



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-000534
(HU508632021); IA/03067/2021

THE IMMIGRATION ACTS

**Heard at Manchester Civil Justice
Centre
On 5 August 2022**

**Decision & Reasons Promulgated
On 6 December 2022**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**OKEDUM BOBO NWOKEKORA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer

For the Respondent: Mr Wilcox

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born 28 September 1986 and is a male citizen of Nigeria. His appeal to the First-tier Tribunal (Judge Birrell) against a decision of the Secretary of State made on 18 January 2021 to refuse him indefinite leave to remain in the United Kingdom on the basis of 10 years continuous lawful residence was allowed on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The complex immigration history of the appellant is set out in the First-tier Tribunal's decision at [4-20]. In short, the appeal turned on the question of whether the appellant was unable to meet the requirements of the Immigration Rules, paragraph 276B(v):

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

...

(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded.

As the judge notes in her summary of the Secretary of State's position, '[the appellant] has been in the UK without lawful leave since 17 August 2017 and is considered to be an overstayer and in breach of Immigration Rules, so cannot therefore meet the requirements of Paragraph 276B(v).'

3. As the judge records, 'on 30 August 2012, [the appellant] submitted an application out of time for leave to remain under 10 years Long Residency. This was refused on 23 October 2013 with a right of appeal. He lodged an appeal in time lodged in time and the decision was reconsidered. The application was refused and his appeal came for Judge Bruce on 28.3.2014. She found he met the requirements of paragraph 276B Long Residence. He was granted leave to remain on 22 August 2014 until 22 August 2016.'
4. Subsequently, 'on 01 March 2016, [the appellant] submitted an application in time for indefinite leave to remain on the basis of Long Residence. This was refused with a right of appeal on 15 July 2016. On 31 July 2016 he lodged an appeal however the appeal was dismissed at the First Tier Tribunal by Judge Cassell on 2.11.2016 and he was refused permission to appeal to the First Tier Tribunal and Upper Tier Tribunal and was appeal rights exhausted on 17 August 2017.'
5. Judge Birrell concluded as follows:

37. I have therefore considered what fresh evidence the Respondent relies on in order to go behind Judge Bruce's findings and re open the issue of the gaps in the Appellants lawful residence. The refusal letter states in reference to the decisions of Judge Bruce and Judge Peart that: "**had they been able to consider the facts as evidenced in the Home Office computerised records they may have arrived at a different determination.**" (my bold)

38. Mr Hall quite properly acknowledged that those records, which the Respondent acknowledges would be evidence, have never been produced either before Judge Bruce, Judge Cassell or me. I find therefore that I have before me no additional evidence I am essentially in the same position as Judge Bruce as I have a series of 6 Appeal Number: assertions made by the

Respondent in the refusal letter and accompanying documents and such assertions I find are not evidence.

39. I therefore conclude that applying the guidance in all of the caselaw before me, that I have not been provided with any evidence that would allow me to go behind the decision of Judge Bruce in 2014. I remind myself that the appeal before me is a human rights appeal but I take into account what was said in paragraph 34 of *TZ and PG* [2018] EWCA Civ 1109 "... where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."

6. The Secretary of State's grounds challenging that analysis are, in my opinion, without merit. At the Upper Tribunal initial hearing, Mr McVeety, who appeared for the Secretary of State, agreed. He told me that Judge Birrell's decision not to go behind the decision of Judge Bruce 'goes to allowing the appeal on Article 8 ECHR and fairness'. That must be correct. The appellant was entitled to rely on the (unappealed) decision of Judge Bruce and Judge Birrell quite properly rejected any submission that she should circumvent or ignore Judge Bruce's decision on the basis of further evidence which to which the Secretary of State had referred but has never adduced before any Tribunal.
7. In the circumstances, the appeal of the Secretary of State is dismissed.

Notice of Decision

The Secretary of State's appeal is dismissed.

Signed

Date 8 October 2022

Upper Tribunal Judge Lane