Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09103/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2018	**On 4 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MS AJOKE OLAJUMOKE SABA-ODEJAYI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Ngwuocha, Carl Martin Solicitors
For the Respondent: Mr A Melvin, Senior Presenting Officer

DECISION & REASONS

1. This appeal came before me for an error of law hearing on 10 November 2017. In a decision and reasons promulgated on 30 November 2017, I found an error of law and adjourned the appeal for a resumed hearing. A copy of that decision is appended.

Hearing

2. I heard submissions from Mr. Ngwuocha on behalf of the Appellant. He argued that the First tier Tribunal Judge accepted the Appellant had resided continuously for 20 years. In the alternative, the Appellant became appeal rights exhausted in 2008 and thereafter her case had been treated as a live asylum case and therefore, the Respondent cannot be correct in saying that she did not have knowledge that the

Appellant had been residing continuously in the United Kingdom since 1995. He submitted that, due to the fact that the Appellant has a live asylum case it is not possible that she could have left the United Kingdom and then subsequently returned without detection. In response to a question from the Upper Tribunal, Mr Ngwuocha confirmed that he had obtained a copy of the Appellant's file from the Home Office by way of a subject access request but had not included this evidence in the Appellant's bundle.

3. Mr Ngwuocha drew my attention to the letter dated 23.10.14 from OLCU stating that her case was still being considered, which is at AB 12-13. He also sought to rely on a letter from the Respondent dated 7.6.13, which had not been previously submitted. He submitted that the key point is that the Respondent knew all along that the Appellant had remained in the UK from 1995 until after the exhaustion of appeal rights in 1998 and the Appellant had made further representations which then remained unresolved until 2014.

4. In his submissions, Mr Melvin made the point that the evidential gap in residence is a substantial gap of 7 years and no evidence has been adduced to show the Appellant was resident in the UK throughout and that it is trite law that the onus or burden is on the Appellant to the balance of probabilities that she remained in the UK and did not return to Nigeria between 1997 and 2004. He submitted that the Home Office file registers her as an absconder and only coming to light years later. He submitted that his reading of the error of law determination and his recollection of the last hearing is that the onus is to be placed on the Appellant that she remained in the UK or was present during those years. He asked that I find on the balance of probabilities that the Appellant has not remained in the UK between 1997 and 2004 and thus cannot succeed under paragraph 276ADE(iii) of the Immigration Rules. Whilst the Appellant's representatives rely on letters showing applications were made the most recent letter of 7.6.13 does not take the case any further in terms of meeting the Rules. He asked that I place little weight in relation to the responses to solicitors' enquiries of the Home Office, which do not show that in any way the Respondent accepts she remained unlawfully in the period in question.

5. In his reply, Mr Ngwuocha submitted that there was nothing to show there is any record of the Appellant leaving the UK and that the Appellant was treated as live asylum case by OLCU. The Respondent has not dealt with the fact that the Appellant always had an outstanding case with the Home Office until a decision was made.

6. I reserved my decision. Following the hearing I received a letter from the Appellant's solicitors dated 27.2.18, appending a copy of the Appellant's Home Office case notes, which they had obtained by way of a subject access request. Consequently, in directions dated 12 March 2018, I gave the Respondent 14 days to make further submissions on this evidence, or to object to its admission. At the time

of writing [28 March 2018] I have not received any further submissions from either party.

My Findings

7. Mr Melvin helpfully accepted that the suitability requirements of the Rules were met by the Appellant and consequently, the only issue for determination is whether the Appellant meets the requirements of paragraph 276ADE(iii) of the Immigration Rules.

8. The Appellant arrived in the United Kingdom unlawfully on or prior to 8 May 1995, when she made an asylum claim. The application which has given rise to the current appeal proceedings, following a decision dated 14 October 2015, was made 18 May 2015. Thus on the face of it, the Appellant had resided for over 20 years at the time she applied for further leave to remain.

9. Therefore, the specific issue for determination is whether, on the balance of probabilities, the Appellant can show that she resided continuously in the UK throughout that 20 year period.

10. I have had regard to the contents of the Appellant's Home Office case notes, which indicate that she arrived and claimed asylum on 8 May 1995. It would appear that she travelled on a properly issued passport in her own identity, issued on 25.10.94 valid for 5 years. There is a reference to the proposed removal of the Appellant on 10 March 1998 to Lagos via Cairo and subsequent reference to the Appellant being treated as an absconder from that date, which indicates that she did not report for removal. There is a subsequent file note referring to an OLCU review on 18.9.12, following which it was concluded that there was no basis to grant leave and then to an application for leave on the basis of family and private life having been made on 27.5.15, which was refused with the right of in-country appeal. There is reference to the Appellant reporting on 2.9.15 and subsequently to being unable to report on 30.3.16 due to undergoing chemotherapy for cancer. There is no reference to either the Appellant departing or re-entering the UK since 8 May 1995. Consequently, I infer from the Home Office case file notes that the Appellant has not left the United Kingdom since 8 May 1995 as there no evidence to support the Respondent's contention in this respect.

11. However, the burden is on the Appellant to prove her case to the balance of probabilities. In respect of positive evidence of her presence in the United Kingdom, I have had regard to the Appellant's bundle and the somewhat scanty evidence in this respect. There is a letter from [ ] surgery dated 19.5.15 which confirms that the Appellant has been registered with them since 4.2.09 and that the earliest date of medical records is 14.11.96. There are further official letters dating from 1995, 1996, 2005 and 2007 but I accept Mr Melvin's submission that there is an evidential gap between 1997 and 2004.

12. I have also had regard to the witness statement of the Appellant's partner, Olatunji Brown dated 6.11.16, who states that he has been living with the Appellant since 2009. However, I am mindful that his evidence was not found to be credible by First tier Tribunal Judge Martins and her findings in this respect have not been subject to successful challenge. Consequently, I place little weight on his evidence.

13. I find the absence of cogent evidence showing positively that the Appellant has been resident continuously in the United Kingdom since 8 May 1995 concerning. However, in light of the fact that there is no evidence that the Appellant has departed from the United Kingdom or returned since 8 May 1995, I have concluded on the balance of probabilities that she has not left the country and has thus resided continuously since that time and thus meets the requirements of paragraph 276ADE(iii) of the Immigration Rules.

14. Given that this is a human rights appeal, I have taken into account the public interest considerations set out in section 117B of the NIAA 2002. I have also had regard to the findings of Judge Martins in this respect, however, they do not address whether the Appellant speaks English nor whether she is financially independent. I find in favour of the Appellant in respect of both those considerations, given that she gave evidence before the First tier Tribunal in English and her husband's long standing employment by Royal Mail as a postman. It is the case, however, that little weight should be attached to the Appellant's relationship with her partner, given that it was formed whilst the Appellant was in the United Kingdom unlawfully. I have concluded in light of my finding that the Appellant meets the requirements of paragraph 276ADE(iii) of the Rules that that this factor is not outweighed by the public interest considerations and it would not be proportionate for the Appellant to be removed to Nigeria.

Decision

15. I allow the appeal on human rights grounds (Article 8).

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

28 March 2018