IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/43496/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 January 2015	**On 6 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

AYOBAMI DAVID SOETAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Anifowoshe of Counsel instructed by K & S @ Law Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Raymond promulgated on 23 April 2014 dismissing the Appellant's appeal against a decision of the Secretary of State for the Home Department made on 7 August 2013 refusing his application for indefinite leave to remain in the United Kingdom made on the basis of having completed ten years' continuous lawful residence, and to remove the Appellant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The Appellant is a citizen of Nigeria born on 26 April 1983. His immigration history and something of his personal history is set out in the decision of the First-tier Tribunal Judge. I do not propose to rehearse all of that information in detail, but the following features are particularly salient given the context of his application and the particular issues that fall for decision in the current proceedings.

3. The Appellant first entered the United Kingdom on 21 August 2001 as a student and was granted subsequent variations of leave to remain, most recently on 29 October 2004 until 30 November 2007. On 29 November 2007 the Appellant purported to submit an application for further leave to remain as part of the International Graduate Scheme ('IGS'). This application, however, was rejected by the Respondent by letter dated 12 December 2007. That letter is on file and it indicates both that there were issues in respect of the documents submitted with the application and, more pertinently for present purposes, that the cheque submitted had 'bounced' - there were insufficient funds in the account and the cheque was returned unpaid.

4. On 16 January 2008 the Appellant submitted a corrected application with the appropriate fee. This application however was refused with no right of appeal on 6 February 2008.

5. In the meantime the Appellant was contemplating a trip back to Nigeria and in due course departed the UK on 26 February 2008. Whilst in Nigeria he made an application for entry clearance which was successful and returned on 23 March 2008 with leave under the IGS valid until 14 March 2009. Thereafter the Appellant made successful applications for variation of leave to remain until he made an application under the so-called '10-year Rule' on 5 February 2013, which was rejected on 23 February 2013. A further application on the same basis was submitted on 8 March 2013.

6. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 7 August 2013 with reference to paragraph 276B of the Immigration Rules. The Respondent also considered the Appellant's application under paragraph 276ADE of the Rules. A Notice of Immigration Decision was issued pursuant to the RFRL, being a refusal to vary leave and a decision to remove the Appellant. It is this immigration decision that is the subject of the appeal in these proceedings.

7. The Appellant appealed to the IAC. The appeal was dismissed by the First-tier Tribunal for reasons set out in the determination of Judge Raymond.

8. The Appellant made an application for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Shimmin on 21 May 2014.

Consideration

9. The Appellant's primary case before the First-tier Tribunal was based on his claim to have been continuously resident in the United Kingdom for ten

years. The Respondent considered that the continuity of the Appellant's residence had been interrupted because of the circumstances surrounding the application said to have been invalidly made just prior to the expiry of his leave in November 2007. The RFRL puts the matter in this way:

> "*It is noted that although you had lawful leave following your arrival in the United Kingdom on 21 August 2001 until 30 November 2007 on 26 February 2008 you left the United Kingdom at a time when you did not have lawful leave. You were informed at that time that if you left the United Kingdom your request for reconsideration would be void. Therefore your continuous leave is deemed to have ceased on 30 November 2007.*
>
> *Paragraph 276D does not allow the Secretary of State the use of discretion where you are satisfied that 276B has not been met. Paragraph 276D states that ILR 'is to be refused' rather than it 'may be refused' or any other use of flexible terminology. Therefore the Secretary of State has no power to take into consideration in the application of paragraph 276C of the Immigration Rules. 276D precludes flexible fulfilment of 276B when considering a grant pursuant to 276C.*
>
> *As detailed above you are considered to have broken your continuous residence in the United Kingdom and have not been here legally throughout the 10 years. As a result you are unable to demonstrate 10 years continuous lawful residence in the United Kingdom and you are not able to satisfy the requirements of the Immigration Rules with reference to paragraph 276B(i)(a*)."

10. The First-tier Tribunal Judge also found against the Appellant on this point. In doing so the Judge had particular reference to paragraphs 34A, G and J of the Immigration Rules. The following appears at paragraph 17 of the Judge's determination:

> "*The burden of proof is upon the appellant to the civil standard of the balance of probabilities. I have taken into account the oral and documentary evidence of the appellant, as outlined in my record of proceedings and this Determination, with the submissions and relevant rules. I do not accept that the appellant can consider that he had somehow continued his leave when he left the UK between 26 February 2008 and his re-entry on 23 March 2008 as a result of his separate application made whilst in Nigeria. The effect of paragraphs 34A with 34G and 34J is that when the appellant failed in his 29th November 2007 [application] on 12 December 2007 because he had not paid a fee he did not have an application date, his previous leave having expired on 30 November 2007, and the 12 February 2008 application for a reconsideration was when he did not have leave, and was in any case to be treated as withdrawn when he left the country. There could have been no extension of leave under 3C in such circumstances*."

11. That is a somewhat inelegant passage, but the essential thrust of it is that with reference to paragraphs 34A-34J of the Immigration Rules the Judge

took the view that the Appellant did not have valid leave when he left the United Kingdom for his short trip to Nigeria, and that his leave was not in any way resurrected by dint of the fact that he subsequently returned to the United Kingdom with valid leave.

12. The grounds of appeal as drafted in support of the application for permission to appeal are no longer relied upon in respect of what they have to say as to the First-tier Tribunal Judge's approach on this issue.

13. Instead the Appellant now seeks to advance his case by reference to the two Skeleton Arguments prepared on his behalf, the first of which is dated 23 July 2014 and the second of which is dated 10 November 2014; both have been settled by Ms Anifowoshe.

14. The argument now advanced identifies that the paragraphs referred to by the First-tier Tribunal Judge under the Immigration Rules were not actually 'in force' at the date of the Appellant's supposedly invalid application and his departure for Nigeria. The relevant Rules cited by the Judge – paragraphs 34A-34J - actually came into force from 29 February 2008, and therefore post-dated the relevant period.

15. To this extent the Judge was plainly in error in placing reliance on those Rules. That is not necessarily sufficient to demonstrate material error. The question still remained whether or not the Appellant could show that his period of residence was uninterrupted. To this extent reliance is now placed upon the provisions of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007.

16. The Appellant's essential submission now is that although he submitted a defective application for variation of leave to remain accompanied by a cheque that 'bounced', his subsequent submission of a valid application with the correct fee had the effect of validating the earlier application such that the date of his application for variation of leave was to be taken as the date upon which he submitted the initial defective returned application - that is to say the application made whilst he still had current leave. In those circumstances it is argued that his leave was continued statutorily by operation of section 3C of the Immigration Act 1971 right up until the time that he left the United Kingdom. In those circumstances, bearing in mind that he then subsequently returned to the United Kingdom with valid leave within a permitted period of time, there was no break to the continuity of residence. If the Appellant is correct in this regard then he will establish that he meets the requirements of paragraph 276B.

17. Reference is made in particular to regulations 16 and 17 of the Prescribed Forms and Procedures Regulations. Those provisions are a matter of record and I do not propose to set them out in detail here. However, what is germane is as follows.

18. Regulations 16(1) indicates that certain procedures are prescribed in relation to an application for which a form is prescribed by regulations 3 to 14. The prescribed procedures relate to the signing and dating of the application form, the requirement that the application be accompanied by

certain documents and photographs as specified in the form, and that each part of the form should be completed.

19. Regulation 17 provides for circumstances in which a defective application may be corrected. It starts in these terms:

> "*17(1) A failure to comply with any of the requirements of regulation 16(1) to any extent will only invalidate an application if:*
>
> *(a) the applicant does not provide, when making the application, an explanation for the failure which the Secretary of State considers to be satisfactory;*
>
> *(b) the Secretary of State notifies the applicant, or the person who appears to the Secretary of State to represent the applicant, of the failure within 28 days of the date on which the application is made, and*
>
> *(c) the applicant does not comply with the requirements within a reasonable time, and in any event within 28 days, of being notified by the Secretary of State of the failure*."

20. Ms Anifowoshe has argued that the effect of those provisions was such that the Appellant had rectified the defects in his initial application of 29 November 2007 through the submission of the subsequent application, and accordingly the initial application was not to be considered invalid.

21. The Secretary of State responds to this submission by making reference to the Immigration and Nationality (Costs Recovery Fees) Regulations 2007, and also in this context pleads in aid the reported decision in **BE (application fee: effect of non-payment) Mauritius [2008] UKAIT 00089**. The provisions of those Regulations make a distinction between applications made prior to 21 May 2007 and those made on or thereafter. There is no dispute that the Appellant's application was made after 21 May 2007, and therefore at a time when, as identified in **BE**, a stricter regime applied.

22. Regulation 16(1) of the Costs Recovery Fees Regulations is in the following terms:

> "*Subject to paragraph (2), where an application to which regulation 3, 4, 11, 12, 13, 14, 15 or 16 refers is to be accompanied by a specified fee, the application will not be considered to have been validly made unless it has been accompanied by that fee*."

Sub-paragraph (2) is in these terms:

> "An application referred to in regulation 3 or 4 which is made prior to 21st May 2007 will be treated as having being validly made regardless of whether the fee specified in respect of that application has been paid."

But, sub-paragraph (3) which then follows, states:

> "*The Secretary of State may treat an application referred to in paragraph (2) as withdrawn if, having written to inform the person*

who made the application the specified fee has not been provided, that fee is not provided within 28 days of the letter having been posted."

23. Because of the date of the Appellant's application it is now accepted that sub-paragraph 16(2) does not apply to him. It follows that he does not have the benefit of subparagraph 16(3). In the circumstances the defectiveness arising by reason of a failure to submit an application accompanied by a specified fee cannot be corrected after the event in a way that would effectively validate the defective application. This is a different approach from a situation covered under the Prescribed Forms Regulations where the defect relates to something relevant to the forms and/or accompanying documents. In short, an application defective for a failure to send in the specified fee with the application is not to be 'resurrected' through subsequent correction, whereas other defects at that time might have been so resurrected.

24. The issue therefore becomes one of whether or not it can be said that the Appellant's application was accompanied by a specified fee. In this regard the Appellant seeks to place reliance upon the observations in the case of **Basnet (validity of application – respondent) [2012] UKUT 00113** and in particular what is said therein at paragraph 20 which is in these terms:

> "*Accordingly we conclude that the Judge erred at paragraph 32 in considering that non-payment, for whatever reason, even if the fault of the respondent, was fatal to the validity of the application and of the subsequent appeal. Validity of the application is determined not by whether the fee is actually received but by whether the application is accompanied by a valid authorisation to obtain the entire fee that is available in the relevant bank account*."

25. It is also emphasised on behalf of the Appellant that the decision in **Basnet** indicated that where the Secretary of State asserted that an application was not accompanied by a fee the onus of proof was on the Secretary of State.

26. Ms Anifowoshe accepts that if a cheque is submitted at a time when there are insufficient funds to allow that cheque to be honoured then that would not constitute the submission of a valid authorisation to obtain the entire fee that is available in the relevant bank account.

27. It is apparent from the documents prepared at or about the time of the rejection of the Appellant's application that he appeared to acknowledge that the defects in this regard were of his own making. There is on file a letter dated 16 January 2008 in which the following is stated:

> "*I received my documents back from you on Thursday, 10 January 2007 only to find out that my application was returned due to lack of cleared funds in the account that I issued the cheque for the payment from and also documents to evidently show my finances and my search for employment in the UK. I sincerely apologise for this*

> *oversight on my part and taken steps to ensure that this will not happen with this application*."

28. There is also a letter from the Appellant's then representatives dated 12 February 2008 which states in part:

> "*On 10 January 2008 he received a letter from your office dated 12 December 2007 instructing him to make the correct payment for the application as there was not sufficient money in* ***his*** *accounts to cover the cheque he had issued*." (My emphasis.)

29. In my judgement those communications are, taken at face value, sufficient for the Secretary of State now to rely upon as discharging the burden of proof in establishing that the Appellant had not submitted valid authorisation with his application on 29 November 2007 in as much as both letters indicate the Appellant acknowledged both the fact of, and the responsibility for, there being insufficient funds in his account when he made his application.

30. That really would be the end of the argument that the Appellant seeks to now run - notwithstanding this matter not having been raised before the First-tier Tribunal or even in the grounds submitted in support of the application for permission to appeal. However, on instructions, Ms Anifowoshe identifies that there were certain documents placed before the First-tier Tribunal by way of bank statements for an account in the name of CCG House of Praise showing significant credit balances throughout the period surrounding the Appellant's application and its rejection by the Secretary of State in late 2007. The position is, it is now said on instructions, that the Appellant's application was supported by a cheque drawn on this account.

31. There is necessarily a factual tension between the assertion now made and the contents of the more contemporaneous documents to which I have just referred. This is not the forum for the hearing of evidence on what is essentially a new point. In all of the circumstances in my judgement it is too late in the day to be raising the argument now advanced given that it is ultimately premised on factual matters that run contrary to the available documentary evidence – evidence that is contemporaneous with the events of late 2007 / early 2008 - and is raising issues that were not advanced before the First-tier Tribunal, or even clearly formulated until the latter stages of submissions today.

32. It seems to me in any event the point has very little merit. If, as is now contended the cheque was drawn on an account that had sufficient funds and it is to be inferred that there had been a mistake on the part of the bank in not honouring the cheque, or on the part of the Secretary of State is processing it, one would have expected to see the Appellant raising that in his correspondence at the time, instead of which he acknowledged the error to be his own.

33. Be that as it may, this is a matter that should have been dealt with in 2007 and it does not behove the Appellant to raise it in the context of the arguments today which, if I may say so, seem to me to have developed as

a matter of expedience because even these matters are not adequately flagged up in the written arguments. Such expedience arises because of the Secretary of State's reliance upon the Fees Regulations in circumstances where the thrust of the Prescribed Forms Regulations do not bear the interpretation originally sought to be put upon them by the Appellant's representatives.

34. In all such circumstances I find that it would be inappropriate to permit this ground of appeal to be advanced, partly because it is premised on factual matters that had not previously been aired and are inconsistent with the documentary evidence, and partly because it seems to me ultimately to be of no substantial merit.

35. That only leaves then the argument in respect of Article 8 raised in the grounds in support of the application for permission to appeal. The First-tier Tribunal Judge, having rejected the arguments in respect of ten years' continuous leave, dealt with the issue of the Appellant's private life and/or family life in a relatively brief manner at the end of paragraph 17 of the determination in the following terms,: "*As the appellant has not been in the UK 20 years he does not come within the private life route at 276ADE and neither is there any evidence that he has any family life which is engaged under Appendix FM*."

36. It is confirmed before me that the Appellant does not seek to advance any submissions in respect of family life, but it is argued that his private life has not been adequately considered by the First-tier Tribunal Judge.

37. The context of this must be considered. The Appellant's witness statement before the First-tier Tribunal makes little or nothing of his private life, focused, as it is, mainly on the circumstances surrounding the application in late 2007 and his assertion of continuous residence. The supporting documents are broadly general in nature and there is nothing in any of those, it seems to me, that points to any particular circumstances that might warrant an exception being made for a person who otherwise does not meet the requirements of the Rules. Indeed, in my judgement, when invited to do so, Ms Anifowoshe struggled to identify anything beyond the length of time the Appellant had been in the United Kingdom and the lawfulness of the time that he has spent here.

38. The length of time the Appellant has spent in the United Kingdom is essentially an aspect that is fully covered by the Immigration Rules. So far as the lawfulness of the time he has spent here in the United Kingdom, it seems to me that that is essentially a neutral factor. Had he been here for periods that were unlawful then that might have some adverse consequence, but the mere observance of the relevant laws of the land is not something that should sound favourably in an overall balancing exercise.

39. In the circumstances, whilst the Judge's approach to the Article 8 issue is indeed brief, it nonetheless seems to me to be adequate where nothing very particular was being advanced on behalf of the Appellant. In those circumstances I find no material error of law.

Notice of Decision

40. The decision of the First-tier Tribunal contained no material errors of law and stands.

41. The appeal is dismissed.

The above represents a corrected transcript of an ex tempore decision given at the hearing on 27 January 2015.

Signed Date: **6 February 2015**

Deputy Upper Tribunal Judge I A Lewis