IAC-HX-GM-V1
First-tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/[redacted]/2013

THE IMMIGRATION ACTS

Heard at Hatton Cross
On 1st May 2013
Prepared 1st May 2013

Determination Promulgated
13 MAY 2013

Before

JUDGE OF THE FIRST-TIER TRIBUNAL NIGHTINGALE

Between

[redacted]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Kan (Legal Representative)
For the Respondent: Ms S Hirech (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria. He gives his date of birth as [redacted]. He appeals the decision of the respondent, dated 18th January 2013, to remove him to Nigeria under Section 10 of the Immigration and Asylum Act 1999 following a refusal to grant him indefinite leave to remain in the United Kingdom on long residence or human rights grounds.

2. The appellant lodged an appeal against this decision by notice dated 4th February 2013. His grounds of appeal state that the decision is not in accordance with the Immigration Rules and that he had resided in the United Kingdom continuously since 13th November 1989 when he arrived on a family visit visa. It is also contended

that the appellant ought properly to be permitted to remain in the United Kingdom on the basis of his family and private life, including his relationship with his fiancée, Ms [redacted]; a national of Estonia living in the United Kingdom. It is also argued that the appellant has a genuine fear of persecution in Nigeria.

Relevant History Summarised

3. The appellant arrived in the United Kingdom on 13th November 1989 and was granted six months' leave to enter as a visitor. He did not depart, and on 14th July 1997 he applied for asylum. His application was refused in September 1997 and an APP104B served on 28th August 1998. An appeal was lodged, but was unsuccessful with appeal rights exhausted on 19th April 1999.

4. On 15th August 2005 the appellant applied for indefinite leave to remain in the United Kingdom on the basis of his long residency. This decision was considered under paragraph 276B(i)(a) and (b), as well as under paragraph A279, Appendix FM and paragraph 276A to 276D HC 395. The immigration decision is accompanied by a reasons for refusal letter dated 18th January 2013.

The Respondent's Reasons for Refusal Summarised

5. It was considered that the appellant had submitted false documentation in support of his application. He was issued with an APP104B on 28th August 1998, which was a notice of intention to deport him and effectively "stopped the clock" with regard to considering continuous residency. In any event, the appellant had not provided evidence of a sufficient quantity or standard to show continuous residence in the United Kingdom for over fourteen years. P60s, P45s and pay slips dated between 1999 and 2006 showed two different national insurance numbers, one ending 22A and the other 28A. A person with the appellant's name, but with a date of birth of 25th November 1956, was registered to the NI number ending 28A. However, the appellant insisted his date of birth was 25th November 1965. HMRC were therefore unable to confirm that these related to one and the same person. The supplied evidence with the NI number ending 22A was not registered to the appellant. It was therefore considered that he had submitted false documentation in support of his claim. Also, his Nigerian passport indicted that the appellant's date of birth was [redacted]. His asylum application, interview and appeal were dealt with under this date of birth. The APP104B and SAL2 also detailed this date of birth. At various points the appellant had claimed his date of birth was, in fact, [redacted]. No birth certificate had been provided, and the only official form of identification held by the respondent was the Nigerian passport. There were discrepancies with regard to evidence detailing the NI number ending 28A also. The pay slips dated 14th November 2000, 21st December 2000 and 18th January 2001 all detailed the same "totals to date" despite all indicating earnings of £456.18. These documents were not accepted as genuine evidence of residence.

6. The respondent considered it likely, on inspection of the evidence believed to be falsified, that the appellant left the United Kingdom around 2001 and returned some time after 2003. There was no way of confirming that the NI number ending 28A was

the appellant's. He had provided evidence of two NI numbers, but people were only allowed to have one. There was therefore no genuine evidence of employment. A letter dated July 2007 indicated intentions to travel at some time in September 2007. The appellant had supplied a significant amount of evidence in the name of his partner and himself. However, no evidence of current employment status was provided. A photocopy of the NI card with the number ending 28A was provided, along with photocopied 2007 pay slips detailing the same number. However, once again photocopies of the pay slips with the NI number ending 22A were also submitted. Insufficient evidence had been provided to confirm continuous residency from 1989 and it was considered that falsified evidence had been submitted. In addition to failing to fulfil the requirements of paragraph 276B, the application was also refused under paragraph 322(1A) HC 395 on the basis that false documents had been submitted.

