UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/22419/2014**

THE IMMIGRATION ACTS

Heard at: Field House
on 12 August 2015

Decision and Reasons Promulgated
on 7 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MRS BUSAYO GRACE AKINDOLIE
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: **Ms D Revill, counsel**
For the Respondent: **Ms A Holmes, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The appellant is a national of Nigeria, born on 20 October 1983. She is married to Mr Adeyoyin Adekunle Tinuosho, who is also a Nigerian national, born on 13 March 1980. They have three children, all born in the UK.

2. The appellant appeals with permission to the Upper Tribunal against the decision of First-tier Tribunal Judge Griffith, who dismissed her appeal against the decision of the respondent dated 7 May 2014 to refuse to grant her leave to remain in the UK on the basis of her family and private life.

3. In granting permission to appeal, Deputy Upper Tribunal Judge Frances stated that it was arguable, given the documentary evidence submitted, that the Judge erred in law in his assessment of paragraph 276B of the Immigration Rules.

4. The appellant appeared before the First-tier Tribunal in person. There was a Home Office Presenting Officer who represented the secretary of state.

5. The appellant entered the UK as a student in November 2004 and was subsequently granted further extensions of leave to remain as a Tier 4 (General) Student until 31 March 2012.

6. Her application dated 19 October 2010 in that category was refused with a right of appeal. Her appeal was subsequently allowed in August 2010 with the result that she was granted leave to remain as a Tier 4 (General) Student until 17 November 2011. Her application for further leave to remain as a Tier 4 student was rejected ons 20 April 2012 as no fee had been paid. Her re-application dated 30 April 2012 was refused on 3 October 2012 with no right of appeal. The matter was eventually reconsidered following which leave was granted [4].

7. On 7 May 2014, her application dated 10 October 2013 for variation of her leave to remain was refused with a right of appeal. A decision was also taken to remove her from the UK. A one stop warning was served upon her pursuant to s.120 of the Nationality, Immigration and Asylum Act 2002. As at the date of her application she had lived here for 9 years and her third child had not yet been born [6].

8. The appellant gave evidence before the First-tier Tribunal. She commented on her immigration history as recorded by the respondent. She claimed that her application dated 30 March 2012 had been accompanied by the appropriate fee. The respondent had returned her application even though there was money in her account. She produced the bank statement covering the relevant period to the First-tier Tribunal Judge.

9. The appellant presented evidence before the First-tier Tribunal that she had been in the UK lawfully for a period of 10 years as at the date of decision.

10. The respondent submitted to the First-tier Tribunal that the appellant had not shown that she had ten years' lawful residence to remain in the UK [23]. It was acknowledged that her length of residence should be taken into account in the “proportionality exercise.” It was specifically contended that on 24 July 2013, the appellant would have been in the UK for eight years and eight months. However, her application “was voided” because there was a previous outstanding application that needed to be dealt with. Accordingly, she failed to meet the criteria for fees.

11. The appellant presented evidence with regard to private and family life. It was accepted that she had been living with a partner and children as part of a family unit [24].

12. Judge Griffith found that in the absence of further detailed information, she was unable to find that the appellant could demonstrate full compliance with paragraph 276B of the Immigration Rules to be eligible for a grant of indefinite leave to remain on the grounds of long residence [29].

13. Nor did she meet the requirements under Appendix FM or under Article 8. She found that relocating to Nigeria with a young family after an absence of 10 years

would not be easy [36]. The decision on proportionality was “finely balanced” but she decided in favour of the respondent [37].

14. Ms Revill (who did not represent the appellant before the First-tier Tribunal) submitted that the appellant had argued on appeal that she satisfied the requirements of the rules based on 10 years' continuous lawful residence. She accepted that as at the date of application on 10 October 2013, she had not yet accumulated 10 years' residence, nor at the date of the decision. Nevertheless, she had done so as at the date of the hearing before the First-tier Tribunal.

15. She submitted that as a s.120 notice had been served on the appellant who had then given a statement of additional grounds, she was entitled to rely on the provisions of paragraph 276B of the Immigration Rules. In her statement of additional grounds made on 25 September 2014 the appellant set out the basis upon which she contended that she had completed her 10 years' continuous lawful residence in the UK.

16. Ms Revill submitted that although the Judge had accepted that the appellant was entitled to rely on the provisions of paragraph 276B of the rules, she failed to have regard to material items of evidence showing that the appellant had indeed been lawfully resident here for ten years.

17. Whilst accepting the continuity of the appellant's residence in the UK, the Judge “apparently doubted” its lawfulness for two periods, beginning on 30 March 2012 and 28 August 2013.

18. She submitted that with regard to the period in 2012, the appellant's leave to remain was due to expire on 31 March 2012. On 30 March 2012, she made an attempted application which was apparently rejected on 20 April 2012 for alleged non payment of fees, following which it was resubmitted. The respondent subsequently refused the application. However, the appellant appealed against that refusal and her appeal was ultimately allowed, following which leave was granted based upon that successful outcome. First-tier Tribunal Judge Chamberlain initially dismissed her appeal. However, on 3 June 2013, Deputy Upper Tribunal Judge Lewis allowed her appeal against that decision. In his determination he noted that the respondent had in due course accepted an application made on 30 April 2012 for leave to remain as a Tier 4 Student Migrant. Further, the First-tier Tribunal Judge dealt with the issue of the right of appeal, finding in favour of the appellant [2].

19. Judge Lewis noted that the Judge had refused her appeal on the basis that she did not have a valid CAS at the date of the respondent's decision. The Judge had not however given consideration as to whether or not the decision was in accordance with the law by reference to fairness. Judge Lewis accordingly set aside that decision.

20. He was satisfied that the appellant was unaware of the decision to revoke her CAS prior to the respondent's decision. She was not put on notice of the revocation. The respondent should thus have permitted her “a period of grace” to allow her a reasonable opportunity to vary her application by obtaining a new CAS. He accordingly directed that a fresh decision on the appellant's application was not to be made for a period of 60 days from the date of promulgation of his determination, to enable the appellant to obtain a fresh CAS.

21. Ms Revill submitted that throughout this period, the appellant's leave was extended for both the period pending the outcome of the application and thereafter pending the outcome of the appeal, pursuant to s.3C of the Immigration Act 1971.

22. The other period in issue related to 2013. The respondent in her decision dated 7 May 2014 contended that on 13 August 2013, the appellant was granted leave to remain until 13 October 2013 and confirmed that she applied for further leave on 10 October 2013. That was before the expiry of her leave. Accordingly, that leave was extended under s.3C while the application was outstanding and the present appeal pending. Ms Revill submitted that had the application not been made in time, there would not have been any right of appeal and moreover, no s.47 removal decision could have been made.

23. She accordingly submitted that the appellant had remained lawfully resident following her allowed appeal in 2013 up to the date of hearing. Attempted applications in August and September 2013 were rejected as invalid, but that did not change the lawfulness of the appellant's residence during that period.

24. Ms Revill also referred to various letters between the appellant's MP and the Home Office. Initially the respondent wrote back to him on 27 February 2014 contending that the appellant had no right of appeal and that her application would not be reconsidered. However, on 25 April 2014, having again been approached by the member of parliament, the respondent accepted that she had been wrong to conclude that there had been no right of appeal and furthermore accepted that her application had been made in time.

25. On 7 May 2014, the appellant received a new decision in which she was given a right of appeal. She did appeal in time.

26. Ms Holmes had been afforded the opportunity during the course of the hearing to satisfy herself that the documents referred to and relied on by Ms Revill corroborated the appellant's claim of lawful residence.

27. Ms Holmes very fairly accepted that having regard to the documentary evidence produced, there was “nothing to dispute” with regard to the contention that the appellant had satisfied paragraph 276B(i)(a) of the Immigration Rules.

28. Ms Revill submitted that the public interest consideration under paragraph 276B(ii) did not disclose any reason why it would be undesirable for the appellant to be given indefinite leave to remain on the grounds of long residence.

29. Ms Holmes submitted that as the respondent has not yet had an opportunity to consider those factors, it would be more appropriate for the case to be remitted to the respondent for the public interest decision to be considered.

Assessment

30. I am indebted to Ms Revill for bringing some order to the voluminous bundle before the Tribunal.

31. I am satisfied on a close analysis of the disputed periods to which I have referred that for the reasons already set out above, the appellant has discharged the burden of proof on the balance of probabilities that she has met the ten year requirements for

indefinite leave to remain under paragraph 276B(i)(a). Ms Holmes' concession in that respect was correctly made.

32. Having regard to the application of s.3C of the Immigration Act 1971, the appellant has shown that she had completed ten years' lawful and continuous residence as at the date of the decision before the First-tier Tribunal. The documentation in support of that contention had been before the First-tier Tribunal.

33. I find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set this decision aside and re-make it.

34. I find that the appellant has completed ten years' lawful and continuous residence in the UK.

35. Ms Holmes submitted that the public interest factors set out at paragraph 276B(ii) should initially be decided by the respondent.

36. Ms Revill submitted that the Tribunal should decide whether it would be undesirable for her to be granted indefinite leave.

37. I have had regard to the Upper Tribunal decision in MU ("statement of additional grounds" - long residence-discretion) Bangladesh [2010] UKUT 422 (IAC).

38. As Senior Immigration Judge McKee observed in agreeing with the respondent's submission in that regard, that if the Tribunal is to become the primary decision maker under that section, then it must be able to take account of all the immigration rules if an appellant claims to qualify for leave to remain in a different category from that for which she applied to the secretary of state [11].

39. The discretion to refuse indefinite leave on long residence grounds is to be found in the Rules themselves. That discretion is exercisable by the Tribunal if it is the first instant decision maker.

40. I thus consider that I have an exercisable discretion as to whether or not indefinite leave on long residence grounds should be refused for the reasons set out in paragraph 276B.

41. I do not find that there are any compelling reasons that have been advanced as to why such discretion should be left to the secretary of state having invited the appellant to respond to a s.120 notice, which she did.

42. Unlike the appellant in MU, this appellant has never practised deception throughout her residence in the UK. There is no suggestion that she has any criminal record, nor that she has in any way breached the immigration rules. I was informed that she has in fact "done jury service". Further, she has been in gainful employment.

43. I have had regard to numerous letters of support. I am satisfied that she has a strong connection in the UK. I do not find that there is anything in her personal history regarding her character, conduct, associations and employment record which in any way militates against a grant of indefinite leave to remain.

44. I have had regard to her domestic circumstances which are set out before the First-tier Tribunal Judge. She is married and has three children, all of whom were born in the UK in 2008, 2012 and 2013. Neither her husband nor her children are British citizens. Her husband does not have leave to remain in the UK. He is however part of

the family unit. I do not find that there is anything in her domestic circumstances which makes it undesirable for this appellant to be granted leave under the rules.

45. I have also had regard to the various diplomas and awards that have been achieved by the appellant during her residence in the UK. She has sufficient knowledge of the English language as well as knowledge of life in the UK.

46. Having regard to the evidence and circumstances as a whole, I find that there is nothing to suggest that the appellant's presence in the UK would be undesirable for any of the reasons referred to in paragraph 276B.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and the decision is set aside. I substitute a fresh decision to allow the claimant's appeal under the immigration rules.

No anonymity direction is made.

Signed Date 5 September 2015

Deputy Upper Tribunal Judge Mailer