Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/15368/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30th April 2014	**On 23rd June 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

ANTHONIA ONYINYE ILOENE Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:

For the Appellant: Mr Owolabi, Samuel and Co Solictors
For the Respondent: Ms Vidyadharan, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Nigeria born on the 13th January 1988. She is married to Jude Emeke Iloene, also a citizen of Nigeria, born on the 9th June 1974. The Appellant appeals with permission the decision of the First-tier Tribunal (Judge Walker), who in a determination promulgated on 5th November 2013, dismissed the appeal of her husband, who was the principal appellant, and this appellant, who was a dependant

of her husband's application, against the Respondent's refusal to vary their leave to remain in the United Kingdom as Tier 1 (General) Migrants.

2. By way of background, there were originally two appellants before the First-tier Tribunal and the Upper Tribunal; the principal appellant who was Mr Jude Emeka Iloene and his wife, the present appellant, who was a dependant to his application.

3. The history of the appeal is as follows. Mr Iloene entered the United Kingdom with entry clearance as a student on 7th September 2003 which was valid until 31st October 2004. Thereafter he was granted further periods of limited leave as a student until 5th February 2010. Following this he was granted limited leave to remain on 23rd March 2010 as a Tier 1 (General) Migrant which expired on 23rd March 2013.

4. The Appellant, his wife, applied for and was granted leave to enter the UK as a Tier 1 (General) dependent partner on 15th December 2012 until 23rd March 2013.

5. On 22nd March 2013 her husband made an application for indefinite leave to remain in the United Kingdom on the basis that he had lived and worked in the United Kingdom continuously and lawfully for the last five years under paragraph 245CD of the Immigration Rules (as amended).

6. In a notice of immigration decision dated 18th April 2013 the application for leave to remain was refused under paragraph 245CD(d) of the Immigration Rules. That Rule stated:-

> **"245CD. Requirements for indefinite leave to remain**
>
> To qualify for indefinite leave to remain, a Tier 1 (General) Migrant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> **Requirements:**
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) if the applicant has or has had leave as a Highly Skilled Migrant, a Writer, composer or artist, a self-employed lawyer or as a Tier 1 (General) Migrant under the Rules in place before 19 July 2010, and has not been granted leave in any categories other than these under the Rules in place since 19 July 2010, the applicant must have 75 points under paragraphs 7 to 34 of Appendix A. …"

The Respondent accepted that Mr Iloene had entered the United Kingdom on 7th September 2003 with entry clearance as a student which was valid until

31st October 2004 and that he had been granted limited leave to remain valid until 29th April 2006. The further periods of limited leave were granted on 5th June 2006, valid until 30th January 2007, 24th January 2007 valid until 24th January 2008 and 5th February 2008 until 5th February 2010. It was further accepted that he was granted limited leave to remain on 23rd March 2010 as a Tier 1 (General) Migrant which expired on 23rd March 2013.

Under the Immigration Rules for Tier 1 (General) applicants must, amongst other things, score:-

> "75 points under Appendix A (attributes) and provide the specified documents; and
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> 10 points under Appendix B (English language) and provide the specified documents; and
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> 10 points under Appendix C (maintenance (funds)) and provide the specified documents."

The immigration decision set out that Mr Iloene had been awarded 55 points under Appendix A and 10 points under Appendices B and C. Under Appendix A: attributes under the section "previous earnings" he was required to demonstrate 40 points but the Respondent awarded him 15. He had claimed 40 points for previous earnings of £43,529.06. This figure represented the following payments, namely dividends from Double Focus Consulting Ltd totalling £16,594.42. However, the Respondent considered it implausible that the dividend payment was a genuine one on the basis that the company had only generated invoices of £6,277 during the period from incorporation of the company on 14th August 2012 until 31st December 2012. It was further considered that the amount of £16,549.42 had been generated by recycling money between the current account and the business account during the same period. Thus the Respondent discounted those amounts as they could not be relied upon as genuine earnings. The further figure included was a redundancy payment of £4,520.84 from Global Dawn Ltd in the earnings of £43,529.06. The Respondent did not accept that this was "unearned income" based on paragraph 103 of the Tier 1 guidance which stated that "unearned sources of income that we will not consider as previous earnings include … redundancy payments". Therefore the Respondent had discounted the figure of £21,115.26 from the claimed earnings of £43,529.06. It was accepted by the Respondent that his salary of £16,186.74 had been accepted as genuine. Thus the total amount of earnings that had been accepted for the purposes of the application were £22,413.80 giving Mr Iloene a total of 15 points. Thus he could not demonstrate that he had 75 points as required under Appendix A (attributes) and the application was refused under paragraph 245CD(d) of the Immigration Rules.