7. Consideration of the appellant's rights to private and family life was made under the Immigration Rules with regard to Appendix FM and paragraph 276ADE. The appellant claimed to be in a subsisting relationship with Ms [redacted], but Ms [redacted] was an Estonian national in the United Kingdom and was not settled. There were therefore no insurmountable obstacles to the continuation of this relationship in Estonia or back in Nigeria.

8. Paragraph 276ADE of the Immigration Rules set out the criteria that the government would expect a person to fulfil in order to establish a right to remain on the basis of their private life. The appellant was either 47 years or 56 years of age. He claimed continuous residence of over 23 years, but this was not accepted. He had grown up in Nigeria and had spent the majority of his life there. It was not accepted he had lost all social, cultural or family ties with Nigeria. He did not fulfil the requirements of Rule 276ADE for leave to remain in the United Kingdom on the grounds of private life and, therefore, Article 8 was not breached.

The Grounds of Appeal Summarised

9. The appellant's grounds of appeal take issue with the assertions made in the reasons for refusal letter. In particular, the appellant refutes the respondent's assertion that any of the documentation submitted at any stage of this application is false. The appellant had not left the United Kingdom since his arrival on 13th November 1989. He had made his application for indefinite leave to remain on the basis of long residency on 15th August 2005. It had always been his intention to have the incorrect date of birth on his Nigerian passport rectified. This had been raised on various occasions by the appellant, through his previous solicitors at Gulbenkian Andonian, by correspondence with the Home Office and, also, in his asylum interview on 1st September 1997. Specifically, the appellant had requested his passport in order that he could rectify the error. He was told he could not have the passport back because his application would then be treated as withdrawn. He produced a statutory declaration and a sworn declaration of age confirming his correct date of birth as [redacted]. In short, the "6" and "5" had become transposed on his passport.

10. The appellant had only been made aware of two NI numbers by way of the reasons for refusal letter. The correct NI number was the one ending 28A. He had submitted his evidence in good faith, believing the P45s and pay slips were correct as they were produced by professional accountants. The appellant's main concern was being paid, so it had not occurred to him to check the other information on his documentation. The appellant had not been notified of the error by his previous employers, accountants or by HMRC. He therefore believed that all of his documentation had been correctly produced.

11. The appellant had given genuine evidence of ongoing employment, and had done work at times when he had permission to do so. However, from 2004 the appellant had been unable to work while his application, submitted in 2005, was ongoing. This was despite requesting the Home Office for permission to do so on numerous occasions in 2007, 2008 and 2012. The appellant had been supported by his ex-girlfriend, Ms [redacted], then his ex-fiancée, Ms [redacted], and currently by his fiancée, [redacted], in the United Kingdom. The appellant remained supported by Ms [redacted]. There were insurmountable obstacles to family life with Ms [redacted] continuing outside the United Kingdom. She had lived in the UK since July 2008.

12. The appellant and Ms [redacted] intended to get married in the UK, but due to this pending application this had been postponed. The appellant was 47 years of age and it was not an easy transition for him to relocate. He had no contact with Estonia, and it would take years to re-establish his life in a country that was alien to him.

13. The appellant also had a fear in Nigeria due to having been a witness to the trafficking of petroleum from Nigeria to Gabon, this had led to him applying for asylum. Despite this incident happening many years ago, the appellant believed it was still unsafe for him to return there.

14. It was contended that the appellant had engaged in a private life, as well as a family life, and that the removal was disproportionate to the legitimate aim pursued. Although the appellant grew up in Nigeria, he had spent 23 years in the UK and had integrated here. He had lost all social and family ties with Nigeria. His only friends are in the United Kingdom. Both of his parents had passed away during the process of his application. His three siblings all resided outside of Nigeria. Two lived in the Congo, and one in the Ivory Coast. He had relatives in the United Kingdom.

Preliminary Matters

15. At the outset of the hearing, I indicated to both parties that there was a "**Robinson** obvious" point with regard to the appellant's current relationship with an EEA national exercising treaty rights in the United Kingdom. Ms Hirech, for the Home Office, indicated that this point had, also, occurred to her on reading the file. Ms Kan asked for a short period to take instructions from the appellant. I rose to permit her to do so.

16. On resuming the hearing, Ms Kan made an application for permission to amend the grounds of appeal. A Section 120 notice had been served and this was a "one-stop"

appeal. I was satisfied that the addition of a further ground of appeal, to take into account the appellant's potential rights as the extended family member of an EEA national, was permissible. Ms Hirech indicated that she had no basis to oppose this application which, she accepted, was an obvious ground of appeal.

17. I considered the application, and, in the interests of completeness and the 'one stop' procedure, I permitted the grounds of appeal to be amended. The grounds of appeal before me now include the following:

> *"The removal of the appellant would cause a breach to the appellant's rights under the community treaties as the extended family member (partner in a durable relationship) of an EEA national exercising treaty rights in the United Kingdom."*

18. Ms Kan indicated that her instructions were also to continue to rely on asylum as a ground of appeal. She would not be arguing that the long residence Rule (fourteen years' unlawful residence) was applicable and accepted that the "clock had stopped" in 1999 by the service of a decision to make a deportation order. She accepted that she was unable to meet the fourteen year Rule. Ms Kan also accepted that the Immigration Rules, with regard to Appendix FM and paragraph 276ADE, were not applicable. She would be arguing Article 8 only by way of the second stage of the two stage assessment; that is to say freestanding of the Immigration Rules.

19. I asked Ms Hirech if she was in a position to proceed on the basis of the grounds of appeal as amended. Ms Hirech considered the position, and indicated that she did feel able to proceed on the basis that the nature of the appellant's relationship with his current partner was a matter which she had prepared to explore by way of her cross-examination on the matter of Article 8.

20. With these issues, very helpfully, clarified by the parties, I proceeded to hear the appeal, satisfied that both representatives were in a position to proceed.

The Documents

21. I had before me, and have considered, the respondent's bundle, served on 14th March 2013, and running to Appendix G6. The decision also includes the reasons for refusal letter, dated 18th January 2013, and the Section 10 removal notice. In addition, Ms Hirech provided me with a copy of the decision of Special Adjudicator Hallam, dated 31st March 1999, dismissing the appellant's appeal against the respondent's decision to make a deportation order against him following the refusal of his asylum claim. Ms Hirech also provided me with a copy of the respondent's decision to make a deportation order/application for asylum refused (APP104B) dated 28th August 1998.

22. I also have before me, and have considered, a large bundle of documents on behalf of the appellant running to some 400 pages. I was also provided with a skeleton argument on behalf of the appellant, to which are attached a number of authorities. I was also provided with a smaller bundle containing the witness statement of the appellant and his four witnesses. Finally, Ms Kan asked me to have regard to copies of a Barclays Bank ledger in the name of the appellant dated November 2002 to 27th

February 2003, a pay slip from Bankwell Recruitment Limited dated January 2003 and a copy of a cheque from Bankwell Recruitment also dated 28th January 2003.

The Oral Evidence

23. I heard oral evidence from the appellant, and from a further four witnesses, in the English language. I made a full note of their oral evidence, which is contained in the Record of Proceedings and to which I have had regard. I summarise their oral evidence below.

24. The appellant confirmed his full name, address and date of birth. He adopted his witness statement, which he signed before me. He said that he had not realised that a different NI number had been used by one of his former employers for a period of time. One of these ended 28A, and this was his correct NI number. The other ended 22A. This was not a correct number. He only realised this had been a mistake when the reasons for refusal letter came. He had never noticed this before. When he got the refusal letter, he had gone to the house of his former boss. She had not been there, but he did know her daughter and had spoken to her and obtained his former employer's telephone number. He had then gone to see her in her home by arrangement, and had told her about the pay slip discrepancy. She had said that she thought that the accountants had made an error and the digits had been written in incorrectly. She felt that the error was made by the independent accountants who she had employed to do her payroll. His former employer had said that she would make enquiries with her accountants, and that she would get back to the appellant. However, to date, she had not sorted it out and had not got back to him. He had asked her to come to court to explain what had happened, but she did not want to because she had made a mistake and, also, because she had employed him when he did not have permission to work. She did not want to get into trouble. He had followed the situation up by calling HMRC to explain what had happened, and he had taken copies of his pay slips and sent them to HMRC as well. He had not heard anything back yet.

25. In cross-examination, the appellant said that his correct date of birth was [redacted]. His passport said [redacted]. This was an error that had been made when he had renewed his passport. He had told the Home Office that his date of birth was wrong when he realised. He had mentioned at his interview for asylum that there was an error in the passport. He had declared this to the Home Office. It was put to the appellant that there was no record of any such conversation in his asylum interview. He said that he had mentioned it, but he could not say if it got written down or not. He did not have a copy of his asylum interview records, and he could not remember if it had been read over to him in full before signing it. It was a long time ago. He still feared being killed or targeted in Nigeria for the reasons that he had expressed previously. However, Nigeria had changed a lot since he had been there, and there were terrorists in the northern parts. In the south, where Christians live, there were a lot of kidnappings and he felt that he would be vulnerable there.

26. The appellant said it was correct that he had met his current partner, Ms [redacted], in 2009. They had wanted to get married in 2012, but as his passport had been with the respondent they had not been able to. He had proposed to marry her earlier. They had decided together to get married. They had moved in together, and her parents had been over from Estonia to visit them on several occasions. His partner's daughter also came to visit her, she was 23 years old and, also, lived in Estonia. She was named [redacted]. He could not remember exactly what date he proposed, or how they decided to marry. It was shortly after they moved in together in 2010 that they decided to marry. His partner had her own business. She had moved her business from Estonia because there were a lot more opportunities in soft furnishings in the United Kingdom. The market for soft furnishings in the United Kingdom was much better than Estonia. She had first come here in 2006, but she had gone back to Estonia for a while. She had started her soft furnishing business in 2010. She made soft furnishings and curtains for house interiors. She had now been running the business for three years and she supported him financially. His partner had a large family in Estonia and the appellant did not know many of them. She had her parents and, also, one brother. Her grandmother had passed away at some time around 2011, and he had seen, in her pictures of the funeral, numerous family members who had attended the funeral. She had a brother called [redacted] and, as far as he knew, numerous extended relatives.

27. The appellant said that it would be impossible for his partner to leave the United Kingdom with him. He had no one to turn to in Nigeria, and nowhere to go. He could not expect her to come with him. His family members had all left Nigeria now.

28. In re-examination, the appellant said that because his partner's written English was not great, he helped a lot with the correspondence to make sure that it was in reasonable English when it went out to customers. He also helped with practical things like lifting heavy rolls of fabric and, also, with the cutting. He also helped with deliveries and would take and deposit packages and do wrapping and packaging. He would also sometimes go to see prospective clients to help her out. He would also research for her and suggest ways for the business to go forward.

29. His partner went back to Estonia every year. Sometimes she went twice and sometimes three times in a year. She usually only went for about a week, and sometimes only for a long weekend.

30. I next heard evidence from Ms [redacted]. Ms [redacted] gave her evidence in English, but an Estonian interpreter was on "stand by" to assist where necessary. In fact, the first witness only needed to ask the interpreter for assistance on one occasion.

31. The first witness confirmed her date of birth and address. She adopted her witness statement, which she signed before me, and said that the contents of her statement were all true and correct.

32. In cross-examination, the first witness said that she and the appellant wanted to get married in 2012, but they could not do this because the appellant's passport was still

with the Home Office. She did not remember the date of the first time that the appellant had asked her to get married, but he had asked her many times. He had asked her before they moved in together, but they had decided/agreed to get married some time around 2010 if she remembered correctly.

33. The first witness said that she had a 23 year old grown-up daughter in Estonia. She was already a grandmother. She also had one brother. Her daughter was named [redacted] If the appellant was unsuccessful then it would be very sad for her. However, she felt that she was settled here in the United Kingdom and her business was here and she wanted to stay here in the UK.

34. In re-examination, the first witness said that when she had moved to the United Kingdom she had been very excited by the market that it offered her furnishing business. She was involved in soft furnishings, and the market here was very much bigger than that in Estonia. People here liked to make their houses cosy and warm, possibly because of the climate. She was very happy with the customer base that she had built up in the United Kingdom, but also with the products and the range of fabrics that she was able to use in the United Kingdom. Fabrics were her hobby, but it had also become her business. All of the important fabric companies were based in the United Kingdom, and she was really interested in the techniques and history of soft furnishings in the United Kingdom. There was a very long history of decorative work and upholstery in the UK.

35. I next heard evidence from Ms [redacted]. She confirmed the contents of her witness statement, which she signed before me, and adopted this as her evidence-in-chief.

