Upper Tribunal
(Immigration and Asylum Chamber)
IA/50518/2013

THE IMMIGRATION ACTS

Heard at Field House
On July 30, 2014

Sent:
On August 4, 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MISS ADAKU UZOAMAKA OHIAGU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Nartey, Counsel, instructed by Owens Solicitors
For the Respondent: Mr Tufan (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born May 31, 1974, is a citizen of Nigeria. She first entered the United Kingdom on a student visa valid from September 24, 2003 until December 31, 2004. She lawfully extended her stay to study until March 31, 2009. On March 4, 2009 she applied to remain as a Tier 1 (Highly Skilled Migrant) and this entitled her to remain until April 5, 2012., On March 29, 2012 she applied to extend her stay further

as a Highly Skilled Migrant but the respondent refused this application on June 22, 2012 because she failed to meet the financial requirements of Appendix C to the Immigration Rules. A section 47 removal decision was also taken. She appealed to the First-tier Tribunal and the matter came before Judge of the First-tier Tribunal Hanratty, RD on September 11, 2012. At that hearing the respondent withdrew the section 47 decision and the judge dismissed the application under the Immigration Rules. On February 27, 2013 the respondent served the appellant with notice of intention to remove. The appellant lodged an appeal against that decision even thought there was no right appeal. Following a consent order on October 28, 2013 the respondent agreed to reconsider her application and having done so refused it on November 19, 2013 and on November 21, 2013 removal directions were given.

2. On November 28, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. In her notice of appeal she accepted she did not meet paragraph 276ADE HC 395 but argued her appeal should be considered under article 8 ECHR.

3. The matter was listed before Judge of the First-tier Tribunal Stokes (hereinafter referred to as "the FtTJ") on March 28, 2014 and in a determination promulgated on May 15, 2014 he dismissed the appeal under both the Immigration Rules and human rights.

4. The appellant appealed that decision on May 23, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal White on June 6, 2014 who found it was arguable the FtTJ had erred because:-

    a. The FtTJ may not have given appropriate weight to the appellant's health, her length of residence and the respondent's conduct.
    b. The FtTJ may have applied a presumption in favour of removal.

5. The appellant was in attendance and the representatives outlined their submissions for me.

SUBMISSIONS ON ERROR OF LAW

6. Miss Nartey submitted there were four areas where the FttJ had erred-

   a. Firstly, the FtTJ had implied the appellant was an overstayer and had approached her case in this light. She was not an overstayer and this being the case she submitted the FtTJ had erred in his approach especially as the FtTJ only found she was here lawfully until February 2012. She referred me to paragraph 29.5 and submitted that this was evidence of his negative approach to the appellant.
   b. Secondly, the FtTJ had regard to her medical condition and should have listed this as a positive factor in her appeal. The fact he did not do this and the respondent had not even considered her medical condition supported her claim that the FtTJ had erred.
   c. Thirdly, when she came in 2003 she had an expectation that if she stayed here for ten years then she would be entitled to stay under the long residence Rule. By September 24, 2013 she had accrued ten years residence during which time she had contributed to society through work and the payment of taxes and fees. The FtTJ should have considered this more highly than he did and by failing to do so he erred.
   d. Fourthly, he implied there was a presumption in favour of removal in paragraph [33] of his determination. This approach tainted his approach to proportionality and in particular the matters highlighted in the previous grounds of appeal. In all the circumstances an error should be found.

7. Mr Tufan relied on the rule 24 letter dated June 23, 2014 and submitted there was no error in law. The FtTJ had not found she was an overstayer and he submitted-

   a. Firstly, he found, as was accepted, she did not meet paragraph 276ADE HC 395 so she could not stay any longer.
   b. Secondly, whilst it was accepted the appellant raised medical issues in these proceedings she had not raised them on her original application. In any event the FtTJ considered her medical condition and made findings open to him.
   c. Thirdly, the fact there was long residence in place in 2003 did not help her because her original visa was granted on the basis she intended to return. She had no expectation that she would be allowed

to stay and if that was her intention she would have been refused her original visa.

d. Fourthly, with regard to paragraph [33] of the determination the FtTJ does not state it is a legal test. The factors he took into account are part of the proportionality test and are factors in favour of removal. Overall he did carry out a proportionality test and reached findings open to him.

8. I stood the matter down briefly and afterwards informed the parties I was refusing the application and I gave oral reasons. I stated the full reasons would be dealt with in a written determination.

ERROR OF LAW ASSESSMENT

9. This is an application to overturn the FtTJ's decision in which he dismissed the appellant's appeal under both the Immigration Rules and article 8 ECHR. I took submissions from both representatives and I have also had regard to the papers before me.

10. Miss Nartey advanced four grounds of appeal but submitted that if ground four was made out then this error would taint the FtTJ's overall approach to proportionality.

11. I considered the grounds both individually and collectively.

12. The FtTJ set out in some detail the appellant's immigration history and in summary she came as a student in 2003 and she switched in 2009 to Tier 1 status as a highly skilled migrant. Her problems began when she took time off through ill-health and was unable to satisfy the Immigration Rules when she sought to extend her stay as a Tier 1 migrant. As she did not meet the Rules her appeal was dismissed and subsequently she was refused permission to stay outside of the Immigration Rules. It was this appeal the FtTJ had before him.

13. In what was a very detailed and carefully considered determination the FtTJ noted the appellant did not satisfy either Appendix FM or paragraph 276ADE of the Immigration Rules but went on to find he could consider the application outside of the Rules. It is findings on this issue that the appellant seeks to challenge.

14. Miss Nartey submitted the FtTJ did not attach sufficient weight to the fact she had been here lawfully and she

argued the FtTJ had implied she had overstayed. I am satisfied the FtTJ did not find the appellant was an overstayer at any stage in his determination. He recorded the respondent's submission but he found she neither was an overstayer nor made any negative finding about her stay. The FtTJ acknowledged at paragraph [28] she had been here lawfully until February 2012 and at paragraph [29.5] he referred to the fact she continued to remain here following court proceedings and was given a right of appeal under article 8 which ultimately led to the decision on November 21, 2013. I therefore reject the submission that in assessing proportionality the FtTJ found she had been here unlawfully.

15. The appellant claimed that when she came here in 2003 she had an expectation that she would be allowed to remain permanently after ten years. I reject that submission because her original visa only gave her leave for fourteen months and then she had to seek a number of extensions. Mr Tufan's submission "if she said she intended to stay ten years she would have been refused" carries some weight in this regard and in any event laws and rules change and at the date she applied the new Immigration Rules were in place. There was no positive factor on this to take into account save that she had been in the country for a lengthy period during which time she had established a private life. The FtTJ acknowledged this in his determination.

16. The FtTJ was fully aware of the appellant's medical condition. He considered the evidence and whether she would meet either an article 3 or an article 8 test. For the reasons he gave in paragraphs [30] and [31] he was not persuaded she did. He found there was no evidence to suggest medical treatment was unavailable in Nigeria. He considered her medical condition and did not find anything that would persuade him to allow the appeal and he gave his reasons. He did not include it as a positive factor for the simple reason it was not.

17. As regards proportionality generally at paragraphs [28] and [29] the FtTJ considered a large number of factors that ultimately he concluded weighed against the appellant. The decision of Nasim [2014] UKUT 00025 considered the position facing many people who came to the UK on limited visas and he referred to this in his decision.

18. As regards his approach in paragraph [33] I accept his wording was clumsy and could have been better but

ultimately he not only gave reasons for finding removal was not disproportionate but went onto explain why. Paragraph [33] could have been better worded but the determination, like the grounds, must be considered as a whole. Having considered the FtTJ's whole decision I am satisfied that based on the content and findings of the determination and having regard to the fact he referred to the correct standard of proof and test in paragraph [5] there is no material error of law.

DECISION

19. There is no material error of law and the original decision shall stand.

20. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:
24 November 2014

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award as the appeal has failed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis