Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32252/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2017	**On 14 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

BUSHIRAT ADEBOLA AKANBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr Nath, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Sethi promulgated on 21 November 2016. The appeal comes before the Upper Tribunal pursuant to permission to appeal granted by Upper Tribunal Judge Kamara on 12 September 2017 following the refusal of permission to appeal by First-tier Tribunal Judge Grant on 22 June 2017.

2. The Appellant is a citizen of Nigeria born on 24 July 1973. She entered the United Kingdom with entry clearance as a student on 12 February 2005 with leave valid until 30 November 2006. She was granted subsequent

periods of leave as a student up until 2 December 2009 when an application as a Tier 1 (Post-Study) Migrant was refused with a right of appeal. The Appellant's appeal was successful and in time she was granted further leave to remain. She was next granted successive periods of leave as a Tier 4 Student from 24 October 2012 until 28 February 2014, and from 20 February 2014 until 20 May 2015.

3. On 2 April 2015 the Appellant applied for indefinite leave to remain on the grounds of ten years' continuous lawful residence. The application was considered with particular reference to paragraph 276B of the Immigration Rules. The Respondent identified a period of 56 days between 31 October 2007 and 28 December 2007 during which the Appellant was without valid leave. It was said that the Appellant's previous leave which was due to expire on 31 October 2007 did indeed expire without the Appellant having made an in-time application for further leave to remain. An application for further leave to remain as a student was received, it was said, on 6 December 2007 - and it was not until 28 December 2007 that the application was granted and the Appellant given a further period of leave.

4. It is the circumstances surrounding the application made at or about the date of the Appellant's due expiry of leave on 31 October 2007 that have been the main focus of the proceedings before the First-tier Tribunal, and in turn the main focus of the challenge to the Upper Tribunal.

5. For completeness, however, I should also identify that the Respondent in the 'reasons for refusal' letter ('RFRL') also gave consideration to issues of family and private life pursuant to Article 8 of the ECHR with reference in particular to Appendix FM of the Immigration Rules and paragraph 276ADE of the Immigration Rules. The Respondent also had regard to whether or not there were exceptional circumstances such as would warrant a grant of leave to the Appellant notwithstanding that the Respondent had concluded that she did not meet the requirements of ten years' continuous residence for the purpose of paragraph 276B, and did not otherwise satisfy either Appendix FM or paragraph 276ADE.

6. I should also emphasise that the Appellant's appeal to the IAC was pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) and thereby limited to human rights grounds. This was not an appeal to be decided or determined on 'Immigration Rules grounds', albeit the Immigration Rules would form a significant and relevant consideration in evaluating aspects of proportionality and, in particular, 'public interest' in the context of Article 8. I mention this because it does seem that Judge Sethi may not have identified the nature and jurisdiction of the Tribunal. Judge Sethi purported to dismiss the Appellant's appeal under the Immigration Rules (see paragraph 32) as well as on human rights grounds (paragraph 33). The Tribunal did not have any jurisdiction to allow or dismiss the appeal under the Immigration Rules. I am not persuaded, however that this in itself was a material error: as I have said above, it was incumbent upon the Judge *to have regard to* the Immigration Rules and then to consider to

what extent such considerations informed the evaluation under Article 8 – which, in substance, the Judge essayed.

7. In such circumstances the focus upon the purported break in the continuity of the Appellant's residence in 2007 was understandably the main focus of proceedings before the First-tier Tribunal. In this regard it is clear that the Appellant's position was essentially to deny that there had been any such break in continuity and to deny that her application had been made out-of-time. She gave evidence to the effect that she had given to her course-provider - who was responsible for forwarding the application to the Respondent - all the necessary documents well in advance of the due date of the expiry of her leave. The following is set out, for example, at paragraph 8 of the Decision of the First-tier Tribunal:

> "*She stated that she had provided the University with all the necessary documents around a week or two weeks before the expiry of her leave and that it was the University's policy to submit the application within a day or two of the student providing the paperwork."*

8. The Appellant also indicated that she had attempted to obtain a copy of her application from the university but had been unsuccessful. In this regard she is recorded as having stated:

> "*that she was confident that had the Respondent produced her application it would show that she had signed and dated it before the expiry of her leave on 31 October 2007, and if there had been delays by the university in submitting it these were not of her making"* (paragraph 9).

9. The Respondent, who indeed had not produced a copy of the Appellant's application in the appeal bundle before the First-tier Tribunal, maintained the position that the records showed that the Appellant's application had been made on 6 December - a CID printout or vignette had been produced in this regard.

10. Because of the significance of the dispute as to the application, First-tier Tribunal Judge Sethi exceptionally made directions for the parties to file and serve any additional materials in the appeal after the hearing - which provided a further opportunity for the application form to be placed before the Tribunal. The Judge refers to the directions at paragraph 16 in these terms: *"...my directions that each party be afforded a further period of 5 days from the date of hearing to file and serve a copy of the disputed 2007 application form...".*

11. The Judge identifies that the Respondent did indeed file materials, under cover of a letter dated 7 November 2016 - I turn to those materials shortly.

12. It is clear that the Appellant's representatives fully understood that such a direction had been given by the Judge. They responded by way of a letter

dated 1 November 2016 referring to the "*order*" of the Judge and enclosing a letter written on 27 October 2016 to the Respondent's Subject Access Requests Directorate seeking the relevant information. It would appear in those circumstances that the Appellant's representatives were implicitly acknowledging that they themselves did not have a copy of the application, but that they were acting as best they could in order to secure such a document.

13. The Respondent in the covering letter of 7 November 2016 also refers to the Judge having *"requested some documents"*. I pause to note - although perhaps ultimately nothing too significant turns on this - that the time for filing the documents in accordance with Judge Sethi's direction expired on 3 November. To that extent the Appellant's response was in time (albeit of limited value), whereas the Respondent's response was late (albeit that it contained exactly the information that the Judge had sought). The Judge refers to the information and documents filed by the Respondent at paragraph 5 of her Decision. She also gives consideration to those documents thereafter, in particular at paragraph 18.

14. The materials filed by the Respondent, contrary to the ardent claims of the Appellant before the First-tier Tribunal, identify that the application was not forwarded to the Respondent until it was done so under cover of a letter from the University of Greenwich dated 5 December 2007. To that end it is clear that the Respondent's record that the application was received on 6 December 2007 is accurate. Moreover the documents reveal that the application form itself was not signed by the Appellant until 27 November 2007. This undermines her claim in her oral evidence that she had provided the university with her application form in good time and inasmuch as there was any delay it was attributable to the fault of the university.

15. I note that 27 November 2007 would have been within one day of the 28 day period of grace permitted pursuant to paragraph 276B(v) of the Immigration Rules. Whilst it might be said in those circumstances that the Appellant had provided the university the relevant information within the period of grace – though see further below as to whether this was indeed the case - it is perhaps unrealistic for the Appellant to have expected the university to be able to forward the application to the Respondent within the period of grace in circumstances where her evidence before the First-tier Tribunal was that it might take one or two days for the university to forward such an application. Be that as it may the university did indeed forward the application to the Home Office, and indeed the application was successful. In the circumstances it is perhaps understandable that no particular issue was explored any further *at that time* as to its timeousness – it perhaps not being conceived that it might occasion some difficulty for the Appellant at a later stage.

16. The body of the application covering letter from the university refers expressly to the fact that the application is being made out-of-time. It is said in the letter that this is "*due to a regrettable oversight*" on the part of

the Appellant. The writer of the letter expresses surprise at such oversight given the qualities and diligence that the Appellant otherwise demonstrates. It is said that the Appellant offers her sincere apologies for the delay.

17. One further matter to be noted in respect of these documents is that supporting materials were submitted with the Appellant's application which included a letter from the Appellant's sponsoring uncle dated 1 November 2007, and a letter from the Appellant's employer in respect of part-time work, a company called Strand, purportedly dated 3 December 2007. On its face the dating of this letter (3 December 2007) would suggest that the Appellant's application was not passed to the university until even later than 27 November, and in those circumstances outside the 28 day 'period of grace'.

18. In consequence of the production of the application form Judge Sethi, understandably, came to the clear conclusion that the Appellant did not satisfy paragraph 276B. She says this at paragraph 18:

> *"I find that it is clear from the dates recorded on the supporting evidence submitted with the application that such evidence was itself obtained by the appellant after the date of the expiry of her leave. The appellant in turn has not provided any submissions in answer to this further evidence."*

The Judge continues at paragraph 19 in these terms:

> *"Taking these matters in the round and on balance I find that I am entirely satisfied that the appellant's evidence that she had in fact completed and submitted her application to the respondent before the expiry of her leave on 31 October 2007, is at best, entirely mistaken and unsupported. I find that in refusing the application the respondent correctly calculated that the appellant's application was submitted out of time and that the appellant had at the time of the application remained in the UK for a period in excess of 28 days without leave and so could not benefit from the saving provision of para 276B(v)."*

At paragraph 20 the Judge said this:

> *"Regrettably for the reason that the appellant's case under para 276B was advanced entirely on the basis that the appellant disputed the respondent's contention as to the late submission of the 2007 application there is no evidence before me to demonstrate that there were any exceptional circumstances as to why the application could not have been submitted in time in respect of which the respondent was then required to exercise discretion."*

19. The Judge's adverse conclusion under paragraph 276B disposed of the matter so far as the Judge was concerned under the Immigration Rules -

albeit as I have indicated above whilst it was appropriate to have regard to the Rules, and indeed to measure the Appellant's application against the Rules, there was no jurisdiction to allow or dismiss any aspect of the appeal under the Rules. Be that as it may, it is inevitably the case that the failure to meet the requirements of paragraph 276B would have informed the evaluation of the Article 8 considerations. The Judge indeed considered Article 8 with reference to the Appellant's private life, but concluded that there was nothing in her private life that sufficiently outweighed the public interest considerations.

20. The Appellant's challenge to the decision of the First-tier Tribunal is essentially one of procedural fairness. The Appellant complains that she did not have an opportunity to address the materials filed by the Respondent pursuant to Judge Sethi's directions. Indeed the Appellant told me today that she did not have sight of those documents until approximately seven days before she received the decision of the First-tier Tribunal. This does not, on its face, appear implausible given that there was a period of approximately fourteen days between the date of the Respondent's covering letter and the date of the promulgation of Judge Sethi's decision.

21. Perhaps the first natural reaction to the Appellant's claim of procedural unfairness is to question what difference it might have made had the Appellant had the opportunity of responding to the documents filed by the Respondent - particularly in circumstances where she had so adamantly put her case in respect of having submitted her application in-time. The documents clearly indicated that the application in 2007 was made late, and squarely reinforced the Respondent's position as to the break in the continuity of residence.

22. In this regard the Appellant now says that as soon as she saw the documents she remembered what had actually happened. She says that at the time both she and her uncle had been unwell and this had caused delay in finalising the application. She points in this regard to aspects of her preparation well ahead of the expiry of her leave. In particular she identifies the renewal of her passport in September 2007, even though it was not due to expire until the end of the year, in an attempt to ensure that there would be no difficulty when the passport was with the Secretary of State; as such she suggests that this demonstrates that from as early as September she was in the process of preparing her application.

23. The Appellant also maintains that she gave the application to the university within the 28 day period of grace. The document that damages her case in this regard, that is to say the employment document dated 3 December 2007 (see paragraph 17 above), she now seeks to address by way of a further letter from a company called Outsourced Client Solutions. This letter is dated 30 November 2016 and is addressed to the Appellant. The Appellant tells me that she obtained this evidence shortly after she had seen the Respondent's materials because she was alert to the issue or

questions raised by reason of the letter from Strand being dated 3 December 2007. The letter from Outsourced Client Solutions is in these terms:

> *"OCS Group – Formerly known as Strand*
>
> *A request was made in October 2007 by the above for a proof of employment letter, this letter was generated on 03 November 2007 but there has been a typing error and the date had been input incorrectly as the 03 December 2007.*
>
> *To clarify the date that should have been on the letter was 03 November 2007."*

24. The Appellant essentially says that had she had an opportunity to respond to the materials filed by the Secretary of State, these are the type of points that she would wish to have advanced to the First-tier Tribunal. Whilst it may well be that she would then have had to overcome the circumstance of having so strongly put her case in respect of having made her application in-time - which might give rise to issues as to either or both her reliability and credibility - she essentially argues that she was denied the opportunity of a fair hearing to have such matters explored. In short, although she might have had particular significant matters to overcome she should nonetheless have been heard.

25. I am concerned in this case that although Judge Sethi gave directions as to the filing of further evidence, and although she has observed at paragraph 18 that the Appellant has not provided any submissions in answer to this further evidence, it is not apparent by what mechanism any such further submissions were to be made. The Judge's directions appear to have been given orally: I can identify nothing on file that indicates that any directions were given in writing. The Judge's record of proceedings in this regard is reflected in what is said at paragraph 26 of the Decision insofar as the directions related to the filing of the application if either party was able so to do. There is nothing in the record of proceedings, or elsewhere in the materials on file, or in the body of the Decision of the First-tier Tribunal Judge, to indicate that there was a further opportunity thereafter for either party to respond to any materials that might be filed or served, or any timetable for such a response. It seems to me in those circumstances that the Appellant's point in respect of procedural fairness is well made.

26. It is perhaps an unfortunate circumstance of this case that Judge Sethi's attempts clearly to try and ensure a fair disposal of the appeal by securing the germane documents that would make the key issue that had been the focus of proceedings more readily resolvable, should have inadvertently resulted in unfairness in any event. I would not wish to discourage the use of such a mechanism to secure further evidence in future cases, but it seems to me that Judges must be alert to the risk of unfairness if the materials thus filed give rise to issues that require to be addressed further. It seems to me that some facility for responding must be made plain when

such directions are given, including an indication that if necessary the appeal may be reconvened to hear further evidence. No such protection mechanism was present in the proceedings herein, and in all of the circumstances I find that there was indeed procedural unfairness. In my judgement the Appellant ought to have been afforded a clear opportunity of responding to any materials filed by the Respondent, and of being informed with clarity of the mechanism and timescale for making any response. Whilst it cannot be said that the outcome would therefore have been determinatively in her favour it seems to me important that due process be observed regardless.

27. The Appellant has now raised something by way of response. Such matters must be evaluated along with the materials already filed by the Respondent further to Judge Sethi's direction, and in the context of the Appellant's evidence and stance at the hearing before Judge Sethi. In re-evaluating the case the next Judge will no doubt wish to have regard to the Appellant's apparent changed position: whether that is credible and simply the case of somebody being able to recall with better clarity than hitherto the events of some ten years ago with the assistance of a 'prompt' from the documents now disclosed; or whether it is insufficiently reconcilable with the firmness of her initial assertions as to the timeliness of her application such that her testimony is rendered either unreliable or incredible. Any resulting findings in respect of the circumstances will then need to be factored into an evaluation of Article 8.

28. I conclude that all such matters require to be reconsidered afresh by a different Judge of the First-tier Tribunal. The relevance or otherwise of the possibility that the Appellant can make a case that the ten year Rule should have been applied in her favour to the overall Article 8 decision will need to be considered in all of the circumstances and findings of the next Tribunal. Suffice to say for the moment I am satisfied that there was an error of law such that the decision of the First-tier Tribunal must be set aside.

Notice of Decision

29. The decision of the First-tier Tribunal contained a material error of law and is set aside.

30. The decision in the appeal is to be remade by the First-tier Tribunal Judge by any Judge other than First-tier Tribunal Judge Sethi.

31. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **13 December 2017**

Deputy Upper Tribunal Judge I A Lewis