ST

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27212/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 March 2016	**On 12 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O M A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Duffy, Home Office Presenting Officer
For the Respondent: Mr Adebayo, solicitor

DECISION AND REASONS

1. OMA is a citizen of Nigeria. She appealed against the decision of the Secretary of State on 9 June 2014 to refuse to vary her leave to remain, on the grounds of long residence, and to remove her by way of directions under s47 of the Immigration, Asylum and Nationality Act 2006. Her appeal came before Judge of the First-tier Tribunal Lingam ("the FTTJ") who in a decision promulgated on 28 September 2015 allowed her appeal under the Immigration Rules and on human rights grounds.

2. For ease of reference I refer to the parties as they were in the First-tier Tribunal with the Secretary of State being the respondent and [OMA] being the appellant.

3. No anonymity direction was made in the First-tier Tribunal but, given my references to her personal circumstances, she is entitled to anonymity in these proceedings and I made a direction accordingly.

4. The respondent sought permission to appeal. It was granted by Judge of the First-tier Tribunal Robertson on 15 February 2016 who considered it was arguable that the FTTJ had made a factual error insofar as the appellant's immigration history was concerned, had failed to take into account the respondent disputed a lengthy period of leave granted to the appellant, had sought to exercise a discretionary power inappropriately and had considered the wrong version of paragraph 276ADE(1)(vi). It was also arguable that the proportionality assessment under Article 8 was contaminated by errors made in the assessment under the Immigration Rules. Permission to appeal was therefore granted.

5. Thus the appeal came before me.

Submissions

6. For the respondent, Mr Duffy submitted that the FTTJ had failed to take into account a period between 2007 and 2009 when the appellant did not have leave to remain. Whilst this period had only been identified by the respondent in the preamble to the reasons for refusal (ie in the immigration history) this was sufficient to identify it as an issue for consideration in the calculation of the period of residence. Furthermore, the FTTJ had taken the appellant's immigration history into account in paragraph 15 of the decision. Her failure to take that history fully into account when applying the Immigration Rules was an error of law.

7. It was not open to the FTTJ to give direct effect to a policy set out in permissive terms (**Ukus (Discretion: when reviewable) [2012] UKUT 00307 (IAC)**). In any event, it was not clear how the FTTJ had applied the policy.

8. Mr Duffy submitted that there was a period of about 18 months when the appellant did not have leave to remain. She could not therefore meet the requirements of paragraph 276B of the Immigration Rules (the long residence provisions). In addition, the FTTJ had applied the wrong test in considering paragraph 276ADE(1)(vi) insofar as the appellant's private life was concerned. Given that the appellant's father lived in Nigeria, it was perverse to find that she had no ties to that country. Mr Duffy accepted there was no challenge to the FTTJ's consideration of the appeal outside the Immigration Rules and in accordance with the Article 8 jurisprudence but submitted that, given she could only base her claim on her private life and did not meet the long residence provisions in the Immigration Rules, the Article 8 assessment was infected by the errors of law in the findings under the Immigration Rules.

9. Mr Adebayo, for the appellant, agreed that the appellant's application for leave to remain in November 2007 was not made in time, contrary to the FTTJ's record of her immigration history [15(iii)]. He noted however that this gap in her leave to remain was not addressed in the main body of the reasons for refusal letter and submitted that it could be inferred from this lack of reference that the respondent "had exercised her discretion by overlooking this". He submitted that that discretion was available to the respondent under paragraph 276A. He submitted that the FTTJ had not erred in law in failing to take this period into account.

10. Mr Adebayo submitted that the two week gap in the appellant's lawful leave to remain in 2007 did not materially affect the outcome of the appeal: her application had been made on 15 November 2007 and had been refused; her solicitors had applied for reconsideration and the respondent had agreed to this following the issue of judicial review proceedings. He noted that leave to remain was granted in 2010 and that this was in response to the original application made in 2007. He submitted that the existence of the consent order made in those JR proceedings (and which noted the grant of leave had been agreed), negated any gaps in leave to remain between October 2007 and May 2010 when the order was made. However, when I pointed out to Mr Adebayo that this could not be the case because the appellant had applied, out of time, on 15 November 2007 for further leave to remain he accepted that was the case and that, at best, it could only have been backdated to the date of her application in N November 2007. He also accepted that there was no evidence that the grant of leave to remain, as evidenced by the consent order and letter from TSols, had been backdated at all.

11. Mr Adebayo conceded that the FTTJ had no power to exercise discretion on the respondent's behalf (**Ukus**) and that her findings in this regard amounted to an error of law. He also conceded that the FTTJ had applied the wrong version of paragraph 276ADE(1)(vi). However, he submitted that the latter was not a material error, given the appellant's father's ill health and her medical condition.

12. Insofar as the FTTJ's consideration of proportionality under Article 8 was concerned, Mr Adebayo submitted that this stood or fell with the FTTJ's findings under the Immigration Rules.

13. In reply, Mr Duffy submitted that the consent order was related to an extension of the appellant's student leave; it was issued at a time when her right to remain under the long residence provisions was not in contemplation. The "mischief" the JR proceedings were seeking to address was the fact that the appellant had not been able to remain in the UK to complete her studies, having been unable to take her examinations due to ill health. The grant of leave in 2010 enabled her to do so. He noted that the author of the grounds of appeal to this tribunal had not had access to TSols' letter issued in December 2009.

Discussion

14. The reasons for refusal letter makes it clear that the appellant's leave to remain expired on 31 October 2007; she applied for further leave out of time on 15 November 2007. Whilst this is only set out under the heading "Immigration History" and not discussed in the main body of the reasons for refusal letter, the reader can be in no doubt the appellant applied out of time. The FTTJ takes the appellant's immigration history into account, setting it out (albeit inaccurately) at paragraph 15. She erroneously refers at sub-paragraph (iii) to the appellant's having made an in-time application on 15 November 2007. She also states at paragraph 19 that "whilst the appellant does not dispute with the respondent's record of dates regarding her immigration presence in the UK; she disagrees with the gaps in her immigration presence in the UK [sic]". The FTTJ then goes on to say at paragraph 20 that "as the respondent does not contest it, the appellant entered the UK for studies in January 2003 and she remained with a student leave February 2010 [sic]". Taken together, the FTTJ relied on a misrepresentation of the appellant's immigration history and the respondent's position in that regard. Whilst I take into account that the respondent did not specifically refer to the issue in her reasons for refusal, the gap in her immigration history was set out in that letter and the letter did not contain any form of concession in respect of any period when she was without leave. Whilst the reasons for refusal focused solely on a later period, it was incumbent on the FTTJ to make findings on the appellant's ability to meet the continuous residence provisions, an essential element for the grant of leave on the basis of long residence under the Rules. The FTTJ's failure to address this issue constitutes an error of law.

15. The FTTJ also erred in law in purporting to exercise her discretion. This is contrary to the guidance in **Ukus.** The exercise of such discretion is limited to the respondent and the FTTJ's options were, in turn, limited to making a finding that the decision was not in accordance with the law.

16. I agree with the respondent that the FTTJ made a factual error in stating that the appellant had had existing leave when she left the UK on 13 July 2012; in fact her leave had expired on 27 May 2012. This is relevant to the application of paragraph 276A(a) which required the appellant to have leave on departure.

17. I also agree with the parties that the FTTJ applied the wrong version of paragraph 2786ADE(1)(vi) with regard to the respondent's consideration of the appellant's private life under the Rules.

18. Finally, I find that the errors made in consideration of the appellant's evidence under the Immigration rules have infected the FTTJ's analysis of proportionality under Article 8. Proper consideration of the public interest factors requires accurate findings as to the appellant's ability to meet the Immigration Rules.

19. Given the number and variety of errors of fact and law in the FTTJ's decision, there can be no doubt that, taken together, those errors are material to the outcome of the appeal. They render the decision unsafe and unsustainable.

20. I have considered whether I can remake the decision on the basis of preserved findings. However I consider these to be inadequate for a fresh decision to be taken with all relevant issues in mind. I also consider that fairness dictates that further evidence be obtained to address apparent anomalies which were not considered by the FTTJ, particularly with regard to the period October 2007 – 05 February 2010. I note the terms of the consent order compromising the judicial review proceedings and the letter from TSols dated 23 December 2009 which includes the following:

> "Having taken instructions from my clients, the Defendant [the Secretary of State] is willing to agree to your request to **extend** the Claimant's [appellant's] leave period until the end of April 2010." [my emphasis]

The use of the word "extend" suggests that the earlier leave to remain was continued and that there was no gap as a result. However, this is inconsistent with the appellant's leave to remain as a student having expired on 31 October 2007 and her making an out of time application on 15 November 2007. There is a further issue: in the reasons for refusal letter it is stated that "On 05 November 2009 [her] application was reconsidered further and [she was] granted leave to remain as a student with leave valid until 05 February 2010". This can be read in two ways: either that the date of 5 November 2009 applies only to the reconsideration or that it applies to both to the reconsideration and the grant of leave. Thus it is not clear from the evidence or the reasons for refusal letter whether the grant of leave was from 5 November 2009 or, as is submitted by Mr Adebayo, whether it was back-dated. These two anomalies impact on the calculation of the appellant's period of residence. It is possible, for example, if the grant were back-dated, that there would only be a short gap in her leave to remain of about two weeks between 31 October 2007 (when her leave to remain expired) and 15 November 2007 (when she made her application for further leave out of time). In addition, once the issue has been decided it is necessary to take into account the relevant paragraph of the Immigration Rules applicable at the time **GK (Long residence – immigration history) Lebanon [2008] UKAIT 00011** and **MD (Jamaica) and GE (Canada) v SSHD [2010] EWCA Civ 213.** This has not been provided to me.

21. Given that the Article 8 assessment should be conducted with the appellant's ability to fulfil the criteria in the Immigration Rules in mind and the FTTJ's findings in that regard are not sustainable, it follows that the FTTJ's findings on human rights grounds are not sustainable either.

22. For these reasons I find that the decision contains various errors of laws and that these are material to the outcome. The most appropriate course is for the matter to be remitted to the First-tier Tribunal for a fresh hearing.

Decision

23. The making of the decision of the First-tier Tribunal involved the making of

errors on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ Lingam.

A M Black
Deputy Upper Tribunal Judge Dated: 1 April 2016

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A M Black
Deputy Upper Tribunal Judge Dated: 1 April 2016

DIRECTIONS

1. Any further documentary evidence relied upon by either party is to be filed with the Tribunal and served upon the other party by no later than 14 days before the date of the hearing in the First Tier Tribunal.

2. The appeal is listed at Taylor House with a time estimate of two hours to be heard at 10.00 am on .....

3. An interpreter is not required.

A M Black
Deputy Upper Tribunal Judge Dated: 1 April 2016