Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04234/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2017	**On 25 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FALILAT ABIODUN FADENI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr M Gaffar of Counsel, instructed by Londonium Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Colvin promulgated on 30 November 2016.

2. Although before me the Secretary of State for the Home Department is the Appellant and Ms Fadeni is the Respondent for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Fadeni as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Nigeria born on 10 January 1973. She first entered the United Kingdom on 1 March 2006 with entry clearance as a visitor. On 7 August 2006 she made an application for leave to remain as the spouse of Mr Fadeni Festus Omoshola. That application was granted on 13 September 2006 with leave until 30 November 2006. Thereafter she made a series of 'in-time' applications for further leave to remain and was granted variations of leave up until a refusal in March 2010. However, subsequent to that refusal the Respondent reconsidered the Appellant's case and she was again granted leave until 8 August 2012. She thereafter secured further leave until 14 September 2014, and then on 6 September 2014 she made an application as the spouse of a settled person, her husband having acquired indefinite leave to remain by that time. That application was granted on 15 October 2014 and the Appellant was granted leave to remain until 15 April 2017.

4. It may be seen in those circumstances that the Appellant's leave would have run to a point just over 11 years after her initial entry to the UK. During the whole of that period the Appellant has made 'in-time' applications all of which were in due course successful. She is plainly an individual who has at all material times complied with the requirements of immigration control.

5. On 30 April 2015 the Appellant made an application for indefinite leave to remain relying in particular upon her long residence in the UK with reference to paragraph 276B of the Immigration Rules. The covering letter with the application drafted by representatives (different from the current representatives) erroneously repeatedly asserts that the Appellant has completed more than 10 years in the United Kingdom. In fact, as may be seen from the chronology, at the time of the application the Appellant was just over 10 months early in making an application based on paragraph 276B.

6. The Respondent refused the Appellant's application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 28 July 2015. In particular it was noted that a period of only 9 years and 4 months had elapsed and therefore the Appellant could not demonstrate 10 years' continuous lawful residence and so did not satisfy the requirements of paragraph 276B(i)(a).

7. The RFRL went on to give consideration to the Appellant's case with reference to Appendix FM, it being identified that the Appellant had a settled partner and also three children in the UK. In respect of the children, whose dates of birth are variously 20 October 2006, 21 November 2009 and 3 July 2013, it is apparent that each of them is eligible to apply for British citizenship.

8. After consideration of the various provisions of Appendix FM, and the consequent potential routes to settlement were leave to be granted pursuant to any of those provisions, the Respondent reached the entirely sustainable conclusion that it would in fact be to the Appellant's disadvantage to place her on what would effectively be a new 10 year route to settlement. Accordingly the Respondent determined that the most appropriate course of action would be simply to refuse the application but to leave the Appellant's still extant leave to remain in place. Her extant leave, as has already been indicated, conferred leave until 15 April 2017.

9. It was also expressly noted in the RFRL that this would allow the Appellant to make an application based on 10 years' continuous lawful residence in due course - that is in practice once the date of 4 March 2016 had been reached – albeit the RFRL contained the caveat that this was on the assumption of no change in the Rules and nothing adverse happening between the date of the decision letter and any subsequent application.

10. Be that as it may, the Appellant elected to appeal. Her right of appeal to the Tribunal, as again identified in the RFRL, was pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002 but limited to the ground that the decision was unlawful under section 6 of the Human Rights Act 1998 pursuant to the amendments to the appeal regime introduced by the Immigration Act 2014: see sections 82(1)(b) and 84(2) of the 2002 Act.

11. I pause to note that there are two aspects of the case that appear curious. The first is the premature timing of the Appellant's application. As I have indicated, the representatives' letter seems to be premised on the erroneous fact that the Appellant had already completed 10 years: on its face there would appear to be scope for some concern as to the extent to which her advisers had understood the factual situation and/or the competency of the advice that the Appellant might have received in respect of making the application so prematurely.

12. The other perhaps curious aspect is the Appellant's election to appeal the decision rather than simply await the passage of time until March 2016 and then make a further application. This matter is alluded to in the Decision of the First-tier Tribunal Judge at paragraph 4 where it is recorded that the Appellant had indicated "*that she did not consider making a settlement application after the refusal decision as this was too expensive*". In this regard by way of 'rough-and-ready reckoning' Mr Gaffar has told me today that the approximate difference between pursuing such an application and pursuing an appeal might be in the order of £1,000.

13. Be that as it may, the Appellant pursued her appeal and it was allowed by the First-tier Tribunal Judge for reasons set out in his Decision. The Respondent has sought to challenge the Decision and was granted permission to appeal by First-tier Tribunal Judge Page on 31 May 2017.

14. I have little hesitation in agreeing with the substance of the Respondent's challenge. I have already indicated that the scope of the appeal was restricted to human rights grounds by virtue of sections 82(1)(b) and 84(2) of the 2002 Act. Whilst the First-tier Tribunal Judge purports to recognise this at paragraph 5 of his Decision, he immediately thereafter goes on to state that the task for the Appellant was "*to show on a balance of probabilities that [she met] the requirements of either the relevant immigration rules or Article 8 outside of the Rules*" (my emphasis).

15. Indeed, in due course, it is clear from paragraph 6 that the Judge simply allowed the appeal on the basis that it was considered that paragraph 276B of the Immigration Rules was satisfied. In terms under the heading 'Notice of Decision' the Judge states: "*The appeal is allowed under the Immigration Rules*". In context, in a very brief decision it is transparent that the Judge simply allowed the appeal on the basis that it was agreed as a preliminary matter at the hearing that the Appellant could by that time demonstrate 10 years' continuous lawful residence in the UK (see paragraph 3).

16. In my judgment this constitutes a clear error in respect of the Tribunal's jurisdiction.

17. I note that Mr Gaffar has today sought to persuade me that the Judge did not fall into error by referring to the Appellant's 'Section 120 Notice' and the case of **Jaff (s.120 notice; statement of additional grounds) Iraq [2012] UKUT 00396 (IAC)**. I am afraid I consider Mr Gaffar's submissions in this regard to be misconceived. There is nothing in the case of **Jaff** that permits the Tribunal to assume a jurisdiction it quite simply does not have simply by reason of matters being raised in a Section 120 Notice.

18. The Respondent additionally raises in her Grounds of Appeal that the error of jurisdiction is not simply immaterial in this regard. In particular, reference is made in the Grounds to the public interest question under Article 8(2) and the analogous balancing exercise required to be conducted pursuant to paragraph 276B, and it is argued that no such exercise was undertaken either by the Respondent in the RFRL (for the simple reason that it was not necessary where the Appellant had not completed 10 years' lawful residence), or by the Tribunal.

19. Whilst factually this is correct, it might also be observed that on the face of it no countervailing factors are readily identifiable in the Appellant's case such as would weigh significantly against the fact of 10 years' continuous lawful residence.

20. However, it seems to me that the situation is one of greater difficulty for the Appellant. Had the Judge properly recognised that his jurisdiction was limited to the ECHR grounds, and in particular Article 8, it would - or at least should - have been readily apparent that the Respondent's decision was not unlawful under section 6 of the Human Rights Act 1998 because it left the Appellant with extant leave and thereby did not interfere in any way with her enjoyment of family and private life in the United Kingdom. I do not see how the Appellant could possibly have succeeded in this appeal on human rights grounds alone.

21. Accordingly, if I am to set aside the Decision of the Judge of the First-tier Tribunal it seems to me inevitable that in remaking the decision under human rights grounds the appeal would require to be dismissed. I have given some consideration therefore to the discretion conferred upon the Tribunal by virtue of section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 such that even if there is an error of law the Tribunal is not duty-bound to set aside the decision of the First-tier Tribunal. I have given careful consideration to this because inevitably matters have moved on since the date of the Respondent's decision - as indeed was recognised by the First-tier Tribunal Judge (and informed the basis of the outcome before the First-tier Tribunal).

22. In this regard it is to be noted that the Appellant has been lawfully present in the United Kingdom since March 2006, has, as I have already indicated, at all times complied with immigration control, and was ultimately granted periods of leave in excess of 11 years. She has previously been granted periods of leave 'in-line' with her spouse who is now settled in the United Kingdom, and their three children are all eligible for British citizenship. The Appellant has provided evidence of her English language skills and a 'Life in the UK' test. There is much of merit in this case which might suggest that the Appellant deserves a successful outcome in her appeal.

23. However, Mr Whitwell argues that the Tribunal should not exercise the discretion under section 12(2)(a) to uphold the First-tier Tribunal Judge's decision. I agree with his submission: ultimately it would not be appropriate to use the discretion to uphold a Decision which is founded on a fundamental lack of jurisdiction, no matter the apparent merits of the case and the possible practicality of such a resolution.

24. Further to this Mr Whitwell notes that ultimately the Appellant is unlikely to be prejudiced in terms of her immigration position. It is still open to her to make an

application under paragraph 276B again. As things stand at the moment, she has statutorily varied leave to remain and has at no point breached immigration control; she may yet make an 'in-time' application prior to becoming 'appeal rights exhausted'. In any event Mr Whitwell has directed my attention to page 9 of 43 of the Respondent's 'Long Residence' instruction (version 15.0, 3 April 2017), which indicates that once 10 years lawful residence has been completed an applicant is entitled to claim the benefit of paragraph 276B even if his or her application is made at some time later. It states in material part: "*Once an applicant has built up a period of 10 years continuous lawful residence, there is no limit on the length of time afterwards when they can apply. This means they could leave the UK, re-enter on any lawful basis, and apply for settlement from within the UK based on a 10 year period of continuous lawful residence they built up in the past. There is also nothing to prevent a person relying on a 10 year period that they may have relied on in a previous application or grant.*" (I note, without making any decision in this regard, that this would appear to reflect the wording of paragraph 276B(i) which uses the phrase *"he has had at least ten years' continuous lawful residence in the United Kingdom"*, with the emphasis on the words 'has had'.)

25. So far as the additional cost that that might be involved, well, bluntly, so be it. It may be a matter for the Appellant to consider whether she has any remedy against her previous advisers in respect of monies wasted on a premature application and whether that might assist her in meeting her future expenses - but that is not a matter for me.

26. Accordingly, in all the circumstances I reach the conclusion that the Decision of the First-tier Tribunal was in error of law because the First-tier Tribunal Judge failed to recognise the limit of his jurisdiction and wrongly allowed the appeal by reference to the Immigration Rules. In those circumstances the decision of the First-tier Tribunal is set aside. I remake the decision with reference to human rights grounds, but for the reasons identified above, in my judgment, it is inevitable that the appeal must fail and accordingly the appeal is dismissed.

Notice of Decision

27. The Decision of the First-tier Tribunal contained a material error of law and is set aside.

28. I remake the decision in the appeal. The appeal is dismissed

29. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **22 July 2017**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: Date: **22 July 2017**

Deputy Upper Tribunal Judge I A Lewis
(*qua* Judge of the First-tier Tribunal)