Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18309/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th September 2015	**On 16th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS MELBA CYNTHIA WAMBUI NJENGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Gillard, Legal Representative
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Kenya born on 15th January 1979. The Appellant first arrived in the United Kingdom on 4th September 2002 with entry clearance as a student. Thereafter the Appellant has an extensive immigration history set out in the Notice of Refusal which culminated on

19th November 2013 in her solicitors applying on her behalf for indefinite leave to remain on the basis of ten years' continuous lawful residence in the United Kingdom. That application was refused by the Secretary of State in a notice of refusal dated 31st March 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Mrs R J N B Morris sitting at Richmond on 13th January 2015. In a determination promulgated on 30th January 2015 the Appellant's appeal was refused both under the Immigration Rules and on human rights grounds. On 30th January 2015 Grounds of Appeal were lodged to the Upper Tribunal. On 12th March 2015 First-tier Tribunal Judge Colyer granted permission to appeal. Judge Colyer noted that the grounds contended:

   (i) that the judge had erred in her assessment of the Immigration Rules, with respect to paragraph 276B (long residence) in that the Appellant was not unlawfully resident in the United Kingdom for a period exceeding two years;

   (ii) the judge had erred in her assessment of the Respondent's guidance in relation to ten years;

   (iii) the judge erred in her assessment of the new Section 117B(5) in holding that the maintenance of immigration control will always outweigh factors that are in the Appellant's favour;

   (iv) it is submitted that paragraph 276ADE(vi) has not been considered; and

   (v) the judge has erred in her assessment of the consideration of exceptional circumstances in the Appellant's appeal.

3. In granting permission to appeal Judge Colyer considered that the main areas where there may have been a material error by the judge were in grounds (i), (ii) and (iv) but granted permission on all grounds.

4. On 26th March 2015 the Secretary of State served a response to the Grounds of Appeal under Rule 24. The Respondent contends that the judge's findings in relation to paragraph 276B are adequately reasoned and properly open to her to find on the evidence before her. But in relation to paragraph 276ADE the judge had noted at paragraph 18 of her determination that it was conceded by the Appellant's representatives that the Appellant could not meet the requirements of paragraph 276ADE. Further at paragraph 5 of the Rule 24 response it was contended that the Appellant did not meet the requirements of the long residence Rule nor the private life Rule (276ADE) and that if the Appellant could not succeed on long residence then she could not succeed in her claim pursuant to private life based on the facts of this case.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier

Tribunal Judge. The Appellant appears by her instructed legal representative Mr Gillard. Mr Gillard is extremely familiar with this matter, he appeared before the First-tier Tribunal and he is also the author of the Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Kandola.

Submissions/Discussions

6. Mr Gillard starts by contending that Grounds 1 and 2 of his Grounds of Appeal are very similar. He acknowledges that there is no "near miss" principle to be followed but contends that the judge failed to make conclusions at paragraphs 16(iv) and (v) of her determination and that in failing to do so there was a material error of law.

7. Mr Kandola responds by stating that the Appellant made an application out of time because she had failed on her appeal and even if I accept that there was an application made for indefinite leave to remain and disregard the current discrepancy between 31 and 28 days for applying out of time that this is in fact a misnomer. Mr Kandola points out that the Appellant's application was out of time and in any event she did not have any leave extant to her which it was possible for her to apply to continue to extend.

8. Mr Gillard challenges the purported concessions with regard to paragraph 276ADE pointing out that where the judge has set out the statutory information at paragraph 10 no reference is made to paragraph 276ADE. Mr Gillard contends the Appellant meets the requirements of paragraph 276ADE(vi) and therefore the judge has materially erred. Mr Kandola responds that Mr Gillard is raising a conflict between the Record of Proceedings and what is now submitted pointing out there has been no request made for a handwritten copy of the Record of Proceedings. In any event he contends that if such a concession is not made it would still not be material as the Appellant would have to show that there could be significant obstacles to the Appellant's integration into Kenyan society if she is returned and an examination of the evidence does not meet that threshold.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law.

Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. It is the contention of Mr Gillard that the Appellant meets the requirements of paragraph 276ADE(1)(vi) namely that the Appellant is aged 18 years or above, has lived continuously in the UK for less than twenty years but there would be very significant obstacles to the applicant's integration into the country to which she would have to go if required to leave the UK. I start by reminding myself that it is for the Upper Tribunal to determine whether there are material errors of law in the First-tier Tribunal's decision rather than to be rehearing the matter. Paragraph 276ADE is addressed briefly by the First-tier Tribunal Judge at paragraph 18. It does not seem to have been argued before her that that paragraph is met. The issue is set out very clearly at paragraph 15 of the determination. In any event the approach adopted by Mr Kandola on behalf of the Secretary of State is persuasive. The Appellant would have to show that there were very significant obstacles to her integration into society if returned and there has been no argument or submission put forward on this behalf. As such any such argument pursuant to such ground amounts to mere disagreement and is not material.

12. What is material relates to the issue in question which was set out at paragraph 15 namely whether the March 2010 application had broken the Appellant's lawful continuous residence in the UK with the result that she did not qualify for leave to remain in the UK on the basis of ten years' continuous lawful residence. That issue is very fully addressed by the judge in paragraphs (i) to (iii) and thereafter the judge has gone on to consider paragraph 276B of the Rules i.e. the requirements for indefinite leave to remain on the grounds of long residence and has made findings of fact at paragraph (i) to (vii) which are well-reasoned and sustainable and disclose no material errors of law.

13. The judge gave due and proper attention to the issue of exceptional reasons and addressed these at paragraph 16(iv) and (v) in her determination. I disagree with the view expressed by Mr Gillard that she did not make findings. It is clear that she did.

14. Further the judge has given due and full attention to Section 117B of the 2002 Act and has approached due consideration of these paragraphs quite

properly within paragraph 33 of her decision. Finally, so far as it is suggested that the judge erred in her assessment of the consideration of exceptional circumstances the judge has given due and full consideration to the authorities that were before her and in any event Lord Justice Sales has confirmed the approach taken in previous cases in the more recent overall guidance given in *SS (Congo)*.

15. In such circumstances the submissions made on behalf of the Appellant amount to little more than disagreement. This is a well-constructed and well-reasoned determination. It discloses for the above reasons no material error of law and the Appellant's appeal is consequently dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the Appellant's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris