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

OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 65 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 25 October 2018** | ..... |

**Before**

**THE HON. MR JUSTICE LANE, PRESIDENT**
**UPPER TRIBUNAL JUDGE FINCH**

**Between**

**OA – FIRST APPELLANT**
**OB – SECOND APPELLANT**
**EB – THIRD APPELLANT**
(ANONYMITY ORDER MAINTAINED)

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the appellants:Mr M Jibowu, Solicitor, MJ Solomon & Partners (Commercial Rd)
For the respondent: Mr S Walker, Senior Home Office Presenting Officer

***Human rights appeals***

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

*proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.*

*(2) The fact that P completes ten years' continuous lawful residence during the course of P's human rights appeal will generally constitute a "new matter" within the meaning of section 85 of the 2002 Act. The completion of ten years' residence will normally have a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the Secretary of State to refuse P's human rights claim is unlawful under section 6 of the Human Rights Act 1998. This is because paragraph 276B of the Immigration Rules provides that a person with such a period of residence is entitled to indefinite leave to remain in the United Kingdom, so long as the other requirements of that paragraph are met.*

*(3) Where the judge concludes that the ten years' requirement is satisfied and there is nothing to indicate an application for indefinite leave to remain by P would be likely to be rejected by the Secretary of State, the judge should allow P's human rights appeal, unless the judge is satisfied there is a discrete public interest factor which would still make P's removal proportionate. Absent such factors, it would be disproportionate to remove P or require P to leave the United Kingdom before P is reasonably able to make an application for indefinite leave to remain.*

*(4) Leaving aside whether P has any other Article 8 argument to deploy (besides paragraph 276B) and in the absence of any policy to give successful human rights appellants a particular period of limited leave, all the Secretary of State is required to do in such a case is grant P a period of leave sufficient to enable P to make the application for indefinite leave to remain. If P subsequently fails to make such an application, P will continue to be subject to such limited leave as the Secretary of State has granted in consequence of the allowing of the human rights appeal.*

### *Statements of additional grounds*

*(5) A statement of additional grounds for the purposes of section 120 of the 2002 Act must be made in writing.*

## DECISION AND REASONS

### *A. Introduction*

1. This is the re-making of decisions in the appeals of three appellants, who are citizens of Nigeria born respectively in 1979, 2007 and 2010. The first appellant is the mother of the second and third appellants. She entered the United Kingdom in October 2007, with leave as a student.

2. The first appellant was subsequently granted periods of further leave to remain as a student, followed by leave to remain as a Tier 1 Migrant, until 4 May 2013. After this, she became the dependent partner of the father of the second and third appellants, and was given leave in that capacity until 30 January 2016, as were the second and third appellants.

3. On 29 January 2016, the appellants applied for leave to remain. Pursuant to section 3C of the Immigration Act 1971, this had the effect of extending their existing leave.

4. On 9 August 2016, the respondent refused the applications for leave, which he also treated as human rights claims. The respondent's decision, in respect of each of the appellants, constituted a refusal of their human rights claims, with the result that the appellants had a right of appeal to the First-tier Tribunal under section 82 the Nationality, Immigration and Asylum Act 2002.

## *B. The appeals in the First-tier Tribunal*

5. On 28 February 2018, First-tier Tribunal Judge Fox, following a hearing at Hatton Cross on 15 January 2018, decided that the First-tier Tribunal had no jurisdiction to entertain the appeals. On 21 August 2018, Upper Tribunal Judge Finch set aside Judge Fox's decision and stated that the re-making of the decisions in the appeals would be undertaken by the Upper Tribunal. This was the purpose of the hearing before us on 25 October 2018.

6. Judge Fox's conclusion that he did not have jurisdiction involved the fact that, by the time the appeals came to the hearing, the first and second appellants had completed ten years' continuous lawful residence in the United Kingdom. They accordingly submitted that they each met the requirements of paragraph 276B of the Immigration Rules, which reads as follows:-

> "276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
>
> (a) age; and
>
> (b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –

(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

7. Judge Fox found that the issue of paragraph 276B was not one that he had jurisdiction to consider. However, Judge Fox failed to appreciate that the appellants were, in reality, seeking to raise a "new matter", within the meaning of section 85(6) of the 2002 Act. Unfortunately, Judge Fox proceeded on the basis that section 85A of that Act was the key provision, without appreciating that this section had been repealed in October 2014.

