Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03299/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reason Promulgated**
On 12th December 2017	**On 14th December 2017**

Before

THE HONOURABLE LADY RAE
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FUNMILAYO ADEKEMI BADMUS
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
Solicitors
For the Respondent: Ms F Allen, of Counsel, instructed by Paul John & Co
Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Nigeria born on 25th October 1968. She claims that she arrived in the UK on 4th May 1995 as a visitor and that she has overstayed in the UK since that time. She applied unsuccessfully to the Secretary of State in 2010 and 2013 to resolve her immigration status. Following the second application she had a right of appeal which was dismissed by Upper Tribunal Judge Finch, and she became appeal rights exhausted in May 2014. She reapplied for leave to remain on the basis of her private and family life ties to the UK on the 15th May 2015, and this application was refused in a decision dated 24th July 2015. Her appeal against this decision was allowed by First-tier Tribunal Judge Rastogi in a determination promulgated on the 7th January 2017.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Ransley on 20th July 2017 on the basis that it was arguable that the First-tier judge had erred in law in accepting that the claimant had been in the UK for 20 years simply because the Secretary of State was not present at the hearing to challenge her evidence, and in failing to take into account the fact that a previous decision of Judge of the First-tier Tribunal Finch dated 18th February 2014 had found that the claimant had only shown residence since 2007.

3. The matter came before the Upper Tribunal to determine whether the First-tier Tribunal had erred in law. There were hearings on 18th September 2017 and 1st November 2017. Both of these hearings were adjourned without resolving this issue, and after the hearing on 1st November 2017 a direction was made that the Secretary of State was to file and serve the decision of Judge of the First-tier Tribunal Finch, and pay the costs of the claimant for that hearing. On 3rd November 2017 the Secretary of State provided a copy of the decision of Immigration Judge Finch promulgated on 18th February 2014 together with the refusals of permission to appeal against that decision.

Submissions – Error of Law

4. The grounds of appeal contend, firstly, that the First-tier Tribunal erred in law as a burden of proof was placed on the Secretary of State to disprove what the claimant sets out with respect to her period of residence, when in fact it is for the claimant to prove her case and further that she was unable to do this as she had no uncontentious evidence to support her claim of having been resident for 20 years or more. The First-tier Tribunal should in any case have placed weight on what was said in the reasons for refusal letter even if a presenting officer had not attended the hearing.

5. Secondly it is argued that the First-tier Tribunal fails to understand that the failure to meet the Immigration Rules identified at paragraph 21 is relevant to the assessment of whether the claimant can succeed in her human rights appeal.

6. Thirdly it is argued that the First-tier Tribunal failed to treat as authoritative the reported case of Devaseelan, which is pertinent as there is a failure to take the findings of the previous immigration judge, namely Judge Finch, in her decision of 18th February 2014 as a starting point. This was material as Judge Finch had found that the claimant's period of residence had only been shown from 2007 due to grave concerns about the genuineness of documents submitted.

7. Ms Allen argued for the claimant that there was no material error of law in failing to take the decision of Judge Finch into account as that decision was not one regarding the length of residence but one with respect to whether the appellant was in a genuine and subsisting relationship with her partner, Mr Tijani. Judge Finch had not believed that this was a genuine relationship but did not deal with the appeal on the basis that there was a 20 year period of residence because it was not claimed that there was at the time of that hearing, see paragraphs 9 and 10 of the decision. Ms Allen argued that the decision of Judge Finch was not entirely clear that the appellant had used forged documents to advance her case at paragraph 25 of the decision either.

Conclusions – Error of Law

8. The First-tier Tribunal does set out a summary of the refusal letter at paragraph 3 of the decision, and also confirms at paragraph 8 of the decision that the Secretary of State's bundle had been provided as evidence.

9. The analysis at paragraphs 21 – 26 of the decision is legally correct. A finding that a claimant can show compliance with the private life Immigration Rules at paragraph 276ADE(iii) would mean that there was no immigration control public interest weighing against the claimant so that her private life ties would then make it highly probable that her removal would be disproportionate.

10. It is however possible that paragraph 19 does amount to asserting a reversing burden of proof in putting some sort of obligation on the Secretary of State to supply records, which would amount to an error of law, although paragraph 20 of the decision is clear that the burden of proof is on the claimant and asserts a correct approach in finding that information has been considered in the round.

11. It is clear however that the First-tier Tribunal errs in law as it does not follow Devaseelan in making the previous decision of First-tier Tribunal Judge Finch a starting point, and indeed seems to be oblivious to its existence despite reference to it in the reasons for refusal letter chronology.

12. This is a material error of law as Judge Finch found that the claimant had not lived in the UK with her purported partner Mr Kehinde Badmus/Tijani since 1995, and indeed had not shown she was married to him (in part

due to anomalies with the official date stamp on the Nigerian marriage certificate) or that they were a couple, which led in turn to a finding that the claimant had no family life relationship in the UK. Judge Finch also found that claimant had only been present in this country since 2007. See particularly paragraphs 19, 20 and 23 of her decision.

13. In coming to these conclusion Judge Finch considered the statements and evidence of Olawale Adetoro, Abdiodun Agboluaje and the letter from Grace Oderinde, as well as the witness evidence of the claimant and Mr Tijani. At paragraph 25 of her decision Judge Finch found that the HMRC documents, P60s, payslips for the period 1995 to 2008, and a British Gas bill from 1998, were all false as the Secretary of State had provided detailed reasons for this being the case and the claimant had not provided an explanation dealing with these reasons. It is clear that these were all material findings which ought to have been considered as the starting point for this appeal, which was a human rights appeal advanced before the First-tier Tribunal on grounds of both the claimant's supposed 20 years of residence in the UK and also on the basis of her family life ties with her partner Mr Badmus/Tijani who has indefinite leave to remain in the UK, see paragraph 17 of the decision which sets out the submissions for the claimant before the First-tier Tribunal.

14. We also find that the decision errs in law for want of reasons at paragraph 25 for the conclusion that the claimant could meet paragraph 276ADE (iii). This is because there are no reasons given for believing the appellant's history beyond saying that she was not inconsistent in her statement, and there is no reference to any supporting documentation or other reasons given for concluding she had been in the UK for 20 years or more.

15. As a result, we set aside the findings and decision of the First-tier Tribunal and remake the appeal de novo. We took a break in the hearing over lunch for the parties to consider how the remaking should take place and formulate submissions on this issue.

16. Ms Allen submitted that we should remit the matter to the First-tier Tribunal for remaking due to the extent of the fact finding required. Mr Kotas was prepared for the remaking to take place in the Upper Tribunal. Our decision was that there was not extensive fact finding required: there were three issues the length of the claimant's residence in the UK; whether she had two years' cohabitation with her partner in the UK; and whether there would be insurmountable obstacles to family life taking place in Nigeria. As a result, we decided, the remaking processes would happen in the Upper Tribunal.

17. Ms Allen then applied for the hearing to be adjourned rather than for the remaking to take place immediately as we proposed. She submitted that it was appropriate to adjourn as the claimant would like to collate further evidence in support of her appeal. She said that the claimant

and her partner would like to produce the following: the original photos and marriage certificate (copies being in the bundle); an expert report showing the marriage certificate is genuine; the birth certificate of their daughter and a statement from their daughter; documents from a Freedom of Information Request to the Secretary of State which she was instructed would show that the claimant had said she had a partner in a previous judicial review and in the previous SET(O) application which would show some of the conclusions of Judge Finch finding that the claimant had not disclosed her partner in these applications were not sound; further evidence of recent cohabitation in the form of utility bills and a letter from the landlord. Ms Allen said these documents were material as they could show the claimant was a credible witness and counter the findings that she was not made by Judge Finch. If the claimant was a credible witness it would be open to us to find that she had been in the UK since 1995, and thus for more than twenty years, and for her appeal to succeed on her oral evidence alone. Ms Allen could not explain why this application was only being made now or why this evidence had not been collated earlier.

18. Mr Kotas submitted that we should proceed immediately with the remaking as the claimant had not applied under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 giving notice that she wished us to consider evidence that was not before the First-tier Tribunal and explaining why it had not been submitted to the First-tier Tribunal.

19. We decided that it was not appropriate to adjourn the remaking hearing. There had been no compliance with Rule 15(2A) and even at this stage there was no explanation as to why the evidence had not been sought and provided earlier. Directions had informed the claimant and her solicitors that she should expect a remaking hearing to follow any finding of an error of law, and this was a case where an appropriately experienced solicitor would have been aware that a finding of an error was very likely. No expert was identified with respect to the report on the marriage certificate. Ultimately fairness did not require an adjournment as none of the evidence would show that the claimant had been in the UK for 20 years and thus assist her case that she had this period of residence in the UK and her appeal on private life grounds; and whilst some of it might have enhanced the contention that she had a genuine relationship with her partner none of it went to the second issue in any family life appeal, namely showing that there would be insurmountable obstacles to family life taking place in Nigeria.

20. As such we proceeded with the remaking hearing.

Submissions and Evidence Remaking

21. The claimant adopted her written statement as her evidence and confirmed that she had signed the statement, and that it was true. In her written statement the claimant continues to assert that she came to

the UK in May 1995 and has not left since this time, and that she stayed here because her husband, whom she married in 1992 in Nigeria, was present here. She says that Mr Tijani is her husband and has supported her during her time in the UK as she has not had permission to work, and that she has now has no family or material possessions in Nigeria. She says that she and Mr Tijani previously applied to remain singly, as opposed to as a couple, as a Nigeria lawyer, who has now returned to that country, advised that this was the correct way to proceed and she now realises that this was wrong and that they were mislead in taking this approach.

22. The oral evidence of the claimant started with her being able to answer some questions but after some initial questions from Ms Allen she ceased to be able to continue and seemed not able to understand the questions put to her. We asked that Ms Allen take instructions outside of the Tribunal hearing room as to whether the claimant needed an interpreter but after doing so Ms Allen said she was instructed that the claimant did not need an interpreter but was having some sort of panic attack type reaction to being in the Tribunal. It was clear that the claimant was very nervous and uncomfortable, and so we tried to address this matter in a number of ways. We were informed that the claimant had been having these problems for the past year, and Ms Allen made no application to adjourn the hearing on the basis of any ill health of the claimant. We gave the claimant a break from questioning by taking her partner's evidence, and then returning to her evidence but this did not assist, and cross-examination had to be abandoned.

23. The information the claimant communicated prior to becoming unable to answer any further questions was as follows. Her brother had sent the registrar's certificate to the UK for her as the marriage certificate had been questioned by Judge Finch as not being genuine due to the 1st May 1992 stamp. She could not say when this had happened and was unclear when she last had contact with her brother. Her brother was her only relative in Nigeria. She had a daughter who now lived in the USA, and had gone to live there after her mother died and been taken there by her husband's cousin at that point. She did not know when any of these events had taken place, bar that she had been in the UK when her mother died.

24. Mr Tijani's statement is very similar to that of the claimant but includes the information that he is 61 years old and would not be able to obtain employment in Nigeria or get the medical treatment for arthritis, high blood pressure and an eye condition which he gets in the UK because he would not have the money to pay for these treatments. He reiterated these medical issues as reasons why he could not have family life in Nigeria in his oral evidence, along with the fact that he would not be able to get work in Nigeria due to his age – now 62 years.

25. In oral evidence Mr Tijani was asked to explain why he used a different surname in the UK to the one on his marriage certificate, where his

surname is given as Badmus, the same name as the claimant uses as her surname. He said that he used Tijani to please his father and it was his father's name, where as Badmus is his family. He confirmed he and the claimant have a daughter born on 12th January 1993 who lives in the USA. Mr Tijani also explained that he had worked for Network Rail until 2006 and thereafter for Proactiv Resources maintaining trains. He is not working as much now as he is studying civil engineering. He said he had been in the UK since 1992, and that his daughter had gone to the USA in 2008 when she was 15 years old, following the death of his mother-in-law who had cared for her until she died in 2007. A cousin of his had taken his daughter from Nigeria to the USA.

26. Mr Tijani said the claimant had one brother and no sisters, and that when she is recorded as having referred to a sister at the hearing before Judge Finch this must have been his sister who lives in Plaistow. It was also not correct that his mother-in-law had sent the marriage certificate to the UK, as is recorded in the decision of Judge Finch, as she had died and the document was sent by a friend.

27. The claimant's bundle also includes GP medical notes for Mr Tijani, which stretch from 2002 to 2011 giving his address as 9 Perkins Square, and which contain references to his having a wife or partner and other medical papers for Mr Tijani from 2016 concerning his eye problems with glaucoma with the address 6 Newhaven Road; undated photos of a Nigerian wedding; witness letters and statements from CA Oderinde, Olawale Samuel Adetoro and Abiodun Ibrahim Agboluaje all dated in 2013 and all of which were before Judge Finch; Mr Tijani's Halifax current account statements which show his address as 6 Newhaven Road and regular payments in by Pro Active Recruitment; a letter from the University of East London dated 2016 regarding Mr Tijani's course in civil engineering and construction management giving his address as 6 Newhaven Road; an invitation to an eye examination from an optician for the claimant giving her address as 6 Newhaven Road dated June 2016; the Nigerian Registrar's Certificate for the marriage of the claimant and Mr Badmus.

28. The respondent's bundle includes a DVLA letter addressed to Mr Tijani for 2016 at 6 Newhaven Road; evidence that the claimant applied to vote from 6 Newhaven Road in July 2013; a British Gas bill for the claimant at 15 Diana House in 2002; one page of GP notes for the claimant giving an address of 34 Bellingham Green from 2006 to 2015; a letter from Philips Oyerinde dated April 2015, who says he is the landlord of 6 Newhaven Road and that the claimant and Mr Tijani are a couple and his tenants; marriage certificate of the claimant and Mr Badmus; grant of ILR to Mr Tijani; passport copy for the claimant issued in the UK in February 2010; the FLR (FP) form giving the claimant's address in April 2015 as 6 Newhaven Road; and the notice of appeal which gives the claimant's address as care of 225A The Grove (her solicitor's address) in August 2015.

29. The respondent contends in the refusal letter that the appellant has not shown that she has cohabited with her partner Mr Kehinde Alade Tijani for the past two years as insufficient documentation had been submitted to show this. It is accepted that Mr Tijani had been granted indefinite leave to remain in July 2012. It is accepted that the appellant had shown she had been in the UK since December 2002 as she had a document with her name and address on it from this year. It is not accepted that the appellant could meet the Immigration Rules at Appendix FM as she has not shown that she had cohabited with her partner for two years. It is not accepted that the appellant can meet the requirements of paragraph 276ADE(1)(vi) as she had not shown she would have very significant obstacles to integration in Nigeria as she had lived in that country for the majority of her life and is still familiar with the language, culture and customs. It is accepted that the appellant had shown sufficient evidence that she and Mr Tijani have a relationship, as there is some evidence that they shared an address, but not that they were married as she had said she was single in an application made for indefinite leave to remain in 2009. This relationship is not an exceptional circumstance which persuades the respondent that it would be a disproportionate breach of Article 8 ECHR to refuse permission to remain to the appellant. It is open to the appellant to return to Nigeria and apply for entry clearance to re-enter as a partner if she so wishes.

30. Mr Kotas submitted that the starting point was the refusal letter and the findings of Judge Finch in her the determination of February 2014. The oral evidence of the claimant and Mr Tijani had caused further doubt as regards which relatives remained in Nigeria, for instance with respect to the claimant's mother, and so there was no credible evidence that the claimant and Mr Tijani did not have relatives they could turn to in Nigeria. There was no new relevant documentary evidence which would displace the findings of Judge Finch. There was no evidence of two years cohabitation and no evidence of insurmountable obstacles to family life taking place in Nigeria. Mr Tijani was working and studying in the UK and had not shown that he could not do the same in Nigeria. The claimant had hairdressing skills according to the evidence in the appeal before Judge Finch. They were both in fairly good health, and could be expected to return to Nigeria given there were no children and they would have family support there. The fact that the claimant speaks English is just a neutral matter, and she had not shown she was financially independent as she was reliant on Mr Tijani. The appeal should be dismissed.

31. Ms Allen submitted that the claimant had shown she had been in the UK for 20 years. The Secretary of State accepts she has been here since 2002, and there was little challenge to the oral evidence of the claimant and her spouse, and it was difficult for those illegally present to have documentary evidence to support their claims of residence. Somethings in the decision of Judge Finch had been potentially misunderstood or were poorly expressed.

32. Ms Allen submitted that the claimant and Mr Tijani are in a genuine relationship, which is clear from their attendance together at all of the appeal hearings; the fact that the respondent accepts they have a relationship; and their evidence of cohabitation. She submitted that they could not live together in Nigeria due to issues of ill-health and the difficulties Mr Tijani would have starting again aged 62 years and obtaining work. The appeal should be allowed.

Conclusions – Remaking

33. The starting point on the issue of the claimant's period of residence is the finding of Judge Finch in the decision of the First-tier Tribunal promulgated on 18th February 2014 that she has been in the UK since 2007. The respondent has accepted that new evidence submitted with the May 2015 application means that the claimant has shown she has been here since December 2002. Judge Finch found that the claimant was not a credible witness as she did not believe her history of marriage and cohabitation with Mr Tijani, and found that she had submitted documents that should be seen as false. The claimant's written and oral evidence before us does not lead us to the conclusion that she should be treated as a credible witness. There is no comprehensive statement setting out her history in the UK. She was clearly very nervous and distressed by giving evidence, but despite being given the opportunity to consult in private with Counsel no application was made to adjourn the hearing for her to seek medical help or to present evidence to us in an alternative way, for instance through a more detailed statement.

34. The evidence of Mr Tijani does not assist the claimant's case on her period of residence either. Once again his statement is not a full descriptive account of the claimant's period of residence. We start from the findings of Judge Finch that Mr Tijani and the claimant had not shown that they were genuinely married or had a genuine and subsisting cohabiting relationship due to having both said they were single/ not disclosed their relationship in earlier applications to the Secretary of State to remain in the UK; due to the lack of any detailed witness evidence about their relationship; due to a discrepancy between the date of the marriage and the official stamp on the marriage certificate; and the lack of genuine documentation placing them at the same address. Mr Tijani gave evidence before Judge Finch that they were genuinely married and cohabiting and regarding the claimant's stay in the UK and it follows that he was not found to be a credible witness by Judge Finch either. The evidence that Mr Tijani gave before our Tribunal was also discrepant with that recorded as being given before Judge Finch by the claimant with respect to who sent the marriage certificate to the UK and the date of death of the claimant's mother.

35. We therefore find that the claimant cannot show that she has been in the UK for 20 years at the time of application as it is correctly accepted

by her counsel that there is no documentary evidence prior to 2002 and we find that the witness evidence before us does not satisfy the burden of proof on the claimant to show that this is so on the balance of probabilities. The claimant cannot therefore meet the requirements of paragraph 276ADE (1)(iii) of the Immigration Rules. For clarity we find that it shown that the claimant has only been in the UK since December 2002.

36. The starting position with respect to the claimant's claimed relationship with Mr Tijani is the decision of Judge Finch in February 2014 that the claimant had not shown she was married to him or had any sort of family life relationship with him. This is however taken forward by the Secretary of State in the decision under appeal of July 2015 who now accepts that the claimant has a relationship, but not one with two years cohabitation, with Mr Tijani.

37. We find there is no evidence which leads us to any more favourable conclusion on this issue than that of the Secretary of State. For the reasons set out above the witness evidence of the claimant and Mr Tijani can be given little weight as they have been found not to be credible witnesses in the past, and their evidence before us gives no reason to change that view. The documentary evidence before us does not support their having any period of cohabitation: it places Mr Tijani at Perkins Square and then at Newhaven Road in the period 2002 to 2016. There is no evidence of the claimant being at Perkins Square but there is evidence of her being at Diana House and Bellingham Green in the period 2002 to 2015. No explanation is offered for these different addresses in the witness evidence. There is only scant documentary evidence of the claimant being at Newhaven Road: two pieces of mail, one regarding voting in 2013 and one from an Optician in 2016 and a landlord's handwritten letter from 2015. In these circumstances we do not accept that the claimant has shown any period of cohabitation with Mr Tijani.

38. We can see no reason to find that Judge Finch's doubts about the marriage certificate were not well founded. The fact that a further document relating to the preparation for marriage, a registrar's certificate, has been produced does not mean that the marriage certificate with a stamp one day before the date of the marriage is genuine. We further find that the two documents do not assist the claimant as we also have doubts about whether the Mr Tijani who appeared before us is the Mr Badmus on the certificate as he could not give an explanation which made sense to us as to as to why he got married using one surname (Badmus) and then very soon afterwards got a passport using another one (Tijani).

39. As we find that the claimant has not shown two years cohabitation in a genuine and subsisting relationship akin to marriage we find that she cannot meet the requirements of the Immigration rules at Appendix FM. For completeness we also find that there would be no insurmountable

obstacles to any family life which may exist in the form of the non-cohabiting relationship between the claimant and Mr Tijani taking place in Nigeria. Both are Nigerian citizens who are entitled to live in that country and who have historically had long periods of residence there. We do not accept that the claimant does not have any relatives in that country: the evidence about her mother's death is inconsistent and the claimant would appear to accept she has a brother and Mr Tijani a cousin in that country. We find that the claimant and Mr Tijani have continuing linguistic, cultural and family ties to Nigeria. We find that the claimant has not shown on the balance of probabilities that she and Mr Tijani would not be able to obtain work in that country given his ability, despite his medical complaints, to do so in the UK and the obviously marketable and transferable skills he has in engineering, and the claimant background in hairdressing as explained in evidence before Judge Finch. There was no supporting country of origin evidence that Mr Tijani would not be able to afford any medical treatment he requires in Nigeria either.

40. We must finally consider whether the claimant could succeed under paragraph 276ADE (1)(vi) of the Immigration Rules on the basis she could show very significant obstacles to integration if returned to Nigeria. For the same reasons as set out above we find that this would not be the case given her cultural, linguistic and family ties to Nigeria and her ability to earn money through hairdressing.

41. Thus, we find that the claimant cannot show that she can meet the family and private life Immigration Rules at Appendix FM or paragraph 276ADE. When looked at more broadly on Article 8 ECHR grounds we find that there are no compelling compassionate matters to weigh against the public interest in maintaining immigration control because little weight can be given to the appellant's private life ties to the UK when considering the proportionality of her removal as all of these have been formed whilst she has been unlawfully present; and likewise little weight can be given to her relationship with Mr Tijani, even if he were seen as a qualifying partner which we have found he is not, as that relationship has been formed whilst she has been unlawfully present, see s.117B of the Nationality, Immigration and Asylum Act 2002. The claimant's ability to speak English and Mr Tijani's ability to support her financially are only neutral matters. Nothing further has been advanced to balance in her favour against the weight that must be given to the public interests in the maintenance of immigration control, and so we find therefore that the removal of the appellant is proportionate and does not constitute a breach of the UK's obligations under Article 8 ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. We set aside the decision of the First-tier Tribunal and all of the findings.

3. We remake the appeal dismissing it on human rights grounds.

Signed: Fiona Lindsley Date: 13th December 2017

Upper Tribunal Judge Lindsley