**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: AA/00434/2016**

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Decision & Reasons Promulgated** |
|---|---|
| **On 21st April 2017** | **On 3rd May 2017** |

**Before**

**UPPER TRIBUNAL JUDGE CHALKLEY**

**Between**

**SIMON GUILHERME MAKENGO**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**And**

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

Respondent

**Representation:**

For the Appellant: Mr McIndoe, a Solicitor
For the Respondent: Mrs Abonie, a Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was born on 10th November, 1970 and is a citizen of the Congo.

2. The appellant claims to have arrived in the United Kingdom on 13th June, 2005, using a passport to which he was not entitled. He claimed asylum the following day, which was refused on 29th June, 2005. The appellant then appealed against that decision and his appeal was dismissed on 14th September, 2005. The appellant became appeal rights exhausted on 23rd September, 2005 and on 18th January, 2010 he lodged further submissions which were refused on 7th June, 2010.

3. The appellant lodged further submissions on 27th January, 2014 and supplementary representations on 3rd January, 2012, 4th April, 2014, 27th February, 2015 and 7th May, 2015.
4. On 8th January, 2016, the respondent decided to refuse to grant the appellant asylum and humanitarian protection under paragraphs 336 and 339F of HC 395.

5. The respondent exercised his right under Section 82 of the Nationality, Immigration and Asylum Act 2002 ("the Act") to appeal to the First-tier Tribunal and his appeal was heard on 24th November, 2016, by First-tier Tribunal Judge A J Parker.

6. In a determination promulgated on 13th December, 2016, the First-tier Tribunal Judge noted that the appellant enjoys a subsisting relationship with his Portuguese partner who had been in a relationship since 2011. His partner has two Portuguese sons, one born on 19th April, 1999, and the second on 30th November, 2004. The children have limited contact with their biological father and regard the appellant as their father. The appellant and his partner went through a religious marriage ceremony on 21st September, 2013, but have not been able to register the marriage since he does not have sufficient evidence of his identity to do so.

7. It is the appellant's inability to produce evidence of identity which prevents him obtaining a passport. Were he in possession of a valid passport, then he would be in a position to apply for a residence card as an extended family member on the basis of his relationship with an EEA national exercising treaty rights under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

8. Instead, the appellant based his appeal on Article 8.

9. The judge noted pay slips produced by the appellant's partner confirming that she is in employment and the judge found that she was a qualified worker so that were the appellant in a position to produce a passport he would be in a position to apply for a residence card.

10. Mr McIndoe, who represented the appellant at the First-tier Tribunal hearing, accepted that the appeal could not be allowed under the EEA Regulations, but argued that the appellant's removal would result in a breach of his Article 8 rights, irrespective of paragraph FM and paragraph 276ADE because it would separate the appellant from both his partner and from her children.

11. The Immigration Judge referred to *Sunassee v Upper Tribunal (Immigration and Asylum Chamber)* [2015] EWHC 1604 Admin and found that the appellant could not bring himself under the Immigration Rules in respect of his Article 8 claim. He then proceeded to consider the appellant's Article 8 claim, finding that the appellant enjoys family life with his partner and her children and that his removal would also interfere with his private life. In considering whether or not the decision was proportionate, the judge said at paragraph 39:-

> "The role of the Human Rights Act is not to fill a gap where the appellant does not meet the Immigration Rules for whatever reason. There is a strong public interest argument in removing persons with no legal basis to stay. In assessing public interest I must take into account Section 117B of the 2002 Act (as amended) which deals with public interest arguments and applies to all decisions made after 8th July, 2014. This provision is mandatory and being enshrined in primary legislation overrides existing case law. The provision sets out the public interest considerations applicable in all cases and requires me to carry out a balancing exercise, where circumstances engage Article 8(1), to decide whether the proposed interference is proportionate in all the circumstances".

The judge then found he was satisfied that the appellant and his partner were in a loving relationship, that they had both been consistent and that they had lived together since 2014. He noted that the Presenting Officer accepted that the best interest of the children was to be with their mother. The judge said:-

> "It is difficult to ignore the EEA aspect in this appeal. The appellant's wife has made a fresh application, her previous one had been refused because she could not establish that she is a qualified person. I have made that finding on the evidence before me. I would find that her appeal decision which may take six or seven months to be made by the respondent will be in her favour. I certainly find she is a qualified person and a Portuguese national. I have been asked to assess the Article 8 implications of this appeal as at the date of the hearing".

12. The judge then found that the parties were in a durable relationship and intended to be legally married when they were able to do so. They had lived together for more than two years and gave consistent evidence at the hearing.

13. The judge then went on to consider the public interest provisions and noted that the appellant spoke some English but that an interpreter had to be used by him and by his partner. The judge noted that the partner was working and could sustain the family without reference to benefits. There was no evidence of the appellant having claimed benefits, although it was true he had formed a private and family life whilst he had been in the United Kingdom unlawfully and his stay in the United Kingdom had been precarious.

14. The judge then said that he gave due weight to the public interest but also had to take into account,

> "**The very real prospect that the appellant will be allowed to stay under the EEA Regulations once he has obtained a passport**. [My emphasis]. The EEA Regulations do not incorporate the public interest provision and normally the public interest provisions for a failed asylum seeker in this situation may require him to return to Congo. I also note that there has been a failure to comply with the EEA Regulations. He has not produced a passport or identity document but he is trying to obtain this. This is not a near miss type case as the appellant's partner ... is exercising treaty rights as I found she is a qualified person. They have lived together since June, 2014 and are in a durable relationship. The children have little contact with their natural father. He does not have a passport to return to Portugal the country of his partner ... is not an option. The children do not speak the language of Tanzania [sic] and there would be difficult cultural difficulties in them relocating. He says he has no immediate family in Congo as his parents have died. He has an uncle and aunts but he is not in contact with them

> as his father was estranged from them. There is also the argument that the appellant does not need a residence card to exercise treaty rights as a family member".

