge's assessment of the obstacles was that they were in the category of very significant even if he did not specifically mention them as such.

19. Whilst it was an error to refer to the requirement as being that the obstacles should be significant it was not a material error of law for the reasons we give in the preceding paragraph. There being no material error of law we find that the judge was correct to decide that the claimant could bring himself within the provisions of paragraph 276ADE of the Immigration Rules as they were at the material time.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold the decision to allow the claimant's appeal

Respondent's appeal dismissed

We make no anonymity order as there is no public policy reason for so doing.

Signed this 11th day of May 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

The judge made a fee award at first instance and we uphold that award

Signed this 22nd day of May 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge