



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

Appeal Number: HU/04000/2016

THE IMMIGRATION ACTS

Heard at Field House

On 15 March 2018

**Decision & Reasons
Promulgated
On 06 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS DORAH BUGOSI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr S Karim, Counsel, instructed by Finsbury Law Solicitors

DECISION AND REASONS

1. I will refer to the parties as they were before the First-tier Tribunal. Therefore the Secretary of State is once more the Respondent and Miss Bugosi is the Appellant.
2. This is a challenge by the Respondent to the decision of First-tier Tribunal Judge Hembrough (the judge), promulgated on 16 June 2017, in which he allowed the Appellant's appeal against the Respondent's decision of 29 January 2016, refusing her human rights claim.

3. The Appellant, a national of Uganda, arrived in the United Kingdom in 2006. By virtue of various grants of leave, and the operation of section 3C of the Immigration Act 1971, by the time the hearing before the judge took place she had clocked up ten years' continuous lawful residence in this country. That being said, the application which led to the Respondent's decision was predicated on a claimed relationship with a British citizen partner and her private life. It was not an application for indefinite leave to remain on the basis of ten years' continuous lawful residence.

The judge's decision

4. It is quite apparent from paragraphs 22 to 25 of his decision that the judge was decidedly unimpressed with the Appellant's credibility. He rejected her claim insofar as the Article 8-related Rules were concerned and concluded at paragraph 25 that, "it is difficult not to conclude that the Appellant's application and this appeal were part of a ruse to keep the clock ticking in the hope that she would accrue ten years' lawful residence before her Section 3C leave ran out."
5. The judge then went on to consider Article 8 in its wider context, having regard to section 117B of the Nationality, Immigration and Asylum Act 2002. He notes the precarious nature of the Appellant's status and found at paragraph 29 that there were no special or compelling circumstances in her case. The focus of her claim, the judge concluded, was solely the length of lawful residence in the United Kingdom. At paragraph 30 it is noted that the Presenting Officer did not challenge the assertion that the Appellant had accrued the relevant period of lawful residence, nor did he assert that the long residence issue was a "new matter" within the meaning of section 85 of the 2002 Act.
6. Based upon submissions made by the Appellant's representative, the judge considered the possibility that the Appellant could have met the requirements of paragraph 276A1 of the Rules (paragraph 276B could not be fully satisfied because the Appellant had not passed a Life in the UK test). Having found that there was no evidence before him which suggested bad conduct and/or character on the Appellant's particular, and noting that she spoke fluent English and appeared to be financially independent, the judge ultimately concluded that the Appellant, by virtue of her ten years' lawful residence in this country, would in effect be entitled to the grant of further leave to remain on the basis of paragraph 276A1. As a consequence of this the judge found that the refusal of the human rights claim and a removal in consequence thereof would be disproportionate.

The grounds of appeal and grant of permission

7. The grounds note that the Appellant had never applied for indefinite leave to remain using the appropriate form and having paid the requisite fee. At paragraph 7 of the grounds the questions of whether the lawful long residence issue constituted a "new matter" or whether the judge was able

to consider a public interest proviso question as a primary decision maker are put to one side. In other words, they are not specifically raised as part of the challenge.

8. Reference is then made to the decision in MU ('statement of additional grounds' - long residence - discretion) Bangladesh [2010] UKUT 442 (IAC). Paragraph 9 of that decision is cited and it is submitted that the judge erred in failing to appreciate that only those who had applied for indefinite leave to remain could potentially benefit from the provisions of paragraph 276A1 of the Rules.
9. Permission to appeal was granted by Resident Judge Appleyard on 28 December 2017.

The hearing before me

10. Mr Duffy reiterated the fact that the Appellant had never actually applied for indefinite leave to remain on the basis of paragraph 276B or for further limited leave to remain on a basis of paragraph 276A1. In addition, and as a result of the failure to make such an application, the Respondent had not been able to exercise her discretion as to any issues relating to character and/or conduct. Mr Duffy submitted that the Appellant could and should have made an application under paragraph 276A1 during the course of the appellate proceedings thus far.
11. Mr Karim submitted that compliance with the Rules was highly relevant to an assessment under Article 8. The Rules constituted the Respondent's view of where the balance lay between the public interest on the one hand and the rights of individuals on the other. The lack of an application on the basis of paragraph 276A1 and the payment of the requisite fee was essentially immaterial. This was in part because the Appellant would have been prevented from making such an application by virtue of section 3(5) of the Immigration Act 1971. The judge was entitled to conclude that the provisions of paragraph 276A1 were met. The judge was also entitled to conclude that there was no evidence to indicate any bad character and/or misconduct on the Appellant's part.
12. Mr Karim submitted that it would be wrong to require the Appellant to make an application under paragraph 276A1 after this appeal were dismissed (if that were the case) because she would then become an overstayer. Her section 3C leave would immediately cease and any disregard of breach of Immigration Rules for what is now a fourteen-day time thereafter was simply on the basis of a grace period permitted by the Rules.
13. In reply Mr Duffy submitted that the judge was not entitled to consider paragraph 276A1 in any way.
14. At the end of the hearing I reserved my decision on error of law.

Decision on error of law

15. After careful consideration I conclude that the judge has not materially erred in law.
16. It was an undisputed fact that the Appellant had by the time of the hearing accrued ten years' lawful residence in the United Kingdom. This significant lawful residence was clearly part and parcel of the Appellant's private life claim and as such it fell to be considered by the judge when considering Article 8 in its wider context. It was a relevant factor notwithstanding the judge's conclusion that the Appellant could not meet Appendix FM or paragraph 276ADE(1)(vi) of the Rules. The lawful residence was clearly not a "new matter", at least it was not regarded as such by the Respondent's representative at the hearing, and the grounds do not take the point. The judge was aware that all the provisions of paragraph 276B could not be met because of the absence of the Life in the UK test.
17. In my view the judge was entitled to consider the particular provisions of paragraph 276A1, at least insofar as they were relevant to the proportionality exercise. It is the case that the Rules represent the framework set out by the Respondent as to where the public interest in the need to maintain effective immigration control is appropriately balanced against the rights of individuals. As with Appendix FM and paragraph 276ADE, compliance with relevant Rules must be highly relevant to an overall assessment as to whether refusal of the human rights claim and removal as a consequence thereof is proportionate or not.
18. The judge addressed his mind to the existence of any public interest factors relating to the Appellant's character and/or conduct. He was entitled to conclude that no such issues arose. There had been no overstaying, criminality, or other significant breaches of immigration laws. The judge was entitled to consider that his adverse credibility findings did not constitute a sufficient basis for finding that there were such adverse public interest issues. He had already noted the precariousness of the Appellant's status and he also addressed his mind to the Appellant's ability to speak English and to maintain herself. These were of course relevant factors under section 117B.
19. The point taken by Mr Duffy as to the inappropriateness of the judge purporting to exercise a discretion reserved to the Respondent is, with respect, misplaced. Whilst it would have had merit in an 'old style' appeal in which there might be an outcome that the Respondent's decision was not otherwise in accordance with the law, this is no longer possible. Judges make their own primary judgments on issues of conduct and character in human rights appeals.
20. In my view there is force in Mr Karim's submission that the Appellant was not able to actually make an application under paragraph 276A1 because of the effect of section 3C(5) of the 1971 Act. She could remedy her situation by that route. Were the Appellant to make an application to the Respondent following the dismissal of this appeal she would do so as an

overstayer because the section 3C leave which she now enjoys would immediately come to an end. This would place her in an invidious situation where she would be liable for detention and for her immigration record to be adversely affected.

21. Taking the judge's decision as a whole, it was open to him to place significance upon the Appellant's lawful long residence and the hypothetical ability to meet all of the requirements of paragraph 276A1 of the Rules. He did not commit the error of purporting to allow the appeal "under the Immigration Rules", but instead considered relevant factors (which included compliance with a Rule) in the context of the job in hand, namely to assess whether a fair balance had been struck by the Respondent's decision.
22. I appreciate that at paragraph 29 the judge stated that he could not see any special or compelling factors in play, but the effect of his assessment of the long residence issue is that this did indeed constitute a strong 'stand-out' factor. As a matter of substance, I do not see any material contradiction here.
23. In light of the above the decision of the First-tier Tribunal shall stand.

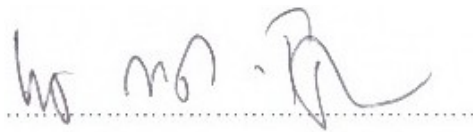
Notice of Decision

The decision of the First-tier Tribunal does not contain material errors of law.

The decision of the First-tier Tribunal shall stand.

The Secretary of State's appeal to the Upper Tribunal is therefore dismissed.

No anonymity direction is made.



Signed

Date: 4 April 2018

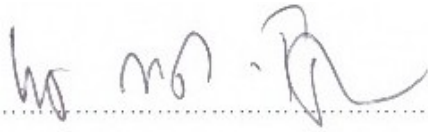
Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. I agree with the view of the First-tier Tribunal that the Appellant has only

succeeded because of a change in her circumstances, namely the accrual of lawful residence.



Signed

Date: 4 April 2018

Deputy Upper Tribunal Judge Norton-Taylor