## *C. New matters and statements of additional grounds*

8. Section 85(5) of the 2002 Act provides that the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

9. Section 85(6) defines a "new matter" as follows:-

"(6) A matter is a "new matter" if –

(a) it constitutes a ground of appeal of the kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of –

(i) the decision mentioned in section 82(1), or

(ii) the statement made by the appellant under section 120."

10. Section 120 of the 2002 Act provides as follows:-

"**Requirement to state additional grounds for application etc.**

(1) Subsection (2) applies to a person ('P') if –

(a) P has made a protection claim or a human rights claim,

(b) P has made an application to enter or remain in the United Kingdom, or

(c) a decision to depart or remove P has been or may be taken.

(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out –

(a) P's reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which P should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in –

(a) P's protection or human rights claim,

(b) the application mentioned in subsection (1)(b), or

(c) an application to which the decision mentioned in subsection (1)(c) relates.

(4) Subsection (5) applies to a person ('P') if P has previously been served with a notice under subsection (2) and –

(a) P requires leave to enter or remain in the United Kingdom but does not have it, or

(b) P has leave to enter or remain in the United Kingdom only by virtue of section 3C of the Immigration Act 1971 (continuation of leave pending decision or appeal).

(5) Where P's circumstances have changed since the Secretary of State or an immigration office was last made aware of them (whether in the application or claim mentioned in subsection (1) or in a statement under subsection (2) or this subsection) so that P has –

(a) additional reasons for wishing to enter or remain in the United Kingdom,

(b) additional grounds on which P should be permitted to enter or remain in the United Kingdom, or

(c) additional grounds on which P should not be removed from or required to leave the United Kingdom, P must, as soon as reasonably practicable, provide a supplementary statement to the Secretary of State or an immigration officer setting out the new circumstances and the additional reasons or grounds.

(6) In this section –

'human rights claim' and 'protection claim' have the same meanings as in Part 5; reference to 'grounds' are to grounds on which an appeal under Part 5 may be brought (see section 84)."

11. Given that Judge Fox was unaware of the relevant legislation concerning new matters, it is unsurprising that he did not engage with the decision of the Upper Tribunal in Mahmud (s.85 NIAA 2002 – "new matters") [2017] UKUT 00488 (IAC), in which the Upper Tribunal held as follows:-

"29. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal. For example, medical evidence of a serious health condition could be a matter which constitutes a ground of appeal on human rights grounds based on Article 3 of the European Convention on Human Rights which if breached, would mean that removal would be contrary to section 6 of the Human Rights Act, a ground of appeal in section 84(2) of the 2002 Act. Similarly, evidence of a relationship with a partner in the United Kingdom could be a matter which constitutes a ground of appeal based on Article 8 and for the same reasons could fall within section 84(2) of the 2002 Act as if made out, removal would be contrary to section 6 of the Human Rights Act.

30. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. In the absence of this restriction, section 85(5) of the 2002 Act could potentially allow the Respondent to give the Tribunal jurisdiction to consider something which is not a ground of appeal by consent, thereby undermining sections 82 and 84 of the 2002 Act.

31. Practically, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. By way of example, evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential

requirements to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to section 6 of the Human Rights Act."

## *D. Questions to be addressed on re-making the decisions in the appeals*

12. Having set aside the decision of Judge Fox, Upper Tribunal Judge Finch gave directions, which required the parties, at the re-making hearing in the Upper Tribunal, to address the following questions:-

    (a) Whether the first and second appellants' reliance on paragraph 276B of the Immigration Rules amounts to a "new matter" for the purposes of section 85(5) of the 2002 Act;

    (b) Whether the appeals of the first, second and third appellants should be allowed or dismissed; and

    (c) Whether additional grounds for the purposes of section 120 of the Nationality, Immigration and Asylum Act 2002 can be raised within a witness statement or orally.

13. In preparation for the hearing on 25 October 2018, Mr Ian Jarvis, Senior Home Office Presenting Officer, prepared a skeleton argument, with annexes. Mr Walker, who represented the respondent at the hearing, spoke to this skeleton argument. We wish to record that we found Mr Jarvis's written submissions extremely helpful.

## *E. Discussion*

### *(a) Whether the reliance of the first and second appellants on paragraph 276B of the Immigration Rules amounts to a "new matter"*

14. Section 82(1)(b) of the 2002 Act provides as follows:

> (1) A person ('P') may appeal to the Tribunal where-
>
> .....
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P…

15. Section 84(2) provides as follows:

> "(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998."

16. Section 113 of the 2002 Act defines a human rights claim as:

"a claim made by a person that to remove him from or require him to leave the United Kingdom or to refuse him entry to the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998".

17. Section 6(1) of the 1998 Act says:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

18. In order to constitute a new matter, the assertion that a person has, by reason of completing ten years' continuous residence, brought themselves within the ambit of paragraph 276B of the Immigration Rules must be capable of having an effect on the outcome of that person's human rights appeal. It must, in other words, have a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the respondent to refuse a human rights claim is unlawful under section 6 of the 1998 Act.

19. As the Upper Tribunal said in Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC):-

"45. We find we must take issue with the last part of paragraph 23 of Greenwood (No. 2). The former ability of the Tribunal to conclude that a decision of the Secretary of State was unlawful, with the result that a lawful decision remained to be made by her, depended upon the fact that under the version of section 86 of the 2002 Act as it was, prior to its amendment by the 2014 Act, the Tribunal was required to allow an appeal insofar as it thought that a decision against which the appeal was brought or was treated as being brought was not in accordance with the law (including immigration rules). That requirement has been removed from the legislation. In this regard, therefore, Parliament has most definitely "taken the opportunity to interfere".

46. The correct approach to adopt in a human rights appeal under section 82(1)(b) is as follows. As section 84(2) makes clear, and as is reflected in the present notice of decision, served in compliance with the Immigration (Notices) Regulations 2003, the decision being appealed is the decision to refuse the claimant's human rights claim. Section 84(2) provides that the only ground upon which that decision can be challenged is that "the decision is unlawful under section 6 of the Human Rights Act 1998". Section 6(1) of the 1998 Act provides that it "is unlawful for a public authority to act in a way which is incompatible with the Convention rights".

47. The definition of "human rights claim" in section 113(1) of the 2002 Act involves the making of a claim by a person that to remove him or her from or to require him or her to leave the United Kingdom would be unlawful under section 6.

48. The task, therefore, for the Tribunal, in a human rights appeal is to decide whether such removal or requirement would violate any of the provisions of the ECHR. In many such cases, including the present, the issue is whether the hypothetical removal or requirement to leave would be contrary to Article 8 (private and family life).

49. In such a paradigm human rights appeal, therefore, we do not consider that paragraph 21 of the decision in Greenwood No 2, including its sub-paragraphs (a) and (b), has any purchase. If the decision to refuse the human rights claim would violate section 6 of the 1998 Act, the Tribunal must so find. In such a paradigm case, we see no purpose in the Tribunal making any statement to the effect that "a lawful decision remains to be made by the Secretary of State". It would certainly be wrong to conclude that, having allowed the appeal, the appellant's human rights claim remains outstanding, in the sense that the Secretary of State must make a fresh decision on that claim. The actual position will be that the Secretary of State, faced with the allowing of the appeal by the Tribunal, will decide whether and, if so, what leave to enter or remain she should give to the appellant. Any deportation decision or decision under section 10 of the 1999 Act that the Secretary of State may have made in respect of the appellant will fall away. Again, we see no need for the Tribunal to make any express statement to that effect.

…

68. … The basic limitation of a human rights appeal is that it can be determined only through the provisions of the ECHR; usually Article 8. A person whose human rights claim turns on Article 8 will not be able to advance any criticism of the Secretary of State's decision-making under the Immigration Acts, including the immigration rules, unless that person's circumstances are such as to engage Article 8(2).

69. Although section 85 of the 2002 Act makes provision for certain matters to be considered on an appeal under section 82(1)(b), we do not see how section 85 can expand the scope of a human rights appeal of the kind with which we are concerned, so as to require the separate judicial adjudication – outside section 6 of the 1998 Act – of matters such as whether the claimant had or had not, breached the immigration rules. On the contrary, the wording of section 85(1) makes it clear that the appeal can include only "an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1)", which is limited to refusal of a protection claim or of a human rights claim and revocation of protection status. Likewise, section 85(2), which concerns section 120 statements, is tied to the grounds of appeal under section 84.

70. Section 85(4) permits the Tribunal to consider "any matter which it thinks is relevant to the substance of the decision". In a human rights appeal, therefore, a matter will be relevant if and only if it goes to the question of whether the decision is unlawful under section 6 of the 1998 Act."

20. Commenting on Charles, the Home Office Guidance: Rights of Appeal (Version 7.0 – 30 July 2018) says this:-

"The question of whether a decision was in accordance with the law will nevertheless be highly relevant in many human rights appeals. Under section 84(2) of the current statutory framework, an appeal against the refusal of a human rights claim must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998. Where it

> is found that the claimant's rights under Article 8(1) of the European Convention on Human Rights are engaged, the Tribunal will go on to consider whether any interference occasioned by the decision under challenge would be "in accordance with the law" for the purposes of Article 8(2). That is the point at which the lawfulness of the decision in a wider sense may now be relevant."

21. As a general proposition, the completion of ten years' continuous lawful residence in the United Kingdom by a person who has appealed against the refusal of a human rights claim will be a matter that constitutes a ground of appeal, compatibly with the decision in Mahmud, because that fact is capable of having a material bearing on the outcome of the appeal.

22. Precisely how that might occur is something we shall address when dealing with paragraph (b) below. For the present, however, the parties before us were agreed that the completion by the first and second appellants of ten years' continuous lawful residence, whilst their appeals were pending before the First-tier Tribunal, constituted a "new matter" for the purposes of section 85 of the 2002 Act. The respondent gave consent for the new matter to be considered by the Upper Tribunal.

***(b) Whether the appeals of the first, second and third appellants should be allowed or dismissed***

23. Having established that reaching ten years' continuous lawful residence brings a person within paragraph 276B, to the extent that this is capable of having a bearing on the outcome of the person's human rights appeal, it is necessary to examine, in the context of the present appeals, whether that fact is determinative of a positive appellate outcome for the first and second appellants.

24. The first point to make is, of course, that satisfying paragraph 276B(i)(a) is a necessary but by no means a sufficient factor for indefinite leave to be granted. The remainder of the requirements must also be satisfied, in order for a person to be entitled to indefinite leave. Amongst these requirements are the manifestly important public interest considerations dealt with in paragraph 276B(ii).

25. In the present case, Mr Jarvis's skeleton argument stated that the respondent "does not raise a public interest objection to leave being granted". The respondent also indicated that paragraph 276B(v) did not represent a difficulty for the first and second appellants.

26. On behalf of the appellants, Mr Jibowu submitted that the first appellant satisfied paragraph 276B(iv) by reason of the fact that she had a master's degree certificate and also a "Life in the United Kingdom" certificate. The second appellant did not require these.

27. The significance of an appellant proving to a First-tier Tribunal judge that he or she meets the requirements of a particular immigration rule, so as to

be entitled to be given leave to remain, lies in the fact that – provided Article 8 of the ECHR is engaged – the respondent will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the respondent in the proportionality balance, so far as that factor relates to the particular immigration rule that the Tribunal has found to be satisfied.

28. Whether or not such a finding in favour of an appellant is likely to be determinative of the human rights appeal will depend upon whether the respondent has any additional reason, effectively overriding that particular rule, for saying that the effective operation of the respondent's immigration policy nevertheless outweighs the appellant's interest in remaining in this country. To take one simple example, an appellant who persuades the First-tier Tribunal that he meets the requirements of the Immigration Rules relating to entrepreneur migrants will not thereby succeed in his human rights appeal if the appellant has been found by the respondent (and the Tribunal agrees) that the appellant falls foul of one or more of the general grounds of refusal contained in Part 9 of the Rules; for example, because he made false representations in connection with a previous application for leave (paragraph 322(2)).

29. It also has to be emphasised that where the Tribunal finds that an appellant's compliance with an immigration rule is such as to require the human rights appeal to be allowed, this does not mean that the appellant is entitled, without more, to be given leave of the precise nature and duration envisaged by that rule. As was explained in Charles, the task of the Tribunal in a human rights appeal is confined to determining the sole ground in section 84(2) of the 2002 Act. We shall have more to say about this later.

30. Let us now return to paragraph 276B. We have seen how, as a general proposition, satisfying the ten years' continuous lawful residence requirement will be sufficient to constitute a "new matter" because it is capable of affecting the outcome of the human rights appeal. However, as we have also seen, paragraph 276B contains a number of other requirements. In the present appeals, the respondent has now been able to confirm that the requirements of paragraph 276B are met in the case of the first and second appellants (the respondent having taken no point on paragraph 276B(iii)).

31. Nevertheless, despite any case management in the First-tier Tribunal, which may serve to put the respondent on notice that there is a long residence element to be considered at the hearing, a First-tier Tribunal judge may still often be faced with a situation where, although the ten years' requirement is found to be met, the respondent's representative at the hearing will submit that the respondent is not in a position to say that, as matters stand, the other elements of the paragraph are also met; for instance, because checks need to be made regarding paragraph 276B(ii)(c).

32. What should the judge do in these circumstances? The answer lies in continually bearing in mind that this is a human rights appeal, where the sole ground is whether the decision to refuse the human rights claim is unlawful under section 6 of the 1998 Act.

33. Accordingly, where the judge concludes that the temporal requirement of paragraph 276B is satisfied and that there is nothing in the evidence before the judge to indicate that an application under paragraph 276B, made by the appellant within a reasonable time after the hearing, would be likely to be rejected by the respondent, the judge should allow the human rights appeal; provided, of course, he or she is satisfied that the respondent cannot rely upon any discrete public interest factor which would still make removal proportionate. In the absence of such a factor, it would not (at least as a general matter) be proportionate to remove the appellant or expect the appellant to leave the United Kingdom (see paragraph 16 above).

34. In the present case, since there was no disagreement regarding the ability of the first and second appellants to satisfy paragraph 276B, Mr Jibowu submitted that the respondent should grant the first and second appellants indefinite leave to remain.

35. Two points need to be made in response. First, even where (as here) the human rights appeal falls to be allowed because the first and second appellants have been found, as matters stand at the date of hearing, to meet the requirements of paragraph 276B, it remains the position that the only action the Tribunal can take is to allow the appeal on the ground specified in section 84(2). Neither the First-tier Tribunal nor the Upper Tribunal (exercising its appellate jurisdiction) has power to direct the respondent to grant any particular form or duration of leave.

36. The second point follows from the first. In all cases, therefore, including where (as here) there is not merely no reason to suppose that indefinite leave would not be granted but an acceptance by the respondent that all the requirements of the rule are currently met, after the appeal is allowed, an application will need to be made to the respondent by the successful appellant for indefinite leave to remain. If the Rules so require, that application will require payment of a fee (or proof of entitlement to fee remission).

37. Unless waived by the respondent, the requirement to make such an application is, thus, unaffected by the allowing of a human rights appeal. Leaving aside whether the appellant has any other Article 8 argument to deploy besides paragraph 276B (as to which, see paragraphs 39 to 44 below), and in the absence of any policy to give successful human rights appellants a particular period of limited leave, all that the respondent is required to do is grant the appellant a period of leave that is sufficient to enable the appellant to make the application for indefinite leave to remain. (Section 3C of the Immigration Act 1971 will extend that leave if it would otherwise expire before the respondent has reached a decision on the application).

38. If an appellant, whose appeal has been allowed by reference to paragraph 276B, subsequently fails to make an application for indefinite leave to remain, then he or she will continue to be subject to such limited leave as the respondent has granted, in consequence of the allowing of the human rights appeal.

39. Although we have spent considerable time on paragraph 276B, Mr Jarvis's skeleton argument concedes that all three of the appeals fall to be allowed. Besides the issue of paragraph 276B, the respondent accepts that the second and third appellants satisfy the specific Article 8 private life requirements of paragraph 276ADE and that, as a consequence, the refusal of the first appellant's human rights appeal will result in "unjustifiably harsh consequences" for her, as provided by GEN.3.2(2) of Appendix FM of the Immigration Rules.

40. Paragraph 276ADE reads as follows:-

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

41. GEN.3.2, so far as relevant, provides as follows:-

> "GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

…"

42. In the light of the detail provided in respect of the private lives of the second and third appellants, their length of residence in the United Kingdom and (when applying the reasonableness test at paragraph 276ADE(1)(iv)) the continuous lawful residence of the second appellant and the first appellant, the respondent accepts (and we agree) that it would be unreasonable in the circumstances to expect the second and third appellants to leave the United Kingdom.

43. Accordingly, the respondent accepts (and we agree) that the appeals of the second and third appellants fall to be allowed on the basis that each of them satisfies paragraph 276ADE(1)(iv) and that the respondent has no other public interest argument for contending that the proportionality balance nevertheless falls to be struck against these two appellants.

44. As for the first appellant, quite apart from the fact that it would be disproportionate to remove her or require her to leave before she has had the opportunity of making a paragraph 276B application, it would, in all the circumstances, be unjustifiably harsh for her to have to leave the second and third appellants and return on her own to Nigeria. Accordingly, she meets the requirements of GEN.3.2 of Appendix FM. In her case also, the respondent has no other public interest argument to deploy.

45. The outcome, therefore, is that the hypothetical removal from or requirement to leave the United Kingdom would constitute a disproportionate interference with the respective Article 8 rights of all three of the appellants.

***(c) Whether additional grounds for the purposes of section 120 of the 2002 Act can be raised within a witness statement or orally at a meeting***

46. In MU ("Statement of Additional Grounds": Long Residence – Discretion) Bangladesh [2010] UKUT 442 (IAC), the Upper Tribunal held that there is no particular form specified for the purposes of section 120(2) of the 2002 Act. Nor is there a specific time limit for the production of such a statement.

47. On behalf of the respondent, Mr Jarvis accepts that it is, accordingly, possible for the contents of a witness statement to constitute a statement

for the purposes of section 120(2); provided, importantly, that the witness statement is served on the Secretary of State or an Immigration Officer.

48. The Upper Tribunal held in Ahmad (Scope of Appeals) [2018] UKUT 0084 (IAC) that:-

> "56. … any statement required to be made under [section 120] has to take the form of a statement made to the respondent or an Immigration Officer, as the case may be. Section 120(5) makes this requirement express in the case of subsequent statements; that is to say, where a section 120 notice has been subsequently served. The requirement is, however, in our view inherent in the preceding subsection of section 120."

49. In Jaff (s120 Notice; Statement of "Additional Grounds") [2012] UKUT 00396 (IAC), the Upper Tribunal held that a statement of additional grounds "must as a minimum set out with some level of particularity the ground or basis relied upon by the appellant as a basis for him remaining in the UK and upon which he has not previously relied" (paragraph 24). That may be "in a document served after the Notice of Appeal is filed" (ibid).

50. The suggestion in the italic words preceding the reported decision in Jaff, that a statement of additional grounds may "perhaps" be made "at the time of … the hearing of the appeal" finds no expression in the body of the decision. In any event, it has now to be read in the context of the "new matter" provisions in section 85 of the 2002 Act, which were introduced in 2014.

51. We agree with the respondent that a statement made pursuant to a section 120 notice must be in writing and cannot merely be made orally, such as at a meeting between the appellant and one or more of the respondent's officials.

52. Although such a requirement is not expressed in terms in section 120, it is implicit. As Mr Jarvis says, it plainly cannot have been the intention of Parliament that a person might be able to provide a statement required by section 120 in the course of a conversation with an official. Communication in oral conversation (such as a telephone call) would be a recipe for confusion and misunderstanding.

53. The legislature has accorded considerable importance to the making of a statement in response to a section 120 notice. For example, section 85(2) of the 2002 Act places a duty on the Tribunal to consider any matter raised in the statement which constitutes a relevant ground of appeal. Section 96 gives the respondent power of certification, so as to deprive a person of a right of appeal, in circumstances where, amongst other things, that person was served with a section 120 notice and appeals on a ground that "should have been, but has not been, raised in the statement made under section 120(2) or (5)", without satisfactory reason being given for that failure.

54. In the light of this, it would, in our view, be no less than perverse to construe the word “statement” in section 120 as including a merely oral utterance.

**Decision**

55. The appellants’ appeals are allowed.

Signed 4 January 2019

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber