Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/15098/2019
HU/16979/2019

THE IMMIGRATION ACTS

Decision under rule 34	**Decision & Reasons Promulgated**
On 30 December 2020	**On 07 January 2021**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

LEONARD CHIELO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of Judge of the First-tier Tribunal Place ('the Judge') sent to the parties on 14 November 2019 by which the appellant's appeal against decisions not to grant him indefinite leave to remain on the basis of ten years' lawful residence and, alternatively, on human rights (article 8) grounds was refused.

2. Judge of the First-tier Tribunal Nightingale granted the appellant permission to appeal on all grounds by a decision sent to the parties on 10 June 2020.

3. The appellant is represented by Universe Solicitors. Grounds of appeal were authored on his behalf by John Walsh, Counsel.

4. The respondent relies upon a 'rule 24' response, authored by Alain Tan, Senior Presenting Office.

Rule 34

5. This decision is made without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules').

6. In light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed at rule 2(1) of the 2008 Rules, and also at rule 2(2)-(4), Upper Tribunal Judge McWilliam indicated by a Note and Directions sent to the parties on 17 November 2020 her provisional view that it would be appropriate to determine the following questions without a hearing:

   (i) Whether the making of the First-tier Tribunal's decision involved the making of an error of law, and if so

   (ii) Whether the decision should be set aside.

7. Upon receiving and considering a rule 24 response from the respondent, I considered whether it was appropriate to consider this appeal under rule 34. In undertaking such consideration, I noted the guidance of the Supreme Court as to circumstances when an oral hearing is to be held in order to comply with the common law duty of fairness: *Osborn v. The Parole Board* [2013] UKSC 61; [2014] AC 1115. I also observed the recent judgment of the High Court in *JCWI v. President of the Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWHC 3103 (Admin), at [6.1 - 6.14].

8. Being mindful of the position adopted by the respondent, which is addressed below, and observing both the importance of these proceedings to the appellant and the overriding objective that requires the Tribunal to deal with cases fairly and justly, I am satisfied that it is just and fair to proceed to consider this matter under rule 34.

Anonymity

9. The Judge did not issue an anonymity direction and no request for such direction has been made in the written submissions before me.

Background

10. The appellant is a national of Nigeria and is aged 38. He was granted entry clearance as a Tier 4 (General) Student, valid from 14 August 2009 until 31 January 2012, and entered this country on 10 September 2009.

11. He was granted leave to remain as a Tier 1 (Post-study Work) Migrant on 21 September 2010 following an in-time application.

12. On 10 October 2012 the appellant made an out-of-time application for leave to remain as a Tier 4 (General) Student. The application was made within 28 days of the expiry of his previously granted leave to remain on 8 October 2012. The respondent granted him leave to remain in this category until 30 January 2015.

13. The appellant's leave to remain as a Tier 4 (General) Student was varied on three subsequent occasions, with such leave ultimately varied to expire on 28 June 2018.

14. On 26 June 2018 the appellant applied in time for leave to remain outside of the Immigration Rules ('the Rules') so that he could continue with his studies. The application was initially refused without a right of appeal on 16 January 2019 but following the initiation of judicial review proceedings the respondent agreed to reconsider the application.

15. The application was again refused by the respondent by a decision dated 27 August 2019, accompanied by an attendant right of appeal.

16. On 6 September 2019, the appellant exercised a statutory right of appeal against the decision of 27 August 2019: HU/15098/2019.

17. On 11 September 2019, the appellant applied for indefinite leave to remain on long residence grounds under the Rules. The respondent refused the application by a decision dated 3 October 2019. The appellant exercised a statutory right of appeal: HU/16979/2019.

18. Both appeals were heard by the Judge sitting at Nottingham who dismissed them after a hearing held on 11 November 2019.

19. The appellant was granted permission to appeal on all grounds by Judge of the First-tier Nightingale who observed at [3]-[4] of her decision:

> '3. The grounds are arguable. It is clear from paragraph 36 that the Judge accepted the appellant's leave had been extended by Section 3C [of the Immigration Act 1971] and that he had achieved ten years' lawful residence continuously in the United Kingdom. It is arguable that the Judge fell into error by not taking into account the appellant's fulfilment of the Immigration Rule relating to private life on the basis of long residence in the proportionality balancing exercise (*TZ (Pakistan)* applies).
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> 4. It is also arguable that the Judge fell into error at paragraph 28 by raising an issue regarding one of the appeals before the Tribunal which had not been raised by the respondent. The respondent considered the appellant to have a valid leave appeal against the application for long residence and, indeed, had considered that application and issued an appealable decision. In view of the lack of issue between the parties, it is arguable that the Judge fell into error in raising this without notice to either of the parties to address this concern. This ground is, too, arguable.'

Decision on error of law

20. By means of his rule 24 response Mr. Tan confirmed the position of the respondent. I detail the response in its entirety:

> 'In response to the directions sent by the Tribunal on 18 November 2020, the SSHD as respondent does not oppose the grounds lodged on behalf the appellant. The First-tier Judge (FTTJ) at [26] found that the appellant enjoyed s.3C leave as a consequence of the refusal of his human rights application on 27 August 2019 (although recorded incorrectly as 3 October 2019, the correct dates noted at [25]) having appealed that decision. Whilst the appellant made a subsequent application on 11 September 2019 for Indefinite Leave to Remain, at this point the appellant had already accrued by virtue of his enjoyment of s.3C leave (from 10 September 2009) a period of ten years continuous lawful residence on the basis of the finding at [26]. The FTTJ failed to take this fact into account at the date of hearing on 11 November 2019, thus it is accepted that the FTTJ erred in [her] consideration of whether the appellant met the Rules, and it is accepted that the consideration under Article 8 is therefore flawed.
>
> Whilst it was open to and legally correct for the FTTJ to find that s.3C(4) prohibits the person from making a further application for variation of leave to remain, s.3C(5) does not prohibit a variation of the application that is yet to be decided. This is reflected in the SSHD's Long Residence guidance 28 October 2019 (page 23):
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> > '***The applicant completes 10 years continuous lawful residence while awaiting a decision of an appeal.***
> >
> > *A person may complete 10 years continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on this basis. Under sections 3C and 3D, it is not possible to submit a new application while an appeal is outstanding. However, the applicants can submit further grounds to be considered at appeal.'*
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> Whilst the appellant did not vary the first application or formally seek to raise meeting the Rules under the ILR route as a 'new matter', it is evident that the issue of meeting the long residence requirement was an issue since it was the subject of the second appeal reference (both appeals being linked by the Tribunal) and parties made submissions on the matter.
>
> On the basis that it is accepted that the FTTJ erred in the central issue of whether the appellant had accrued 10 years continuous lawful residence, the Tribunal is invited to set aside the decision and allow the appeal under Article 8 with reference to the guidance set out in *OA and Others (human rights; 'new matter'; s120) Nigeria* [2019] UKUT 65 (IAC).'

21. The reference by the respondent to *OA and Others (human rights; 'new matter'; s120) Nigeria* [2019] UKUT 65 (IAC), [2019] Imm. A.R. 647 concerns the confirmation by a Presidential panel of this Tribunal that in a human rights appeal under s.82(1)(b) of

the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') the fact that an appellant has completed ten years' continuous lawful residence while their appeal is pending, and therefore claims to have brought themselves within the ambit of paragraph 276B of the Rules will generally constitute a 'new matter' within the meaning of s.85 of the 2002 Act.

22. The respondent is correct to make such concession. Whilst the Judge was mindful of the judgment of the High Court in *R. (on the application of Bhgat) v Secretary of State for the Home Department* [2014] EWHC 772 (Admin), [2014] 1 W.L.R. 3710, a matter in which a second application by the claimant for leave to remain as a Tier 1 (Post-study Work) Migrant, made at a time when his appeal against the refusal of his first application was outstanding, was found to be prohibited by s.3C(4) of the Immigration Act 1971, her attention was not drawn either to the respondent's guidance or to the decision of the Tribunal in *OA & Others*. Consequently, the Judge's decision is adversely impacted by a material error of law and must be set aside.

Remaking the decision

23. In remaking the decision, I observe the respondent's consent that the Tribunal can properly consider as a new matter in these proceedings the issue as to whether the appellant meets the requirements of paragraph 276B of the Rules. I further note the respondent's concession that the appellant does meet such requirements.

24. I therefore find that the appellant satisfies the long residence requirements of the Rules and so his appeal on human rights (article 8) grounds is allowed.

25. Upon the respondent accepting that the appellant meets the relevant requirements of the Rules, I am not required to consider the appellant's appeal in relation to article 8 outside of the Rules.

Notice of Decision

26. The decision of the First-tier Tribunal, dated 14 November 2019, involved the making of a material error on a point of law and is set aside.

27. The decision is remade, and the appeal is allowed on human rights (article 8) grounds.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 30 December 2020

TO THE RESPONDENT
FEE AWARD

I have allowed the appellant's appeal in both matters.

I am satisfied that the respondent's decision of 27 August 2019 was reasonable on the basis of the information before the decision-maker at that time, the appellant not having sought to rely upon the long residence requirements of the Rules prior to such consideration. No fee award is made in relation to appeal number HU/15098/2019.

The respondent now accepts that it was clear that she should have considered her policy guidance in respect of the appellant's long residence application at the time of the second decision, dated 3 October 2019. I therefore make a fee award in favour of the appellant. The respondent is to pay the appellant's fee of £140 in relation to appeal number HU/16979/2019.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 30 December 2020