Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08684/2012

THE IMMIGRATION ACTS

Heard at Field House

On 17 September 2013

Determination Promulgated
On 12 December 2013

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

OLUBUNMI OLUWATOSIN TAIWO
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan
For the Respondent: Ms Vidyaharan

DETERMINATION AND REASONS

1. The Appellant is a citizen of Nigeria born in 1986. She applied on 14 November 2011 for indefinite leave to remain on the basis of long residence. The application was refused under paragraph 276A-D of the Immigration Rules on 21 March 2012.

2. It was accepted by the Respondent that the Appellant had entered the UK on 13 September 2001 with clearance as a student. Her leave had

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thereafter been renewed on various occasions until 31 August 2004. However, the Respondent claimed, the Appellant left the UK on 20 March 2005 without any lawful leave this having expired on 31 August 2004. She then re-entered the UK on 18 June 2005 with entry clearance as a student. The result was that there was a gap in residence when she did not have leave from 31 August 2004 until 18 June 2005.

3. A new period of residence started on 18 June 2005 when she re-entered and she was subsequently granted leave to remain until 15 November 2011. As a result she had shown continuous residence in the UK in a lawful capacity for six years and five months. She thus failed to satisfy paragraph 276A-D.

4. The application was also refused under Article 8 (ECHR).

5. She appealed. The basis of the appeal was that from early August 2004 until around 10 March 2005 her passport was with the Home Office for renewal of her student visa. During this period her grandmother fell gravely ill in Nigeria. The Appellant had asked whether the process of renewal could be speeded up because of the grandmother’s illness. She wanted to go to her urgently. She was told by the Home Office that this was not possible and that it could not be guaranteed that a decision on the variation application would be made before she was due to travel. However she was presented with the option of withdrawing her application and obtaining entry clearance in due course from the High Commission in Nigeria to return as a student and she followed that advice.

6. At no time was she informed that if she travelled she would be starting again in terms of continuous years spent in the UK. The impression she was given was that her period of stay would still be considered continuous in her particular circumstances. She felt it unfair that she had not been informed specifically that such was not the case.

7. As for Article 8 she has two brothers and two sisters who are British Citizens and a niece and nephew as well. They have lived in the UK most of their lives and she is closely involved with them. Her adult life has been spent in the UK.

8. In brief findings Judge of the First tier Tribunal Wiseman, following a hearing at Hatton Cross on 7 September 2012, found that the Appellant was absent from the UK between 20 March 2005 and 18 June 2005. However, because her last leave had expired on 31 August 2004 ‘she had no valid leave between 31 August 2004 and a date close to 18 June 2005 when she returned’ [13]. Such a lengthy period without leave, the judge found, was fatal to her application based on ten years continuous residence and the position was not changed by the apparent confusion with the case worker as to the effect of her leaving. He dismissed the appeal under paragraph 276.

9. As for Article 8 the judge ruled that as the Appellant had failed to attend the hearing he had ‘no way of assessing whether a combination of the particular circumstances historically and the apparent family life in this country would enable the Appellant to be successful in an Article 8 appeal’ [14]. He thought that she had been confused. Having asked for the appeal to be determined ‘on the papers’ the Tribunal had decided that the matter should be dealt with at an oral hearing. He concluded that he had ‘no alternative but to dismiss the appeal under Article 8 because of the absence of proper supporting evidence…’ [15]

10. The Appellant sought permission to appeal which was granted by a judge on 17 January 2013. He stated: ‘…

> *3. The application for permission to appeal disputes the factual basis of the judge’s findings under paragraph 276B. It was submitted that the judge did not have all the relevant evidence. The grounds also question the basis for finding the Appellant’s removal would not be a disproportionate breach of Article 8.*
>
> *4. The judge proceeded to hear and decide the appeal in the absence of the Appellant but arguably there was no exercise of discretion by the judge as to whether this was the appropriate course. The reasoning in relation to Article 8 is arguably inadequate.’*

11. In submissions before me at the error of law hearing both parties agreed that the factual analysis by the Respondent and the judge was wrong. An application for further leave had been made by the Appellant prior to the end of her existing leave in August 2004. Thus she had leave under section 3C of the Immigration Act 1971 until she asked for her passport back in March 2005 and withdrew her application. It came down, in Ms. Sharma’s view (Appellant’s representative), to the six days or so following return of her passport until she left the UK for Nigeria on 20 March 2005. That comment apart both parties were unable to assist me in the analysis of the meaning of ‘continuous residence’ and its application in this case.

12. Both parties agreed that the judge erred in not considering Article 8 on the information that was before him. Were the case to fail under the Rules it would have to be reheard under Article 8. It was not suggested that the judge had been wrong to proceed to deal with the case in the Appellant’s absence.

13. I reserved my decision.

14. I subsequently issued the following error of law decision (to avoid excess repetition only the later paragraphs need to be stated):

> *‘14. In considering this matter the facts of the Appellant’s history are not disputed. In summary, the Appellant entered the UK with clearance in September 2001. She renewed her leave on two occasions until 2004. Prior to the expiry of her leave in August*

2004 she sought further leave within time. In doing so she had continued leave pending a decision on her variation application under Section 3C of the Immigration Act 1971. The Respondent did not make a prompt decision on that application. It was still pending in March 2005. The Appellant's grandmother became ill. The Appellant wrote to the Respondent seeking a decision on her application. Having been told that such could not be guaranteed before she had to travel she withdrew her application. The exact date is unclear. However I see no reason to doubt the information in the Grounds of Appeal that she wrote to the Respondent to that effect on 4 March 2005. There is acknowledgement from the Respondent on 14 March 2005 which stated 'I am returning your passport as requested. This cancels the previous application'. From then until she left the UK on 20 March 2005 she did not have leave. She was without leave whilst in Nigeria until granted entry clearance to return to the UK on 18 June 2005. She has had leave since then until her application in November 2011 for indefinite leave.

15. *The judge was mistaken in finding that the Appellant did not have leave from 31 August 2004 until around 18 June 2005 when she returned. The correct period was from about 14 March 2005 until about 18 June 2005.*

16. *The gist of the grounds seeking permission is that the judge erred in finding that the Appellant was without leave in the UK for seven months. Rather, her absence without leave in total was from March to June 2005 which was less than the six month's gap permissible for continuous residence and as such "ought not to be considered as a break in continuous reside ". Also although she overstayed for six days following return of her passport and before she left such did not count as a break in continuous residence for that period as it was "within the permissible seven days unlawful stay".*

17. *Paragraph 276A reads:*

    (a) *"continuous residence means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return… [The subparagraph then goes on to define five circumstances in which continuity will have been considered to have been broken. It is common ground that none of these factors applies in this case].*

> *(b) 'lawful residence' means residence which is continuous residence pursuant to:*
>
> *(i) Existing leave to enter or remain,....."*

18. Paragraph 276B states that

> *"The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:*
>
> *(i)(a) he has had at least ten years continuous lawful residence in the United Kingdom;....."*

19. The judge erred in finding that the Appellant had no valid leave between August 2004 and June 2005. However, that was not a material error of law.

20. Ms. Sharma was not able to give me any authority for the assertion that it was permissible for the Appellant to remain as an overstayer for about six days before her exit and that such would not count against her in considering whether continuous lawful residence had been broken.

21. Paragraph 34J of the Rules states: 'Where a person whose application or claim for leave to remain is being considered requests the return of her passport for the purpose of travel outside the common travel area, the application for leave shall, provided it has not already been determined, be treated as withdrawn as soon as the passport is returned in response to that request'. Such accords with the information given by the Respondent in the letter of 14 March 2005.

22. I conclude that the Appellant had no existing leave for the period from 14 March 2005 until she left the UK on 20 March 2005. I see no reason not to give the language of the Rule its plain and ordinary meaning. The definition "lawful residence" in 276A(b) is clearly exhaustive. It says that "lawful residence means residence which is continuous residence pursuant to..." [it then gives three categories of case]. It does not say that lawful residence includes these three categories. Further, I see no reason to give anything other than the plain and ordinary meaning to the requirement in 276A(a) to have "existing limited leave to enter or remain upon their departure and return". As indicated no authority was put before me for any different interpretation.

23. As for the period of about three months outside the UK she also did not have leave. In ***TT (Long residence – 'continuous residence' – interpretation) British Overseas Citizen [2008] UKAIT 00038*** *the Tribunal held that a period of*

continuous residence as defined in the Rules, paragraph 276A(a), is not broken in circumstances where a person with leave to remain in the UK obtains further leave from an ECO while temporarily outside the UK prior to the expiry of the leave to remain. The Tribunal did not address the issue of continuous residence if a person exits with leave which later expires and after a period returns with further leave obtained after the expiry. It is not necessary for me to give a view on that because the Appellant having left the UK without existing limited leave to remain cannot succeed under 276A(a).

24. Although the judge erred on the facts the error was not material as the case could not succeed even under the correct facts.

25. The decision to dismiss the appeal under the Rules stands.

26. As for Article 8 no suggestion was made that the judge was wrong to proceed to determine the appeal in the absence of the Appellant. It seems that no oral hearing was originally sought but that administratively a judge considered that the issues were such that the case be put down for an oral hearing. Notice of oral hearing was sent to the Appellant. If there had been uncertainty she could have sought advice.

27. The judge had the issue of Article 8 before him. It was not appropriate for him to state he had "no way of assessing whether a combination of the particular circumstances and the apparent family life in this country would enable the Appellant to be successful in an Article 8 appeal". His duty was to decide the Article 8 claim on the information that was before him. In failing to do so (and yet dismissing the appeal under human rights) he materially erred.

28. The decision to dismiss the appeal under Article 8 is set aside and will need to be reheard.'

15. At the resumed hearing parties agreed that the only issue was Article 8. The Appellant was not present Mr Khan stating that it had been mistakenly thought that the resumed hearing was the error of law hearing. However, Mr Khan indicated that he was content to proceed in her absence with submissions.

16. In her submissions Ms Vidyaharan stated that there was no family life. Whilst there were adult siblings of the Appellant in the UK there was no indication that the relationship amounted to more than normal emotional ties. Whilst it was clear that there was a private life which would be interfered with were she required to leave such would not be disproportionate not least because she has always been in the UK on a temporary basis.

17. Mr Khan referred me to the Appellant's written statement for her history. Most of her family are here and it is here that she has made her life for many years. Her failure to satisfy the long residence Rule was a technical breach. The evidence strongly pointed in her favour in the proportionality assessment.

18. Turning to consider Article 8 the House of Lords in **Huang [2007] UKHL 11** made it plain that a step-by-step approach as laid out in **Razgar [2004] UKHL** was the appropriate method in an Article 8 case. The first question is whether the removal would be an interference with the exercise of the Appellant's right to respect for family or private life.

19. In this case it was not argued that the Appellant has family life. There was no evidence of a partner or children. Although she has adult siblings living in the UK it was not suggested that her relationship with them amounted to more than normal emotional ties. It was not disputed, however, by Ms Vidyaharan that the Appellant has established a private life having lived in the UK for some eleven years which encompassed her relationship with her siblings and their children, as well as her social life, studies and work. I agreed that the Appellant has established a private life.

20. Having found that there is a private life, turning to the next question the Court of Appeal has stated that the threshold for establishing an interference with private or family life is not a high one. In **AG (Eritrea) v SSHD [2007] EWCA Civ 80**1, Sedley LJ said (at [28]):

> *'While an interference with private or family life must be real if it is to engage Article 8(1), the threshold of engagement (the "minimum level") is not an especially high one. Once the Article is engaged, the focus moves, as Lord Bingham's remaining questions indicate, to the process of justification under Article 8(2). It is this which, in all cases which engage Article 8(1), will determine whether there has been a breach of the Article."*

21. Removal of the Appellant has the capacity to interfere with her private life in respect of separation from her family and friends. The threshold is accordingly reached.

22. That the decision is in accordance with the law is not disputed. Further, I am satisfied that the decision to remove does pursue a legitimate aim, namely, the maintenance of a fair and effective system of immigration control. The question remaining is whether or not the decision is proportionate given all the circumstances of the case.

23. In **DM (Zambia) v SSHD [2009] EWCA Civ 474**, at [9] Sedley LJ said:

> *'... this court has said many times that you cannot dispose of an Article 8 proportionality issue in a perfunctory or formulaic way. It requires a structured decision, however economically expressed.'*

24. In this case nothing in the statements before me was challenged at the hearing by Ms Vinyaharan. The Appellant entered the UK in 2001 as a child student. She has remained here for more than ten years entirely lawfully with the exception of the very brief period in 2004 when, having received her passport back from the Respondent, she took about six days to arrange her departure to Nigeria to see her sick relative. The consequence was that having withdrawn her application in order to get her passport back to travel, she was without leave when she left the UK. Although she obtained leave to return to the UK three months later and has remained lawfully ever since, the exit without leave meant she could not satisfy the Immigration Rules. Such is not in her favour in considering the balancing exercise. However I consider that that failure can, as Mr Khan submitted, properly be described as a technical breach as there was little she could do to avoid it as she needed a short period to arrange her departure.

25. Her situation at the time was not, in my judgment, helped by the fact she having made her application for variation of her leave as a student in time, the Respondent had still not made a decision on it after seven months, this despite the caseworker having been made aware of the Appellant's desire for a decision to be made so that she could get her passport back and travel to see her relative. I also see no reason to doubt her claim that the impression given by the case worker was that if she travelled she would not be starting again in terms of the calculation of continuous residence in the UK a matter supported, in her mind, by the fact that she was granted leave in Nigeria to return as a student.

26. I find the nature of the breach of the Rules and reasons behind it do not reflect adversely on the Appellant in the balancing exercise.

27. In that regard I note Lord Carnwath in **Patel v SSHD [2013] UKSC 72** who stated: 'the balance [between the Article 8(1) interest and legitimate aim pursued] drawn by the rules may be relevant to the consideration of proportionality', and that 'the practical or compassionate considerations which underlie the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument [under Article 8].' (at [55]).

28. In considering other factors in her favour the Appellant entered the UK as a minor aged 15 years. She went to school and university here. She is now 26 years old. While Ms Vinyaharan was correct to state that the Appellant's leave has been temporary as a student, the effect has been that her formative years have been spent here. All her brothers and sisters were born in the UK and following a period in early life when they lived in Nigeria, have been in the UK for many years. They are British citizens. I accept that she is close to them and to their children and they to her. Such is confirmed by statements from them.

29. I also accept that, as she indicates in her statement, during her many years here she has made many friends from school, work and through other means. Again there are statements supporting such.

30. I further accept that she has worked, lawfully, at the various locations in London indicated in her statement as well as doing voluntary work for a number of charities. She has been of good character throughout.

31. In addition I accept that having been away from Nigeria for so long she has lost contact with almost everybody she knew there as a young child and that the only reason she goes to Nigeria is to see her parents. As she says in her statement referring to the UK 'this is where (her) life is'.

32. Seeking to make a balanced judgment on all the material evidence before me I conclude that the removal of the Appellant would not be proportionate to the legitimate aim. The appeal succeeds on Article 8 grounds.

Decision

The previous Tribunal erred in law. Its decision is set aside and remade as follows:

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

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Conway