



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

Appeal Number: IA/06580/2014

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
On 15 August 2014**

**Determination  
Promulgated  
On 17 September 2014**

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**UDO CHRISTOPHER UKPONG**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Martin Solicitor

For the Respondent: Mr M Matthews, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant who is a national of Nigeria born 23 November 1973 has been granted permission to appeal the decision of First-tier Tribunal Judge Bradshaw who for reasons given in his determination dated 17 April 2014 dismissed the appeal by the appellant under the Immigration Rules and on human rights grounds against the Secretary of State's decision dated 15

January 2014 to refuse to vary Mr Ukpong's leave to remain and her further decision to remove him.

2. The background facts are these. The appellant entered the United Kingdom on 3 September 2002 with entry clearance as a student. He obtained successive periods of leave to remain on this basis, the most recent granting him leave until 1 October 2013. On 18 January 2013 he applied for indefinite leave to remain based on ten year's continuous lawful residence in the United Kingdom with reference to paragraphs 276B & C of HC 395. The appellant is married and they have two children. Neither had lived in the United Kingdom for at least the seven years immediately preceding the date of application. These family members are also nationals of Nigeria.
3. The respondent refused the application because of a break in the appellant's period of lawful residence between 10 September 2010 and 5 January 2011. The appellant had made an application on 25 August 2010 for leave to remain which was rejected on 10 September 2010. It is undisputed that he did not seek to vary his leave to remain until 47 days later on 28 October 2010 and thus outside the 28 days period of grace provided for in the Rules. The respondent did not make her decision on the further application until 5 January 2011 when the appellant was granted further leave until 24 January 2012.
4. The respondent also considered the appellant's case under Appendix FM and paragraph 276ADE giving detailed reasons why these could not assist the appellant.
5. The grounds relied on before the First-tier Tribunal were that the appellant met the requirements of paragraph 276C of the Rules. Although it was accepted that the appellant did not meet the requirements of Appendix FM or paragraph 276ADE it was a good arguable case on Article 8 grounds taking account of the appellant's circumstances and those of his family including his daughter who has Down's syndrome. Article 3 was also relied on in respect of the hostility anticipated in Nigeria due to the daughter's disabilities and the risk of FGM.
6. These grounds of challenge were amended by Mr Martin at the hearing before me; he no longer relied on the assertions that the First-tier Tribunal Judge had erred in his consideration of the Article 3 factors. The remaining grounds argue that the judge had failed to refer to the full terms of the Secretary of State's policy regarding out of time applications on a long residence basis and this was the focus of his submissions.
7. The case put by the appellant for applying for further leave outside the 28 day grace period in 2010 was that this had been caused by a serious medical problem he had encountered in the course of his study and by his daughter's ill-health. He had been diagnosed with type 2 diabetes and before the diagnosis had been suffering from serious depression, a migraine headache and an eye problem which eventually led to his eyes

giving tears uncontrollably which caused him blurred vision. He could not read properly or see letters effectively and this problem had eventually led to the omission of a section of the application form which had resulted in its rejection in September 2010.

8. The application for further leave to remain as a student dated 21 August 2010 had been refused because the appellant did not have a valid CAS in that he had failed to provide the CAS details on the application form. His evidence was that he had filled in three application forms for his then only child and for his wife in addition. By mistake he had missed providing the information which he attributed to his eye problem.
9. The appellant had relied on medical evidence corroborating his condition before the judge. This included a report from Dr Coupar, a registered psychologist, and from Dr Lucy Reynolds, a consultant paediatrician as to the daughter's state of health.
10. My conclusions are as follows.
11. Paragraph 276B of the Rules (relevant to this appeal) provides:

*"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:*

*(i)(a) he has had at least 10 years' continuous lawful residence in the United Kingdom.*

*..."*

12. "Continuous residence" is defined in paragraph 276A as is "lawful residence". In summary, "continuous residence" means residence in the United Kingdom for an unbroken period but such a period shall not be considered to have been broken where there has been absence from the United Kingdom for six months or less or steps taken for removal. "Lawful residence" means -

*"... Residence which is continuous residence pursuant to:*

- (i) existing leave to enter or remain; or*
- (ii) temporary admission within s.11 of the 1971 Act where leave to enter or remain is subsequently granted; or*
- (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."*

13. At the hearing before the First-tier Tribunal the appellant confirmed to the Presenting Officer that he had a valid CAS when he made the application on 21 August 2010.

14. The judge noted the policy guidance at [18] of his determination and concluded at [68] and [69] as follows:

“68. In terms of the policy guidance founded upon by Miss Dune examples given are of a postal strike, hospitalisation or an administrative error made by the Home Office. In respect of example (3) about a single gap in lawful residence due to submitting an application 34 days out of time it was specified that this would be granted because the individual in question had provided a letter from their consultant stating that they were hospitalised during this period. The guidance specifies that the individual had proved there were exceptional reasons for the late application.

69. I do not consider that such exceptional reasons apply. It seems to me that the gap in the appellant’s lawful residence was not due to extenuating circumstances which were beyond his control.”

15. These observations were followed by a detailed analysis of the medical evidence. The judge observed at [85] that the important question was not why the CAS number had been omitted from the original application but why there was delay by the appellant in submitting the second application which was clearly filled in properly as it had been granted. The guidance to which the judge was referred was in the bundle of documents before him and replicated in the skeleton argument.

16. The complaint made in the grounds of application relates to a different limb of the policy. It is argued that the judge had not considered the policy’s remaining terms which state that “exceptional reasons include ‘serious illness’.” It is argued that both sections of the policy were specifically highlighted before the judge. Reference is made to page 53 of the appellant’s bundle as to the further limb which it is argued the judge had failed to take into account. As I observed at the hearing pages 49 to 54 are missing from the appellant’s bundle and I am by no means certain that the further terms of the policy were specifically drawn to the judge’s attention. Nevertheless I consider the challenge on the basis that they were.

17. Pages 20 to 22 of the policy are under the heading “Out of time applications”. It is explained that the page “...tells you about ‘out of time’ applications submitted for ten years’ long residence applications”. The policy refers to changes in the Immigration Rules after 1 October 2012 and states that the changes affect applications which were made on or after 9 July 2012 and are decided on or after 1 October 2012. I pause here to observe that the application was made on 26 September 2013.

18. The policy guidance provides in addition:

*“If the continuous residence period includes periods of overstaying before further leave being granted before 1 October 2012, you may disregard these periods for indefinite leave to remain (ILR) provided the period does not exceed 28 days.*

*For applications made before 9 July 2012 there is no requirement for applications for indefinite leave to remain (ILR) to be made 'in-time' under the ten years' long residence Rules.*

*For applications made on or after 9 July 2012 an applicant applying for an extension of stay or indefinite leave to remain (ILR) on the basis of long residence must not be in breach of the Immigration Rules. However, for the purposes of the application a period of overstaying of 28 days or less on the date of application will be disregarded."*

19. The guidance proceeds to advise on out of time applications made on or after 9 July 2012 and includes the instruction that:

*"When refusing an application on the grounds it was made by an applicant who has overstayed by more than 28 days, you must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying."*

20. There follows an explanation of what constitutes exceptional circumstances. This includes reference to serious illness.
21. I am not persuaded by Mr Martin's submissions that this guidance embraced situations where an appellant had been without lawful leave for more than 28 days during the currency of the ten year period as opposed to late applications made after its expiry. It is clear to me that the policy is directed towards the handling of applications *after* completion of ten years' continuous lawful residence which are made late. Accordingly the best the appellant could expect from the policy were the provisions addressed by the judge on which he came to a rational conclusion giving adequate reasons for doing so.
22. The guidance the appellant was entitled to rely on provides that the caseworker "can use [his] judgment and use discretion in cases where there may be exceptional reasons why a single application was made more than 28 days out of time". Examples are given which were considered by the judge. Such examples are not exclusive and I consider that serious illness could be a valid consideration.
23. There is no doubt that the judge undertook a careful analysis of the medical evidence and was rationally entitled to conclude for the reasons given that there was no provision for exercising discretion favourably in the circumstances advanced by the appellant. It is clear to me that the judge was not ruling out the possibility that a health concern could result in a favourable exercise of a waiver but that in appellant's case this was not appropriate. Accordingly I find the judge did not err in his consideration of the policy which might otherwise have assisted the appellant. This is the sole extent of the remaining challenge. The appeal is therefore dismissed.
24. At the conclusion of the hearing Mr Matthew sought leave to lodge further evidence pursuant to Rule 15(2A) in the event that error of law was found.

The evidence advanced seeks to support the assertion that it was not because of any medical problem that the appellant had failed to complete the form correctly but because he did not have a CAS which he could have referred to. In the light of my conclusion I do not make a ruling on the application.

Signed

Date 16 September 2014

A handwritten signature in blue ink, appearing to read "Dawson", with a horizontal line extending to the right.

Upper Tribunal Judge Dawson