



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12808/2015

THE IMMIGRATION ACTS

Heard at Field House
On 6th of February 2018

Decision & Reasons Promulgated
On 8th March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR FRANCIS GODWIN IGHODALO AHAGBUJE
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant appeared in person

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 19th of May 1993. He appeals against a decision of Judge of the First-tier Tribunal Clarke sitting at Taylor House on 9th of March 2017 in which she dismissed the Appellant's appeal against a decision of the Respondent dated 23rd of November 2015. That decision was to refuse the Appellant's application for indefinite leave to remain, the Appellant stating that he

had completed six years discretionary leave at that stage. The Respondent refused the application on the basis that it had not been shown that the Appellant had completed six consecutive years of discretionary leave.

2. The Appellant arrived in the United Kingdom on 5th of August 2006, aged 13, with entry clearance to accompany his mother valid from 20th of February 2006 until 20th of February 2008. On 29th of November 2009 discretionary leave to remain was granted valid until 29th of November 2012. The Appellant made further applications for leave to remain on 26th of November 2012 and March, April and May 2014 but all were rejected. The application the Appellant made on 9th of July 2014 resulted in the grant of discretionary leave to remain valid until 26th of September 2017. On 13th of August 2015 two years before his leave was due to expire the Appellant made an application for indefinite leave to remain the refusal of which gave rise to the present proceedings. The Appellant has since been granted further leave to remain by the Respondent valid until August 2020.

The Decision at First Instance

3. At [8] of the determination the Judge found that the case involved a discrete issue as to whether the Appellant had enjoyed six years of consecutive discretionary leave. The Judge found that the Appellant had not because there had been gaps in the two periods of leave granted. The application made on 26th of November 2012 as a dependent child was rejected by the Respondent on 5th of November 2013 because the Appellant had been an adult at the date of application. The difficulty for the Appellant was that there was no expert evidence to show the Appellant was incapable of handling his own affairs at that time. As a result, the Appellant was not treated as suffering a mental incapacity that would have meant he could be treated as his mother's dependent notwithstanding he was over the age of 18. This rejection of the 2012 application led to what the Judge described as "the fatal break in continuous leave".
4. A number of applications followed and were rejected, in part at least, because fees were not paid. Finally, a successful application for leave to remain on compassionate grounds was made in July 2014. The first grant of discretionary leave to remain had been granted to the Appellant before the changes made in the Immigration Rules came into force on 9th of July 2012. The effect of the Rules was that six years continuous discretionary leave to remain was required to establish an entitlement to indefinite leave to remain but no such leave had been given and therefore the appeal was dismissed. The Appellant had had an initial period of entry clearance when he arrived with his mother as her dependent. Unfortunately for the Appellant there was a gap between 20th of February 2008 when the Appellant's entry clearance expired and 28th of December 2008 when the Appellant made an application for indefinite leave to remain as a dependent child. This break meant that the Appellant could not show continuous leave either. The Judge dismissed the appeal.

The Onward Appeal

5. The Appellant appealed against this decision arguing that he had in fact arrived in United Kingdom on 1st of December 2001 not on 5th of August 2006. He had made an application in 2008 for leave to remain under the 7 years concessionary rule but instead of granting this application the Respondent had granted the Appellant only three years discretionary leave from 29th of November 2009 until 29th of November 2012. The Appellant had a disability and was receiving disability living allowance. His mental capacity was of great concern and therefore he was considered a dependent of his mother. The grounds queried why the Appellant should have been granted three years further leave from September 2014 until September 2017 without being required to apply for leave from outside the country. Three years discretionary leave was stopped on 9th of July 2012 for any applicant except those who were already en route and at that time enjoyed the concession. The Appellant did not seek entry clearance in 2006 because he had been in the care of social services since January 2006.
6. Subsequently the Appellant submitted an amended application for permission to appeal which appears to have been drafted by a firm of solicitors acting at the time for the Appellant. These grounds argued that the grant by the Respondent on 26th of September 2014 was an acknowledgement that the Appellant had continued his lawful leave in this country since 29th of November 2009. The Judge had not had sufficient information in relation to the rejected applications to find that there was a gap in the Appellant's leave. There was evidence that the Appellant had a history of mental health difficulties which meant he was a vulnerable adult. The Judge should have made further enquiries of the Respondent to ascertain why further leave was granted in 2014 and whether or not the Appellant's leave was deemed to have continued since 2009 or expired.
7. The application for permission to appeal came on the papers before Deputy Upper Tribunal Judge Chapman sitting as a Judge of the First-tier Tribunal on 17th of October 2017. In granting permission to appeal she noted that despite the fact the Appellant's appeal was confined to human rights the Judge had failed to engage with or determined the appeal on this basis. This was a Robinson obvious point that constituted an arguable error of law. Whilst it would appear that there was a gap in the continuity of the Appellant's residence between 29th of November 2012 and 9th of July 2014 which rendered the Appellant ineligible for indefinite leave to remain on the basis of 6 years discretionary leave, it was arguable there were errors of fact in the First-tier Tribunal Judge's understanding of the chronology and background to the appeal. Those misunderstandings merited further consideration particularly when considered through the prism of the Appellant's private life in the United Kingdom since his arrival in 2001 at the age of 8 years.
8. The Respondent replied to the grant of permission to appeal on 22nd of November 2017 opposing the Appellant's appeal. The Judge had directed herself appropriately. The immigration history recounted by the Judge reflected the immigration history set

out in the refusal letter. There was no UK immigration entry stamp to show that a visa issued in July 2001 had been used to enter the United Kingdom. None of the remaining documents established the Appellant's residence in the United Kingdom prior to 2006. In any event the issue was not the Appellant's date of entry but whether he had accumulated six years of discretionary leave since it was granted on 29th of November 2009. The grounds failed to deal with the two-year gap in the continuity of residence which would have broken any accumulation of leave to remain and prevented the acquisition of indefinite leave to remain. Given that the Appellant at the date of hearing was already in possession of limited leave to remain it was not clear how there could be any material error of law with regard to any assessment outside the Rules. The Appellant had been granted further leave to remain until 2020 by the date of the Respondent's letter.

The Hearing Before Me

9. At the hearing before me the Appellant appeared in person with his mother as he had before the First-tier Tribunal. His mother spoke for him as she had at first instance (see [7] of the First-tier determination). She indicated that both she and the Appellant were content for the matter to proceed without representation. I also heard oral evidence from the Appellant himself.
10. For the Respondent, the Presenting Officer indicated he did not consider there had been an error of law. The Appellant had leave at the time of the hearing which lasted until 6 months after the determination was promulgated. The Appellant's leave had been extended since then. The only argument was whether the Appellant should have been granted indefinite leave. There may be a dispute of fact as to when the Appellant entered. The Judge had considered the matter properly looking at the Respondent's guidance and she had found a break in the period of discretionary leave. It was difficult to see where this appeal could go. There were no removal directions because the Appellant had existing leave but there was a right of appeal against the Respondent's decision according to the Respondent's letter of 23 November 2015.
11. Speaking on behalf of her son the Appellant's mother stated that she had entered the United Kingdom with four children but of them only the Appellant now did not have a United Kingdom passport. She did not know the reason why. He had arrived in the United Kingdom in 2001. He had not returned to Nigeria since then. Her job required her to travel around which explained why she had left the United Kingdom and was stopped by Immigration Officers when she returned in or about 2007.
12. In 2006 there had been some problems when she had been forced to leave her property and social services had become involved. Her children were taken into care at that time. The reason why there was a gap in lawful residence in 2008 was the Respondent's fault. The Appellant had made an in-time application, she had paid a £750 fee and then had been told by the Respondent there was no fee but what she had paid was not returned to her. At that point her son was granted three years

discretionary leave (from 2009 until 2012). In 2015 he qualified for indefinite leave to remain. The family applied and the Appellant's sister was granted leave.

13. The Appellant had no home other than hers, she was the only parent he knew. The only time he had ever left the United Kingdom was in 2015 when he went to his brother's wedding in France for which he had to get a visa. He had been in the United Kingdom since he was 8 years old. When the Appellant was in the care of social services the council wrote to the Nigerian High Commission when they should have written to the Respondent. That was why the Respondent thought that the Appellant had travelled but he had not. The Appellant's home was in the United Kingdom. He was experiencing difficulties accessing medical treatment. She had had to pay £600 for his medical treatment and he was unable to go on to higher education. He was being treated differently to the rest of the family.
14. The Presenting Officer queried these last points as the Appellant had been granted further discretionary leave until August 2020 and was entitled to treatment under the NHS.
15. The Appellant stated that he thought his application would have been sorted out before now. He did not understand the Respondent's argument against his application. When he went on holiday he had had to go to the French Embassy to obtain a visa because he did not have a British passport to travel on. The problem now was that he wanted to go on holiday with his girlfriend but he was having problems obtaining a visa to do that.

Findings

16. The first issue I have to decide is whether there is a material error of law in the Judge's determination. As the Deputy Upper Tribunal Judge pointed out when granting permission to appeal this appeal could only ever proceed under Article 8. The Judge found that the Appellant could not succeed under the Immigration Rules. It was important for the Judge to make findings on that issue since any application under Article 8 outside the Rules had to be looked at through the prism of the Rules. The Judge found that the Appellant was not entitled to be granted indefinite leave to remain, under the Rules, on the basis of 6 years discretionary leave because of a break in that leave between 2012 and 2014.
17. The Appellant disputes that there was any such break stating that there was a problem over the application forms but I found the evidence of the Appellant's mother on this point somewhat difficult to follow. This was not assisted by the amended grounds settled by the Appellant's previous solicitors which did not deal with the 2008 issue at all and only dealt with the 2012 to 2014 break in somewhat vague terms. Their main point was that the Respondent's decision in September 2014 to grant discretionary leave was somehow an acknowledgement that the Appellant had had continuous leave up until that point. It was nothing of the kind. The Respondent frequently grants leave to applicants after periods when those applicants

had no leave. If the Respondent did not do that she might face criticism in the courts for having an unfair and inflexible policy. That the Respondent granted leave to this Appellant is not to be taken as an indication that there had been no break in leave.

18. I accept that some of the confusion in this case does rest with the Respondent who has made a series of decisions in relation to the Appellant the rationale for which has not always been entirely clear. It is not clear for example why in November 2009 when the Appellant's application for indefinite leave to remain in this country was refused in line with the application made by his mother, he was nevertheless granted three years leave to remain until November 2012. Nor is it clear why the Appellant's leave which at the time of the hearing at first instance was valid until 2017 has again been further extended until 2020.
19. It was a material error of law for the Judge not to deal with Article 8 since that was the only basis on which the Appellant could have appealed. The Judge was right to consider whether the Appellant could first of all bring himself within the provisions of the Immigration Rules that is to say whether he had a sufficient period of consecutive discretionary leave such that he then qualified as eligible for indefinite leave. The Judge held that the Appellant could not succeed under this route because of the break in 2012 to 2014 not assisted by the break in 2008.
20. The burden of proof of establishing that the Judge was wrong about that rests on the Appellant and in the absence of a very clear explanation why the Judge was wrong to say that there was such a break, I cannot find that the Judge erred in her treatment of the Immigration Rules. That however is not the end of the matter because I still have to remake the decision myself under Article 8 outside the Rules.
21. I appreciate the Respondent's argument that given the periods of leave which have been granted to the Appellant the Appellant's success outside the Rules under Article 8 is not without difficulty. Nevertheless, and assuming that the Appellant is entitled to a right of appeal under Article 8 even if he has existing leave, it does seem to me that these grants of short periods of leave from time to time do represent an interference in the Appellant's private life. Clearly, they do not interfere to the extent that an outright refusal would interfere with protected rights but the Appellant is left in a state of limbo with only a precarious immigration status and not permanent status. He is obviously consciously aware that he has been treated differently to the rest of his family and the explanation why he has been treated differently is, as I have indicated, not entirely clear.
22. The Appellant has had a troubled past, he was disruptive in his earlier years and he was referred for psychiatric assistance. He is a vulnerable party. I agree with Judge Clarke that there is no confirmed diagnosis but the uncertainty of the position cannot be helping the Appellant psychologically. I take into account the Appellant's vulnerabilities when ascertaining the serious effect on him of the Respondent's decision. The Appellant has established a private life in this country since first arriving here. To the extent that it is relevant to ascertain the date of his arrival and

thus the length of time he has spent here and the extent of the private life developed, I consider that matter. There is a dispute as to when he arrived, he states that he arrived in 2001 with his mother whereas the Judge found that he did not arrive until 2006. Either way, the Appellant has been in this country for at least 11 years and he has been granted leave until 2020 which will mean that by that time he will have been here for 14 years.

23. The evidence that he arrived in 2001 appears to be based on an assertion only. A photocopy of the Appellant's visa granted to him to accompany his mother is dated 20th of February 2006. While I do not doubt that the Appellant's mother was trying to give me an accurate account of matters I consider her recollection on this point to be at fault. If the Appellant had entered this country in 2001 it is reasonable to have expected some documentary evidence to confirm it but there was none. I do not accept the claim that he arrived in this country in 2001. Nevertheless, the Appellant has clearly established a private life in this country since 2006 having been educated here and received medical treatment for his psychological difficulties. There is no evidence that he has returned to Nigeria since arrival.
24. The decision not to grant him indefinite leave to remain but only to continue with a series of grants of discretionary leave to remain is an interference in his private life because of the precarious nature of his status as a result of those decisions. Are those decisions in accordance with the legitimate aim of immigration control? Arguably they are not because they are not pursuant to a particular immigration route any longer but are simply short-term grants to tide the Appellant over. Assuming for these purposes that they are in accordance with the legitimate aim of immigration control, are they a proportionate interference in the Appellant's private life given his circumstances?
25. This is something of an exceptional case because of the frequent grants of leave to remain apparently on compassionate grounds but with no real end in sight as to whether the Appellant will eventually be granted indefinite leave to remain. It is not clear what the Appellant needs to do to be able to justify indefinite leave to remain. Even if he cannot show that he is entitled to indefinite leave to remain on the basis of a continuous period of six years leave, he has now had leave for a very substantial period of time. Were he to apply on the basis of 10 years continuous lawful residence the same problem with the break in lawful residence would apply as was found by the Judge in the First-tier under the discretionary leave provisions. I do not consider this matter on the basis that the Appellant would be able to qualify under paragraph 276B of the Immigration Rules.
26. Instead I look at the matter outside the Rules as to whether there are compelling and compassionate circumstances such that the Appellant's appeal should be allowed. Whilst this is a case which is not without difficulties I come to the view that the Respondent's decision is a disproportionate interference with the Appellant's right to a private life notwithstanding that the Appellant has leave until 2020 at the present time. I consider that the correct course of action would have been to have granted the

Appellant indefinite leave to remain given the length of time he has been here and the fact that he has not been in trouble during that time. I set aside the decision of the First-tier Tribunal on the grounds of material error of law that is that Article 8 was not considered and I proceed to remake the decision in this case by allowing the appeal under Article 8 outside the Immigration Rules.

- 27. It is potentially another matter as to what practical effect my decision will have since I have allowed the appeal outside the Rules. I would expect the Respondent to take my decision into account and give serious consideration to the grant to the Appellant of indefinite leave to remain in order to prevent further litigation on or after August 2020.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision in this case by allowing the Appellant’s appeal against refusal to grant him indefinite leave to remain.

Appellant’s appeal allowed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 23rd of February 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

A fee of £140 was payable. I have allowed the appeal on a different basis to what was decided at first instance and therefore I make no fee award in this case.

Signed this 23rd of February 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge