Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02119/2017

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5th October 2018	**On 12th October 2018**

Before

UPPER TRIBUNAL JUDGE COKER

Between

CHARLES IKEMEFUNA ANYAEGBUNAM

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, instructed by Riverbrooke, solicitors
For the Respondent: Ms Z Kiss, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 22 October 2013 Mr Anyaegbunam applied for indefinite leave to remain on the grounds that he had completed 10 years lawful residence in the UK. That application was refused by the SSHD for reasons set out in a decision dated 17th January 2017. His human rights claim was refused and he appealed. His appeal was dismissed by First-tier Tribunal judge Sullivan for reasons set out in a decision promulgated on 16th May 2018. Mr Anyaegbunam sought permission to appeal to the Upper Tribunal out of time. Time was extended and permission granted.

2. The grounds relied upon in the application for permission were:
   (i) The rejection by the judge of the claimed residence from 2001 because there was no documentary evidence is a material error of law because had he been resident since 2001 he would have completed 10 years lawful residence at the date of his application.
   (ii) The First-tier Tribunal judge failed to engage with or provide adequate reasons for not placing weight upon the evidence of failings by previous representatives which resulted in an earlier rejection and failed to consider whether the discretion that exists in the respondent's guidance fell to be exercised in his favour.
   (iii) The respondent had previously exercised discretion and the failure to exercise discretion on this occasion amounted to an inconsistency with which the First-tier Tribunal judge did not engage.
   (iv) The appellant had spent some 15 years in the UK absent some short periods without leave to remain and the First-tier Tribunal judge failed to have regard to *SS (Congo)* [2015] EWCA Civ 387 and Patel & Others [2013] UKSC 72.
   (v) The finding by the judge that there were no particularly strong community ties was irrational given his length of residence and that the judge failed to have regard to the appellant's evidence in connection with the future benefit the appellant can bring to the UK.

3. Mr Karim condensed these, helpfully, to three:
   (a) firstly it was the appellant's contention that he had initially entered the UK lawfully, provided a schedule of his entries and exits which he adopted in oral evidence, gave oral evidence of his schooling and, considered cumulatively, he would have accumulated 10 years lawful residence. The First-tier Tribunal judge had, he submitted, failed to make findings on a salient aspect of the appellant's case.
   (b) Secondly that the First-tier Tribunal judge did not grapple with the issues of delay and asserted negligence by the appellant's previous representatives and that the appellant had been misadvised, such contention being previously accepted by the respondent.
   (c) And, finally, the finding that the appellant did not have a strong private life despite having lived in the UK for a significant number of years, even if the first ground was not accepted.

Ground (a)

4. In [13(a)] the First-tier Tribunal judge found:

> I am not satisfied as to any of the appellant's journeys to or from the UK prior to January 2003 because there is no documentary evidence of entry to, exit from or presence in the United Kingdom prior to that date and the respondent has not conceded the issue. The detail in his representatives' letter dated 18 October 2013, including reference to school attendance and GCSEs, suggests that documentary evidence should have been available."

5. The chronology claimed is as follows:

September 2001 to December 2001 in UK as a visitor "looking for a school". *The respondent accepts the appellant had entry clearance as a visitor valid from 19th December 2001 until 19th December 2003.*

January 2002 arrived UK on student visa and remained until July 2005 save for short holidays to Nigeria. Claims 1 term for GCSEs and that he obtained 9 GCSEs. Claims he took AS levels. *In his grounds of appeal the appellant states he first arrived in the UK in January 2003. According to the respondent the appellant arrived in the UK on 25th January 2003 with entry clearance as a student valid until 31 October 2005.*

July 2005 to September 2005 – on holiday in Nigeria.

October 2005 to 16th February 2006 at an international school in Nigeria.

16th February 2006 to March 2006 in UK visiting family. *According to the respondent, the appellant re-entered the UK as a visitor on 28th February 2006 with entry clearance valid until 3rd January 2011; and that he left the UK on 27th June 2007.*

March 2006 to June/July 2006 in Nigeria; returned to UK as a visitor; visited Dublin for 2 weeks.

November 2006 returned to Nigeria; applied for student visa.

January 2007 returned to the UK to commence a course at Exeter University. Claims he left Exeter at the end of the second year in 2008 and returned to Nigeria for a holiday. He returned to the UK and went to Sussex University. *According to the respondent the appellant re-entered the UK on 20th October 2007 with entry clearance as a student valid until 31st October 2010. A letter from the University of Sussex confirms that the appellant was registered as a student with them from 6th October 2008 until 14th June 2013.*

An application for further leave to remain made in October 2010, allegedly with mistakes made by his legal representatives at that time, was refused in January 2011 and his appeal dismissed. *This refusal and dismissal of appeal is acknowledged by the respondent; the appellant became appeal rights exhausted on 20th June 2011*

A further application was made through the same representatives and refused because of inadequate finance; no right of appeal. *According to the respondent an application was made on 28th June 2011 which was refused on 23rd September 2011 with no right of appeal.*

On 26th June 2012 a further application for leave to remain was made and granted with leave to remain granted until 21st October 2013. *According to the grounds of appeal this application was made on 3rd February 2012 and led to a decision dated 26th June 2012 granting the appellant leave to*

remain until 21st October 2013. This accords with what the respondent says.

18th October 2013, the applicant applied for indefinite leave to remain on the grounds of 10 years lawful residence.

6. The respondent in the decision the subject of this appeal dated 17th January 2017 confirms that although the appellant had a visit visa and visited briefly in 2001, he was not issued with his student visa until January 2003. The respondent refers to the lack of documentation to confirm residence in the UK prior to that entry. An earlier decision refusing indefinite leave to remain on the grounds of long residence (albeit subsequently withdrawn) dated 6th March 2014 also referred to a lack of documentary evidence.

7. Although the appellant provided evidence to the First-tier Tribunal of his attendance at Sussex University, there was no documentary evidence of his attendance at any school, of his GCSEs or AS levels, attendance at the International School in Nigeria or attendance at Exeter University. He did not have a student visa until January 2003. His grounds of appeal refer to entry as a student in January 2003.

8. The appellant, before the First-tier Tribunal, adopted the schedule of his entries and exits, which reflected the information given to the respondent by his solicitors in the application for indefinite leave to remain, but he failed to produce corroborative evidence to the First-tier Tribunal despite being notified that he was refused by the respondent because of, *inter alia*, lack of evidence. The mere adoption of a schedule and the giving of evidence does not render correct that which is not. This appellant was aware that the respondent's view was that there was no documentary evidence to support his assertion that he had been in the UK since 2001, first as a visitor (other than briefly) and then as a student from January 2002. The First-tier Tribunal judge concurred with that view. The burden of proof lies with the appellant and he has failed to discharge that burden of proof despite being notified of the gaps in his evidence.

9. The First-tier Tribunal judge did not simply say there was no documentary evidence; he qualified that statement by reference to the appellant's claim which could have been supported by available documentary evidence.

10. The finding reached by the First-tier Tribunal judge was open to him on the evidence before him.

Ground (b)

11. The judge considered the evidence provided by the appellant (or rather lack of evidence) as to whether despite those mistakes by previous representatives, he would have been granted further leave because he met the Rules at the relevant dates. There was no evidence that he met the Rules at the relevant dates. The judge noted the lack of evidence provided by the appellant.

12. Unless there is a discretion in the Rules, the First-tier Tribunal judge cannot exercise that discretion. Nevertheless, those are matters that would normally fall within an assessment of the proportionality of the decision in human rights terms. The judge considered the explanation put forward by the appellant and concluded that the appellant did not meet the Rules. He considered the delay in the issue of a new CAS, that the appellant did not know when, after 23 September 2011 he was able to meet the requirements of the Rules and that he had not demonstrated exceptional circumstances.

13. It seems that the respondent had exercised his discretion previously in granting the appellant further leave to remain as a student despite the appellant being an overstayer of more than 28 days. It seems this occurred because the appellant had provide an explanation for the delay which included problems with his previous solicitors and the evidence from the University. Because the respondent exercises discretion once in a different type of application (extension of leave to remain as a student as oppose to an application for indefinite leave to remain) that does not require the respondent to exercise his discretion in the appellant's favour. The judge considered the evidence relied upon by the appellant regarding delay and noted that it appeared that the appellant was 'caught' by the changes in the Immigration Rules.

14. Mr Karim accepted that matters of weight are for the judge but submitted that the judge had not engaged with the submission that the previous representatives were negligent. It does not appear from the evidence that the appellant has made a complaint that the solicitors were negligent to the solicitors, or to the administrators or to the SRA. Even if he had, that does not necessarily mean that discretion should be exercised in his favour, or, more correctly, that there is a significant shift in the proportionality assessment. The judge engaged with the evidence that was before him in the context of applications for leave to remain and set out the areas where the appellant had not provided evidence of reasons that covered the whole period in question.

15. Ms Kiss referred to *Mansur (Immigration advisor's failing: Article 8) Bangladesh* [2018] UKUT 274 (IAC) and submitted that the appellant had not established that the failings of his previous advisors met the threshold in that decision. Mr Karim disagreed and submitted they had been met.

16. The judge considered the 'fairness' of the respondent's decision in [15]. Although that is not strictly speaking the correct approach in a statutory appeal, it nevertheless falls within the proportionality assessment. The judge set out the factors adverse to the appellant, the gaps in his evidence and reached a finding that was open to him that the appellant had not provided evidence to demonstrate circumstances which prevented him from making a timely application for leave to remain or explaining the delay. This despite acknowledging that the appellant may have been badly advised. In this case, although not specifically referring to the previous representatives,

it is plain that the judge considered the factual matrix including the absences from the UK, and reached a decision that taking all of those factors into account, the appellant did not have 10 years lawful residence.

Ground (c)

17. The decision by the judge that there were no particularly strong community ties was not irrational. Mere length of residence, which was taken into account by the judge, does not of itself amount to particularly strong ties. The judge considered the appellant's friendships and that he would need to re-establish ties in Nigeria. The judge noted that there was no witness statement or oral evidence from friends or relatives. Although it seems the appellant's brother was at court he was not called to give evidence. The judge cannot be criticised for referring to the lack of evidence from a brother, even if he was at court. The judge noted that the appellant had job offers from the UK and Korea. Although the grounds upon which permission was granted assert that the judge failed to give weight to the potential benefit to the UK of having the appellant in the UK, the grounds do not identify evidence that was before the judge of such benefit, that was not considered. The evidence was simply not there to support the submission made.

18. The decision by the judge that the decision was not disproportionate was open to the judge on the basis of the evidence before him.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

I do not set aside the decision; the decision of the First-tier Tribunal stands.

Date 8th October 2018

Upper Tribunal Judge Coker