IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005012

First-tier Tribunal No: HU/61445/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 January 2025

Before

UPPER TRIBUNAL JUDGE BULPITT

DEPUTY UPPER TRIBUNAL JUDGE BUTLER

Between

AKACHI IKECHUKWU ONYIA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Ferguson, counsel
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

Heard at Field House on 7 January 2025

DECISION AND REASONS

1. The Appellant is a dual national of Nigeria and the USA. He entered the UK in 2012 at the age of ten and thereafter entered full-time education in this country, which he pursued until he left school. He has subsequently went to university and currently holds a graduate visa. He appeals against the determination of FTTJ C J Williams ('**the Judge**'), dated 14 May 2024. In that determination, the Judge dismissed his human rights appeal on the grounds that the Appellant was unable to meet the immigration rules and there were no exceptional circumstances rendering the refusal of indefinite leave to remain disproportionate.

Factual and procedural background

2. The Appellant first came to the UK when he was ten years old on 4 September 2012. It is not clear from the papers what form of leave to remain he held at that time but he held leave to remain until 12 November 2014. He was subsequently granted further leave to enter until 7 November 2017. On 4 August 2017 he applied for further leave which was granted until 8 November 2019. On 3 September 2019 he applied for further leave, which was granted until 10 October 2022. On 29 August 2022 he applied for further leave, which was granted until 18 January 2024.

3. During the above periods (subject the absences discussed below), the Appellant was in full time education in the UK. He studied at Rugby School and subsequently went to Reading University. We were informed by counsel that he now holds a Graduate visa valid until 2026.

4. On 20 June 2023 the Appellant submitted an application for indefinite leave to remain ('**ILR**') on the basis of long residence. He stated that he had achieved ten years' continuous lawful residence and was therefore entitled to ILR under paragraph 276B of the Rules. That application was refused by the Respondent on 13 September 2023. The sole basis on which the Appellant was found not to meet the provisions of the Immigration Rules for ILR based on long residence was the fact of his excess absences from the UK. The Rules provide that an application for ILR must be refused if relevant absences exceed 548 days within the ten-year period. The Appellant's absences were 777 days.

5. While there are numerous absences during school holidays which add to the total of 777 days, there are three relevant periods of absences which led to the Appellant exceeding 548 days, namely:

    a. **The 2018 Absences.** 18 August 2018 – 25 August 2018 (on the Appellant's case) or 4 November 2018 (on the Respondent's case). There is a dispute between the parties as to when the Applicant returned, which we address below.

    b. **The Early 2020 Absences.** 18 March 2020 – 14 August 2020 (148 days' absence). The Appellant states that this absence was due to the Coronavirus pandemic.

    c. **The 2020/21 Absences.** 13 December 2020 – 5 April 2021 (112 days' absence). The Appellant states that this absence was due to the Coronavirus pandemic.

6. The Appellant appealed against the refusal decision to the First-tier Tribunal and his appeal was heard on 23 April 2024. The determination promulgated on 14 May 2024 dismissed his appeal on the following grounds:

    a. The Appellant did not meet the requirements of paragraph 267B of the Rules. He had been absent for 777 days in the ten-year period.

        i. In relation to the 2018 Absences, the Appellant had not established that he had returned to the UK on 25 August 2018.

ii. In relation to the Early 2020 and 2020/21 Absences, the Appellant had contended that these should not be held against him because they were as a result of the pandemic and associated travel difficulties. The Judge considered that there was no concession or exception provided by the Rules at the time of the application (albeit this had changed by the date of the hearing), and so the Appellant could not meet the Rules due to excess absences.

b. The Appellant could not satisfy the requirements of Appendix Private Life. While the Respondent accepted that the Appellant satisfied the 'half of life' rule within PL 4.1, PL 7.3 prohibits excess absences. While Appendix Continuous Residence could potentially allow those absences to be disregarded for the purposes of settlement applications under Appendix Private Life, in order to be eligible the Appellant had to have a form of leave listed in PL 14.3.

c. While the Judge expressed "*a great deal of sympathy*" for him, the Appellant could not succeed outside the Rules. While he had a private life in the UK, his failure to meet the Immigration Rules was a "*relevant and important consideration*". There were no exceptional circumstances and the interference with his private life was proportionate.

7. The Appellant appealed to the Upper Tribunal. He advanced five grounds:

a. The Judge failed to take into account evidence or resolve conflicts of evidence regarding the 2018 Absences.

b. Regarding the Early 2020 and 2020/21 Absences, the Judge failed to consider whether the Respondent should have exercised discretion given the circumstances of the pandemic.

c. The Judge failed to consider whether similar policies and subsequent amendments to the Rules were a relevant factor in the proportionality assessment.

d. The Judge failed to give sufficient life to private life and essentially treated the Immigration Rules as determinative of the question of proportionality.

e. The Judge should have considered the Rules as they applied at the date of the hearing and not just as at the date of the application.

8. On 29 October 2024 FTTJ Chowdhury granted the Appellant permission to appeal on all grounds.

The hearing

9. At the outset of the hearing we noted that the Appellant had adduced a letter from Rugby School dated 20 May 2024 but that no application had been made under r. 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Ms Ferguson subsequently made such an application orally but, in the event, we have not found it necessary to determine this application in light of our conclusions on the Appellant's later absences.

10. We invited both parties to address us on Ground 5, as we considered it might be dispositive of the appeal. Ms Ferguson referred us to Appendix Long Residence, which came into force from 11 April 2024 and to which Appendix Continuous Residence applies. Ms Ferguson explained that she had made submissions to the Judge on these provisions. Her position was that human rights matters should be considered as at the date of the hearing and, at the date of this hearing, Appendix Long Residence and Continuous Residence made it clear that absences due to the pandemic should be disregarded. Ms Ferguson argued therefore that as at the date of hearing the Appellant met the requirements of the relevant Immigration Rules for being granted indefinite leave to remain and that his appeal should have been allowed on that basis. Ms Ahmed's position was that the Appellant had not shown he could succeed under Appendix Long Residence.

11. We concluded that the Judge had erred as set out in Ground 5 for the reasons set out below. We indicated our intention to proceed immediately to remaking. Ms Ahmed invited us to adjourn the hearing so that she could take instructions. We refused this request but rose and allowed the parties two hours to prepare for the remaking.

12. When we returned, there was a discussion regarding the extent of the Judge's findings which should be preserved. We explained that the only finding which was preserved was the Judge's finding regarding the 2018 absences. The Judge made no findings about whether the Appellant's absences in 2020 and 2021 were due to the Coronavirus pandemic.

13. The Appellant was called to give evidence. He adopted his witness statement and was cross-examined. Insofar as relevant, his evidence was that he could not return to the UK in 2020/21 due to travel restrictions resulting from the Coronavirus pandemic.

14. Ms Ahmed then made submissions inviting us to dismiss the appeal. She relied on the refusal letter, Respondent's review and her skeleton argument prepared for the hearing. She submitted that the question for the Tribunal, pursuant to *TZ (Pakistan) v SSHD* [2018] EWCA Civ 1109, was whether the Appellant met the Rules at the date of the hearing, not whether he would succeed if he made a new application. She drew our attention to the Statement of Changes HC 590, which provided that for applications made before 10 April 2024 they would continue to be considered by reference to the earlier immigration rules. She referred us to Appendix Long Residence and its requirement to make a paid application. Her position was that the public interest required us to dismiss the appeal and for the Appellant to make a paid application under the new Appendix Long Residence. She also argued that the Appellant had not shown that he was unable to return due to travel disruption and he had not shown that there were "*no flights at all*" during the periods he was absent in 2020 and 2021.

15. Ms Ferguson made closing submissions. She stated that, as at the date of our hearing, the Appellant could satisfy the requirements of Appendix Long Residence. Her position on the need to make a paid application was that it was

redundant and that, in any event, the Appellant had already made an application in the correct form (at the time) and paid the relevant fee. A new application would succeed under the Rules. The only basis for his application being refused was excess absences and those absences now fall to be disregarded under Appendix Continuous Residence. Ms Ferguson helpfully took us through the evidence before the Judge relating to the travel disruption to which the Appellant attributes his absences.

16. We reserved our judgment.

Legal framework

17. At the time of his application, the relevant provisions of the Immigration Rules were at paragraph 276B. Insofar as relevant, that provision provided that an individual would be granted ILR where they had ten years' continuous lawful residence. The contemporaneous guidance on this provision stated that: "*If the applicant has been absent from the UK for more than 6 months (184 days) in one period or more than 18 months (548 days) in total, the application should normally be refused. However, it may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances.*"

18. Appendix Continuous Residence was in force at the date of the Appellant's application but it did not apply to applications under paragraph 276B. Currently, Appendix Continuous Residence states that:

> "*CR 2.1. To meet the continuous residence requirement the applicant must not have been outside the UK for more than 180 days in any 12-month period (unless CR 2.2., CR 2.2A., CR 3.1. or CR 3.2. applies, and subject to CR 2.3.).*
>
> *CR 2.2. For any absence from the UK with permission granted under the rules in place before 11 January 2018, the applicant must not have been outside the UK for more than 180 days during any consecutive 12-month period, ending on the same date of their current application unless CR2.2A applies, and subject to CR 2.3.*
>
> *CR 2.2A. Subject to CR 2.3, where the application is under Appendix Long Residence, the applicant must not have:*
>
> > *(a) spent a total of more than 548 days outside the UK during their qualifying period, where that 548-day total was reached before 11 April 2024; and*
> >
> > *(b) been outside the UK for more than 184 days at any one time during their qualifying period, where that absence started before 11 April 2024.*
>
> *CR 2.3. When calculating the period of absence in CR 2.1., CR 2.2. or CR 2.2A., any period spent outside the UK will not count towards the period of absence where the absence was for any of the following reasons:*

(a) the applicant was assisting with a national or international humanitarian or environmental crisis overseas, providing, if on a sponsored route, their sponsor agreed to the absence for that purpose; or

(b) travel disruption due to natural disaster, military conflict or pandemic […]"

19. The provisions of Appendix Continuous Residence were materially identical as at the date of the hearing in the First-tier Tribunal.

20. With effect from 11 April 2024 the Rules were amended to introduce a new Appendix Long Residence. This replaced Appendix 276B but makes similar provision for ILR to be granted for those who obtain ten years' continuous lawful residence. The relevant provisions are:

"***Validity requirements for settlement on the Long Residence route***

LR 9.1. A person applying for settlement on the Long Residence route must apply online on the gov.uk website on the specified form "Apply to settle in the UK – long residence".

LR 9.2. An application for settlement on the Long Residence route must meet all the following requirements:

(a) any fee must have been paid; and

(b) the applicant must have provided biometrics when required; and

(c) the applicant must have provided a passport or other document which satisfactorily establishes their identity and nationality.

LR 9.3. The applicant must be in the UK on the date of application.

LR 9.4. An application which does not meet all the validity requirements for settlement on the Long Residence route may be rejected as invalid and not considered.

Suitability requirements for settlement on the Long Residence route

LR 10.1. The decision maker must be satisfied that the applicant should not be refused under Part 9: grounds for refusal.

LR 10.2. The applicant must not be:

(a) in breach of immigration laws, except that where paragraph 39E applies, that period of overstaying will be disregarded (although it will not count towards the qualifying period); or

(b) on immigration bail.

Eligibility requirements for settlement on the Long Residence route

Qualifying period requirement for settlement on the Long Residence route

LR 11.1. The applicant must have spent a qualifying period of 10 years lawfully in the UK, for the entirety of which one or more of the following applied:

(a) the applicant had permission, except permission under Appendix Ukraine Scheme, or permission as a Visitor, Short-term Student (English language) or Seasonal Worker (or under any of their predecessor routes); or

(b) the applicant was exempt from immigration control; or

(c) the applicant was in the UK as an EEA national, or the family member of an EEA national, exercising a right to reside under the Immigration (European Economic Area) Regulations 2016 prior to 11pm on 31 December 2020 (and until 30 June 2021 or the final determination of an application under Appendix EU made by them by that date).

LR 11.2. The following periods will not count towards the qualifying period for Long Residence:

(a) time spent on immigration bail, temporary admission or temporary release; and

(b) any period of overstaying between periods of permission before 24 November 2016 even if a further application was made within 28 days of the expiry of the previous permission; and

(c) any period of overstaying between periods of permission on or after 24 November 2016 even if paragraph 39E applies to that period of overstaying; and

(d) any current period of overstaying where paragraph 39E applies.

LR 11.3. Subject to LR 11.4, the applicant must have had permission on their current immigration route for at least 12 months on the date of application, or have been exempt from immigration control in the 12 months immediately before the date of application.

LR 11.4. If the applicant's current permission was granted before 11 April 2024, LR 11.3. does not apply.

Continuous residence requirement for settlement on the Long Residence route

LR 12.1. The applicant must have met the continuous residence requirement set out in Appendix Continuous Residence for the entirety of the qualifying period."

Our decision

Error of law

21. As we indicated at the hearing, we find that the Judge materially erred by failing to consider whether the Appellant met the long residence rules as at the date of the

hearing. In human rights matters, the Tribunal is required to consider the proportionality of refusal as at the date of the hearing.

22. It is not entirely clear whether the Judge concluded that the Appellant was able to meet the rules as in force from 11 April 2024. At [22], the Judge notes the new Appendix Long Residence but simply states that this "*is not the provision which the appellant applied under*". We note that the Judge makes some critical comments at paragraphs 18 – 20 about the Appellant's absences during 2020 and 2021 but we do not consider that these amount to specific findings that the Appellant fell outside the scope of the new Rules, in particular Appendix Continuous Residence. His express conclusion at [23] was the Appellant could not satisfy paragraph 276B "*in the absence of any concession or exception provided by the Rules*".

23. In reaching that conclusion, we consider that the Judge fell into error. Although it is correct that Appendix LR is not the provision the Appellant applied under, it was the provision in the Immigration Rules concerning Long Residence that applied at the time of the hearing. In these circumstances, the Judge was required to consider whether the Appellant met the Rules that were those in force at the date of the hearing. Those Rules included a clear concession for those with excess absences due to the pandemic. The Judge was required to consider those Rules and reach a conclusion as to whether the Appellant met them, but did not do so. Furthermore, even insofar as the Judge was considering the Rules in force as at the date of application, he should have had regard to the Respondent's guidance which recognised that excess absences could be disregarded for "*compelling or compassionate reasons*". A global pandemic is plainly capable of giving rise to such reasons and should have been considered.

24. Further, we consider that the Judge fell into error by failing to consider the new Rules in his analysis of the Appellant's case outside the Rules. The Judge's conclusion on the public interest was based on the public interest in effective immigration control meaning that in most circumstances leave should not be granted where the requirements of the Immigration Rules were not met. In this case however the Secretary of State had changed the Rules applicable to the appellant's application while the appellant's appeal was still outstanding and in these circumstances it was necessary for the Judge to assess whether the appellant could fulfil the new requirements of the Rules in order to identify the extent of the public interest. . In particular, we consider that the Judge was required at a minimum to grapple with the fact that the Immigration Rules (which reflect the Respondent's view of the public interest) had changed with the effect that a long residence applicant who had excess absences due to the pandemic should still be able to obtain ILR. His failure to do so amounts to an error of law such that the decision must be set aside

25. We have not found it necessary to address the other grounds of appeal on which permission has been granted. Ground 1 is essentially academic; if we found against the Appellant on the Early 2020 and 2020/21 Absences, then his ability to succeed in relation to the 2018 Absences would not bring him within the 548-day

limit. Grounds 2 to 4 are largely ancillary to Ground 5 and do not require any separate consideration.

Remaking decision

26. This appeal concerns a single issue, namely whether the Appellant's absences above the 548-day limit should be disregarded and whether, in those circumstances, he should succeed either on the basis that he meets the Rules or on the grounds that the refusal is a disproportionate interference with the Appellant's private life considered outside the Rules.

27. **Reason for A's absences.** As we have set out above, we do not consider that the Judge's comments regarding the Early 2020 and the 2020/21 Absences amount to findings that the Appellant was outside the UK for reasons other than the pandemic. In our view, the Judge reached no conclusion either way on that point.

28. The Appellant's case is that he was outside the UK during the 2020/2021 absences due to travel disruption caused by the pandemic.

29. It is significant that there is no real challenge to the Appellant's credibility. He is a young man of good character and who has at all times complied with immigration control. The Respondent's position was that the Appellant had failed to discharge the burden of proof, but we did not understand Ms Ahmed to be making any suggestion that the Appellant was dishonest. Insofar as such a suggestion was intended, we would not accept it as there is simply no basis in his evidence or conduct for such an allegation.

30. The absences in 2020 and 2021 cover the two periods of 'lockdown' which were imposed in the UK from March 2020 and from December 2020. We accept that both absences extend beyond the restrictions imposed by the UK government, but we consider that the Appellant's case is strongly supported by the context of the global pandemic and the restrictions during the periods he was absent.

31. Ms Ferguson took us to documentary evidence which supports the Appellant's account. There are booking records for a return flight from London Heathrow to Lagos leaving on 18 March 2020 and returning on 21 April 2020. We accept that this shows that the Appellant initially intended to return to the UK in just over a month. Ms Ahmed argued that the Appellant left two days before the government announced the first lockdown, but it was clear by that point that significant restrictions were likely and we consider it entirely reasonable that the Appellant would seek to return to his family home in light of the outbreak of the pandemic. We therefore find that he left the UK on 18 March 2020 as a result of the pandemic.

32. The question posed by Appendix Continuous Residence is whether the Appellant's subsequent absence was attributable to "*travel disruption due to […] pandemic*". We therefore have to consider whether the Appellant's absence between 18 March 2020 and 14 August 2020 was due to travel disruption caused by the pandemic. It is clear from the documentary evidence that this was the case. In

the bundle before us there is an article from Reuters dated 17 August 2020 noting that Nigeria reopened its airports to international flights from 29 August 2020. That article explains that "*the airports have been closed since March 23 to all but essential international flights*". We have also been provided with an email from Virgin Atlantic dated 3 August 2023 which referred to a "*decision to delay restarting our London Heathrow to Lagos service*". We therefore accept that there was travel disruption in Nigeria which prevented the Appellant from returning as planned on 21 April 2020 and that this continued until the Appellant's return in August 2020.

33. We note the Judge's criticism that the Appellant managed to return earlier than the 29 August 2020 reopening date and the suggestion that there were therefore flights earlier, but this is not relevant; it is clear that there was significant travel disruption due to the pandemic and we find that this caused the Appellant's absence. His ability to return slightly earlier than the article suggests is a point in his favour. Ms Ahmed also submitted that the Appellant had not shown that he was "*unable to return*" to the UK. This is not the relevant test. The question for us is whether the absence was "*due to travel disruption*", not whether it was impossible for the Appellant to return to the UK. We do not read Appendix Continuous Residence as setting any such elevated test as that contended for by Ms Ahmed.

34. Regarding the 2020/21 Absences, we accept the Appellant's evidence that he travelled home at the end of the autumn term in 2020 for the Christmas holidays. His departure on 13 December 2020 strikes us as wholly consistent with his well-established pattern of attending education in the UK during term time and only returning to Nigeria during the holidays. By 13 December 2020, the UK had reintroduced 'tier' systems due to increasing prevalence of Coronavirus. After he left, it is clear that he was prevented from returning due to travel disruption. We have been shown an eticket (which was before the Judge but not considered by him) which refers to a return flight for 3 January 2021. It is endorsed "*CHNG DUE COVID-19*", which we understand to mean that the flight was cancelled due to the pandemic. This is unsurprising as, on 4 January 2021, the government announced a new national lockdown, requiring people to stay at home and avoid non-essential travel. We have been provided with a chronology of restrictions in the UK, which notes that there were very limited easing of restrictions on 8 March 2021 (allowing people to meet one person from outside their household). The stay-at-home order was lifted on 29 March 2021 but a new international travel ban was introduced to prevent people leaving the country without a reasonable excuse.

35. While it is not entirely clear what the rules regarding international travel were during the 2020/21 Absence, we accept that there was very significant disruption to international travel in early 2021 and we consider that it is unlikely that the Appellant could lawfully have returned to the UK much sooner than he did. We accept that the 2020/21 Absence was due to travel disruption caused by the pandemic.

36. We therefore accept that 260 days of the Appellant's absences fall within CR 2.3(b), in that they were caused by travel disruption due to the pandemic.

37. **Ability to meet the Rules.** We consider that the Appellant is able to meet the Rules. While it is not necessary for the purposes of remaking, we also consider that he met the Rules as at the date of the First-tier Tribunal hearing. We consider that the absences on which the Respondent relies as taking the Appellant beyond the 548-day limit fell to be disregarded as a result of Appendix Continuous Residence.

38. We are not persuaded by Ms Ahmed's submission that the Appellant fails to meet the Rules because he has not made an application for settlement on the Long Residence route and in accordance with LR 9.1-9.4. He made a valid application for settlement on the basis of long residence in the correct format and with the correct fee as at the time of his application. It was the Respondent's decision to alter the Rules after his application was made. The Appellant cannot be criticised for failing to use an application form that did not exist as at the date of his application. He used the analogous form and process that were in force at the time and we do not see that this amounts to a failure to meet the current Rules.

39. As he meets the Rules, the Appellant's application should succeed. As explained in *OA & ors (human rights; 'new matter'; s. 120) Nigeria* [2019] UKUT 65 (IAC), a finding that a person satisfies the requirements of a particular immigration Rule means that the Respondent is not able to point to the importance of maintaining immigration controls as a factor weighing in her favour.

40. **Outside the Rules.** If we are wrong in the foregoing analysis, we nevertheless consider that the Appellant should succeed outside the Rules. The Appellant has been lawfully and continuously present in the UK since he entered at the age of ten. He is of unblemished character. He has been in the UK for more than half of his life. It is not in dispute that he has established a private life in the UK.

41. We accept that, during that time, the Appellant's leave has been precarious and therefore attracts little weight. However, we consider that his ability to show ten years' continuous lawful residence and presence in the UK for more than half his life means that, as a matter of the Respondent's own policy reflected in the Rules, his private life is such as to warrant a grant of indefinite leave to remain.

42. The Respondent's position is that, even if he meets the substantive eligibility and suitability provisions of the Rules, it is in the public interest for the Appellant to submit a second, paid application in materially identical terms to his earlier application. We find that such an application would be certain to succeed and therefore, applying *Chikwamba v SSHD* [2008] UKHL 40 by analogy, there is no public interest in requiring him to do so. We reject the suggestion that there is any public interest in requiring an individual who has already made an application in the proper form to repeat that process. Such a finding would be inconsistent with case law and a triumph of formalism over substance. It would be disproportionate in the terms set out in *R (Quila) v SSHD* [2011] UKSC 45 at §45

(endorsing Lord Bingham's analysis in *Huang v SSHD* [2007] 2 AC 167 at §19) as, *inter alia*, there is no rational connection between the enforcement of immigration control and the requirement for a lawful resident who meets the rules to 'tick the box' of submitting a second materially identical application. In this respect we repeat the observation that it was the respondent's decision to change the Rules which means the position at the time of the hearing differed from the situation at the time of the application. It is not the case that the case put forward by the Appellant has altered in any way from the time he made his application.

43. We therefore consider that, even if the Appellant is unable to meet the Rules as he did not submit an application in the form stipulated in Appendix Long Residence, he should succeed outside the Rules as the refusal of indefinite leave to remain in these circumstances would constitute a disproportionate interference with his rights under Article 8 ECHR.

Notice of Decision

44. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). We remake the decision and allow the appeal on the basis that the Respondent's decision constitutes a disproportionate interference with the Appellant's rights under Article 8 ECHR, both as set out in the Rules and outside the Rules.

M Butler

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Signed 10 January 2025