



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

Appeal no: **IA/23793/2015**

**THE IMMIGRATION ACTS**

At **Field House**  
on **1<sup>st</sup> June 2017**

**Decision & Reasons Promulgated  
on 9<sup>th</sup> June 2017**

Before:

Upper Tribunal Judge  
**John FREEMAN**

Between:

**Obinna Peter IKEDIANYA**

appellant

**and**

**Secretary of State for the Home Department**

respondent

Representation:

For the appellant: *Frances Allen* (counsel instructed by Owens, Luton)

For the respondent: Mr Chris Avery

**DECISION AND REASONS**

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge NA Malik), sitting at Manchester on 18 October 2016, to dismiss a long residence appeal by a citizen of Nigeria, born 1984. The appellant came here on a student visa in 2003, and had leave to remain on that basis till 16 December 2010. His out of time appeal against refusal of further leave to remain on 17 January was finally rejected on 16 May 2011, and Miss Allen accepted that he was here without leave from then till 18 June 2014, when he was given leave to remain till 18 October that year.

2. On 14 October 2014, the appellant applied for indefinite leave to remain, on the basis that he had been lawfully here for ten years. Owing to the break in his leave, that was refused; and he was also refused leave to remain under article 8 of the Human Rights Convention. The judge held, for reasons she gave, that this was not disproportionate to the legitimate purpose of immigration control. Permission was granted on the basis that the judge had been wrong about the length of the break in leave, which it

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*

(2) *persons under 18 are referred to by initials, and must not be further identified.*

is now accepted she was not; but also in the way she treated his explanation for it.

- 3.** The judge dealt with the evidence on this point at paragraphs 26 - 27: she noted that the appellant blamed his former solicitors for not appealing the 17 January 2011 refusal in time, and that there was evidence showing the Solicitors Regulation Authority [SRA] had intervened in their practice; but he had retained their services up to and including the present application in October 2014. The judge declined to consider whether the appellant was right in saying that the only reason for that refusal had been his failure to produce an original birth certificate, which he eventually did. It is now agreed that, since this was not a 'specified document' for the purpose of the points-based system [PBS], an in-time appeal on that basis should have succeeded.
- 4.** The way in which Miss Allen put the appellant's case on this point before the judge was based on the Home Office long residence guidance of 8 May 2015. At paragraph 28 she set out the relevant provisions:

When considering 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 overstaying within the first 28 days of overstaying. The threshold for what constitutes 'exceptional circumstances' is high, but could include delays resulting from unexpected or unforeseeable causes.
- 5.** As the judge pointed out, this appellant had applied for leave to remain in time, but appealed out of time; so the decision-maker did not have the discretion given by that paragraph. Miss Allen did not argue the point before me in the same way, but on the basis that the judge should nevertheless have taken into account the appellant's history of what happened, in her decision on proportionality.
- 6.** At paragraph 32 the judge declined to do this, on the basis that there was nothing to show that the respondent was made aware of any exceptional circumstances when the applicant made his long residence application. That would have been an entirely valid reason for refusing judicial review; but on a statutory appeal, the judge needed to make her own decision, except on points that had to be established by 'specified documents' under the PBS.
- 7.** At paragraph 37 the judge did however go on to consider the appellant's history, but said "... this does not though negate the fact that there has been a break in his lawful residence such that he does not meet the requirements of the rules, nor am I able to second guess what may have happened had the decision been appealed in time". At paragraph 38 she considered the proportionality of requiring the appellant's return to Nigeria, in terms of his private and family life, in a way which was not, and could not have been the subject of criticism, apart from the point made about the break in the appellant's stay.

## **CONCLUSIONS**

**8.** Miss Allen did not argue that the appeal could have been allowed under the Rules; so the judge needed to consider the effect of s. 117B of the [Nationality, Immigration and Asylum Act 2002](#) on the proportionality equation. The relevant parts for present purposes are these:

(1) The maintenance of effective immigration controls is in the public interest.

...

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious

...

**9.** I agree with Miss Allen that there are degrees of unlawful presence, as with most things; and this appellant's history, accepted as it is, puts him at the very bottom end of the scale of persons unlawfully present, for the three years till 18 June 2014, as the grant of further leave to remain at that point really showed. On the other hand, even precarious presence requires little weight to be given to private life. As the judge pointed out at paragraph 38, this appellant's presence in this country has been precarious throughout: as a student, he was here with short-term leave, which had to be renewed from time to time, on the assurance that he would leave when he finished his course, or any post-study work. There was no evidence of any private or family life here with which he could not keep in touch from Nigeria.

**10.** I am sorry for the appellant having been let down by his solicitors, but he is still in time to bring an action against them, so far as that may be any consolation. What must be clear is that whatever sympathy I might have with him could not have obliged the judge, or entitled me to allow this appeal by giving greater weight than Parliament has prescribed to what has happened during his time here as a student (or for a short time a post-study work migrant).

**Appeal dismissed**



(a judge of the Upper  
Tribunal)

**08. 06. 2017**