7. In the notice of immigration decision, section B dealt with rights of appeal including the One-Stop Warning – Statement of Additional Grounds. That set out as follows:-

"One-Stop Warning – Statement of Additional Grounds

You must now inform us of any reasons why you think you should be allowed to stay in this country. This includes why you wish to stay here, and any grounds why you should not be removed or required to leave.

You do not have to repeat any reasons you have already given us but if you do have any more reasons you must now disclose them.

If you apply later to stay here for a reason which you could have given us now, you may not be able to appeal if the application is refused.

If, at a later date, the reasons why you think you should be allowed to stay in this country change, or new reasons arise, you must tell us as soon as possible.

If you later apply to stay here for a reason which you could have raised earlier, you may not be able to appeal if the application is refused.

This ongoing requirement to state your reasons is made under Section 120 of the Nationality, Immigration and Asylum Act 2002.

Please note, if you choose to appeal the decision under Section 82(1) of the Nationality, Immigration and Asylum Act 2002, your previous leave and the terms of conditions attached to it, will be extended by virtue of Section 3C of the Immigration Act (as amended) until such a time as the appeal is resolved."

8. Mr Iloene and his wife exercised their rights to appeal that decision. The Grounds of Appeal submitted on Mr Ileone's behalf gave the reasons why he sought to appeal the "non-asylum decision" relating to the Immigration Rules. In the Statement of Additional Grounds the following was stated:-

> "The decision will cause the UK to be in breach of her obligations under Article 8 of the ECHR as the Appellant (Mr Iloene) has established a private life in the UK having lived in the UK lawfully throughout his stay here."

9. Their appeal was heard on 31st October 2013 at Hatton Cross before the First-tier Tribunal (Judge Walker). In a determination promulgated on 5th November 2013, Judge Walker dismissed Mr Iloene's appeal under the Immigration Rules and on human rights grounds. As a consequence of his decision, this appellant could not succeed as she was dependant upon his application as the partner of a Tier 1 Migrant. The judge heard oral evidence from Mr Iloene only(and not his wife) and had the advantage of considering a bundle of documentation including witness statements filed on behalf of them both and documents relevant to the appeal under the Immigration Rules.

10. At paragraphs 21 to 28 the judge set out his findings of fact concerning that application. He found that the Mr Iloene had failed to show the earnings as claimed by him and was therefore not entitled to the 40 points claimed under Appendix A.

The judge, having considered the oral evidence in the light of the documents that had been placed before him of these sums that had been claimed as earnings from Double Focus Consulting were in fact not earnings and that a substantial amount of money had been moved from other accounts as well as a repayment of a loan that appeared to have nothing to do with the business. Thus he did not accept Mr Iloene's claim that the business had grossed the amount of £18,672 as claimed either as a limited company or the Appellant as a sole trader. He found that he had been trying to pass off the movement of funds as earnings which was not the case.

11. The judge also considered the claim to remain under Article 8 of the ECHR at paragraphs 28 to 33. He noted that in respect of both Mr Iloene and his wife, if returned to Nigeria, they would return as a family unit along with their daughter who at the date of the hearing was 5 months of age, and also a national of Nigeria. Therefore he found there to be no interference with their family life. As to their private lives, and in particular Mr Ileone who the judge noted had been studying and working in the United Kingdom for ten years, the judge found that whilst there would be an interference with their private lives he did not find it to be of such gravity as to engage Article 8. He stated:-

> "31. There has been no detailed evidence as to exactly what interference there would be to their private lives other than the general claim being made. The male Appellant has accepted in cross-examination that whilst he was studying it was always his intention to return to Nigeria but that once he had started working in the United Kingdom he wanted to stay to take advantage of these work opportunities. That may well be the case but the Appellant is now well qualified after his UK studies and has had good work experience. This will no doubt place him in good stead for employment on a return to Nigeria."

The judge then went to the issue of proportionality and reached the conclusion that having taken into account all the relevant circumstances the decisions of the Respondent were proportionate. It was further accepted that the neither Mr Ileone nor his wife could not comply with the requirements of paragraph 276ADE with regard to any private life. Thus the appeals were dismissed.

12. An application for permission to appeal the decision of the First-tier Tribunal was made on behalf of both Appellants, as they then were, on 13th November 2013. The grounds are as follows:-

> "2. With reference to paragraph 29 of the determination and reasons, it is arguable whether the Immigration Judge may not have misapplied or failed to apply the relevant paragraph of the Immigration Rules in respect of the First Appellant.
>
> 3. The IJ states at paragraph 29:
>
> > 'I do accept that there will be interference with their private lives and more particularly the male Appellant as he has been studying and later working here in the UK for ten years. Nevertheless the

Appellants are unable to comply with the requirements of paragraph 276ADE with regard to private life.'

4. In submissions on behalf of the Appellant at the hearing, the IJ had been respectfully invited to take note of the Appellant's statement at paragraph 34 of his witness statement to the effect of his ten years' lawful residence in the UK and the acceptance by the Respondent of the Appellant's immigration history detailed at paragraph 2 of the notice of immigration decision.

5. The IJ had then properly requested the Respondent's representative (HOPO) to comment on this (and Article 8). The HOPO responded that the Respondent accepts the Appellant's immigration history and do not dispute the fact that he had resided lawfully in the UK for ten years. This exchange will be in the Record of Proceedings.

6. It was submitted that the Appellant therefore met the requirements of paragraph 276B which provides for the grant of indefinite leave to remain in the UK on the basis of his ten years' lawful residence and includes the requirement to have passed the Life in the UK Test proof which the Appellant had submitted to the Respondent as listed at paragraph 54 appearing in the Respondent's bundle for the hearing.

7. It is submitted that the application to the male Appellant by the Immigration Judge of paragraph 276ADE of the Immigration Rules which contains different requirements of that which his case rests upon is wrong and justifies the grant of permission on this ground on the basis that the judge's error has vitiated his conclusions.

8. It is submitted that save for the misapplication of the aforesaid paragraph of the Immigration Rules the IJ (supported by the acceptance and no contest put forward by the Respondent) would have allowed the appeal of the male Appellant who clearly meets all the requirements at paragraph 276B of the Immigration Rules.

9. The Tribunal is invited to grant permission to appeal the decision of the IJ as a different Tribunal properly directing itself as the relevant Rule is likely to reach a different conclusion from that reached in this case."

13. On 29th November 2013 Upper Tribunal Judge Roberts granted permission for the following reasons:-

"2. The grounds seeking permission claim that the First Appellant was entitled to be granted indefinite leave to remain in the United Kingdom on the basis of his ten years' lawful residence under paragraph 276B of the Immigration Rules. It is claimed that the Respondent and the First-tier Tribunal Judge were put on notice of this at the hearing of the appeal on 31st October 2013. Ground 8 of the grounds seeking permission advances

this argument and sets out that the judge should have allowed the appeal of the First Appellant who clearly meets all the requirements of paragraph 276B of the Rules.

3. The Record of Proceedings shows that this issue was raised with the judge. However, the judge's determination does not address this point.

4. It is arguable that in failing to address this point, the judge may have erred, not least because this is a matter which may have factored into the Article 8 consideration. Permission to appeal is granted."

14. The Secretary of State issued a Rule 24 response on 13th December 2013 on the following terms:-

> "The Respondent opposes the Appellant's appeal. In summary the Respondent will submit that the Judge of the First-tier Tribunal directed himself appropriately. It is submitted that the First-tier Tribunal Judge did not err in law. The appeal was based on the application made by the Appellant under the PBS Rules and refused in relation to those Rules on this basis. If the Appellant wished to make any other application to be considered under any other parts of the Immigration Rules he will need to make an application and pay the fee. It will be submitted that the judge has considered Appendix FM and stage 2 outside the Rules on the evidence before him. The Respondent requests an oral hearing."

15. Thus the appeal came before the Upper Tribunal on the 16th January 2014. At that hearing there were two Appellants before the Tribunal, Mr Jude Emeka Iloene and his wife Anthonia Onyinye Iloene. They were represented by Mr M Owolabi, who had appeared before First-tier Tribunal Judge Walker. The Secretary of State was represented by Mr Nath. At the outset of the proceedings Mr Nath observed that there had been no attempt made to either ask for or provide the Record of Proceedings bearing in mind that the grounds for permission drafted on behalf of the Appellants stated that the exchange between the judge and the Appellants relating to any application under paragraph 276B would be in the Record of Proceedings (see Ground 5). Mr Nath said that there was no record from the Presenting Officer on file and he had attempted to ask the Presenting Officer as to the events before the First-tier Tribunal Judge but had not been able to do so. He submitted that he would wish to see this before making any further submissions. I considered the case file and was able to provide to both parties the note of Judge Walker which was in summary form but was typed. The only reference was the very last entry on the page. There was no information as to what was actually said by either advocate. There is no record other than that as to the basis upon which it was put, how it was raised or in what context. Consequently the advocates sought time to discuss matters between themselves and to consider the ROP, therefore I stood the case down.

16. When the case resumed Mr Nath stated that both representatives considered it was necessary for further material to be obtained and that both agreed that the matter

should be adjourned. It appeared that following their discussions it transpired that an application had been made by Mr Iloene prior to the First-tier Tribunal hearing made in September for leave to remain on long residence grounds under paragraph 276B. An acknowledgement of the application was dated 7th November 2013. However it is plain from what the advocates told me that this application which had been made by Mr Iloene prior to the FTT hearing, the judge had not been referred to such an application. In those circumstances both parties sought time for material to be made available including the application that had been made to the Secretary of State and also any further notes concerning the Record of Proceedings which had not been possible for Mr Nath to obtain in advance of the hearing. Furthermore, there was no evidence placed before the Tribunal on behalf of the Appellants as to the events before the First-tier Tribunal and therefore directions were made for a hearing.

17. The directions were issued on 16th January 2014 directing any further response that the Secretary of State wished to make under Rule 24 should be filed and served no later than seven days before the hearing and it was also ordered that the Respondent should file and serve a copy of the Presenting Officer's minute within 21 days of service of the directions. Further directions related to the parties serving upon the Tribunal any other documentary evidence upon which it is intended to rely. The directions included one relating to both parties filing and serving skeleton arguments and the legal authorities relevant to the issues and in particular those relating to Section 120 notices.

18. Following the hearing, a letter was sent from the Appellants' solicitors dated 24th April indicating that the first Appellant, Mr Iloene had been granted indefinite leave to remain and requesting for the hearing of the appeal, that was to be listed on 30th April 2014 to be vacated. The issue was dealt with by Upper Tribunal Judge O'Connor who responded to that request as follows:-

> "By Section 104(4A) of the Nationality, Immigration and Asylum Act 2002, the first Appellant's appeal is to be treated as abandoned as a consequence of him having been granted leave to remain; however the second Appellant, Mrs Iloene, still has an appeal pending before the Upper Tribunal. There has been no application for permission to withdraw her case. In such circumstances the hearing of 30th April 2004 will proceed in order to determine this extant appeal."

19. Thus the appeal was listed before the Upper Tribunal on 30th April 2014 and at this stage by reason of the decision of Upper Tribunal Judge O'Connor in the light of the grant of indefinite leave to remain to Mr Iloene, his appeal was treated as abandoned leaving only his wife as an Appellant before the Upper Tribunal. I should observe at this stage that despite the directions made following the adjourned hearing, none of those directions had been complied with by either party and no further evidence was provided by either party, no Record of Proceedings or any further evidence relating to what had occurred before the First-tier Tribunal and no further evidence of any kind and despite the provision for skeleton arguments and the legal authorities relevant to the issues, none of those were forthcoming.

20. At the outset of the hearing Mr Owolabi made reference to the correspondence to the Upper Tribunal of which he informed the court that Mr Iloene had been granted indefinite leave to remain and had asked for the appeal to be vacated. He appeared to be stating that the present Appellant Mrs Iloene was seeking to withdraw, however, it became apparent that there was no application to withdraw her appeal. He confirmed that there had been no further documentation supplied in accordance with the directions made. The advocates asked for time to discuss the issues between themselves.

21. The hearing was then resumed. I heard submissions from each of the advocates as this was an application to determine whether or not the First-tier Tribunal (Judge Walker) made an error of law in the decision relating to the only Appellant now, the Appellant's wife. The relevant evidence being that which had been placed before the First-tier Tribunal.

22. Mr Owolabi submitted that there as an error of law disclosed in the First-tier Tribunal's decision in relation to the consideration of the former first Appellant's appeal on the basis of paragraph 276B of the Immigration Rules. He submitted that in the first Appellant's witness statement the relevant paragraph being paragraph 5 (see page 33, 34 of the bundle) which was a joint statement that there was specific request to consider paragraph 276B and that the Appellant's husband had stated that the period of residence had been lawful. It was therefore submitted that that was a Ground of Appeal and was brought to the attention of the Immigration Judge. He conceded that there was no evidence by way of solicitor's note or witness statement from those present but relying on the Record of Proceedings of the judge that had been disclosed that at the bottom of the page where it stated "276B" clearly related to that paragraph being raised. This can be seen as a specific submission in view of the Appellant's request in his statement. The Appellant's husband had already accrued ten years' lawful residence before the hearing before the First-tier Tribunal. There is no reference in the determination to paragraph 276B. Whilst the decision on private life referred to paragraph 276ADE and his failure to accrue twenty years' residence, under paragraph 276B he had accrued ten years' lawful residence before the First-tier Tribunal decision and therefore it should have been considered.

23. He further submitted that in the light of that error, it was necessary to consider the only Appellant's position namely his wife. She had applied as a dependant of her husband and thus if he had succeeded under paragraph 276B then she would have succeeded on human rights grounds. He dealt with the position of Article 8 under paragraph 276ADE and therefore her circumstances meant that she should have succeeded under Article 8. When asked what particular circumstances were relevant, Mr Owolabi submitted that she had entered the United Kingdom lawfully to join her husband as his dependant and they had lived together and secondly their child was born in the United Kingdom on 15th June 2013. However he conceded that the child was not a British citizen and was not a child of a settled person.

24. I heard submissions from the Senior Presenting Officer Ms Vidyadharan. She observed that it was important to remember that at this stage the Tribunal was at the

error of law stage and in those circumstances it was difficult to see how the judge made an error when looking at the evidence that had been provided before him in respect of the evidence under the Immigration Rules and Article 8. Paragraph 276B was not raised in the Grounds of Appeal that he had acquired ten years' lawful residence and it could not be in the grounds because at that stage he had not accrued ten years' lawful residence. There was no Section 120 notice at any time and therefore it was difficult to see how the judge had fell into error. She submitted that he considered the case on the basis upon which it was presented and the burden of proof was on the Appellant who had had the ample opportunity given to provide evidence as to the events before the First-tier Tribunal which has not been forthcoming and therefore they had not demonstrated that any Section 120 notice had been made. Therefore the judge considered the issue of length of residence by reference to paragraph 276ADE which was the correct Rule when considering Article 8. She further submitted that Mr Owolabi was seeking to argue that the judge should have considered paragraph 276B because he could potentially meet the long residence Rules and therefore it was a breach of Article 8. However, his wife could not meet any Rule as her length of residence was only from December 2012 and it is difficult to see on the facts of her particular case how she could succeed outside the Rules relating to Article 8.

25. Mr Owolabi submitted by way of reply that potentially the First-tier Tribunal Judge could have allowed the appeal and should have considered the position of the second Appellant in the chronology of events. He confirmed that the Appellant Mrs Iloene did not give oral evidence before the First-tier Tribunal because the appeal turned on the husband's case and not his wife's.

26. At the conclusion of the submissions I reserved my decision which I now give.

Conclusions:

27. There is only one Appellant before the Tribunal, Mrs Anthonia Onyinye Iloene and the stage of the proceedings that we have reached is that the Upper Tribunal is required to determine whether the decision of the First-tier Tribunal (Judge Walker) discloses an error of law in his decision by reference to the evidence that was before him.

28. It is necessary to set out the chronology of events. Mr Iloene entered the UK as a student on 7th September 2013. His leave as a student was extended and was later extended as a Tier 1 (General) Migrant expiring on 23rd March 2013. His wife joined him as a dependant of a Tier 1 (General) Migrant in December 2012. The application that was made by Mr Iloene with his wife as a dependant was made when he had leave on 22nd March 2013 and this was for indefinite leave to remain under paragraph 245CD of the Immigration Rules HC 395 (as amended). This was on the basis that he had lived and worked in the United Kingdom continuously and lawfully for the last five years.

29. At the date of that application, Mr Iloene had not accrued ten years' lawful residence and his wife had been in the United Kingdom for a period of four months only.

30. The decision made by the Secretary of State was made on 18th April 2013 and I have set out the terms of that decision at paragraph 5 of the determination. At the date of the decision of the Respondent Mr Iloene had not accrued ten years' lawful residence.

31. Following the refusal of the decision, the Grounds of Appeal made no reference to an application under paragraph 276B and in the statement of additional grounds there was also no reference to it. That is not surprising because at the date when the Grounds of Appeal were filed Mr Iloene could not meet the criteria of ten years' lawful residence by that date.

32. The ten years' lawful residence was accrued in September 2013. It now appears from information that was provided to Mr Nath in January 2014 at the last court hearing, that an application was made for indefinite leave to remain after he had accrued ten years' lawful residence which was before the hearing before the First-tier Tribunal but that such an application does not appear to have been brought to the attention of the First-tier Tribunal Judge, indeed it was not brought to the attention of the Upper Tribunal until 16th January 2014. It was that application which succeeded in February of this year which led to Mr Iloene's appeal being abandoned.

33. Turning to the hearing before the First-tier Tribunal. That took place on 31st October 2013 and it is clear from the determination that the judge plainly had regard to the fact that Mr Iloene had been in the United Kingdom with lawful leave for a ten year period. It is further plain from the decision of the First-tier Tribunal that the case was advanced substantially and primarily on the basis of Mr Iloene (with his wife as a dependant) as a Tier 1 Migrant and having satisfied paragraph 245CD. The decision of the First-tier Tribunal considered that application in the light of the decision of the Respondent but reached the conclusion that Mr Iloene had failed to demonstrate the earnings as claimed by him and thus was not entitled to the 40 points claimed under Appendix A and therefore could not satisfy the Immigration Rules under paragraph 245CD.

34. He gave further consideration to the Article 8 rights of both Appellants at [29-31]. He took into account that return to Nigeria would be as a family unit along with their daughter, a Nigerian citizen, who was 5 months of age and therefore there would be no interference with their family life. He did accept that there would be an interference with their private lives and gave express consideration to Mr Iloene's position noting that he had been studying and working in the United Kingdom for ten years, however, as the judge observed, the application had been considered under paragraph 276ADE and neither Appellant could meet the requirements of the Immigration Rules relating to Article 8. Nonetheless, rather than considering whether or not there were any compelling circumstances that existed outside of the Rules, the judge went on to consider freestanding Article 8 at [31] but found that

there would not be an interference with the private life to be of such gravity as to engage Article 8 noting that,

> "There has been no detailed evidence as to exactly what interference there would be to their private lives other than the general claim being made. The male Appellant has accepted in cross-examination that whilst he was studying it was always his intention to return to Nigeria but that once he had started working in the UK he wanted to stay to take advantage of the work opportunities. That may well be the case but the Appellant is now well-qualified after his UK studies and has had good work experience. This will no doubt place him in good stead for employment on a return to Nigeria."

Notwithstanding that paragraph as to the gravity of the interference the judge resolved, it appears, the **Razgar** questions in favour of the Appellants and considered the issue of proportionality at [33]. He stated that having carried out a balancing exercise and taking into account the relevant circumstances that the decision was a proportionate one. Thus he dismissed the appeals under the Immigration Rules and on human rights grounds.

35. The basis upon which it is stated the judge made an error was originally advanced on behalf of Mr Iloene. Whilst he is no longer an Appellant before the Tribunal it is still advanced by Mr Owolabi that there was an error of law in relation to the decision relating to his appeal.

36. I observe that it is difficult to reach a firm conclusion as to what transpired at that hearing. Despite issuing directions in January, no further evidence has been filed as to the events before the First-tier Tribunal by either party. It was the case on behalf of the Appellant that the judge was specifically provided with submissions relevant to paragraph 276B and that such an exchange would be in the Record of Proceedings and was confirmed by the Presenting Officer at the time. There is no minute from the Presenting Officer and there is no further evidence on behalf of the appellant by way of a witness statement or otherwise in relation to those proceedings. There is however a copy of the judge's Record of Proceedings which fortunately was typed. It is however in note form and the only reference to paragraph 276B is at the very last page in which it is said "276B of the Rules. He has been here with leave since 2003" and then at the very bottom "276B". Mr Owolabi submits that the case on behalf of the Appellant was advanced on the basis that he met the requirements of paragraph 276B at the hearing before the judge and relies upon the witness statement of Mr Iloene. I have been referred to paragraphs 34 and 35 of the witness statement dated 31st October 2013. It states as follows:-

> "33. I further ask the court to consider my case under the right to family life and private life consideration in the Immigration Rules.
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> 34. As I stated previously, I have lived in the UK for a period of over ten years now and as acknowledged in the refusal notice of the Secretary of State, all my period of residence to date has been lawful and is now a gross period of ten years and one month.

35. Further my wife is in the UK as my dependant both under the Immigration Rules and in respect of this appeal. We also have our daughter who was born in the UK and as I understand it she is not in the UK unlawfully.

36. I request the Immigration Judge to kindly consider our case and allow our appeal against the decision of the SSHD."

37. There is no specific reference to paragraph 276B in that statement or any request for the judge to consider that as an issue although there is reference at [34] that he had lived in the UK for a period of over ten years and that it was lawful residence of ten years and one month when the statement was made, and in those circumstances may potentially be seen as a reference to paragraph 276B. However if that were right, it has still not been explained why there was no express reference to paragraph 276B in the witness statement nor why a Section 120 notice had not been filed at the time when ten years had been accrued on behalf of the Appellant on a date either before the hearing of the First-tier Tribunal or even at the outset of the hearing before Judge Walker.

38. I can find no reference to any notice being provided at the beginning of the hearing or any preliminary issue being raised at the outset of the hearing concerning this issue. At best, the only available evidence is the Record of Proceedings, which does make reference to paragraph 276B at the very last part of the proceedings but as the judge has not recorded anything further it is not clear to me as to whether or not it was accepted by the judge that this constituted notice or that there had been any formal application made. I accept that the issue of paragraph 276B was raised at the hearing as it is plain from the Record of Proceedings in broad terms that that paragraph was referred to by reason of the reference to it, although it has not been explained further as to what submissions exactly were made and why they were not made at the outset of the hearing or for any Section 120 notice to be filed.

39. I have considered the law relevant to this issue and despite a direction to both parties to provide skeleton arguments to deal with this issue none have been forthcoming. I have considered the decision of **Lamichhane v The SSHD [2012] EWCA Civ 260** and that a statement of "additional grounds" may be made in response to a Section 120 notice at any time, including up to (and perhaps at the time of) the hearing of the appeal. That decision also makes plain that although the legislative scheme prescribes no particular form in which a statement of "additional grounds" must be made, such a statement must as a minimum set out with some level of particularity the grounds relied upon by the Appellant as the foundation for remaining in the UK and upon which reliance has not previously been placed. It must "state" the additional ground to be relied on in substance or, at least in form.

40. The decision of the Supreme Court in **Patel v The SSHD [2013] UKSC 72** confirms that Section 85(2) of the Nationality, Immigration and Asylum Act 2002 imposes a duty on the First-tier Tribunal to consider any potential Ground of Appeal raised in response to a Section 120 notice, even if it is not directly related to the issues

considered by the Secretary of State in the original decision. The Supreme Court held that the grounds for an application for leave to remain can be varied up to the time when the decision is made. If an application is varied after the decision, then it would be open to the applicant to submit further grounds to be considered at appeal.

41. The Supreme Court agreed with the conclusion of the majority in **AS (Afghanistan) v The SSHD [2009] EWCA Civ 106** that an appeal to the First-tier Tribunal covers not only any ground before the Secretary of State when she made the decision under appeal but also any grounds raised in response to a one-stop notice issued under Section 120 of the 2002 Act, even if they had not been the subject of any decision by the Secretary of State and did not relate to the decision under appeal. In **AS (Afghanistan)** the Court of Appeal had said that the decision appealed against which is referred to in the 2002 Act Section 85(2) is the immigration decision taken under Section 82 but is not a decision characterised by reference to a particular Immigration Rule. Accordingly it is appropriate in response to a one-stop notice under Section 120 for an Appellant to state any provision under which he sought leave to remain in the UK. All such grounds would then come within the jurisdiction of the Tribunal on appeal, including any on which the Secretary of State has not already made a decision. The Secretary of State was not obliged to issue a one-stop notice but if she did, Section 3C did not prevent the Appellant from raising all the grounds for leave on which he sought to rely even if he had not raised them on an application before. There was no reason in such circumstances why the Tribunal should not be the primary decision maker.

42. However the issue is whether or not the submission made at the conclusion of the proceedings constituted a notice under Section 120. As I have set out earlier, it has not been explained why, if he had accrued ten years' residence before the hearing of the First-tier Tribunal why a Section 120 notice was not served either prior to the hearing or at the very least at the outset of the hearing or as a preliminary issue in accordance with **Lamichhane** (as previously cited) where it is clear that there is no particular form in which a statement of additional grounds must be made, however, such statement, must as a minimum set out with some level of particularity the grounds which he relies upon. However I am prepared to accept given the reference to it that a submission was made in that respect when taken with the statement of Mr Ileone which, although not specifically referring to paragraph 276B, related in substance to the fact that he had accrued ten years' residence prior to the decision of the First-tier Tribunal.

43. I now turn to the proceedings that are presently before the Tribunal. There is no appeal on behalf of Mr Iloene as by reason of Section 104 of the 2002 Act his appeal has been abandoned having been granted indefinite leave to remain. The question before me is whether, in respect of the Appellant (Mr Iloene's wife) the judge made an error of law that was material to the outcome of his wife's appeal. As I have stated I am prepared to accept that potentially there was an argument raised that Mr Iloene had accrued ten years' lawful residence and was therefore entitled to succeed under paragraph 276B. However even if the judge had recognised that Mr Iloene should have been granted leave on the basis of his ten year residence that does not

necessarily mean that his wife's position who is the current Appellant, that this would make her Article 8 appeal any stronger. Mrs Iloene had entered the United Kingdom as a dependant on 15th December 2012 and therefore had been in the United Kingdom for less than a year at the time of the hearing before the First-tier Tribunal. Even accepting the relationship between Mr Iloene and his wife, and on the basis that the judge should have reached conclusions that he had accrued ten years' lawful residence and he could potentially satisfy paragraph 276B, this did not carry with it any conclusion that the wife's appeal would succeed simply on the basis that he would be eligible for a grant of indefinite leave to remain. She could not herself satisfy any relevant Immigration Rule. Such a potential grant of leave does not preclude Mr Iloene from returning to Nigeria if he chose to, to preserve family life with his wife as he remains a Nigerian citizen with no Article 8 claim that requires him to stay in the United Kingdom. The grant of indefinite leave to remain is therefore of no material relevance to the wife's appeal and does not carry any presumption that she would be granted indefinite leave to remain and therefore her position as a Nigerian citizen has not changed.

44. As the First-tier Tribunal Judge observed when dealing with Article 8 issues, there was little evidence advanced before the First-tier Tribunal concerning Article 8 issues. It consisted of a witness statement from the husband which was co-signed by the present Appellant as a dependant referring to her presence in the United Kingdom and that they had a child that was born in the United Kingdom, although it is common ground between the parties that the child is not a British citizen. The Appellant, Mrs Iloene, did not give oral evidence before the First-tier Tribunal and it is plain from the findings recorded by the judge that that is consistent with the lack of evidence advanced on Article 8 grounds. There was no evidence from which it could properly be said that he parties could not resume their family life in their home country, which was the finding made by the First-tier Tribunal judge.

45. I have therefore considered what evidence there was to say that the parties should enjoy family life in the UK rather than in Nigeria? Considering the Appellant's position according to the history, she married a Nigerian citizen and had remained living in Nigeria during the time that he had established his business in the United Kingdom. It is not said that she has any right to remain in the United Kingdom and her length of residence has been short and there is little by way of further evidence in support of any private and family life. If the position is considered jointly with her husband, the position in my judgment is no different. Both Mr and Mrs Iloene remain citizens of Nigeria and whilst Mr Iloene may have been granted indefinite leave to remain there is no evidence demonstrated as to why family life cannot be enjoyed in their country of nationality rather than the United Kingdom. It is plain that she could not meet the Immigration Rules relating to Article 8 to demonstrate family life and in those circumstances, any error of law made by the judge in not dealing with the issue of paragraph 276B in relation to her husband, does not materially affect the decision relating to the Appellant's wife on any Article 8 grounds.

46. For those reasons I have reached the conclusion that the Appellant has not demonstrated any error of law which should lead to the decision being set aside. Thus I conclude that even if the judge were in error in respect of Mr Iloene such error was not capable of affecting the outcome of the appeal, therefore it has not been demonstrated that the determination should be set aside.

Decision

47. The decision of the First-tier Tribunal therefore should stand.

Signed Date

Upper Tribunal Judge Reeds