The judge concluded that there were strong grounds for allowing the appeal outside the Immigration Rules. He reminded himself of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 and then at paragraphs 49, 50 and 51 said this:-

> "49. Taking the above conclusions into account I find on the facts as established, that the appellant would not face a real risk of persecution on return to Congo for a Refugee Convention reason. Even given the high threshold of conduct which is necessary to find that he would not face torture, inhumane or degrading treatment, I find that rights under the Human Rights Convention with respect to Article 3 would not be infringed by his removal.
>
> 50. I must formally dismiss the appellant's imputed claim for humanitarian protection under Immigration Rule 339C(ii) as there is no credible evidence to support such a claim.
>
> 51. However I would allow the appeal under Article 8 of the Human Rights Act".

15. The respondent sought, and was granted, leave to appeal.

16. The grounds point out that the appeal rights being exercised by the appellant were under the Immigration Act and not the EEA Regulations and the Article 8 provisions were therefore to be considered in the light of the Immigration Rules and Section 117B in association with relevant case law. It was conceded that the appellant could not meet the EEA Regulations at the date of the hearing and it is not intended that Article 8 should be used to "fill gaps" where an appellant does not meet the Immigration Rules for whatever reason. The judge has failed to separate consideration under the EEA Regulations from consideration under the Immigration Rules. The judge, having found that the spouse was a qualified person and accepted that the relationship between the appellant and his spouse is genuine, failed to give any reasons why an application under the EEA Regulations could not be made by the appellant in due course. The judge had not considered or explained why the appellant had been unable to obtain a passport.

17. The case of *Chikwamba* predates both the new Rules and the primary legislation regarding Section 117B and the judge's statement that the public interest provisions expressly exclude the EEA Regulations is misconceived, given that the application and the appeal were not made under the EEA Regulations. They were under the Immigration Rules via further submissions on the asylum claim and therefore the public interest provisions were clearly relevant to them. Lastly, it was asserted that when assessed against the provisions of paragraph 276ADE and Section 117B, it was unclear on what basis the appellant's case outweighed the public interest factors, absent a misconceived reliance on the EEA Regulations. It was argued that the judge had failed to give adequate reasons for concluding that the requirements of paragraph 276ADE were met.

18. At the hearing before me, Mrs Abonie told me that she relied on the grounds. The judge had allowed the appellant's appeal on Article 8 grounds, ignoring the fact that the appellant could succeed under the EEA Regulations if he were to make an application. The judge found nothing exceptional or compelling which would justify allowing the appellant's Article 8 appeal outside the Immigration Rules. It was clearly not disproportionate to refuse the appeal. The children were not qualifying children under the Immigration Rules in any event, being the partner's children by her former husband. The children in question are 18 years and 12 years and their father plays no part in their life. For the respondent, Mr McIndoe reminded me that the judge had made clear findings that the parties were in a qualifying relationship. The case was not put on the basis of the EEA Regulations and the judge does appear to have confused the situation under the EEA Regulations and on Article 8 but he has made clear findings. Mr McIndoe said that he did not accept that the appellant could not meet Article 8 under the Immigration Rules on the basis of paragraph 276ADE(vi) based on the length of time the appellant had been out of the Congo. He accepted that the appellant had spent the first 25 years in the Congo, that he speaks Lingala, Portuguese and French as well as English.

19. Mr McIndoe told me that to his credit the appellant works as a volunteer, he has done so for several charities. His asylum claim was dismissed in 2005. I reserved my determination.

20. I am satisfied that the First-tier Tribunal did err by confusing the issues of the appellant's entitlement under the EEA Regulations and his appeal under the Immigration Rules. Were the appellant to be able to obtain a passport, then he could at some stage apply for a residence card under the Immigration Rules. His difficulty appears to be that he has no means of identity and as a result the Congolese authorities in London will not grant him a passport until he is in a position to prove his identity. So far as the appellant's Article 8 claim under the Immigration Rules is concerned, I do not accept that there would be any obstacles to the appellant's integration on his return to Congo. He is a 46 year old, healthy male who speaks Lingala, Portuguese and French as well as English, and who spent the first 35 years in Congo. I do not accept, therefore, that the appellant can succeed on his Article 8 claim under the Immigration Rules.

21. To his credit, this man has spent his time as a volunteer in the United Kingdom. He has formed a loving relationship with a Portuguese lady who now appears to exercise treaty rights in the United Kingdom. The appellant's sponsor's children are aged 18 and 12 and they regard the appellant as their father. They have little contact with their own father. I bear in mind that to separate the appellant from his partner and from her children would cause his partner and her children considerable distress. I have no doubt it would also cause the appellant considerable distress. However, there is no evidence before me that removing the appellant from the United Kingdom would cause his partner or her children any long term damage. Having considered all the appellant's circumstances, I find that there is nothing about him or his circumstances which would entitle me to

allow his appeal outside the Immigration Rules, given the need to consider the rights of the wider public in the maintenance of effective immigration.

22. I am satisfied that the making of the decision involved First-tier Tribunal Judge A J Parker in making an error on a point of law. I set aside his decision. For the reasons I have given I find that I must dismiss the appellant's human rights appeal.

***Richard Chalkley***
A Judge of the Upper Tribunal

**TO THE RESPONDENT**
**FEE AWARD**

There is no fee award.

***Richard Chalkley***
A Judge of the Upper Tribunal