Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00086/2020 (R)

THE IMMIGRATION ACTS

Remote Hearing by Microsoft Teams	**Decision & Reasons Promulgated**
On 13th July 2021	**On 28th July 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

GBENEKANU LEDORNU MPIGI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Mughal, instructed by Envoy Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

1. The hearing before me on 13th July 2021 took the form of a remote hearing using Microsoft Teams. Neither party objected. The appellant joined the hearing remotely and was with his solicitor throughout. I sat at the Birmingham Civil Justice Centre. I was addressed by the representatives in exactly the same way as I

would have been if the parties had attended the hearing together. I was satisfied: that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it is in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing will ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

2. The appellant is a national of Nigeria. He first arrived in the UK on 27th September 2009, with leave to enter as a student until 30th March 2011. He has made a number of successful applications for further leave to remain. On 9th December 2018 he applied for, and was granted, further leave to remain as a student valid until 9th December 2019. On 25th September 2019, he applied for indefinite leave to remain on the basis of long residence and on private life grounds. The application was refused by the respondent for reasons set out in a decision dated 11th December 2019. The respondent accepted the appellant had lawful leave to remain between 27th September 2009 and 11th December 2019. The respondent said:

> "However during your 10 year period it is noted that you had an absence from the UK totalling 360 days. To be able to meet the requirements of indefinite leave to remain under the immigration rules for long residency, an applicant should not be out of the UK for a single period of more than 180 days or a total of 540 days over the period of 10 years. It is therefore decided that you do not meet the requirements of the immigration rules detailed in paragraph 276B.
>
> Where an applicant's absences exceed that of the required days consideration is given to the reasoning. You have stated that your extensive period outside of the UK was for research purposes, a research location that you had chosen and therefore this is not considered to be an exceptional circumstance."

3. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Bagral for reasons set out in her decision promulgated on 9th October 2020.

4. The appellant relies upon two grounds of appeal. The appellant refers to paragraphs [33] and [36] of the decision of Judge Bagral and claims the appellant's absence from the UK was consistent with the terms of his Visa, *(i.e. for the completion of his PhD).* At paragraph [5] of the Grounds for Review, reference is made to 'The Home Office Guidance on Long Residence (Published for Home Office Staff on 4 June 2020 version 2.0)' which is said to state:

> "**Allowable absences**
>
> Absences must be for a reason consistent with the original purpose of entry to the UK, or for a serious or compelling reason, in the following categories….*(none of which apply here)*
>
> For all other categories, absences must be consistent with, or connected to, the applicant sponsored or permitted employment, or the permitted economic activity being carried out in the UK - for example, business trips or short secondments."

5. The appellant claims in the grounds of appeal that the reasons provided by Judge Bagral are contrary to the guidance and the judge failed to fairly apply the guidance to the appellant's circumstances.

6. Second, the appellant claims Judge Bagral failed to have proper regard to the policy statement of the then Chancellor that overseas research activity will count as residence in the UK for the purposes of applying for settlement meaning researchers will no longer be unfairly penalised for time spent overseas conducting vital fieldwork.

7. Permission to appeal was granted by Upper Tribunal Judge Grubb on 13th January 2021. He said:

> "The judge correctly concluded that the appellant could not succeed under para 276B but in not taking into account this was a period of fieldwork, the judge arguably unreasonably discounted this on the basis that the appellant had chosen his research topic and so, despite it being part of that topic, it had not been necessary for him to undertake fieldwork abroad. The judges reasoning in para 33 is arguably irrational and arguably fails to take into account the substance of the respondent's policy set out at para 5 of the grounds. Ground 1 is, on that basis, arguable.
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> Ground 2 is, perhaps, less persuasive based, as it is, upon a brief statement by the Chancellor of the Exchequer. I would not, however, exclude consideration of it."

The appeal before me

8. Before me Mr Mughal referred to paragraph [5] of the grounds of appeal and the policy referred to. He candidly accepts that was not the guidance that was before the First-tier Tribunal *(the guidance that was before the Tribunal is listed at paragraph [11(vi)] of the decision)* and that he and those that instruct him, have been unable to locate and provide a copy of the guidance referred to in the Grounds of Appeal for me to consider. He submits the grounds were settled by counsel, and counsel that settled the grounds has not been available to provide a copy of the policy that was referred to. Nevertheless, Mr Mughal provided the Tribunal with a link to other guidance; 'Indefinite leave to remain: calculating continuous period in UK, version 22.0 published on 1st December 2020'. That is guidance published for Home Office staff regarding the calculation of the continuous lawful period requirement for applicants applying for settlement under various routes. He referred to page [10] of that guidance, which is in very similar terms, under the heading 'Allowable absences', to the guidance referred to in the grounds of appeal. Mr Mughal submits the respondent's published guidance makes provision for allowable absences where the absence is for a reason consistent with the original purpose of entry to the UK, or for some other serious or compelling reason.

9. Mr Mughal submits the appellant came to the UK to commence and conclude his education, and the completion of his PhD required fieldwork abroad. He candidly accepts that the published guidance that he has drawn my attention to, expressly provides that the guidance does not apply to the continuous period requirement in long residence cases, but he submits, similar principles ought to be applied. He submits the First-tier Tribunal had before it the documents from the University confirming the appellant had approval to undertake fieldwork in Nigeria. I invited Mr Mughal to draw my attention to the evidence that was before the First-tier Tribunal to establish that the appellant had to remain in Nigeria throughout, uninterrupted, for the 360-day period between 31st May 2015 to 26th May 2016, to complete that fieldwork. Initially, Mr Mughal submitted that his recollection of the appellant's evidence was that the appellant claimed it was significantly

expensive for the appellant to travel back and forth. I turned to the Judge's record of proceedings which notes the following

Q. Did you have to be in Nigeria for fieldwork?

A. Yes

Q. Why?

A. I was using humans as part of my research. When you apply to the Ethics Committee of UCL they look at your application and factor in the time you applied for and approve it. It was approved for 12 months.

…

Q. Could you have returned to the UK?

A. I had to be absent as it was approved, and the letter was approved. The volume of my research requires me to be absent and if I returned without studying each piece of research I would miss out on the results expected

…

Cross-Examination

Q. You chose to complete in Nigeria?

A. Yes. They look at your application. You pass through an application. They approve it

…

Q. What evidence is there that you had to be there for a year?

A. The letter from UCL, the outcome of my PhD which Dr Colin being the programme director…. wrote confirming that I had passed my PhD"

10. Mr Mughal submits that at paragraph [33] of her decision, Judge Bagral irrationally concluded that the evidence does not sufficiently indicate that it was necessary for the appellant to be outside the jurisdiction for 12 months in order to complete his PhD. The appellant's perception was that it was necessary for the appellant to be outside the UK for a period of 12 months. The appellant relied upon his oral evidence. Mr Mughal accepts that beyond the oral evidence of the appellant, there was nothing before the Tribunal to establish that the appellant had to remain outside the UK, for an uninterrupted period between 31st May 2015 and 26th May 2016.

11. In reply, Mrs Aboni relied upon the Rule 24 response dated 1st February 2021 that has been filed and served on behalf of the respondent. The respondent states that it is not clear which guidance is relied upon by the appellant in paragraph [5] of

the grounds of appeal. The respondent refers to the guidance that was before the FtT and listed at paragraph [11(vi)] of the decision. The guidance refers to events that break continuous residence, and time spent outside the UK. The guidance provides:

> "If the applicant has been absent from the UK for more than 6 months in one period or more than 18 months in total, the application should normally be refused. However, it may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances.
>
> This must be decided at senior executive officer (SEO) level with a grant of leave outside the Immigration Rules being the appropriate outcome."

12. The guidance goes on to refer to factors that should be considered when assessing whether the absence was for compelling or compassionate circumstances. Mrs Aboni submits Upper Tribunal Judge Grubb was misled into granting permission by reference to guidance that the appellant now accepts, did not apply because the guidance relied upon by the appellant expressly states, at page 4, that it does not apply to a long residence cases. Mrs Aboni submits it is common ground that the appellant had been out of the UK for a period of 360 days. She submits when considering whether it is appropriate to exercise discretion in respect of excess absences the appellant would have to establish that he was prevented from returning to the UK through unavoidable circumstances such that there are compelling or compassionate circumstances. She submits Judge Bagral referred to the respondent's guidance at paragraph [35] of her decision, and it was in the end, open to the Judge to dismiss the appeal for the reasons given in her decision.

Discussion

13. The parties agreed at the outset that the issue in the appeal before me is a narrow one. It is whether the conclusion reached by Judge Bagral, at paragraph [33], is irrational. It is now accepted on behalf of the appellant that the judge did not err in failing to take into account the substance of the respondent's policy set out in paragraph [5] of the grounds of appeal, albeit Mr Mughal submits a similar approach should nevertheless be adopted. It is useful to set out paragraph [33] of the decision:

> "As part of his PHD studies there is no *(sic)* that the appellant was required to undertake the field research. I agree with Miss Swindells that there is insufficient evidence that that generally could not have been conducted in the United Kingdom. The appellant chose to undertake his research into the "*social network of urban and peri-urban agriculture and the transformation of livelihoods in Port Harcourt City, Nigeria between 1999-2014*". I agree with Mr Mughal that it was entirely proper for the appellant to be able to choose his research topic and location. The appellant chose to go to Nigeria and the opening paragraph of the letter from Professor John Foreman approving the project, suggests that the duration of the project was one that was put forward by the appellant through Dr Simmonds for approval. The evidence seems to indicate therefore, that the appellant choose *(sic)* the subject matter, location and duration of his project which was approved by the Ethics Committee at UCL. I agree with Miss Swindells, therefore, that the evidence does not sufficiently indicate that it was necessary for the appellant to be outside the jurisdiction of the United Kingdom for 12 months in order to undertake his research. Even if he was, a fact of the matter remains, it was the appellant's choice to be so."

14. The decision must be read as a whole. At paragraphs [17] to [22] of her decision, Judge Bagral sets out the appellant's evidence. In particular, at paragraph [19], she refers to the appellant's oral evidence in which he confirmed that it was necessary to conduct fieldwork in Nigeria that was integral to his PhD. She also referred to his evidence that he was required to remain in Nigeria for the research in order to collate the results. Having carefully considered the record of proceedings, I am quite satisfied that the evidence is accurately recorded by Judge Bagral. In fact, the appellant does not claim to the contrary. Judge Bagral sets out her findings and conclusions at paragraphs [28] to [45] of her decision. In reaching her decision as to whether the requirements of paragraph 276B of the immigration rules are met, Judge Bagral clearly had regard to the evidence relied upon by the appellant regarding the fieldwork that he was undertaking and the appellant's evidence regarding his absences from the UK. It was in my judgement open to Judge Bagral to find as she did at paragraph [33], that the evidence does not sufficiently indicate that it was necessary for the appellant to be outside the jurisdiction of the United Kingdom for 12 months in order to undertake his research. That is a finding that is in my judgement neither unreasonable nor irrational. In reaching her decision, Judge Bagral also considered, at [35], whether the appellant's choice to pursue fieldwork in Nigeria for the duration, can be considered an exceptional or compassionate circumstance. In reaching her decision she had due regard to the respondent's guidance that the Tribunal was referred to.

15. It was in my judgement open to Judge Bagral to conclude that the appellant is unable to satisfy the requirements for indefinite leave to remain on the grounds of long residence for the reasons set out in her decision.

16. Mr Mughal did not make any submissions before me regarding the second ground of appeal. That relates to the Chancellor of the Exchequer's spring statement of 2019. That is addressed at paragraph [37] of the decision, and I am quite satisfied that it was open to Judge Bagral to conclude that the appellant gains no assistance from that statement for the reasons she gave.

17. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998.

18. In my judgement, read as a whole, Judge Bagri reached conclusions that were properly open to her on the evidence before the Tribunal. The Judge referred to the explanations given by the appellant for his absence from the UK. The findings made by the judge were findings that were properly open to the judge on the evidence and cannot be said to be perverse, irrational or findings that were not supported by the evidence. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the rules. That was plainly the approach adopted by Judge Bagral at paragraphs [28] to [47] of her decision.

19. At paragraph [45] of her decision Judge Bagral acknowledged that her decision will come as a considerable disappointment to the appellant, and it is not a decision that she made lightly. She noted that the appellant's desire to remain in the United Kingdom is understandable and there is no doubt that he is a hard-working and assiduous individual whose efforts are to be commended.

20. I entirely agree with the sentiments expressed by Judge Bagral. The Court of Appeal in UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 and AA (Nigeria) v SSHD [2020] EWCA Civ 1296 urge restraint and confirm the Upper Tribunal in the exercise of the powers conferred upon it by the Tribunals, Courts and Enforcement Act 2007, is not entitled to find an error of law or seek to remake the

decision of the FtT simply because it does not agree with it, or because it thinks it can produce a better decision. It forms no part of the Upper Tribunal's function to seek to restrict the range of reasonable views which may be reached by Judges of the FtT in the value judgements they must make, by substituting the views of the Upper Tribunal as to the outcome.

21. It follows that in my judgement there is no material error of law in the decision of First-tier Tribunal Judge Bagri, and I dismiss the appeal.

Notice of Decision

22. The appeal is dismissed.

V. Mandalia

Upper Tribunal Judge Mandalia **14th July 2021**