36. In cross-examination, the second witness said that she knew that the appellant was currently living somewhere in Bethnal Green with his present partner. She thought that he had been with his present partner for a while, she was not exactly sure but thought it was roughly three years.

37. In answer to my question, Ms [redacted] said that she was the appellant's "ex", but they had remained on friendly terms after they split up. Their relationship had ended somewhere around the end of 2008.

38. At this point in the proceedings, Ms Hirech indicated that she had no cross-examination to put to the other two witnesses, who were then called to adopt their witness statements.

39. Mr [redacted] adopted his witness statement, which he signed before me, as true and correct. There was no cross-examination.

40. Ms [redacted], also confirmed that the contents of her witness statement, which she signed before me, were true and correct and adopted this as her evidence. There was no cross-examination.

Submissions

41. On behalf of the respondent, Ms Hirech relied on parts of the refusal letter, although she accepted that there were parts which now appeared to be doubtful in light of the evidence. She did ask me to have regard to the fact that the appellant had some credibility issues which had to be taken into account. He arrived as a visitor in 1989, and had overstayed his leave to remain. In regard to the asylum claim, she referred me to the previous determination and the case of **Devaseelan**. His credibility had clearly not been accepted by any special adjudicator and there was nothing before me that indicated that that finding ought properly to be revisited. His credibility had suffered some damage by his making of an asylum claim which was not credible.

42. With regard to the issues surrounding the appellant's date of birth, it was difficult to see how these two figures "56" and "65" had become transposed. There was no indication that he had ever sought to put right the passport which was said to be in error.

43. With regard to the appellant's relationship with the first witness, Ms Hirech did not wish to make any submissions. She asked me to determine whether or not the relationship was a durable one on the basis of the evidence before me. She accepted, however, that the second witness had produced sufficient evidence to show that she was exercising treaty rights presently by way of a self-employed business in soft furnishings. This was not a case of permanent residence, and Ms Hirech reminded me that, as the couple were unmarried, there was discretion with regards to whether or not a residence card should be issued to the appellant.

44. With regard to Article 8, Ms Hirech relied on the reasons for refusal letter. She was unable to assist me as to why it had taken eight years for the respondent to determine the appellant's application for ILR/leave to remain on human rights grounds. She accepted that this was a considerable delay, but did not have an explanation, and accepted that this would have to be weighed in the balancing exercise. She had nothing to add to this, and asked that the appeal be dismissed.

45. On behalf of the appellant, Ms Kan relied on her skeleton argument. She asked me to note that the appellant had spent over half of his life in the United Kingdom, and that he had strong family, personal and social ties to the United Kingdom. There had been an eight year delay in the consideration of his application, and the file of papers for his previous representatives showed that the respondent had been chased regularly, and diligently, until 2012. She submitted that the appellant was in a genuine and subsisting relationship, had been in the United Kingdom for a very long period of time and that removal would be disproportionate in all the circumstances.

46. With regard to asylum, she asked me to find that the evidence before me was such to show that the previous decision ought properly to be revisited. There was no witness protection scheme in Nigeria, and she referred me to pages 386 to 389 with respect to this.

47. With regard to the appellant's credibility, she asked me to find that the two national insurance numbers on the pay slip had been no more than a mistake. The appellant had not looked at his national insurance number when he had received his pay, and he had tried to take steps to rectify this situation. He had given evidence of the steps that he had taken, but unfortunately was unable to call the employer at that time, who did not wish to get into trouble for employing somebody who did not have permission to work.

48. With regard to the appellant and the first witness, she submitted that the evidence was overwhelming to show that they were in a genuine and subsisting relationship. They had lived together for nearly three years, and the first witness was a self-employed EEA national who had her own business. It was unreasonable to remove the appellant from the United Kingdom in these circumstances. She asked that the appeal be allowed.

49. At this stage in the proceedings, the appellant indicated that he wished further matters to be taken into consideration. He wanted to say that he had tried to correct his date of birth at his asylum interview and that this matter had been raised with by previous solicitors. He asked me to take into consideration the fact that his correct date of birth had been notified to the respondent by his previous solicitors. He did not have a birth certificate, so he was unable to provide this to UKBA and could not get his date of birth changed.

50. I indicated to the appellant that I would take into account all the evidence before me, oral and documentary, and reserved my determination.

Applicable Law

51. The burden of proof is on the appellant to show that, as at the date of hearing, there are "substantial grounds for believing" or "a real risk" that he meets the requirements of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 or that he is entitled to be granted Humanitarian Protection in accordance with paragraph 339C of HC 395, and that returning him to Nigeria will cause the United Kingdom to be in breach thereof. The same burden and standard is also applicable to the alleged breach of the appellant's protected human rights under Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

52. With regard to all the general grounds for refusal found at Part 9 of the Immigration Rules, including paragraph 322(1A) HC 395, the burden of proof falls upon the respondent on balance. So far as is relevant to the issue raised in the reasons for refusal letter, the Immigration Rule states as follows:

> "322(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application

or in order to obtain documents from the Secretary of State or a third party required in support of the application."

53. Article 8 provides for the right to respect for private and family life as follows:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There should be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

54. It is for the appellant to establish on the balance of probabilities that he enjoys private and/or family life in the United Kingdom. He must establish that this will suffer interference as a result of the decision appealed. If he does so, then it is for the respondent to establish that such interference caused is lawful and a proportionate response to the lawful aim on balance.

55. The step-by-step approach to the questions that must be answered in consideration of Article 8 cases has been laid down with clarity by the House of Lords in **Razgar**:

"In a case where removal is resisted in reliance on Article 8 these questions are likely to be;

(1) Will the proposed removal be interference by a public authority with the exercise of the applicant's right to respect for his private or, as the case may be, family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?" (**Razgar [2004] UKHL 27**).

56. There is nothing in the judgment of **Huang** that alters this basic test. If, and indeed only if, question 5, above, is reached then the issue becomes a simple balancing exercise between the interests of the parties. It is expressed as follows:

> "20. In an Article 8 case where this question is reached, the ultimate question for the Appellate Immigration Authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide."

57. The Immigration (European Economic Area) Regulations 2006 provide for the issuing of residence documentation to EEA nationals who are "qualified persons" in the United Kingdom and their family, and extended family, members. The relevant Regulations are as follows:

> "17. (4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—
>
> (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
>
> (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

> "8.- (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national."

Findings and Reasons

58. With regards to the appellant's claim to be entitled to international protection, I have considered the evidence before me in the round in accordance with the decision in **Karanakaran**. I have applied the lower standard applicable and considered the reports to which I have been directed by Ms Kan. I find no risk has been established in Nigeria so as to entitle the appellant to asylum or Humanitarian Protection.

Following the decision in **Devaseelan**, I have taken into account the decision of Special Adjudicator Hallam, as my starting point. Contrary to Ms Kan's submissions, the appellant's asylum appeal was not dismissed because it was said he could access witness protection, rather his account was comprehensively disbelieved by the Special Adjudicator. The availability of witness protection in Nigeria, or lack thereof, makes no impact upon the findings of fact made by the Special Adjudicator and I find nothing on the evidence which has been put before me to indicate that the findings made should be re-visited. I consider the factual findings of Special Adjudicator Hallam to be binding upon me and I adopt his findings herein. I find no real risk to the appellant of persecution or serious harm if he were removed to Nigeria in pursuance of the Section 10 directions. However, for the reasons given below, this is to a large extent academic. I do not find the Section 10 decision to be in accordance with the law for the reasons given below, therefore the question of risk to this appellant in Nigeria does not, in fact, arise.

59. I have considered the allegation of the respondent with regards to false documentation. So far as the general grounds for refusal under the Immigration Rules are concerned, the burden is upon the respondent to establish that the documentation submitted is false. The first of these documents appears to be the appellant's Nigerian passport. It is the appellant's case that the passport is incorrect, in that the date of birth was accidently written in error as "1956" rather than "1965". The appellant states that he did inform the respondent of this at his asylum interview. I have no copy of the asylum interview and I am, therefore, unable to say as to whether or not he did so. Certainly, I cannot say that he did not do so and that the respondent has not been fully aware, for many years, that the appellant does not accept that the date of birth in his passport is correct. There is certainly no evidence before me which indicates that the passport is a false document or, indeed, that the date of birth is not an administrative error made by the Nigerian authorities in issuing his passport. Indeed, the respondent has had many years to approach the Nigerian authorities in the UK, who issued this document, to obtain a definitive answer. The appellant has not obtained a copy of his birth certificate, but neither has the respondent established that the Nigerian passport is a false document or that the contents are false, in the sense in **AA** that the date of birth has been deliberately altered or deliberately presented incorrectly so as to mislead. I cannot therefore find that the appellant's national Nigerian passport is a false document.

60. I therefore turn to the pay slips, which are for a particular employer, where the appellant's national insurance number is wrongly written as ending in 22A rather than 28A. Again, there is nothing before me from the respondent which indicates that these documents are false or that the discrepancy is any more than an accidental error. There is no evidence which establishes that the pay slips referred to are falsified. It may well be that the error on these particular pay slips render them unreliable as evidence of continued employment during this period. That is not, however, at all the same thing as a deliberate misrepresentation or falsification. The burden with respect to this particular Rule is upon the respondent and it has not, I find, been discharged on balance on the stringent test as set down in **RP (Nigeria)**.

61. Nonetheless, the issue with regard to false documentation does not go to this particular appellant's case other than to, possibly, the weight that is to be given to the respondent's lawful aim in the balancing exercise with regard to Article 8. This appellant is not contending that he meets the Immigration Rules either by way of long residence (fourteen years) or by way of Article 8 as is set out in Appendix FM and paragraph 276ADE. In addition, if I am satisfied that there is a prima facie case for the consideration of the grant of a residence card to him, then his rights as an EEA national's family member would, also, fall outside the Immigration Rules.

62. I have considered the documents before me with care and, also, had regard to the oral evidence from the appellant and the witnesses. The respondent's reason for refusal letter does not take issue with the appellant's relationship with the first witness. Indeed, it is contended that the appellant and his partner move back together to Estonia in order to enjoy their family life there. There were not thought to be insurmountable obstacles to the enjoyment of their relationship in Estonia. The refusal letter notes, in particular, that 'a very large amount of evidence' has been submitted with regard to the relationship. I am fully satisfied, from the oral evidence and the documents before me, that the appellant and the first witness are in a durable relationship which has existed for around three years. I am also satisfied that they have co-habited since around 2010 and that they are committed to each other and have plans to marry in the future. The appellant's witnesses were all clearly aware of the relationship, and although Ms [redacted] was the appellant's partner at the time that this application was made, she was clearly aware that the appellant had been with the first witness for some three years and, also, was aware of the area in which the couple lived together. I am fully satisfied that the relationship between the appellant and the first witness is one which meets the requirements of a "durable" relationship for the purposes of being an extended family member of an EEA national under Regulation 8 of the 2006 Regulations.

63. Regulation 17(4)(b) gives the respondent a discretion to issue a residence card to the extended family member of an EEA national where "in all the circumstances it appears to the Secretary of State appropriate" to do so. This is a discretion which is, in the first instance, for the respondent to exercise. It is not reviewable by this Tribunal unless, or until, the respondent has first considered whether to exercise the discretion to issue the card. Consequently, it is for the respondent to decide whether or not to issue this appellant with a residence card as the partner in a durable relationship. I am therefore bound to find that the respondent must consider whether to exercise discretion and grant a residence card to this appellant prior to taking any decision with regard to removal. It does, however, follow from this that at the time it was made, and presently, the Section 10 removal decision is not in accordance with the law and the appeal would have to be allowed to the extent that a decision would need to be made on the issuing of a residence card. This appeal must, therefore, be allowed on grounds relating to the potential interference with the appellant's rights as a family member of an EEA national.

64. However, I am mindful that this is an application which took the respondent nearly eight years to decide. When this application was made, in 2005, the appellant was

with a previous partner. He has been with his present partner for three years. He has, I accept, been in the United Kingdom for at least ten years and, more likely than not, since his entry as a visitor in 1989. Certainly, he has an established private life of long standing in the United Kingdom, as well as a family life with his partner. In view of the very considerable delays in this case, it seems to me appropriate to continue with the determination of this appellant's Article 8 appeal (freestanding of the Immigration Rules) rather than simply allowing this appeal to the limited basis indicated above.

65. I accept that the appellant has established, on balance, that he has resided in the United Kingdom since 1989. His residence has been largely unlawful, but it is of some 23 years standing. I accept that he has a partner with whom he is in a durable relationship, and whom he intends to marry, in the United Kingdom. I am not persuaded that the difficulties with regard to his date of birth have been resolved, but nonetheless I find little turns upon this. It has not been established that he has used forged documents, but neither am I satisfied that the pay slips between 2001 and 2003 are reliable given the unexplained discrepancy with the NI number. Nonetheless, I note that the appellant's bank ledgers from 2003 appear to indicate that he was receiving income into his account during this time. Whether this was from the employer claimed, or not, I do find that this is evidence which establishes it as more likely than not that he was in the United Kingdom in 2002 and 2003. I find that the appellant has a longstanding and established private and family life in the United Kingdom.

66. Requiring the appellant to return to Nigeria would, I find, cause considerable interference with his established family and private life. I accept that he has not been in Nigeria for the past 23 years, and, also, that it would be unreasonable to expect his partner, an EEA national exercising treaty rights in the United Kingdom, to depart with him.

67. Notwithstanding the respondent's duty to consider exercising discretion with regards to the Residence Card, I find that the interference caused with the appellant's private and family life by the requirement that he depart the United Kingdom would be in pursuance of a lawful aim; namely the maintenance of a fair and effective immigration control in the interests of maintaining the economic wellbeing of the United Kingdom. However, the weight to be given to the respondent's lawful aim is not fixed and will vary from case to case depending on the individual circumstances of appellants. This is a case in which the respondent has delayed very considerably, and inexplicably, in deciding the appellant's application. The appellant's asylum appeal was dismissed in 1999. Although the respondent decided to deport him in 1998, as an overstayer, no deportation order was signed and no further steps to deport or remove him taken until 2013. When the appellant made his application for leave to remain on long residence and Article 8 grounds in 2005, the respondent, from the correspondence before me, indicated that this would be decided within three to thirteen weeks. There is a large file of papers from the appellant's previous representative which evidences repeated, and diligent, attempts to "chase" the respondent for news on progress on this particular application. Indeed, in 2007 it

appeared that the appellant's application was sent to a "senior caseworker" for resolution. Despite this, the appellant did not receive a decision until January 2013, some eight years after making this application.

68. During the eight year wait, the appellant met his present partner, became involved in assisting her with her business, and made plans to marry. As a result of the delay, he has now been in the United Kingdom, I accept, for 23 years. He is perfectly able to take employment, as has been shown by the earlier evidence of employment; albeit employment without permission. I do not find it likely that he would cause any particular detriment to the economic wellbeing of the United Kingdom if he were permitted to stay in the United Kingdom, either with a residence card or with leave to remain, since he would most likely again seek employment. Certainly, I accept that he is currently, and has been for the past three years, supported by the EEA national from the business which she operates. In light of the very considerable delay by the respondent in taking a decision in this particular appellant's case, I cannot find that the need to pursue the lawful aim can be argued to have been great or urgent. In view of the very considerable delay in this case, and the further establishment by this appellant of private and family life in the United Kingdom during that time, I find that the weight to be given to the respondent's lawful aim is considerably reduced. Nonetheless, I do weigh the respondent's aim in the balancing exercise.

69. Balanced against this are the appellant's circumstances. I am not persuaded that his removal would, in any event, be in accordance with the law, given that no decision has been made yet with regard to the exercise of discretion in the grant of a residence card. The appellant has been in the United Kingdom for 23 years and has built up a considerable private and family life. He has a partner in the United Kingdom and I do not find it reasonable to expect her to return with him to Nigeria or, indeed, to cease her exercise of treaty rights in the United Kingdom and return with him to Estonia. I find that the interference caused with the private and family life of the appellant, and his partner, would be considerable in all the circumstances.

70. Balanced against this is the respondent's aim. The decision to remove the appellant is not in accordance with the law, for the reasons given, and also carries considerably reduced weight by virtue of the respondent's inexplicable, and very considerable, delay in deciding this appellant's application. I cannot find that the respondent's aim, even if lawful, would outweigh the interference caused with this appellant's family and private life were he required to depart the United Kingdom. I would also, therefore, allow this appeal on Article 8 grounds.

Decision

71. The appeal is dismissed on Asylum and Humanitarian Protection grounds.

72. The appeal is allowed on human rights (Article 8) grounds.

73. The appeal is also allowed under the EEA Regulations 2006.

No anonymity direction is made.

Signed Date: 1st May 2013

Judge Nightingale

Judge of the First-tier Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 1st May 2013

Judge Nightingale

Judge of the First-tier Tribunal