Upper Tribunal
(Immigration and Asylum Chamber)

Pembele (Paragraph 399(b)(i) – "valid leave" – meaning) [2013] UKUT 00310 (IAC)

THE IMMIGRATION ACTS

Heard at : Field House **Determination Promulgated**

On : 18 April 2013

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Before

UPPER TRIBUNAL JUDGE KEBEDE

UPPER TRIBUNAL JUDGE KOPIECZEK

UPPER TRIBUNAL JUDGE REEDS

Between

PAUL ZANOTO PEMBELE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr D Furner, instructed by Birnberg Peirce and Partners

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

The term "valid leave", as appears at paragraph 399(b)(i) of the Immigration Rules, means leave to enter or remain under the Immigration Act 1971. Periods of temporary admission cannot be counted when calculating whether a person has achieved the necessary 15 years residence under that rule.

DECISION AND REASONS

1.
The appellant is a citizen of the Democratic Republic of the Congo (DRC) , born on 8 March 1983 . He has been given permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision that section 32(5) of the UK Borders Act 2007 applie d .

2.
The appellant arrived in the UK on 13 August 1991 with his parents and sister. His father made an application for asylum including him as a dependant. As the asylum claim was still outstanding in January 1999 his father was granted indefinite leave to enter on 28 February 1999 as part of an

asylum backlog clearance announced by the Government in a W hite P aper. He was granted leave in line with his father .

3.
Between February 1999 and March 2011 the appellant amassed a total of 29 convictions for 86 offences in the United Kingdom . On 4 May 2010 he was convicted on three counts, of handling stolen goods, driving whilst disqualified and using a vehicle without insurance. He was sentenced on 29 July 2010 to 15 months' imprisonment on count 1 and 3 months' imprisonment consecutive on count 2, with no separate penalty on count 3, making a total of 18 months' imprisonment. He was also disqualified from driving for 5 years. Whilst serving his custodial sentence for these offences he was convicted, on 31 January 2011, of unlawful wounding, and sentenced on 8 March 2011 to 18 months' imprisonment concurrent to the aggregate of 18 months' imprisonment imposed on 29 July 2010.

4.
As a result of his convictions, the appellant was informed, o n 14 November 2011, of his liability to automatic deportation . He responded, giving details of his partner, SN , a British national of Congolese origin, with whom he had been in a relationship since June 1999 (in subsequent evidence amended to 2003) and his three British children from that relationship with whom he had been living prior to his imprisonment , with his partner , namely MP born in 2005 , BN born in 2006 and SP born in 2010.

5.
A deportation order was signed against the appellant on 2 October 2012 and on 3 October 2012 a decision was made that section 32(5) of the UK Borders Act 2007 applied. He appealed against that decision and his appeal was heard on 7 January 2013 before the First-tier Tribunal , by a panel consisting of First-tier T ribunal Judge Boardman and Mr M G Taylor .

Appeal before the First-tier Tribunal

6.
The Tribunal heard from the appellant, his partner SN , his sister and his friend . They noted that it was accepted by the respondent that he had three British children ; that, aside from when in prison, he had continuously lived with his children at his partner's address ; and that it would not be reasonable to expect them to relocate to the DRC with him. They found that his partner was not willing to relocate to the DRC and that she would be able to care for the children in the United Kingdom if he were removed. As such, they found that the appellant did not meet the requirements of paragraph 3 9 9(a) of the Immigration Rules. The Tribunal found further that the appellant had a relationship with SN , albeit not a strong one, and that they had lived together since 2005. However, since he had lived in the United Kingdom with valid leave for less than 15 years, having acquired his leave to remain in 1999 and spent 5 years in prison, he did not meet the requirements of paragraph 3 9 9(b) of the Rules. Neither could he meet the requirements of paragraph 3 9 9A and, as such, and in the absence of any exceptional circumstances, his deportation was required in the public interest, in accordance with the Immigration Rules . With regard to Article 8 of the ECHR, the Tribunal found that the appellant had established family and private life ties in the United Kingdom, albeit neither were strong ties , and that Article 8 was engaged as a result of the interference caused by the respondent's decision to deport him. They found, nevertheless, that such interference was not disproportionate to the legitimate aims , namely the prevention of crime and the maintenance of an effective immigration control, and that his deportation would not breach Article 8. They accordingly dismissed the appeal on all grounds.

7.
P ermission to appeal to the Upper Tribunal was sought on behalf of the appellant, on several grounds . The grounds , in summary, assert that the Tribunal had erred in law in its Article 8 proportionality assessment by failing to consider the length of time spent by the appellant in the United Kingdom as a child , by failing to take into account that he had been lawfully in the United Kingdom throughout the entire period of his stay , by perversely drawing a distinction between valid leave and being lawfully present in the United Kingdom and failing to take this into account as a near miss , by failing to take account of the children's best interests as a primary factor and by finding that the appellant's family and private life was not strong . The grounds assert further that the Tribunal erred in law in stating that the appellant did not meet the requirements of paragraph 399(b)(i) of the Immigration Rules and by excluding, in calculating the relevant 15 year period, the period spent lawfully in the United Kingdom on temporary admission from his entry in 1991 until the grant of indefinite leave in 1999.

8.
In granting p ermission to appeal on 8 February 2013, Upper Tribunal Judge Martin considered it arguable that the First-tier Tribunal had erred in finding that paragraph 399(a) or (b) did not apply since it was arguable that the appellant had been in the United Kingdom with leave throughout. Permission was also granted on the basis of an arguable failure to address the principles in Uner v The Netherlands - 46410/99 [2006] ECHR 873 and Maslov v Austria - 1638/03 [2008] ECHR 546 when considering Article 8.

Appeal hearing and submissions

9.
T he appeal came before us on 18 April 2013 . Skeleton arguments had been submitted by both parties in advance of the hearing , in accordance with directions from the Tribunal, to address the first point upon which permission had been granted, with respect to paragraph 399(b)(i) of the Immigration Rules. The respondent's skeleton had been prepared by Mr Deller, although it was Mr Avery who appeared before us on behalf of the respondent.

10.
Mr Furner took us through his skeleton argument in submitting that the meaning of the phrase "valid leave" in paragraph 399 (b) (i) was that the individual concerned had lawful permission to be in the United Kingdom throughout the relevant period. In so doing, he referred us to case law relevant to the interpretation of the Immigration Rules and to the E xplanatory M emorandum to HC 194, the Statement of Changes which incorporated paragraph 399(b) into the Rules. He submitted further that periods of stay on t emporary a dmission were periods of lawful residence, so that the appellant's stay in the United Kingdom from his entry in 1991 until the grant of indefinite leave to remain in 1999 was valid leave within the meaning of paragraph 399 (b) (i) such that the requirements of that Rule had been met. Accordingly the decision to deport the appellant was unlawful and the decision of the First-tier Tribunal ought to be set aside and re-made by allowing the appeal. In the event that we were against him in that regard, Mr Furner submitted that the Tribunal had erred in law by failing to consider, in their Article 8 proportionality assessment, that the distinction between valid leave and lawful residence was an objectionable one and was unjustifiable in the context of public interest considerations; by failing to take account of the respondent's delay in dealing with the appellant's father's asylum claim ; by failing to apply the principles in Maslov and by failing to give proper consideration to the best interests of the children. He submitted further that the Tribunal had erred by finding the appellant's private life not to be a strong one.

11.
Mr Avery submitted that t emporary a dmission was not leave to remain under the Immigration Rules and did not constitute “valid leave” under paragraph 3 9 9(b)(i). The distinction between the two did not give rise to any public interest considerations under Article 8 of the ECHR and the Tribunal had not erred in their findings on Article 8 in that or any other respect.

12.
Mr Furner, by way of response, reiterated the points initially made.

13.
It was agreed by all parties that if we were to find an error of law in the First-tier Tribunal’s decision in regard to the period of “valid leave” for the purposes of paragraph 399(b)(i) of the Rules, that would be the end of the matter, since the decision would simply have to be re-made by allowing the appellant’s appeal. If, however, we found no error in that respect, but found errors on the other grounds relating to Article 8 of the ECHR, the hearing would have to be resumed on a subsequent occasion in order for submissions to be made with a view to re-making the decision.

Consideration and findings

14.
We commence by setting out the relevant provisions of the Immigration Rules relating to deportation and Article 8, as introduced by the Statement of Changes in HC194 on 9 July 2102, at paragraphs 39 6 to 399B . We have highlighted the significant section for the purposes of this appeal:

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK 's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of le ss than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK , and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigrati on decision; and in either case

(a) it would not be reasonable to expect the child to leave the UK ; and

(b) there is no other family member who is able to care for the child in the UK ; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK .

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted.

15.
No challenge has been made to the First-tier Tribunal’s finding that the appellant was unable to meet the requirements of paragraph 399(a) of the Rules.

16.
It is relevant to note, with respect to paragraph 399(b), that it was accepted by the First-tier Tribunal that the appellant had a genuine and subsisting relationship with his partner, SN . Although we found the Tribunal’s findings in that respect, at paragraph 64, somewhat unclear, Mr Furner’s submissions

proceeded on the express understanding that that was not in issue and Mr Avery did not seek to challenge that. Neither was it in dispute that there we re clear findings of insurmountable obstacles to the appellant's family life with SN continuing outside the United Kingdom .

17.
Th e only basis, therefore, upon which the Tribunal found that the requirements of paragraph 399(b) had not been met, was with respect to the period spent by the appellant living in the United Kingdom with valid leave. As such, if the Tribunal's findings in that respect are found to be in error, the only conclusion, on the otherwise accepted findings made by the Tribunal, including that he had been resident in the United Kingdom for over 15 years, is that the appellant was able to meet the requirements of the Immigration Rules.

18.
It wa s Mr Furner's submission that the meaning of "valid leave" ha d to be the same as " lawfully in the United Kingdom ", so that the appellant ha d accumulated more than the 15 years required for the purposes of paragraph 399(b)(i). However, the respondent maintain ed that the term refer red to a period of leave to enter or remain under the Immigration Act 1971 so that the relevant period ha d not been accumulated .

19.
It is the case that there is no specific definition of either of the term s "leave" or "valid leave" in the interpretation section at paragraph 6 of the Immigration Rules . We therefore turn to the guidance provided in the authorities referred to by Mr Furner in our consideration of the meaning of the term s . With regard to the proper interpretation of the Rules, Lord Hoffman gave the following guidance in Odelola v Secretary of State for the Home Department [2009] UKHL 25 , at paragraph 4 of the judgement:

" Like any other question of construction, this depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy. "

20.
In t he Supreme Court case of Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer [2009] UKSC 16 , Lord Brown, having referred to the discussion in Odelola , said at paragraph 10:

" … The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative poli cy… True, as I observed in Odelola (para 33): "the question is what the Secretary of State intended. The rules are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations . Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs)… "

21.
Mr Furner relied upon the Explanatory Memorandum to HC 194 as an aid to discerning the Secretary of State's intentions with respect to paragraph 399(b) and referred us to the form of wording used there, which differed from that appearing in the Rules themselves, in that it used the wording "lived here lawfully" rather than "with valid leave." His case , therefore, was that the Secretary of State intended to make provision, in paragraph 399(b)(i), for those who had lived here lawfully for 15 years,

rather than requiring them to have had leave to enter or remain for that period. The respondent's case , however, is that that did not entitle the appellant to ignore the use of the wording in the Rules themselves. We find ourselves in agreement with the respondent in this regard .

22.
In making his case, Mr Furner relied upon guidance in the cases of Westminster City Council v National Asylum Support Service [2002] UKHL 38 and D & M, R (on the application of) v Secretary of State for Work & Pensions [2010] EWCA Civ 18 in regard to the status of the Explanatory Memorandum as an expression of the Secretary of State's intention. However, we note that, w hilst the Courts in those cases found that such explanatory documents were useful as aids to construction, they both emphasised the limitations of such documents. In the latter case, Lord Justice Carnwarth (as he then was) state d , at paragraph 49 :

" 49. Thus, the explanatory memoranda in the present case represent formal statements of the Secretary of State's intentions as the author of the relevant statutory instrument…"

but then went on to state as follows:

"51… I would emphasise that, even accepting the special significance of explanatory documents such as these, they remain only aids to construction, and no more. The essential task is to construe the language of the legislation, not that of the explanatory material . Thus in the present case, the memoranda may help to explain the background and general purpose of the regulations. They do nothing to explain why, contrary to the apparent intention to "align" the various rules, different wording was used in the two provisions. For the answer to this question, in the default of other aids, one is driven back to analysis of the words of the legislation. "

23.
That, we consider, is a clear reflection of what Lord Brown stated in Mahad , when referring to the IDI's. We have no hesitation in concluding that the Secretary of State's intention was that "valid leave" should mean leave to enter or remain under the Immigration Act 1971. That is the plain and obvious meaning and is reflected in the use of the word "leave" at section 3(1)(a) of the Immigration Act 1971 and in the context in which it appears throughout various definitions within paragraph 6 of the Immigration Rules , such as within the definition of "overstaying" , and in the use of the term "valid leave" within the definition in paragraph 6 of "working illegally" and "in breach of immigration laws", all of which are plainly intended to refer to a period of leave within the 1971 Act. Indeed the use of the word "valid" serves only to emphasise the formality of the leave and in that respect we note that "a valid application" is defined in paragraph 6 as an application made in accordance with the requirements of the Rules. We also agree with the point made by the respondent that had the intention of the Secretary of State been that paragraph 399(b)(i) imported a period of 15 years' lawful residence, it was open to her to use the same terminology as in paragraph 276B and that the use of different wording in paragraph 399(b)(i) would seem to have been deliberate.

24.
We find no merit in Mr Furner's submission that the respondent's interpretation of paragraph 399(b)(i) wa s unlawful and incompatible with Article 8, as privileging people with a more temporary purpose, such as visitors and students, above those who are more established (for example having remained lawfully awaiting a decision on an asylum claim) . We would find it hard to conceive of a situation where a person had managed to accumulate 15 years of leave to enter and remain and still be considered as remaining here on a temporary basis . In any event we find no reason why those here on the basis of a grant of leave to enter or remain under the 1971 Act ought not to be entitled to

benefit from such formal status. Indeed that was a matter considered by the Supreme Court in ST Eritrea, R (on the application of) v Secretary of State for the Home Department [2012] UKSC 12 , albeit in a different context, to which we shall come shortly . It is relevant, i n any event, to take account of the fact that , as found in MF (Article 8 - new rules) Nigeria [2012] UKUT 393 and Izuazu (Article 8 – new rules) Nigeria [2013] UKUT 45 , the Rules are not normally conclusive of an Article 8 assessment and it is for the Tribunal to go on to consider such matters within the wider context of Article 8. It was because of such residual discretion that the Administrative Court in Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 found that the new rules were not unlawful.

25.
Accordingly, we find that the term “valid leave”, as appears at paragraph 399(b)(i) means leave to enter or remain under the Immigration Act 1971. Periods of temporary admission cannot be counted when calculating whether a person has achieved the necessary 15 years residence under that rule . Therefore , th e period spent by the appellant on temporary admission prior to the grant of indefinite leave to enter in 1999 is not counted as part of the required 15 year period.

26.
We find, in any event, that such a period cannot be considered as lawful residence for the purposes Mr Furner would have us accept and we find that his submissions in that regard were somewhat misleading. Whilst it was found that that was the case by the House of Lords in Szoma v. Secretary of State for the Department of Work and Pensions [2005] UKHL 64 , to which we were referred by Mr Furner, we note that the Court of Appeal in JA (Ivory Coast) E S (Tanzania) v Secretary of State for the Home Department [2009] EWCA Civ 1353 subsequently found that to be limited to the circumstances of that case, which related to eligibility for public benefits . At paragraph 20 of JA , the Court found that:

“ Szoma neither decides nor gives any basis for inferring that an illegal entrant is to be assimilated for any wider purposes to a lawful entrant. As the House made clear in Khadir [2002] UKHL 39, temporary admission is a term of art within the Immigration Act 1971, allowing the temporary release (under strict limits prescribed by law) of persons otherwise liable to administrative detention pending removal as illegal entrants. Illegal entrants who are temporarily admitted rather than detained may thus be lawfully present here in the restricted sense material to the decision in Szoma ; but they remain without an entitlement to be here . ”

27.
That was a view subsequently endorsed and adopted by the Court of Appeal in Secretary of State for the Home Department v ST (Eritrea) [2010] EWCA Civ 643, followed by the Supreme Court in ST Eritrea, R (on the application of) v Secretary of State for the Home Department [2012] UKSC 12 , when considering the wording “lawfully in their territory” in Article 32(1) of the Refugee Convention. At paragraph 66 of the judgement of the Supreme Court, Lord Dyson stated as follows:

“there is nothing in article 32(1) which requires us to disapply section 11(1) of the 1971 Act and say that a refugee who is given temporary admission pending determination of her status is lawfully in the United Kingdom . ”

28.
We would add that we do not consider the fact that the appellant was subsequently granted indefinite leave to enter, and that the grant came after a delay of some years, adds anything to our view above. The grant of indefinite leave was made on the basis of the Government’s backlog clearance , and was

not confirmation of a status that had existed since his father's arrival, as would have been the case had he been granted leave as a refugee. T here has never been any evidence to show that his father's asylum claim would have been successful – indeed the fact that he was deported to the DRC suggests that it would not. The appellant can therefore only be said to have benefitted from the delay.

