



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06012/2016

THE IMMIGRATION ACTS

Heard at Rolls Building
On 13 March 2018

Decision & Reasons Promulgated
On 29 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

STELLA OLAJUMOKE OKUSANYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Corban, Solicitor

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is a citizen of Nigeria born on 26 August 1959. The appellant claims she came to the UK in December 1991, having entered illegally. However, in an earlier determination, promulgated in May 2010, the First-tier Tribunal dismissed an appeal brought by the appellant against a decision to refuse to grant her leave to remain on the grounds of her long residence. Having considered the evidence, the Judge found the appellant had failed to show that she had had continuous residence in the UK since 1991, although he accepted she had lived in the UK for a continuous period since 1999. As she had failed to prove 14 years' continuous residence, her

appeal was dismissed under paragraph 276B of the Immigration Rules. The appeal was also dismissed on article 8 grounds.

2. On 7 July 2012 the appellant applied for leave to remain on the basis of her family and private life but this application was refused with no right of appeal. The respondent made another decision on 19 February 2016 again refusing the appellant leave to remain on article 8 grounds. The reasons for refusal letter stated the appellant did not have a partner or dependent children under the age of 18 so as to qualify for consideration under the partner or parent routes provided in Appendix FM of the rules. Consideration was given to paragraph 276ADE of the rules. The appellant was then aged 56 years and five months. She had entered the UK illegally so the date of entry could not be corroborated (sic). The letter noted the findings of the previous Judge that the appellant had resided continuously in the UK since 1999. She had not therefore accrued 20 years so as to qualify under subparagraph (iii).
3. Regarding subparagraph (vi), it was not considered there would be very significant obstacles to the appellant's reintegration to Nigeria upon her removal there. She would have been around the age of 39 when she entered the UK. The appellant had claimed to be a widow and to have no one to return to in Nigeria but records showed that her eldest daughter had returned to Nigeria. Accordingly, it was considered she had close family members. Finally, the letter gave reasons why there were not considered to be exceptional circumstances to warrant a grant of leave outside the rules. It was noted the appellant had been invited to make an asylum claim but had failed to do so. She had breached the rules by using false documents to obtain work. She had accessed NHS treatment to which she was not entitled.
4. The appeal was heard at North Shields on 10 July 2017 by Judge of the First-tier Tribunal Caskie. The appellant was represented at the hearing and gave evidence. The Judge noted the previous determination was his starting point. He noted the appellant had failed, as she had at her previous appeal, to assemble evidence demonstrating her residence in the UK going back to 1991. However, the appellant produced a witness, namely her cousin. The Judge stated in paragraph 19 of his decision that he regarded him as an impressive witness. He found him credible, including when he provided evidence that the appellant had lived with him for approximately seven years after her arrival in the UK. However, the Judge continued, it was necessary for him to reach an overall conclusion as to whether the appellant had discharged the burden on her of establishing she had entered the UK more than 20 years ago. He found that, notwithstanding her cousin's evidence, the burden had not been discharged. He went on to find there were not very significant obstacles to the appellant's reintegration in Nigeria and the decision was proportionate.
5. Permission to appeal was granted by the First-tier Tribunal because it was arguable the Judge made a perverse or irrational finding on a matter that was material to the outcome in finding that the evidence of one of the appellant's witnesses was entirely credible but then going on to find that the facts the witness had given evidence on were not credible because of other evidence.

6. The respondent has filed a rule 24 response opposing the appeal.
7. I heard submissions from the representatives on the question whether the Judge made a material error of law in his decision. It is not necessary to set these out in detail as the central point in issue is very simple and straightforward. Mr Corban's submissions relied on the grounds seeking permission to appeal and Mr Melvin relied on his rule 24 response. In essence, he argued the Judge had considered the evidence in the round and was entitled to conclude as he did.
8. I asked Mr Corban to provide me with a copy of the letter provided to the Judge by the appellant's cousin, Mr Adewale Olufemi Okutuvo, because it was not immediately clear whether his evidence had been the appellant had lived with him for seven years *from 1991* or later. This was not recorded in either paragraph 8 or paragraph 19 of Judge Caskie's decision. Mr Corban could not find it. However, when the decision is read as a whole, it seems reasonably clear that the decision only makes sense if seven years after her arrival referred to seven years from 1991.
9. The crucial passage in Judge Caskie's decision is to be found in paragraph 19 of his decision:

"... I also note the evidence from the Appellant's cousin. I did regard him as an impressive witness. I found him to be credible, including when he provided evidence that his cousin had lived with him for approximately seven years after her arrival in the United Kingdom. He is clearly an intelligent man who works as a journalist, and who provided his evidence in a clear and straightforward manner. It was no surprise to me that [the presenting officer] chose not to cross-examine him, and provide a further opportunity for him to establish his reliability. That was clearly a sensible forensic approach to take to someone who did appear to be a strong witness for the Appellant during the small amount of evidence he gave. However, it is necessary for me to reach an overall conclusion as to whether the Appellant has discharged the burden upon her of establishing that she had entered the United Kingdom more than twenty years ago. No attempt was made to establish that she had arrived after 1991 but more than twenty years ago. I simply did not consider on the balance of probabilities that the Appellant had discharged the onus, which was upon her. Notwithstanding the cousin's evidence. It alone was not enough."
10. The Judge gave other reasons for not finding the appellant's claim credible. She had not adduced documentary evidence of her residence despite the previous Judge describing this as a "glaring omission". Her daughter had not given evidence. Her conduct in using a passport and ILR stamp which did not belong to her undermined her credibility. On the evidence overall it was plainly open to the Judge to find as he did, that the appellant had not established her presence in the UK prior to 1999. He directed himself correctly as to the burden and standard of proof and recognised that he had to look at all the evidence in the round.
11. Plainly, oral evidence alone is capable of establishing the point about the appellant's length of residence even if it is not supported by documentary evidence. The problem with the Judge's manner of expression in paragraph 19 ("I found him

credible ...”) is that it reads as though he made a finding that Mr Okutuvo’s evidence was true. As seen, the oral evidence of the witness was not challenged by cross-examination. No reasons are given for disbelieving because it was untrue or considering it was mistaken. No reasons are given for attaching less weight to it than the matters from which the Judge drew an adverse inference. A finding of credibility and a finding of fact are obviously distinct concepts and it is likely the Judge intended to express himself in terms of the former rather than the latter. However, if an ostensibly credible witness’s evidence is ultimately rejected, the losing party is entitled to know why. I do not consider the Judge’s decision to be adequately explained in this regard and for that reason, with some reluctance, I set it aside.

12. The appellant’s appeal is allowed and the First-tier Tribunal’s decision to dismiss the appeal is set aside.
13. It was not possible to proceed to re-make the decision as the appellant had not anticipated she needed to bring her witnesses. None of the findings made by Judge Caskie are preserved and a hearing de novo is required on the issues of whether the appellant meets the requirements of either paragraph 276ADE(1)(iii) or (vi) or the decision is otherwise unlawful on article 8 grounds. The appeal is therefore remitted to the First-tier Tribunal.

Notice of Decision

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal is remitted to the First-tier Tribunal to make fresh findings of fact.

No anonymity direction is made.

Signed

Date 13 March 2018

Deputy Upper Tribunal Judge Froom