IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001615

First-tier Tribunal Nos:
HU/59810/2023
LH/00965/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 10th of July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

IFE STEPHANIE NWIBE
(NO ANONYMITY ORDER MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Mr E Terrell, Home Office Presenting Officer

Heard at Field House on 21 June 2024

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Nigeria born on the 3 June 1997. She sought entry clearance as an accompanied child and this was granted on the 28 February 2013 for six months. She subsequently in time applied on the 17 July 2013 for entry clearance as a child student and arrived on the 9 August 2013. The Claimant was subsequently granted further periods of leave under Tier 4 as a student until such time that she had amassed ten years' continuous lawful residence and on the 26 July 2023 she applied in time for indefinite

leave to remain. By that time, the Claimant had qualified as a doctor and taken up a role within the NHS.

2. Her application, however, was refused on the 1 August 2023 on the basis that the Claimant's absences exceeded the permitted 548 days over the ten year period. This included 45 days study leave between 1 March 2014 and 7 March 2014, 26 May and 21 June 2014, of five days and 25 days respectively and also fifteen days from 24 May 2018 to 9 June 2018. Furthermore, during the coronavirus pandemic the Claimant was out of the UK from the 20 March 2020 until the 11 August 2020.

3. The Claimant appealed against this decision and her appeal came before the First-tier Tribunal for hearing on the 28 February 2024. There was no Presenting Officer present at that hearing. In a determination promulgated later the same day the First-tier Tribunal Judge allowed her appeal on the basis that she found that discretion should have been exercised in the Claimant's favour and therefore her application met the requirements of paragraph 276B of the Immigration Rules.

4. On the 11 March 2024 the Secretary of State made an application for permission to appeal on the basis that the judge materially erred in law in exercising her own discretion when finding excess absences should be disregarded and it was not within her jurisdiction to impose her own view as to how discretion should have been exercised, *cf.* Marghia [2014] UKUT 00366 (IAC). Consequently, and secondarily the judge further erred in finding that the Rules were satisfied was determinative of the proportionality balancing exercise because that finding was based on a material error with regard to the exercise of discretion and that thirdly the judge erred in incorrectly attaching positive weight to the Section 117B factors which are neutral and the absence of criminal convictions.

5. Whilst permission to appeal to the Upper Tribunal was refused by a First-tier Tribunal Judge, following renewed grounds of appeal in the same terms on the 28 March 2024, permission to appeal was granted by Upper Tribunal Judge Macleman on the 15 May 2024 on the basis that:

> *"It is easy to see why the tribunal's sympathies were with the Appellant, but the grounds are arguable on whether it strayed beyond its scope in holding at [40] that the Appellant 'meets the rules'; which is the crux of its decision."*

Hearing

6. At the hearing before the Upper Tribunal there was no appearance by or on behalf of the Claimant. In response to a telephone call made by my clerk her former solicitors confirmed that they had been de-instructed by the Claimant who had made a new application to the Home Office for leave as a skilled worker. Contact was then made with the Claimant who confirmed this and that she was content for the hearing to proceed in her absence.

7. I heard submissions from Mr Terrell on behalf of the Secretary of State who submitted that the judge had erred materially in law in exceeding her jurisdiction as it was a matter for the Secretary of State whether or not to exercise discretion. I agreed. It is abundantly clear from eg the decision of the Upper Tribunal in *Marghia* (*op cit)* at [10] that:

> *"It was a matter for the Secretary of State as to whether or not she exercised any residual discretion to permit the Claimant to have a further Tier 4 visa notwithstanding her clear inability to meet the criteria set out in the Rules. That exercise of such residual discretion, which does not appear in the Rules, is absolutely a matter for the Secretary of State and nobody else, including the court (see Abdi [1996] Imm AR 148). The Court should not have sought to impose its own view. This trespassed upon the proper functions of the executive*."

8. I set aside the decision of the First-tier Tribunal and remake the decision. Having considered the new Appendix Long Residence rules in force since the 11 April 2024 and Appendix Continuous Residence, also in force from that time, Mr Terrell accepted that CR2.3 of the Continuous Residence Appendix essentially provides that absences can be overlooked where there is e.g. a pandemic and that this brings in the Home Office policy guidance from outside the Rules to within the Rules.

9. Mr Terrell also sought to rely on the decision OA and others (human rights; 'new matter'), s.120) Nigeria [2019] UKUT 00065 (IAC) and he consented to the fact that the Claimant now, at today's date, meets the requirements of the Rules as a new matter. Mr Terrell further submitted that the period of absence due to the coronavirus pandemic of 144 days between the 20 March 2020 and 11 August 2020 could be disregarded in light of CR 2.2A and 2.3 and that further ,the first two periods of study leave, which were between the 1 March 2014 and the 7 March 2014 and the 26 May 2014 to the 21 June 2014, which constitute 30 days could also be disregarded given that the date is the 21 June 2024. Therefore, in summary, he accepted that the Appellant now met the requirements of Appendix Long Residence and Appendix Continuous Residence on the basis that her absences over the ten years, including the date of the hearing before the Upper Tribunal, were 545 days.

10. As a consequence of Mr Terrell's very helpful submissions, I apply the decision in TZ (Pakistan) [2018] EWCA Civ 1109 and find that as a consequence of the Claimant being able to meet the Immigration Rules, her appeal should be allowed on the basis that her removal would be contrary to Article 8 of the Human Rights Convention. Whilst the decision as to the period of leave to be granted is a matter for the Secretary of State, this would seem to be a case where the grant of Indefinite Leave to Remain would be appropriate.

Notice of Decision

11. The First-tier Tribunal Judge materially erred in law. I set aside that decision and substitute a decision allowing the Claimant's appeal.

Rebecca Chapman

Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

8 July 2024