Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13019/2018

THE IMMIGRATION ACTS

Heard at Manchester **Decision & Reasons Promulgated**
On 24 January 2019 **On 5 February 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

Obiageli Anne Okoltu
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms A Faryl, instructed by MA Consultants
For the respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Williams promulgated 18.9.18, dismissing her appeal against the decision of the Secretary of State, dated 3.6.18, to refuse her application made on 14.12.17 for Leave to Remain in the UK on the basis of the 10 years long residence provisions under paragraph 276B of the Immigration Rules.

2. First-tier Tribunal Judge Mailer granted permission to appeal on 22.10.18, on grounds 2 & 3 only, there being no arguable error of law in the refusal to adjourn in order to enable the appellant to complete what she claimed would be 10 years' lawful residence.

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3. However, Judge Mailer considered it arguable that unfairness may have arisen in the failure of the judge to consider potentially relevant Home Office guidance that an application can be granted “if it is considered 28 days or less before the applicant completes the required qualifying period, provided they meet all the other rules for long residence,” (Long Residence Version 5.0 April 2017).

4. Judge Mailer also considered ground three arguable, on the basis of the appellant’s contention that this was a *de minimis* case or, alternative, that the failure to complete the 10 years by some 14 days at the date of the promulgation was highly relevant to the Article 8 assessment outside the Rules.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Williams should be set aside.

The appellant’s Immigration History

6. It is necessary to first establish the appellant’s immigration history before considering whether she could have met the 10 years long residence requirement under the Rules, and, if not, how close she came.

7. The appellant first came to the UK on 2.10. 2008 with entry clearance as a student. She was subsequently granted further leave as a Tier 1 (Post Study) Migrant and later as a Tier 4 (General) Student Migrant. Her last leave expired on 30.1.13.

8. Within extant leave, on 30.1.13, she applied for Leave to Remain as a Tier 1 Entrepreneur but this was refused on 5.3.14. Her appeal to the First-tier Tribunal was dismissed on 23.8.17. Her application for permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 23.10.17 and by the Upper Tribunal on 1.12.17, so that she became Appeal Rights Exhausted on 1.12.17.

9. On 14.12.17 she made an out of time application for Indefinite Leave to Remain on the basis of 10 years long residence, which was refused in the decision of the respondent (RFR), dated 3.6.18.

10. At the date of the RFR, the appellant had only been in the UK a total of 9 years, 8 months and 1 day. The respondent accepted that pending the outcome of her appeals the appellant had section 3C leave but that expired on 1.12.17, so that the total length of continuous lawful leave was only 9 years, 1 month, and 21 days, as explained in the RFR.

11. It was also accepted that as the out of time application of 14.12.17 was submitted within 14 days of expiry of becoming ARE, paragraph 39E of the Rules applied so as to ignore the period of overstaying in respect of the

requirement under 276B(v) that an applicant must not be in breach of immigration laws.

12. However, as explained in the RFR, the respondent considered that as the application was made out of time she cannot benefit from 3C to extend the period of continuous leave beyond 1.12.17, and thus she did not qualify under the 10 years' long residence provisions of paragraph 276B. The Secretary of State considered that it was not appropriate to apply her discretion and consequently the application was refused under paragraph 276D.

13. The crucial issue in consideration of any error of law in the decision of Judge Williams is whether the appellant's period of continuous lawful residence ended on 1.12.17 or whether it can be regarded as extended further by operation of paragraph 39E and 276B(v). However, even if can be extended further, the continuous lawful residence still had not reached the required 10 years by the date of the RFR on 3.6.18, as explained above.

14. This issue was recently litigated before Mr Justice Sweeney on similar factual circumstances, see R (on the application of Ahmed) v SSHD (para 276B – ten years lawful residence) [2019] UKUT 00010. At the outset of the hearing, I drew this decision to the attention of Ms Faryl and acceded to her request to put the case back in the list to allow her to consider the case.

