



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12172/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 14 May 2018

Decision & Reasons Promulgated  
On 23 May 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHARITY INYANG OKPUKPAN  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer  
For the Respondent: Mr D Riok, Rehoboth Law

DECISION AND REASONS

1. This is a re-making of the appeal of Ms Okupukpan, the appeal having been brought against the Secretary of State's refusal to grant leave to remain on the basis of ten years' continuous lawful residence or on Article 8 ECHR grounds.

2. For the purposes of this decision I refer to the Secretary of State as the respondent and to Ms Okpukpan as the appellant, reflecting their positions before the First-tier Tribunal.
3. The appellant is a citizen of Nigeria born on 27 March 1980. She came to the UK on 20 October 2004 with leave as a student and was subsequently granted leave as a student until 14 June 2014. She then applied in time for further student leave, varying that application to one for indefinite leave on long residency grounds. The respondent refused that application on 26 April 2016. The appeal comes to be re-made following my error of law decision issued on 16 March 2016.
4. In the context of this Article 8 ECHR appeal, the dispute that remains is whether the appellant can show 10 years' continuous residence given that there are two undisputed gaps in her immigration record. The appellant argues that there are exceptional circumstances explaining those gaps and that they should be disregarded following the respondent's guidance documents concerning breaks in continuous residence. She should therefore be regarded as having 10 years' continuous leave and the respondent's decision be found to be not in the public interest and a disproportionate interference to her Article 8 private life where that is so.

#### Gap in leave from 27 March 2008 until 16 June 2008

5. A gap in the appellant's residence occurred between 27 March 2008 and 16 June 2008. She was refused leave as a student on 30 November 2007. Her appeal against that refusal was dismissed on 5 February 2008. On 26 March 2008 the respondent maintained the decision to refuse leave. On 13 May 2008 the appellant made an application for further leave to remain. On 16 June 2008 the respondent granted leave until 30 September 2008 in order for the appellant to obtain evidence of progress in her studies so as to obtain a CAS in order to continue studying.
6. The appellant's explanation for this gap in her leave is at paragraphs 12–23 of her witness statement dated 18 September 2017, as follows:
  - “12. I once again applied to vary my leave as a student on 16/11/2007. However, the Secretary of State refused my application on 30/11/2007 due to the fact that North London College was not on the register. My solicitors at the time (Dunamis Solicitors) lodged an appeal but it was dismissed on 05/02/2008. All appeal rights were taken and exhausted. The decision was maintained after reconsideration on 26/03/2008.
  13. My solicitors made representations to the Home Office requesting for a reconsideration based on the Tribunal's decision. My application was submitted on 13/05/2008.
  14. Any delay in resubmitting the application (if any) was because of the uncertainty about the future of the North London College. The respondent confirmed in their refusal letter that the college lost their licence during the period in question, which was why my application was refused by the respondent. I was caught in the middle of the whole scenario not knowing what to do. I also tried to gain

admission at another college but could not as the academic year was already in progress and no other college was taking new students during that period.

15. Because of the uncertainty surrounding the North London College with regards to their licence, I was in a dilemma whether to continue studying at that college and was traumatised and in a state of confusion because of those developments. I decided to move to South Chelsea College where I studied HIV/Aids at level 4. There is no doubt that my circumstances were truly exceptional because the loss of licence by the North London College was due to circumstances beyond my control. If the college did not lose their licence, the respondent would have granted me further leave to remain following my initial application.
  16. When I did resubmit my application the Home Office indicated in their letter that they would need a 'Level 3' certificate before any consideration could be given to my application. I was given three months to obtain a level 3 certificate. At no stage did communications cease (sic) with the Home Office.
  17. We acted on the Home Office instructions and eventually further leave to remain was granted on 16/06/2008 until 30/09/2008. Therefore, the claimed delay by the Home Office was unfair and if any, could be explained by the above exceptional circumstances."
7. Before me, the appellant maintains that the core reason for this break in her leave was the respondent taking North London College off the register after she had applied for leave and at the time of the decision refusing leave. She maintains that she should have been granted 60 days to find a new sponsor, a process routinely adopted in due course by the respondent after the higher courts indicated that to do otherwise was unfair; see, for example, Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 00151 (IAC). It appeared to me that this submission had force. The appellant could do nothing about her college coming off the record, had no option but to appeal and that appeal was unlikely to succeed where, strictly, the Immigration Rules were not met. The respondent had an additional opportunity to act fairly when asked to reconsider in March 2008 but did not do so.
  8. There is less clarity about the reasons for not making a new application within 28 days of the refusal to reconsider dated 26 March 2008. Following the reasoning above, however, the appellant should never have been left in the position of having no opportunity to find a new sponsor whilst retaining leave to remain. All that followed, the appeal being dismissed in February 2008 and the difficulty in making a further application within 28 days of the 26 March 2008 reconsideration decision arose because of the underlying unfairness of the appellant being refused for something done by the respondent which was wholly out of her control.
  9. Regarding the period after 26 March 2008, the appellant also relies on there being confusion where North London College was later reinstated on the register on 7 December 2007 and, according to the respondent's refusal letter "removed again and then added back on the register". That argument can be dealt with relatively briefly as there is no detail as to when the college was taken off and put back on the register

for the second time and so no indication of how that might have impacted on the appellant.

10. I can also indicate that a letter dated 26 January 2018 from Peter Obidi at page 5 of the appellant's supplementary bundle adds nothing to the evidence on what happened from March 2007 to May 2007 where he indicates that he has no papers, has only "vague recollections" and his comments that he had to encourage the appellant to seek alternative assistance is not a matter she raises in regards to any difficulties during the second gap in her residence.
11. The respondent's guidance on disregarding gaps in continuous residence states:

"When refusing an application on the grounds that it was made by an appellant who had overstayed by more than 28 days before 24 November 2016, you must consider any evidence of exceptional circumstances which prevented the appellant from applying within the first 28 days of overstaying.

The threshold for what constitutes 'exceptional circumstances' is high, but could include delays relating from unexpected or unforeseeable causes. For example:

- Serious illness which meant the appellant or their representative was not able to submit the application in time - this must be supported by appropriate medical documentation.
- Travel or postal appellant or their representative was not able to submit the application in time.
- Inability to provide necessary documents - this would only apply in exceptional or unavoidable circumstances beyond the appellant's control, for example:
  - It is the fault of the Home Office because it lost or delayed returning travel documents;
  - There is a delay because the appellant cannot replace their documents quickly because of theft, fire or flood - the appellant must send evidence of the date of loss and the date replacement documents were sought;

Any decision to exercise discretion and not refuse the application on these grounds must be authorised by a senior caseworker at senior executive officer (SEO) grade or above."

12. It is my conclusion that the difficulties the appellant faced in 2007 and 2008 because of North London College being taken off the register and no 60 day letter or period of leave being afforded for the appellant to find a new sponsor does come within the guidance. She was unable to provide a necessary document, a new CAS, because of a matter outside her control, the respondent taking her college off the register and failing to afford her time to do something about this. If, as regards the technical definition of exceptionality in the guidance, I am wrong on this, it remains my view that a significant unfairness arose that was exceptional for the purposes of an Article

8 ECHR proportionality assessment. The gap from 27 March 2008 to 13 May 2008 should not be weighed against the appellant in that assessment, therefore.

Gap in leave from 3 November 2010 to 18 August 2011

13. This gap in the appellant's history was from 3 November 2010 until 18 August 2011. The appellant applied for further leave to remain as a student on 28 September 2010. That application was rejected on 2 November 2010 because mandatory sections of the application form had not been completed. Her legal advisors then submitted a further application on 8 November 2010 but this was also rejected on 23 December 2010 because the wrong version of the form had been used.
14. On 5 January 2011 the appellant made a further application for leave to remain which was refused on 21 February 2011. The reason for that application being rejected are not clear in the materials before me. The appellant also maintains that this refusal was on 21 February 2011 or 28 February 2011 but nothing turns on that for the purposes of this appeal. The appellant then made an application for further leave to remain on 10 March 2011 and on 18 August 2011 the respondent granted the appellant further leave to remain.
15. The appellant's explanation for this gap is at paragraphs 19 to 35 of her witness statement:
  - "19. I then instructed Victory at Law Solicitors to handle my file. My application for further leave was submitted on the 28/09/2010. However my application was sent back on 02/11/2010 as my Solicitors needed to complete a section of the Home Office form. The relevant section was completed, a new passport picture was attached and the application was resubmitted immediately on the 08/11/2010.
  20. A new points-based system came into effect on the 21/10/2010. New forms were introduced and this replaced the old forms. I was not aware that the new and correct forms were not used on 08/11/2010.
  21. I trusted that my Solicitors knew what they were doing and since the return forms from the Home Office had only required the relevant and mandatory section to be filled this led to a genuine believe that the documentation were in order.
  22. My application was rejected on 23/12/2010. Although this decision had no right of appeal, it indicated that a new application could be submitted on fresh documents.
  23. The Home Office required under its points system that the English language test should be completed. I took and passed this exam on 23/03/2011. The reason for the delay in resubmitting my application was due to the fact that the bank statements enclosed in support of my application to the Home Office on 28/09/2010 when my initial application was submitted were no longer deemed valid and acceptable as the required recent bank statements needed funds on my bank account for 28 days.

24. After this requirement was met, the bank statements were duly requested from the bank.
  25. The reason for not having large amount of money in my personal account at that moment was due to the fact that my uncle was responsible for my school fees and I was waiting for him to provide me with funds.
  26. In the past application for renewal of leave to remain, my uncle's bank statement accompanied the application.
  27. The long and protracted history of this application meant that I had to start all over again and prepare the file for submission afresh under the new requirements.
  28. I recognise my obligations and the need to comply with the immigration Regulations and procedures, to this effect I instructed a lawyer to assist in the process.
  29. When the application for further leave to remain on 28/09/10 was submitted, it was presented on the correct form.
  30. When the forms were returned to solicitors it indicated that the relevant sections be filled out. No indication was given that the forms were incorrect.
  31. My solicitors wrote to the Home Office requesting that the application for extension of leave to further remain be considered as all documentation were intact when the initial application was made.
  32. I decided to end instructions with Victory at Law as I had to take instructions from a new firm of solicitors before sending the forms back to the Home Office.
  33. My application for leave to remain was submitted on 05/01/2011 and was refused on 28/02/2011 without the right of appeal. The respondent was wrong in claiming that the application was refused on 21/02/2011. The refusal letter was dated 28/02/2011 and was served on me several days thereafter. It is therefore incorrect for the respondent to claim that it took 78 days for me to resubmit another application.
  34. I reapplied on 10/05/2011 for leave to remain and my application was successful. I was granted leave on 18/08/2011 valid until 28/02/2013.
  35. Any delay in resubmitting the application was because I needed to provide bank statements with sufficient funds to satisfy the financial requirements of the application. This was therefore an exceptional circumstance beyond my control. Again, the respondent finally extended my leave because the respondent was convinced my circumstances were beyond my control."
16. The appellant maintains that the rejection of her application on 2 November 2010 was the responsibility of her previous representatives, Victory Solicitors, as they did not complete a section of the form. She also maintains that they were responsible for the second rejection on 23 December 2010 as they used the wrong form.

17. The reported case of BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311. This decision maintained that:

“If an appeal is based in whole or in part on allegations about the conduct of former representatives there must be evidence that those allegations had been put to the former representative, and the Tribunal must be shown either the response or correspondence indicating that there has been no response.”

18. The appellant has provided a response from Victory Solicitors on the alleged failures raised by the appellant. The firm's letter dated 31 January 2018 states:

“We can confirm that we submitted an application for a grant of leave and biometric immigration document under tier 4 (general) student about the 27<sup>th</sup> September 2010 and we note that pages 20 and 21 of the form were not completed because the client at the time has not provided us with the information, hence it was uncompleted.”

19. At pages 6 to 7 of the supplementary bundle is the covering letter written by Victory Solicitors for the 17 September 2010 application. It states, on page 7 of the supplementary bundle, that that there was no CAS with the application. That supports the submission of the solicitors in the 31 January 2018 letter that they had not been provided with the information required to complete the application. It is consistent with the refusal letter dated 28 February 2011 at pages 41 and 42 of the main bundle which refers to a CAS having been assigned only on 29 September 2010.
20. That evidence, in my view, does not support the appellant's assertion that she thought that the solicitors had completed the application correctly and that its shortcomings were their responsibility, not hers. The appellant could be expected to know that she had not been assigned a CAS as of 17 September 2010 and that absence of a CAS could not be the responsibility of the solicitors. I do not accept the rejection of the 17 September 2010 application was the responsibility of the legal advisers, therefore, or something exceptional. The problem was a failure to have the mandatory documents for further leave which is not an exceptional matter on any basis.
21. Victory Law Solicitors go on in the letter of 31 January 2018 to accept that it was their responsibility, not the appellant's, that the wrong form was used when the application was resubmitted, leading to the rejection on 23 December 2010, however. That can account for the period 3 November 2010 to 23 December 2010 by way of exceptional circumstances but not the other periods of time. I also did not accept the argument that the respondent's current policy on requesting additional documents or affording time for a correct version of an application form to be provided could be used to show exceptionality or unfairness in the 2010 rejections of the applications. The law in force at that time did not contain the same provisions and it was those provisions that are relevant, not new provisions.
22. The solicitors using the wrong version of the form also does not explain what happened next, however, the application made on 5 January 2011, refused on 28 February 2011. That refusal letter indicates that as the CAS was issued after 12

August 2010 the appellant had to provide an English language certificate but had not done so. Nothing in the materials before me explains why there was no English language certificate. The appellant does not assert this was the responsibility of her legal advisers. In addition, the decision of 28 February 2011 indicates that the financial evidence was not in order where she had not provided evidence of her relationship to her financial sponsor. Again, there is no suggestion from the appellant that this was the responsibility of Victory Law Solicitors.

23. It is therefore my conclusion that the appellant has not shown exceptional circumstances explaining the gap in her residence from 3 November 2010 to 10 May 2011, other than, at best, the period 3 November 2010 to 23 December 2010. The appellant cannot show, therefore, that as she meets the Immigration Rules for long residence, there can be no public interest in support of the refusal of leave and in her return to Nigeria.
24. The appellant argues that weight should be placed in her favour in the proportionality assessment as this is a “near-miss” situation. In SS (Congo) and Others [2015] EWCA Civ 387 (at [56]) it was held that the fact that a case was a “near miss” in relation to satisfying the requirements of the Rules would not show that compelling reasons existed requiring the grant of leave outside the Rules. However, if a claimant could show that there were individual interests at stake covered by Article 8 which gave rise to a claim that compelling circumstances exist to justify the grant of leave outside the Rules, the fact that the case was a “near miss” might be a relevant factor which tipped the balance in his favour. In MM (Lebanon) [2017] UKSC 10 the Supreme Court when allowing the appeal of the appellant SS from SS (Congo) said at [103] the issue was not whether there was a “near miss” [from the maintenance figures in the Rules] but the weight to be given to any factors weighing against the policy reasons relied on by the respondent to justify an extreme interference with family life.
25. It is not my conclusion that there are sufficient factors here weighing against the policy reasons relied upon by the respondent, the maintenance of clear and effective immigration control where the Immigration Rules are not met, even taking full account of the appellant’s lawful residence other than the period in 2010 to 2011.
26. The Article 8 claim here was brought on the basis of private life. Any private life here weighs little where the appellant only ever had precarious leave, even if she has almost always been here lawfully and has been here for 13 years. I accept the evidence of the appellant and her uncle that she has no relatives in Nigeria. It remains the case that she spent most of her life there and all of formative years. Her evidence and that of her uncle is that she has been supported by him in her studies and that he would continue to do so, including fees of some thousands of pounds, were she to be able to remain. He suggested that he would not want to send funds to the appellant in Nigeria because of the cost of currency conversion and fees but that did not appear to me to be a credible reason for finding that she could not expect financial support from her uncle on return. It is not arguable, even if she has no immediate relatives there, that she would face very significant obstacles to



reintegration in Nigeria. It was argued that the economy and employment situation in Nigeria would make life difficult for her but the evidence was not such as to show this to be a very significant obstacle, particularly where she has qualifications obtained in the UK and her uncle can provide some financial support. The appellant's ability to speak English very well was not a matter capable of shifting the balance substantively in her favour; see Rhuppiah [2016] EWCA Civ 803 at [58] to [62]. She cannot be said to be financially independent; see Rhuppiah at [63]-[65].

27. I did not find any merit in the tentative suggestion made only in submissions that the appellant had a family life with her uncle. This was not argued in any of the materials provided for the appeal and was not made out on the evidence provided, the appellant herself and the documents indicating that have not lived together for some years.
28. For these reasons I did not find that the decision of the respondent was a disproportionate interference with the appellant's private life and refused the Article 8 ECHR appeal.

### **Notice of Decision**

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.

The appeal is re-made as refused under Article 8 ECHR.

Signed:   
Upper Tribunal Judge Pitt

Date: 14 May 2018