Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52192/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 January 2015	**On 4 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

Ms CHRISTINE MADU
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Isherwood of the Specialist Appeals Team
For the Respondent: Mr A Slatter of Counsel instructed by Fursdon Knapper, solicitors

DECISION AND REASONS

The Respondent and her immigration appeal history

1. The Respondent to whom I shall refer as the Applicant is a citizen of Nigeria born on 27 October 1965. She asserts she arrived in the United Kingdom on or about 27 January 1997. On or about 3 March 2007 she made an application for indefinite leave based on long residency and it would appear this application was refused. She made another

application on or about 15 April 2011 for indefinite leave based on fourteen years' continuous residence.

2. On 15 April 2011 the Respondent refused the Applicant leave finding she had not shown she had had either ten years' continuous lawful residence or fourteen years' continuous residence in the United Kingdom and there was no evidence she had sufficient knowledge of English language and life in the United Kingdom. The notice of decision advised the Applicant she had no basis for remaining in the United Kingdom and that if she failed voluntarily to leave enforcement action would be taken. The decision did not carry with it any right of appeal. The SSHD gave reasons for its decision in a letter of the same date.

3. No further legal action was taken by the Applicant in relation to that decision until 31 May 2011 when her solicitors wrote to the Respondent re-asserting the Applicant's entitlement to further leave on the basis of long residency and supplying further evidence said to show she had been in the United Kingdom since 1997. There was no explanation why such evidence had not or could not have previously been disclosed.

4. It would appear the SSHD responded by a letter of 4 August 2011 but no copy of that letter was put before the Tribunal. It is referred to in a letter of 14 September 2011 from the Applicant's solicitors to the Respondent noting that the letter of 4 August 2011 maintained the refusal to grant further leave and requesting the Respondent to issue an enforcement decision which would carry with it a right of appeal to the Tribunal.

5. There is no indication in the Tribunal file of any further activity until a letter of 9 January 2013 sent by the SSHD to the Applicant or her solicitors. No copy of it was before the Tribunal. Its existence is evidenced by a reference to it in a letter of 28 October 2013 sent by the Applicant to the Respondent in respect of which it would appear from the tenor of the letter that she had received legal advice. The letter refers to the failure of the Respondent to issue an enforcement notice and to enclosing further evidence to show she had been in the United Kingdom since 1997. The additional evidence submitted is said to be fully listed at paragraph 6 of the skeleton argument of Mr Slatter put before the First-tier Tribunal Judge. Again, there was no explanation why such evidence had not or could not have previously been disclosed.

6. A decision to remove the Applicant to Nigeria was made on 28 November 2013. The Applicant challenge this decision which carried with it an out of country right by lodging in-country a notice of appeal: the validity of which must be open to doubt.

7. The next development referred to by Mr Slatter was a letter from the Respondent to the Applicant's solicitors of which there is no copy in the Tribunal file, although it is referred to in the letter of 20 January 2014 in reply at page A1 of the SSHD's bundle. This enclosed what are described as "Grounds of Appeal/Statement of Additional Grounds". The Grounds

start by asserting they are Grounds for an Appeal against an Enforcement Notice which would appear to have been served under cover of the letter of 14 January. There is no need to consider them in depth because on 23 January 2014 the Respondent wrote to the Applicant's solicitors withdrawing the enforcement notice and enclosing a further enforcement notice dated 23 January which is in form IS.151A. The notice simply informs the Applicant she is a person liable to removal and to detention pending the decision whether to give removal directions. Such notices are not immigration decisions having a right to an appeal to the Tribunal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act).

8. On 24 January 2014 the SSHD wrote to the Applicant's solicitors confirming that their earlier letters and enclosures had been considered as further representations and explaining why the SSHD would not grant the Appellant further leave to remain. This letter accompanied a Notice of Decision of the same date giving the Applicant an in-country right of appeal.

9. The Applicant lodged notice of appeal against the 24 January 2014 decision. The Grounds are identical (including the then incorrect reference to the date of the decision as 28 November 2013) to those originally submitted under cover of a letter of 9 December 2013 from the Applicant's solicitors. The Grounds assert the appeal is based exclusively on issues arising under Article 8 of the European Convention asserting the Applicant should have an in-country right of appeal. The decision of 24 January 2014 gave the Applicant an in-country right of appeal. The other assertions in the Grounds are that the Applicant had:-

> Previously made an application and representations to the Home Office on the basis of her long residence .... those representations dated 1 March 2011 and 14 September 2011 are enclosed for your attention.

10. Mr Slatter did not refer to the decisions and correspondence subsequent to 20 January 2014.

11. He asserted the Applicant had established a sufficient nexus between the immigration decision under appeal and her claim under Article 8 to entitle her to an in-country right of appeal. He relied on paragraph 10 of the judgment in *BA (Nigeria) v SSHD [2009] EWCA Civ.119* and noted that indeed the Applicant had been given an in-country right of appeal in the decision of 24 January 2014.

12. This led him to submit that the 2011 decision was unlawful and the SSHD had made a fresh decision with an in-country right of appeal in January 2014 but the relevant law to be applied was to be at the date of her application in 2011.

13. He continued that the Judge had been correct to apply the provisions of the pre-10 July 2012 version of paragraph 276ADE because the

application had been made in 2011 and so had the benefit of the transitional provisions. The Judge had therefore been correct to apply the previous version of paragraph 276 and the determination did not contain a material error of law.

Findings and Consideration

14. The Applicant claimed the SSHD's decision on 15 April 2011 to refuse her further leave without a right of appeal was unlawful. The letter of 15 April 2011 giving the SSHD's reasons for refusing the Applicant further leave addressed any potential claim she might have had based on Article 8 of the Immigration Rules. Sedley LJ said:-

> .... On a purely literal construction of Section 92(4)(a) any historic asylum or human rights claim gave an in-country or suspensive right of appeal – failed because it would lead to an inexplicable and arbitrary distinction between individuals who were similarly placed. It followed that, although not spelt out, there had to be a nexus between the immigration decision against which the appeal was directed and the content of the initial claim for protection.

It would appear there was sufficient nexus which indeed the reasons letter of 15 April 2011 recognised. Mr Slatter's argument continued that consequently the 2011 decision was unlawful. There was no evidence of any threat or attempt to challenge this decision for example by way of judicial review. The solicitor's letter of 31 May 2011 enclosing further evidence and seeking reconsideration made no suggestion the April decision was unlawful nor was any attempt made to appeal or challenge it. There was no submission to the Tribunal that the Applicant had attempted to appeal it or to seek judicial review.

14. It appears that by a letter of 4 August 2011 the SSHD maintained its position. No copy of this letter before the Tribunal. On 9 January 2013 the Applicant's solicitors submitted further evidence of the Applicant's claimed long residence and requested the issue of an enforcement order in the expectation that it would grant the Applicant an in-country right of appeal. The decision to remove of 28 November 2013 did not carry an in-country right of appeal but did carry an out of country right of appeal. Again there was no evidence before the Tribunal of any attempt to challenge this 2013 decision by way of judicial review.

15. The Applicant finally was given an in-country right of appeal by reason of the decision of 24 January 2014 being the decision leading to the present appeal. The law to be applied is the law as at the date of the decision: see *Odelola v SSHD [2009] UKHL 25*. The Applicant's case is that the decision of January 2014 was made in response to her application of April 2011 and so was entitled to the benefit of the transitional provisions.

16. On the balance of probabilities the SSHD's letter of 4 August 2011 and the Applicant's letter of 14 September 2011 requesting the issue of an enforcement notice but probably meaning removal directions or a decision to make them effectively disposed of the 2011 application.

17. The letter of 14 September did not make any other challenge to the April decision or its lawfulness. I am fortified in my view by the lapse of time before the Applicant took any further action which was not until 9 January 2013, over 15 months later and even then it was not until 20 January 2014, when another year had passed, until the Applicant renewed or rather re-commenced her efforts to obtain status in the United Kingdom. The reliance in the letter of 20 January 2014 upon information given to the SSHD in 2011 is in all the circumstances, particularly the periods of inactivity on the part of the Applicant and the failure on the part of the Applicant to appeal or otherwise challenge any of the SSHD's earlier decisions, not sufficient to support the submission that the letter of 20 January 2014 was a continuation of the 2011 application. It amounted to fresh representations which the SSHD treated as a new application leading to the decision of 24 January 2014 giving rise to the subject appeal.

18. The conclusion is that the Judge made an error of law in proceeding on the basis that the application leading to the decision under appeal had been made in 2011 and not 2014. Consequently, his decision must be set aside in its entirety without any findings being preserved. The case is remitted to the First-tier Tribunal for a hearing afresh in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 and paragraph 7.2 of the Upper Tribunal's Practice Statement of 10 February 2010 as amended.

Anonymity

16. There was no request for an anonymity order and having heard the application and considered the papers in the Tribunal file I find that none is warranted.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside in its entirety and the appeal is remitted to the First-tier Tribunal for hearing afresh before any Judge other than Judge Dennis.

Anonymity order not made.

Signed/Official Crest Date 04. ii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal