



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/50519/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal  
On 18 February 2016

Decision & Reasons Promulgated  
On 29 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

FOLOSADE JUMOKE ADEBAOYO  
(ANONYMITY ORDER NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Youssefian (D J Webb and Co Solicitors)  
For the Respondent: Mr D Mills (Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Folasade Jumoke Adebayo, a citizen of Nigeria born 6 October 1965, against the decision of the First-tier Tribunal to dismiss her appeal against the decision of the Respondent of 1 December 2014 to refuse her application for further leave to remain and to set removal directions against her under section 47 of the Immigration Asylum and Nationality Act 2006.
2. She entered the United Kingdom as the spouse of Solomon Adebayo on 10 November 2007 and was granted leave until 24 July 2009; an application for settlement as a spouse subsequently failed, and appeal rights against that decision were exhausted on

12 October 2010. On 23 September 2011 she was subsequently granted Discretionary Leave to Remain (DLR) until 23 September 2014; it is against the refusal of a subsequent extension request that this appeal now arises.

3. The application was refused because the relationship with Mr Adebayo was no longer subsisting, and she could not demonstrate very significant obstacles to her integration in Nigeria. There were no exceptional circumstances warranting departure from the Immigration Rules.
4. The Appellant's evidence on appeal below was that she had worked as a qualified nurse in a government hospital in Nigeria for twelve years, marrying Mr Adebayo in May 2006. She had applied for settlement as his wife in July 2009, following a period over which she lived in Bath during the week to pursue nursing studies whilst her husband remained in London. These living arrangements meant they could put forward only limited proof of cohabitation. As a result the Home Office had invited them to interview to assess the reality of their marriage, and concluded that it was not genuine and subsisting.
5. On appeal against that decision Judge Kamara for the First-tier Tribunal found that she was not in a genuine relationship with her husband and that her removal would be proportionate given that she had obtained entry on the basis of a false claim to be in a genuine relationship, one wholly undermined by the fact she had lived separately from her husband from the time of her arrival; her private life connections here were founded on that dishonesty.
6. Her relationship with her husband began to breakdown in early 2010, and he mistreated her. She confided in her pastor but did not report the matter to the police. She applied to regularise her position in July 2011, stating in cross examination that she did so as a spouse; this was refused but she received DLR outside the Rules.
7. She now lived in Birmingham in a rented property paying £310 monthly, working as a Care Assistant earning around £1,000 monthly. She was heavily involved in the Kingdom Life Apostolic Church which she attended twice weekly, and was a member of the International Christian Association, giving talks on the Christian faith. She felt that she had nothing to return to in Nigeria as her parents were dead, and her sister and brother could not support her, indeed presently she remitted funds to them, the former being a widow with five children and the latter being unemployed. When she returned to the country she had to stay in a hotel rather than with them. Her qualification in Nigeria had expired and she would not be able to support herself using her nursing skills. She argued that having been granted DLR in September 2011 she benefit from the transitional policy statement of June 2012 which set out that those granted DLR before 9 July 2012 would continue on a route to settlement subject to passing criminality tests.
8. The First-tier Tribunal dismissed the appeal under the private life route because the Appellant could not establish an inability to integrate in Nigeria. Considering her case outside the Rules, it was not accepted that she lacked social and cultural ties there, nor

that she had shown that her nursing qualifications would no longer be valid. She was familiar with the local language and could be expected to maintain her friendships in this country, using modern means of communication from abroad. As to her arguments based on her past grant of DLR, that had apparently been made in error, given the only apparent justification for it was the fact of her continued status as the wife of her husband, overlooking the findings of Judge Kamara and indeed the Home Office's own past assessment of her circumstances as not involving a genuine or enduring relationship. Accordingly refusal of further leave was appropriate applying Rule 322(1) because the grounds on which she was previously granted DLR no longer persisted.

9. Grounds of appeal alleged that the First-tier Tribunal had erred in law in failing to identify any material change of circumstances, absent firm evidence as to the basis of the grant of DLR, and indeed ignoring the concession made by the Presenting Officer below to that effect. Judge Keane granted permission to appeal on 12 June 2015 for the First-tier Tribunal, identifying the arguable error of law as the judge's presumption as to the basis for leave in the light of the concession.
10. At a previous hearing of the appeal the proceedings were adjourned because of the need for the Appellant's representatives to assimilate and digest the evidence sought to be adduced by way of a Rule 15A notice by the Secretary of State. That evidence takes the form of General Case Information Database (GCID) Case Record Sheets recording that in truth the grant of leave was based on the belief that the Appellant was in a subsisting relationship, she having provided further proof of cohabitation from March 2009 until August 2011. The minute records that she had been married to a British citizen since May 2006 and had lived here since November 2007 and had built a private and family life here, and that there was now sufficient evidence of cohabitation provided to justify the grant of DLR (the grant of leave taking place outside the Rules because the timing of the application constituted her as an overstayer). Following referral to a supervisor the provisional decision to grant DLR was endorsed. On 3 September 2012 the receipt of a letter is recorded, in which Mr Adebayo stated that he was no longer supporting his wife's claim to stay in this country as she had left him.
11. Mr Youssefian submitted that there had been no clear communication of the basis of leave being granted from the Respondent to the Appellant, leaving her uncertain as to the basis on which she had been granted leave and thus unclear as to how to conduct herself in the future. The First-tier Tribunal could not have concluded there to have been a genuine change of circumstances without making an evidence-based assessment as to the basis for the original grant of leave. The case note did not unequivocally show that marriage was the sole basis of DLR: the phrase "private and family life" appeared at one point.
12. For the Secretary of State, Mr Mills submitted that the minute as to the basis for leave being granted should be admitted into evidence, either at the error of law stage, his preferred position though one he sensibly admitted suffered from the disadvantage that the failure to adduce it sooner was essentially unexplained, or, if error of law was

found, upon the re-determination of the appeal that would inevitably follow. The minute made it clear that, whilst the First-tier Tribunal might be criticised for speculation on the state of the evidence before it, it had nevertheless come to the right conclusion and one with which the Upper Tribunal should agree.

## Findings and reasons

13. There is no appeal before the Upper Tribunal against the decision to reject the Appellant's case as to the compatibility of her expulsion with the private life requirements of the Immigration Rules, or with the broader conception of Article 8 ECHR outside those Rules. The sole issue is whether the Respondent's approach to her own Guidance was correct. That sets out:

### **"Transitional Arrangements**

? All decisions made on Discretionary Leave on or after 9 July 2012 will be subject to the criteria set out in this guidance....

### **Applicants granted Discretionary Leave before 9 July 2012**

? Those who, before 9 July 2012, have been granted leave under the DL policy in force at the time will normally continue to be dealt with under that policy through to settlement if they qualify for it (normally after accruing 6 years continuous DL). Further leave applications from those granted up to 3 years DL before 9 July 2012 are subject to an active review.

? Consideration of all further leave applications will be subject to a criminality check and the application of the criminality thresholds, including in respect of cases awaiting a decision on a further period of DL on that date. See Criminality and Exclusion section above.

? Decision makers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same and the criminality thresholds do not apply, a further period of 3 years DL should normally be granted. Decision makers must consider whether there are any circumstances that may warrant departure from the standard period of leave."

14. The Appellant, being a person who was previously granted leave to remain under this policy, was entitled to further consideration of extension applications by reference to that policy, so long as she could demonstrate that "the circumstances prevailing at the time of the original grant of leave continue at the date of the decision". If the Secretary of State failed to follow her own policy, the appeal would fall to be allowed as the underlying immigration decision was not in accordance with the law.

### *Decision on error of law*

15. The first question that arose at the hearing was whether the Upper Tribunal should accede to the Respondent's application to admit the minute of decision making. I declined to do so, given that no satisfactory explanation was given for its late production: and in these circumstances, I accepted that Mr Mills was right to concede that the First-tier Tribunal decision was flawed by having made a finding without evidential foundation whatsoever.

*Decision on reconsideration of the appeal*

16. As there was no requirement to entertain any further evidence from the Appellant's side, the parties agreed that, once the First-tier Tribunal decision was set aside, the appropriate disposition of the appeal was for the Upper Tribunal to proceed to determine the matter finally for itself. Once again the admissibility of the decision minute fell to be confronted: I now considered it appropriate to admit the evidence of the basis for the DLR grant, given that it was clearly in the public interest that any entitlement to leave to remain should be determined on the basis of the true facts, particularly where a grant of leave appears to be inconsistent with judicial findings on the appeal made previously. The Appellant has had plenty of notice of the Home Office case on this issue given the previous adjournment of the appeal.
17. The minute of decision making now demonstrates beyond reasonable doubt the basis for the original grant of DLR: ie that the Home Office caseworker and their supervisor believed the original relationship with her husband to still be extant. This dovetails with the Appellant's own evidence below that it was her relationship that grounded her application. The single reference to "private and family life", in the face of the Appellant's precarious residence, somewhat chequered immigration history given the adverse judicial findings made in her appeal, and limited connections with this country, cannot reasonably be read as indicating that the scope of Article 8 rights thereby recognised extended beyond her relationship to her husband. Accordingly it can be seen that the condition precedent for a further extension of leave under the transitional arrangements, ie that "the circumstances prevailing at the time of the original grant of leave continue at the date of the decision", was simply not established.
18. The Respondent's decision was therefore consistent with her policy and the appeal falls to be dismissed.

Decision:

The decision of the First-tier Tribunal contained a material error of law.

Having reconsidered the appeal, however, the decision of the Secretary of State was a perfectly lawful one.

The appeal is dismissed.

A handwritten signature in blue ink, appearing to read 'M. A. Symes', with a long, sweeping underline that extends across the width of the signature.

Signed:  
Deputy Upper Tribunal Judge Symes

Date: 22 February 2016