29.
It follows, therefore, that we consider that the First-tier Tribunal did not err in their conclusions at paragraph 65 of their determination, when finding that the appellant had not lived in the United Kingdom with valid leave for 15 years, and that they properly found that he was unable to meet the requirements of paragraph 399(b)(i) of the Immigration Rules.

30.
For the same reasons we find no merit in the grounds of appeal asserting that the Tribunal failed, in their Article 8 assessment, to consider the proximity to the Immigration Rules, given the period of the appellant's lawful residence. We consider that the argument made in the grounds of appeal to that effect is no more than a "near-miss" argument, albeit that Mr Furner sought to persuade us that it was not, and as such is adequately disposed of by reference to the Court of Ap pe al judgement in Miah & Ors v Secretary of State for the Home Department [2012] EWCA Civ 261 . In any event, this was not a "near-miss" since, as we have found, the Rules clearly require a 15 year period of leave to enter remain within the 1971 Act, which the appellant fell two years short of being able to establish.

31.
We also find no merit in the grounds complaining of the Tribunal's consideration of the appellant's family life. The Tribunal w ere entitled to find that his family life was not strong and they gave full and proper reasons for so concluding, at paragraphs 64 and 74 of their determination. Contrary to the assertion in the grounds, we find further that the Tribunal gave full consideration to the best interests of the children, in line with the relevant principles, and found that it would not be in their best interests for the appellant to be deported. They took that into account in their balancing exercise, recognising, as they were required to do, that that was a primary consideration.

32.
However, we consider that the Tribunal failed, nevertheless, to take into account all relevant matters when conducting their proportionality balancing exercise. There is no indication, in their findings, that they applied any of the principles in Maslov v Austria to the appellant's circumstances . Although reference was made to th at case on page 6 of their determination and to the principles therein at paragraph ee) on page 8, that was simply by way of setting out the respondent's reasons for deportation. Similarly, reference was made to the appellant's length of residence in the United Kingdom and the age at which he arrived here at paragraph 60, page 23 of the determination, but again that was only by way of recording submissions made on his behalf. Their findings on Article 8 commence at paragraph 7 1 . At paragraph 88 they noted the appellant's length of residence in the United Kingdom and at paragraph 91 they noted that he had never returned to the DRC. However, at no point did the Tribunal consider and assess the fact that the appellant came to the United Kingdom as a young child and that he spent the majority of his childhood here , nor that in such circumstances very serious reasons were required to justify expulsion . On the contrary, their findings that the appellant's private life was not strong and that he had no strong connections to the United Kingdom suggest that they had completely overlooked such matters in conducting the balancing exercise, rather than giving them the detailed consideration required by the Maslov principles.

33.

We consider the Tribunal’s failure in that regard to be a fundamental and material one. As such, we set aside the decision with respect to Article 8 of the ECHR, with a view to the issue of proportionality being re - visited and a fresh decision made by the Upper Tribunal.

34.
Our preliminary view , a s we indicated at the hearing on 18 April 2013, was that there would be no need to hear further oral evidence. We maintain that view to the extent that the Tribunal’s findings of fact stand and the decision is simply to be re-made by undertaking the proportionality balancing exercise ourselves. However, we appreciate that it may be helpful to be provided with any relevant evidence relating to the appellant’s current circumstances and to that extent, therefore, we would be prepared to hear limited oral evidence.

35.
Accordingly, w e make the following directions for the resumed hearing.

Directions

(a) No later than ten days before the date of the next hearing, any additional documentary evidence relied upon by either party is to be filed with this Tribunal and served on the opposing party.

(b) The appellant or h is representatives are to file with the Tribunal and serve upon the respondent a consolidated, indexed and paginated bundle containing all documentary evidence relied upon .

(c) In respect of any witness who is to be called to give oral evidence there must be a witness statement drawn in sufficient detail to stand as evidence in chief filed with the Tribunal and served upon the respondent .

(d) The appellant’s representatives are to file with the Tribunal and serve upon the other party a skeleton argument setting out all lines of argument to be pursued at the hearing .

Signed Date

Upper Tribunal Judge Kebede