



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/01688/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 27th September 2018**

**Decision & Reasons
Promulgated
On 18th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**S E E
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Chikwe, Solicitor

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by S E E against the decision of Judge Shanahan to dismiss her appeal against refusal of her application for leave to remain in the United Kingdom made on grounds of long residence in the UK under paragraph 276B of the Immigration Rules. I extend the anonymity direction that was made by the First-tier Tribunal.
2. The Appellant first entered the United Kingdom, with entry clearance for study, on 8th November 2004. That period of leave expired on 31st October 2007. She then made two further applications to remain as a student

which were refused. On the 10th December 2010, she made yet another application for leave to remain as a student. That too was refused but this was reversed on appeal on the 30th December 2010. Further leave to remain was then granted until 25th June 2012. It seems that at some point thereafter she returned to Nigeria and came back to the United Kingdom having in the meantime been granted entry clearance and leave to remain until 11th December 2012. A further application for leave to remain on human rights grounds was refused on the 14th February 2013. Her appeal against that refusal was allowed on the 28th October 2013 following which she was granted further leave to remain until the 23rd June 2016. She then made another visit to Nigeria. Whilst away, her leave to remain was curtailed with effect from 30th October 2015. She was accordingly refused leave to enter when she returned to the United Kingdom on 28th January 2016. She however made a claim for asylum and was accordingly granted temporary admission. That claim for asylum was refused on 24th February 2016. She appealed that refusal until her rights of appeal were exhausted on 21st November 2016. The application that is the subject of this appeal (based upon 10 years' continuous lawful residence under paragraph 276B) was made on 14th December 2016.

3. Given the gap between the curtailment of her leave to remain on the 30th October 2015 and being granted temporary admission following her asylum claim on 30th January 2016, it is unclear how the Appellant could have succeeded under paragraph 276B even had she brought her application within time (see paragraph 4, below). It may therefore have been somewhat generous for the decisionmaker to concede that she had resided lawfully in the United Kingdom until had she exhausted her right of appeal against refusal of her asylum claim on the 21st November 2016. Be that as it may, the appeal in the First-tier Tribunal proceeded on the basis of that concession (see paragraph 37 of the decision).
4. The original application for leave to remain under paragraph 276B was refused on two bases: (1) the application was made more than fourteen days after it was assumed she had ceased to be in the United Kingdom lawfully (see above) and (2) she had not satisfied the English language requirement. Judge Shanahan made an express finding that the Appellant effectively satisfied the English language requirement (see paragraph 39 of the decision). The main thrust of Mr Chikwe's argument is that the judge fell into error by not treating this finding, together with the decisionmaker's concession that the Appellant had been lawfully in the United Kingdom for ten years, as a powerful if not decisive reason for allowing the appeal under Article 8 of the Human Rights Convention. Before examining the above argument, it is first necessary to return to the factual background of this appeal.
5. The Appellant has a daughter who, for reasons that are not entirely apparent from the judge's decision, has been living in foster care since 2014. It was this breakdown in the Appellant's relationship with her daughter that apparently led to the Respondent's decision to curtail her leave to remain in the UK with effect from the 30th October 2015. Whilst there was some dispute at the hearing before Judge Shanahan as to the

extent to which there had been indirect telephone contact between the Appellant and her daughter, the Appellant nevertheless accepted that she had not had direct face-to-face contact with her daughter since 2016; that is to say, for approximately two years at the date of the hearing before Judge Shanahan.

6. As previously noted, it is Mr Chikwe's principal submission that the judge failed to give due weight to the fact that, excepting the period of three weeks during which the application was overdue, the Appellant met the requirement of long residence for leave to remain under paragraph 276B of the Immigration Rules.
7. The relationship between the Immigration Rules and Article 8 of the Human Rights Convention can be confusing. The confusion arises principally from the Secretary of State's attempt to codify Article 8 jurisprudence within paragraph 276ADE and Appendix FM of the Immigration Rules. It is compounded by the fact that certain other Rules, which are not on the face of them intended to represent the Secretary of State's view of the operation of Article 8, are nevertheless deemed under the Rules to include a claim under Article 8 and thus to attract a right of appeal under Section 82 of the 2002 Act (see Appendix AR). It nevertheless remains the case that a decision taken under the Immigration Rules can only be challenged under section 84 on the ground that the decision is unlawful under section 6 of the Human Rights Act 1988. It is within this framework that a refusal of leave to remain under paragraph 276B falls to be considered. Paragraph 276B predates the introduction of paragraph 276 ADE. It was accordingly never intended to codify the jurisprudence relating to private life under Article 8. The judge was therefore right to take Appendix FM and paragraph 276ADE as his starting point when considering the appellant's right to respect for private and family life rather than, as Mr Chikwe argued, paragraph 276B.
8. The only requirement under paragraph 276ADE which the Appellant may have been able to meet on the facts of this appeal was that contained within sub-paragraphs (vi); that is to say, that she would face "very significant difficulties" to her reintegration in Nigeria. The judge dealt with this at paragraph 46 of the decision:

I have considered paragraph 276ADE. The Appellant cannot meet the age or length of residence requirements under sub-paragraph (iii) to (v). In relation to subparagraph (vi) I take account of the fact the fact that the Appellant has been able to return to Nigeria on a number of occasions and most recently, as far as the evidence shows, in July 2015 to January 2016. She is fully aware of the language and customs and has family there. I am satisfied that there are no very significant obstacles to her re-integration if returned to Nigeria.

There has been no criticism of that analysis in this appeal.

9. The only other basis on which the appellant could have succeeded under the Rules was by showing that she had "a genuine and subsisting parental relationship" with her daughter for the purposes of Section Ex.1 of

Appendix FM. Unsurprisingly, given the facts, the judge concluded that the Appellant did not have such a relationship with her daughter. Mr Chikwe argues that the Appellant's relationship with her daughter was a "peripheral issue". He argues that the focus of the appeal ought instead to have been upon the lawfulness of the curtailment of the Appellant's leave to remain in October 2015. I disagree. The question of the Appellant's relationship with her daughter was critical to the decision that the judge was required to make under Section Ex.1 of Appendix FM of the Rules, as well as to the decision outside the Rules under section 117B(6) of the 2002 Act. The lawfulness of the Respondent's decision to curtail the Appellant's leave to remain in October 2015 due to the failure of that relationship was accordingly irrelevant. That decision was not the subject of this appeal and ought to have been challenged, if at all, by way of Judicial Review upon the Appellant's return to the UK in January 2016.

10. I can therefore find no error of law in the judge's analysis of the facts of this appeal and it follows that this appeal is dismissed.

Notice of Decision

11. The appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 15th October 2018

Deputy Upper Tribunal Judge Kelly