

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28835/2012

THE IMMIGRATION ACTS

Heard at Field House
On 10th July 2013

Determination Promulgated
On 19th July 2013

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

ADEOLA ADETONA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Adojutelegan from Natado Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Kinnell made following a hearing at Hatton Cross on 14 February 2013.

Background

2. The Appellant is a citizen of Nigeria born on 24th December 1971. She claims to have entered the UK on 4th March 1998 with a visit visa. On 23rd May 2012 she applied for indefinite leave to remain on the basis of her length of residence in the UK.

3. The Secretary of State refused the application because he was not satisfied that she had been resident for the period claimed. There was no evidence of lawful entry and it was assumed that she was an illegal entrant. The Appellant provided one payslip for February 1999 and a Woolwich Bank statement for February 2000 and a British Telecom bill dated February 2002 and then provided substantial evidence from 2005 to 2012. The Secretary of State considered that she had only been resident in the UK from 2005 and not since 1998 as claimed. She refused the application on the grounds that the Appellant had failed to meet the requirements of paragraph 276D with reference to paragraph 276B(i)(b) of HC 395 as amended.
4. The Secretary of State then considered the Appellant's claim in respect of Article 8 of the ECHR and stated that the Appellant did not meet the requirements of the new Immigration Rules, amended on 9th July 2012.
5. The Judge agreed with the Respondent and said that the Appellant had not proved to the standard of a balance of probabilities that she had been present in the UK for a continuous period of fourteen years. He considered the Appellant's claim to resist removal on the grounds that she had established a private life in the UK but concluded that removal would be proportionate.

The Grounds of Application

6. The Appellant sought permission to appeal, in essence, on the grounds that the Judge had not properly considered all of the documentary evidence, in particular the documents from 1999 and 2000; his reasoning was not within the spirit of the old fourteen year rule. He had not properly considered the witness evidence and should have considered Paragraphs 276DG and 395C.
7. Permission to appeal was refused by Upper Tribunal Judge Martin who stated that the Judge had given detailed reasons for disbelieving the Appellant's claim to have been in the UK for fourteen years. She said that Paragraph 276DG was irrelevant to the appeal since it was introduced after the application was made, and Paragraph 395C was deleted in February 2012 before the Appellant made her application.
8. The Appellant then renewed the application on new grounds. Ground 1 states that the Judge accepted that the old rules applied but the decision was made under the new rules. The appeal therefore should have been allowed as not in accordance with the law.
9. Secondly, the Judge accepted the Respondent's classification of the Appellant as an illegal entrant but that arose solely because of an absence of records to show that she had arrived in the UK on a visit visa on 4th March 1998. The UKBA website states that the onus is on the Respondent to demonstrate that the applicant is a illegal entrant to a higher standard of probabilities, but the Respondent has failed to provide any evidence that the UK immigration services retain records as far back as 1998 which would be a basic prerequisite to a decision that the applicant was an illegal entrant.

10. Finally, the Judge's treatment of the witness evidence was unlawful because the applicant had not been required to demonstrate a break in continuous residence and this was not therefore part of the case that she had to answer. The Judge failed to make clear findings on the witness evidence which was that they had known the applicant throughout the period, from 1998 to date.
11. Permission to appeal was then granted by Upper Tribunal Judge Perkins on 21st May 2013 on all grounds.
12. On 5th June 2013 the Respondent served a reply opposing the appeal arguing that the Appellant was obliged to prove that she entered with leave as claimed and had to demonstrate that she met the requirements of the Rule including continuous residence. The reliance on the UKBA website was a clear mistake since the reference to the burden as being to a higher probability is incorrect.

Submissions

13. Mr Adojutelegan said that he was relying on the second set of grounds. He submitted that the Judge had made a finding that the appeal should be considered under the old Rules because the application was made before July 2012 and consequently the original decision by the Respondent was unlawful. Secondly, according to the UKBA website, the burden to demonstrate unlawful entry lies with the Secretary of State. Finally, whilst the burden was on the Appellant to show continuous residence that was not the same as establishing that she had not been out of the country. He asked that the decision be remade in the Appellant's favour.
14. Mr Tufan accepted that the decision should have been made under the old Rules, because the application was made before July 2012. but stated that any error in the refusal letter was immaterial because it had been corrected by the Judge. The Secretary of State had produced all the information that she could with respect to the Appellant's entry, and even if the burden was on her it had been discharged. So far as ground 3 was concerned, it amounted to a mere disagreement with the decision. The obligation lay with the Appellant to show that she had been in the UK for a continuous period of fourteen years and there was a period of three years from 2002 to 2005 when there was no documentary proof of her being here.

Findings and Conclusions

15. The reasons for refusal letter states that:

"As it is concluded that you have been resident in the UK for only seven years and you have failed to provide satisfactory evidence that you have had at least fourteen years' continuous residence in the UK you have failed to meet the requirement of paragraph 286D with reference to paragraph 276B(i)(b) of HC 395 as amended."

16. It is agreed by all parties that the Rules governing this appeal are those which were in place at the date of application. The passage in the refusal letter quoted above correctly refers to the Rules as they were before amendment in July 2012.
17. The Respondent then considered the Article 8 aspects of the appeal under the Rules as they were at the date of her decision, namely the Rules as amended on 9th July 2012, and she should not have done so. However the Tribunal corrected the error. The Judge did not address the argument that the Respondent had acted unlawfully in considering the Rules as they were at the date of decision, since that argument was not made to him. However, he stated that the fact that the Appellant is not able to meet the requirements of the new Rules with respect to Article 8 is not the end of the matter, and did in fact decide the appeal on what he described as classic Article 8 principles, as he was required to do.
18. With respect to ground 2, it seems that the Respondent has not helped herself by placing on a website, which may be historic, a statement that “the Secretary of State has to show illegal entry (proof on a high balance of probabilities)”. There is no such thing. The standard of proof is the balance of probabilities. However whether the Appellant was an illegal entrant or not is immaterial to the decision. What the Appellant has to show is continuous residence regardless of how she entered.
19. The Judge had before him some evidence that the Appellant was working in February 1999, although the payslip only shows a name and no address, and states that she had earned £5,940 to date. Taken by itself it is capable of showing that the Appellant was working as at that date but it is not possible from that single payslip to deduce that she had entered the UK as she claimed in March 1998, still less, in the absence of any documentary evidence at all for a period of over 3 years, that the Appellant had been continuously resident since that date.
20. Finally, it was open to the Judge to reject the oral evidence from the witness for the reasons which he gave in paragraph 39. The burden lies with the Appellant to establish the case which she is seeking to make. The Judge was neither satisfied that the witness had not met the Appellant as claimed by chance in 1998 nor that he was in a position to give evidence that he had known her during the period when documentary evidence was unavailable.

The Decision

21. The judge’s decision will stand. The Appellant's appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor