IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003451
First-tier Tribunal No:
EA/02199/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 August 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALABA THOMAS OLADUNJOYE
(no anonymity order made)

Respondent

Representation:
For the Appellant: Mrs A Nolan, Senior Home Office Presenting Officer
For the Respondent: The respondent did not appear and was not represented

Heard at Field House on 31 July 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State refusing him leave to remain under the EU Settlement Scheme.

2. The claimant did not appear before me. It was convenient to hear the appeal at 10.22 a.m. The records show that Notice of the Hearing was served on the appellant by post and e-mail on 13 July 2023. My clerk confirmed that the claimant had not presented himself and checked with the office to make sure there was no explanation for his absence. This was not a day when the Tribunal was aware of widespread travel difficulties and in the circumstances I was satisfied that the claimant had proper notice of the hearing and I decided to go ahead in the absence of the claimant.

3. The appeal was determined on the papers by the First-tier Tribunal. It was noted then that the claimant is a national of Nigeria who was in born in 1983. His application was refused because the Secretary of State was not satisfied that he

met the requirements for settled status or pre-settled status under the EU Settlement Scheme.

4. At paragraph 4 of the Decision and Reasons the judge noted that the Secretary of State had considered if the claimant:

> "qualified for settled status on the basis of completing a continuous period of five years' residence in the UK and Islands under Rule EU11 and decided the [claimant] did not meet the requirements on the basis of a continuous qualifying period of five years".

5. The claimant's position was straightforward. He said he had been resident in the UK since July 2010 and had attained settled status on 23 October 2019. He also claimed that he had been given six consecutive EEA family permits and was admitted to the United Kingdom on 6 February (he did not say which year) on the basis of an EEA family permit.

6. With respect, the Secretary of State's grounds of appeal to the Upper Tribunal are particularly apt and clear. They begin by recording, correctly, that the First-tier Tribunal Judge found that the claimant meets the requirements of settlement status:

> "seemingly on the basis that the [claimant] was present in the United Kingdom for a period of 5 continuous years from 2009-2014".

7. The problem for the claimant is that mere residence in the United Kingdom, even lawful residence, is not sufficient for the purposes of the EU Settlement Scheme. It is necessary that the five years continuous qualifying period is five continuous years in a particular EEA related category, in this case as a family member of a relevant EEA citizen. The claimant relies on his relationship with his sponsor who did not enter the United Kingdom until 2010 and in the circumstances there could be no question of the claimant starting to accrue his five years' continuous residence before July 2010.

8. In his grounds of appeal to the First-tier Tribunal the claimant corrects the Secretary of State for stating, wrongly, that he entered the United Kingdom in 2013, pointing out that he had been studying biomedical science at the University of Sunderland from September 2009 to November 2014. However, as indicated above, the corrected chronology does not give the claimant five years' continuous residence as the family member of an EEA national because the EEA national was not in the country until 2010.

9. The claimant also said in his grounds that on his "last entry to the UK" he was allowed entry as the family member of an EEA national with an EEA family permit and said "I had been identified as a family member by the Home Office since 2015". However, this misses the point. What was necessary was *continuous* residence and the claimant did not have continuous residence. Rather, he had resided as a student in the United States of America.

10. Mrs Nolan particularly drew to my attention copies of the claimant's passport which he had provided. There is a visa dated 19 September 2009 confirming his claim to have entered the United Kingdom as a student. There is also entry clearance identifying him as a family member of an EEA national coming to join his partner. That is dated 1 December 2015. However, there is also entry clearance issued in New York in the United States of America in 2016. He was again identified as an EEA family member but the entry clearance confirms that he was in New York. These things were considered by the First-tier Tribunal Judge who noted at paragraph 20 of the Decision and Reasons that it was the claimant's case that he travelled to the United States of America in November 2014 to study at Andrews University from January 2015 to July 2019. He claimed

to have come to the United Kingdom for "most of his holidays" but that was not accepted by the First-tier Tribunal Judge. A troublesome passage is at paragraph 25 of the decision and reasons where the judge says:

> "In relation to the qualifying period I accept, as is supported by the [claimant's] sponsor, that the [claimant] first came into the UK on 19 September 2009 where he stayed until 2014 before commencing his studies in America. I have also had sight of the [claimant's] visas to study in the United States which date back to 19 December 2014. It is accepted by the [Secretary of State] that the [claimant] was residing in the UK between April 2013 and November 2014, but I find there have been significant gaps since 2014. However, I have no reason to doubt the [claimant's] claim that he was in University from September 2009 leaving for America in November 2014, and was present for a continuous period of five years. This is supported by the [claimant's] sponsor; however, this is not within the qualifying period".

11. At paragraph 26 the judge continued:

> "The [claimant's] uncle explains the [claimant] following the completion of his study and clinical placement in the USA in 2019 was to return to the UK but the visa was wrongfully refused. This was subject to an appeal process, and I had sight of correspondence from the [Secretary of State] which I have referred to previously. I accept the [claimant] applied for an EEA family permit on 18 April 2019 and that there was a delay in the return of his passport for five months after his appeal was overturned and then he was subject to COVID restrictions so could not return until 2020. I therefore accept there are reasonable grounds as to why the [claimant] did not re-enter the United Kingdom until November of 2020".

12. What the judge did not do is explain why the fact that there were "reasonable grounds" for not re-entering the United Kingdom means that he should have somehow been excused the obligation to comply with the Rules that required his presence in the United Kingdom.

13. I have no hesitation in setting aside the First-tier Tribunal's decision. The First-tier Tribunal erred in law. Having made findings of fact that were not advantageous to the claimant the judge gave no explanation for deciding that the delay in issuing the visa was to be treated as if the claimant satisfied the requirements of the Rules.

14. Having set aside the decision I must decide how to proceed further. I realise it is unattractive to the claimant to find that his appeal has been dismissed but he had notice of the proceedings and presumably chose not to take part. It is not a case where his credibility is in question. This case appears to turn on agreed facts. I cannot work how these facts entitle the claimant to succeed. The simple fact is that he did not meet the requirements of the Rules. He must show that he probably satisfied the Rules and his evidence shows that he clearly did not. I am not aware of any mechanism in the Rules that creates a discretionary power or other basis on which to allow the application in the circumstances given. It follows therefore that I must substitute a decision dismissing the appeal.

Notice of Decision

15. I allow the Secretary of State's appeal against the decision of the First-tier Tribunal. I re-make the decision and I dismiss the claimant's appeal against the decision of the Secretary of State.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 August 2023