15. On resumption of the hearing, Ms Faryl submitted that before the First-tier Tribunal the Home Office Presenting Officer Mr Richardson made the concession that the appellant had completed nine years, eight months and one day of lawful residence in the UK on the basis of 39E. This is recorded at [9] of Judge Williams' decision but with respect to both Mr Richardson and Judge Williams, if such a concession was made, it was made in error of law.

16. The definition of "lawful residence" is found in paragraph 276A(b):

"276A. For the purposes of paragraphs 276B to 276D and 276ADE(1)…

(b) "lawful residence" means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."

17. This makes it clear that lawful residence means continuous residence which was pursuant to existing leave to enter or remain; or to temporary admission within s.11 of the 1971 Act where leave to enter or remain was subsequently granted; or to an exemption from immigration control (including where an exemption ceases to apply it is immediately followed by a grant of leave to enter or remain). The appellant had no "lawful residence" after 1.12.17 as she had no existing leave, temporary admission or exemption from immigration control. She was without leave at all from that date.

18. 276B sets out a series of requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the UK. It is clear from the structure of paragraph 276B, read with paragraph 276D, that sub-paragraph (v) represents one of a number of supplementary requirements in addition to the primary requirement under sub-paragraph (i)(a) that the applicant has to have had *at least* 10 years continuous lawful residence in the UK.

19. 276B(v) does not alter the requirement to demonstrate 10 years continuous lawful residence and does not provide an exception to the clear requirement of 276B(i)(a). 276(v) sets out an additional requirement, which does not qualify any other pre-existing requirement in the Immigration Rules, such that even if a person has had at least 10 years continuous lawful residence in the UK, he would not be entitled to indefinite leave to remain if he was in the UK in breach of immigration laws, unless one of the exceptions in sub-paragraph (v) applied. The appellant cannot rely on 39E for any purpose other than meeting the requirement in 276B(v). It does not and cannot extend the period of continuous lawful residence as defined in 276A(b). It follows that any concession made to the contrary in the First-tier Tribunal was in error of law even if erroneously accepted by Judge Williams.

20. Given the definition of "lawful residence" in paragraph 276A(b) and its effect as explained above, Ms Faryl’s submission that the Applicant could meet the first requirement under paragraph 276B(i)(a) cannot succeed. In the circumstances, I reject the argument that for the purposes of paragraph 276B, the appellant should be treated as if she had leave to remain and thus to be in "lawful residence."

21. It is obvious from the foregoing that the appellant could never have met the requirements of 276B at all. To the extent Judge Williams may have erred in finding otherwise, that error is not material to the outcome of dismissal of the appeal.

Ground 3: De Minimis & Relevance to Article 8

22. Whilst I accept that the appellant came within a year of completing the required 10 years’ continuous lawful residence, it was not a shortfall of 14 days as contended for by the appellant, but more than 3 months. There is

nothing to suggest that the Secretary of State should have exercised her discretion in those circumstances.

23. I also accept that the extent to which an applicant might meet the requirements of the Rules is highly relevant to any article 8 proportionality balancing exercise. However, the judgments of the Supreme Court in Hesham Ali (Iraq) and, R (on the applications of Agyarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11, and the subsequent judgment of the Court of Appeal in EEA (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239, show that Article 8 must now be considered in the light of changes made to the legislative scheme by the Immigration Act 2014 - in consequence of which, the appellate scheme is no longer based on the premise that a person may fail under the Immigration Rules, but succeed under Article 8 on appeal. Courts and Tribunals are also obliged to follow sections 117A - 117D (above) - which include the provision that little weight should be given to a private life established by a person at a time when their immigration status is precarious, as was that of the appellant.

24. There is no arguable case that the respondent's decision prejudiced the Applicant's private or family life in a manner sufficiently serious to amount to a breach of Article 8. I am satisfied that the Applicant's Article 8 claim was also bound to fail. Acquiring 9 years and one month’s lawful residence does not bring the appellant anywhere close to meeting the requirements.

25. In all the circumstances, and for the reasons explained above, I find that there is no error of law in the decision of Judge Williams. Any error there may have been was not material to the outcome of a dismissal of the appeal.

Decision

26. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal dismissing the appellant’s appeal stands and the appeal remains dismissed.

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated