Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44392/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 15 September 2015	**On 17 September 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

Florence Abuor Okoh OKONKWO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Byrne, Advocate, instructed by Drummond Miller, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria, born on 28 November 1965. She appeals against a determination by First-tier Tribunal Judge Morrison, promulgated on 26 January 2015. Judge Morrison recorded the appeal as taken against the respondent's decisions of 30 September 2014 to refuse her leave to remain in the UK and to remove her to Nigeria.
2. The appellant says that she entered the UK unlawfully in August 2001 with her daughter, Esther Onyeka Okonkwo, also a citizen of Nigeria, born on 7

October 1995. An application was made for leave to remain in the UK on 11 May 2010, apparently on the basis of Article 8 of ECHR, outside the Immigration Rules.

3. After reaching the age of 18, the appellant's daughter was granted leave to remain on the basis of meeting the requirements of paragraph 276ADE of the Immigration Rules.

4. On 4 November 2014 the appellant filed notice of appeal to the FtT against a decision by the respondent served on her on 22 October 2014. She attaches copies of a decision to remove her dated 20th and served on 22 October 2014 and of an explanatory letter by the respondent also dated 20 October 2014. The letter deals with the case in terms of the Immigration Rules Appendix FM (family life) and paragraph 276ADE (private life) of the Rules as they came into effect on 9 July 2012. The respondent finds that the appellant does not meet those requirements, that there are no exceptional circumstances to grant leave outside the Rules, and no reasons in terms of paragraph 353B such that her removal would not be appropriate.

5. It appears from the file that the appellant may have attached copies of both the September and October decisions to her notice of appeal. The appeal should properly have been considered against the later decisions. However, this makes no difference to the substance of the case and the matter was not mentioned either in the FtT or in the UT.

6. In her grounds of appeal to the FtT the appellant relied only upon Article 8 of ECHR, outwith the requirements of the Immigration Rules.

7. In his determination Judge Morrison acknowledged that this was an unusual case in that the appellant's daughter had discretionary leave to remain and that the return of the appellant would be a very disappointing result for both of them, but concluded at paragraph 28 that "… while there will be a substantial interference to the family life which exists between Esther and the appellant … the decision is proportionate."

8. The appellant sought permission to appeal to the Upper Tribunal, on 2 grounds:

> (i) The respondent's decision of 20 October 2014 was *ultra vires*, on the authority of *Edgehill v SSHD* [2014] EWCA Civ 1241. Having submitted her original application in 2010 and claiming to having entered in 2001, the appellant might have qualified under the "old Rules" in terms of "the long residence rule requiring 14 years continuous lawful residence. While the period of time stops following issuance of a notice of liability to remove, the issuance of that notice in this case on 20 October 2014 was unlawful, predicated upon for its lawful authority the *ultra vires* decision under paragraph 276ADE." The point was not raised before the FtT, but was of such jurisdictional and obvious importance as to merit a grant of permission.
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> (ii) The FtT failed to have regard to the length of the applicant's residence which was "on or around 14 years".

9. On 19 March 2014 FtT Judge Osborne granted permission, in light of *Edgehill*.

10. On 26 March 2014 the respondent made a written response to the grant of permission. This is based on *Singh v SSHD* [2015] EWCA Civ 74, which resolved the conflict between *Edgehill* and *Haleemudeen v SSHD* [2014] EWCA Civ 558.

11. It is common ground that applying *Singh,* this case would not fall for consideration under the "old" Rules.

12. The appellant's case moved on as set out in a supplementary submission, as follows. *Singh* was wrongly decided insofar as it sought to overturn *Edgehill.* The correct interpretation of transitional provisions would give the appellant the benefit of the old Rules. In terms of fairness, the appellant was told that her application "would be dealt with under the existing Rules, and then the respondent changed her mind." The outcome of *Singh* was arbitrariness, inconsistent with the appellant's ECHR rights. The decision should revert to the respondent for consideration in line with her policies as at the date of application, including "the common law on the interpretation of Article 8 … by the time the decision got round to being made, the applicant had accumulated 14 years residence without issuance of removal decision. Correspondingly, she would be entitled to indefinite leave to remain …"

13. The respondent countered again in a note of argument. The appellant was served with notice of liability to removal on 10 December 2013 and on 12 December 2013 with a notice of decision to remove. The notice of liability to removal remains in place. The appellant was served with a further decision to remove on 20 October 2014. Thus, any period of residence has been interrupted for purposes of long residence provisions. *Singh* was correctly decided and should be applied. There was no implied undertaking to consider the appellant's application under existing Rules because she made no application under the Rules, only outside, and did not request leave on the basis of long residence. In any event, she could not have qualified because the continuity of her residence was interrupted by service of notification of liability to removal. There was no error in the outcome in terms of proportionality.

14. The respondent produces a copy page from the application by the appellant leading to these proceedings. Asked to tick a box selecting the category in which she is applying for an extension of stay, she chooses "other purposes/reasons not covered by other application forms" and explains:

> "I wish to apply for extension of stay under Article 8 of the Human Rights Act 1998. I have established private and family life here in the UK and have no-one to return to in Nigeria and also fear for me and my daughters lives if returned."

15. Mr Byrne in oral submissions acknowledged that the original grounds had been overtaken by *Singh*, and that in light of further information now emerging, it might be doubtful whether, even on the analysis that *Singh* was wrongly decided, the appellant would reap any benefit from the old

Rules. However, he maintained that the FtT decision could still be seen to have been made in the shadow of an incorrect understanding of the Article 8 exercise, which had been different before and after amendment of the Rules. If the decision were to be remade, there was a new matter to be borne in mind. The Judge gave some significance to the fact that the appellant's daughter might be leaving Edinburgh to attend University and so moving away from her mother. In fact she did not intend to leave Edinburgh, had not told the FtT that she was likely to do so, and if she were likely to study anywhere it would be at an institution in Edinburgh. The FtT read into the case an element which was not there. Although the appellant had not made her application under the 14 year long residence rule, if she did in fact have a good case on that basis, the respondent or the Tribunal ought to have recognised it.

16. Mr Mullen's submissions were along the lines of the note. He emphasised that the appellant in her grounds and submissions in the FtT had tacitly and correctly accepted the basis of the refusal decision, namely that her case could not meet the requirements of the Rules, and fell for consideration only outside the Rules.

17. I reserved my determination.

18. I have no difficulty in preferring the respondent's analysis of this case, as it has emerged above. While the decision in *Edgehill* held out some apparent hope, that was always illusory. The appellant did not apply and would not have qualified under the "old Rules". Any debate about the analysis of the Court of Appeal in *Singh* is irrelevant.

19. It is not clear whether ground (ii) was covered by the grant of permission. It has not been insisted upon and is ill-founded. The FtT plainly did have regard to the time the appellant had spent in the UK.

20. Mr Byrne in closing submissions mentioned a letter from the appellant's solicitors seeking to add a further ground, and said he had nothing further to add to it. There is among the papers on file a letter from those solicitors dated 1 June 2015 asking to add a further ground, "Failure to properly assess the proportionality of requiring the appellant's daughter to return to Nigeria to maintain her family life with her mother in the light of her grant of status under the private life rules." The judge's decision plainly incorporated that matter.

21. There is no significant point of distinction between the approach to proportionality taken by the judge and which might have been taken prior to amendment of the Rules. The grounds all resolve into no more than disagreement with a proportionality assessment properly reached.

22. The appellant has not shown that the making of the FtT's decision involved the making of any error on a point of law. The determination shall stand.

23. No anonymity direction has been requested or made.

Upper Tribunal Judge Macleman

15 September 2015