



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09715/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 4 February 2021
*Extempore decision***

**Decision & Reasons Promulgated
On 24 May 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**MRS IQUO NWAJEI
(NO ANONYMITY DIRECTION)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Victor-Mazeli, Counsel instructed by Vanguard Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

This is an appeal against a decision of First-tier Tribunal Judge Lodge promulgated on 25 September 2019. The judge dismissed an appeal brought by the appellant, a citizen of Nigeria born in August 1968, against a decision of the respondent dated 17 May 2019 to refuse her human rights claim.

Factual Background

The appellant arrived in this country in May 2006 as a student. She enjoyed repeated and successive grants of leave to remain until 19 May 2015. The appellant submitted an application for further leave to remain on 20 May 2015 which, in accordance with the rules then in force, was not regarded as being out of time. That application was refused, initially in circumstances which did not attract a right of appeal exercisable from within this country. However, following a challenge by way of judicial review the respondent reconsidered that decision, and took a further decision in country did carry a right of appeal, which the appellant exercised. That appeal was dismissed on 25 October 2016. An application to the Upper Tribunal for permission to appeal was refused on 28 November 2017 with the effect that the appellant became appeal rights exhausted on 12 December 2017.

The timing of the appellant exhausting all avenues of appeal is significant. Between May 2006 and December 2017, the appellant enjoyed leave to remain, whether conferred upon her as a student, or extended by virtue of Section 3C of the Immigration Act 1971 during the currency of her appeal proceedings. She accrued ten years' of continuous, lawful residence. However, upon accruing ten years' continuous lawful residence, the appellant did not submit a further application for leave to remain, for example on the basis of her long (ten years) residence. She did not submit a further application for leave to remain until 29 November 2018, some eleven and a half months after becoming appeal rights exhausted, which was the point at which her leave under section 3C of the Immigration Act 1971 came to an end. That application was refused, and it was that refusal decision which was under challenge before the judge below.

The representations which had accompanied the application for further leave to remain in November 2018 made a range of submissions. At page two, the representations said that the Secretary of State was:

“...invited to consider the long residency Rule in respect of [the appellant's] right to private and family life under Article 8”.

Although the representations did not articulate paragraph 276B of the Immigration Rules, which provides that those with long residence are entitled to indefinite leave to remain, they did address paragraph 276ADE(1)(iv), in relation to which the appellant's daughter, Victoria, had previously succeeded in an appeal before the First-tier Tribunal. The submissions focussed on paragraph 276ADE(vi) of the rules in relation to the appellant, which concerns whether an applicant would face “very significant obstacles” to their integration upon their return.

At the appeal before the First-tier Tribunal, the appellant focussed on the health conditions which she has experienced for a number of years, and for which she is receiving treatment in this country. It is not necessary to outline the details of those conditions or the judge's findings in relation to them, for there are no challenges to the judge's findings that she would receive adequate healthcare in Nigeria. The judge reviewed the medical evidence at [37]:

“Tying these threads together I am left with an appellant who has had a serious medical operation but who is not significantly physically affected at the present time though she requires ongoing reviews. An appellant who is an intelligent, well-educated woman who has not lost her social and cultural ties to her home country. Even if I were to accept that she has no family or friends in Nigeria with her educational accomplishments in the UK I cannot find she would not be able to obtain employment in Nigeria.”

That led to the judge’s operative finding in the decision at [38] that the appellant did not meet paragraph 276ADE(1)(vi).

The judge then continued to analyse proportionality. He directed himself that it was necessary to consider whether the appellant would encounter “unjustifiably harsh consequences amounting to exceptional circumstances” in the event the application were refused. In that respect, at [40] the judge had regard to the fact the rules were not met and, although the appellant had established a private life in this country, it had been established while her immigration status was precarious and, as such, attracted little weight.

In the course of reviewing the appellant’s private life and immigration history, the judge made a number of observations which lie at the heart of this appeal.

At [24] the judge said:

“The appellant has been in the UK since arriving on a student visa in 2004. She has had successive student visas until the 20th May 2015.”

Then at [27]:

“The appellant has spent at least ten years in the UK as a student.”

The judge dismissed the appeal, finding that there were no exceptional circumstances, having regard to the maintenance of effective immigration control and being satisfied that the decision to remove the appellant was proportionate, see [41].

Grounds of appeal

Permission to appeal was granted by First-tier Tribunal Judge Keane on the basis that:

“It was incumbent upon the judge having arrived at findings of fact to consider the applicable Immigration Rules and arguably paragraph 276B fell to be considered. Nowhere in his decision did the judge consider paragraph 276B or arrive at findings of fact which included a finding as to whether the appellant had had at least ten years’ continuous lawful residence in the United Kingdom and the judge arguably failed adequately to direct himself as to the applicable Immigration Rules and to take into account relevant considerations namely the length of the appellant’s continuous lawful residence in the United Kingdom.”

The grounds of appeal which led to that grant of permission were essentially threefold. First, that the judge failed properly to consider paragraph 276B of the Immigration Rules concerning the ten year long residence rule. Secondly, that the judge made contradictory findings of fact. Thirdly, that the judge contaminated the proportionality assessment as a result of having both failed to consider the Immigration Rules and having arrived at what were said to be contradictory findings of fact.

Pursuant to directions issued initially by Upper Tribunal Judge Lane and subsequently Upper Tribunal Judge O'Callaghan, the parties exchanged written submissions with a view to determining the issue on the papers. In the event, it was decided by a judge of this Tribunal that it would not be appropriate for these proceedings to be resolved without a hearing and it was in those circumstances that the matter was heard before me remotely.

Submissions

On behalf of the appellant, Ms Victor-Mazeli, who did not appear below, anchors her primary submissions to what she contends was a failure by the judge to consider the import of paragraph 276B of the Immigration Rules. That is a provision which provides that, upon accruing ten years' continuous lawful residence, provided certain other criteria are satisfied (including an immigration status requirement), an individual will be entitled to indefinite leave to remain on the basis of their long residence. Ms Victor-Mazeli submits that the fact the appellant met the ten year requirement should have formed a central role in the judge's proportionality assessment. Its absence from the judge's proportionality analysis was a significant omission. Even though the appellant's case was not advanced in that way before the First-tier Tribunal, it was incumbent upon the judge actively to have identified that point of his own motion. Ms Victor-Mazeli accepts that this issue had not expressly been raised before the First-tier Tribunal, but submits that references were included to the point in the covering letter accompanying the 30 November 2018 application for leave to remain. She also accepts that the grounds of appeal to the First-tier Tribunal were silent on the potential impact of paragraph 276B, and that the point was not included in the appellant's skeleton argument. The judge's Record of Proceedings, which I have had the benefit of reviewing in the Tribunal's file, records a series of submissions made on behalf of the appellant which do not include the contention that paragraph 276B was satisfied and as such the appeal should be allowed. It is common ground that this point was not made below.

Ms Victor-Mazeli also points to what she contends to be factual errors in the judge's decision. In relation to the timing of the appellant's arrival in this country, the judge said at [24] that she had arrived in the United Kingdom in 2004. Ms Victor-Mazeli submits that that was an error. As set out in the Secretary of State's refusal letter it was not until 28 May 2006 that the appellant was to arrive in this country. As such, it is submitted, the judge's error at [24] in relation to the timing of the appellant's arrival reveals that the judge failed to deploy anxious scrutiny in his consideration of this appeal, thereby revealing an overall flawed approach to the proportionality exercise.

Ms Victor-Mazeli submits that, by highlighting the total length of the appellant's residence, albeit having given the appellant the benefit of two years' residence which she did not in fact accrue, the judge demonstrated that he was clearly mindful of the potential importance and impact of the previous length of the appellant's lawful residence, yet failed to consider those features of her residence when assessing the proportionality of her removal.

On behalf of the Secretary of State, Mr Walker relies on written submissions dated 26 June 2020. There it is submitted on behalf of the Secretary of State that the appellant had been without leave since 12 December 2017. Accordingly, at the point she applied for further leave to remain in late November 2018, she was an overstayer of some vintage. The private life application was therefore significantly out of time, and it could not be said that the appellant met the requirements of the long residence provisions contained in paragraph 276B, for the simple reason that she could not satisfy the immigration status requirements. The submissions highlight the potential availability of rule 39E to certain overstayers, but note that rule 39E provides only a fourteen day maximum grace period, whereas the delay in the appellant's application for leave to remain was nearly twelve months.

The issue of paragraph 276B was not a live issue before the judge and that this is an entirely new point which was being adopted on appeal, submits the Secretary of State.

The remaining submissions of the Secretary of State take issue with contents of the original grounds of appeal, which have since been conceded by those representing the appellant to have been included in error. For example, the original second ground of appeal additionally contended that the judge's finding concerning the appellant having engaged in dishonesty was not open to the judge on the facts. There was no suggestion and there is no suggestion that this appellant has engaged in any form of dishonesty and there are absolutely no suitability-based concerns in relation to her. It was entirely erroneous for the original grounds of appeal to take issue with part of the First-tier Tribunal's decision which simply did not exist, and to the extent that the grounds of appeal relied on that phantom finding of dishonesty the subsequent written submissions advanced on behalf of the appellant rightly disassociated themselves from the original submissions.

Discussion

Addressing Ms Victor-Mazeli's primary ground of appeal, it is necessary to recall that appeals to this Tribunal lie on the basis of errors of law in a decision of the First-tier Tribunal rather than disagreements of fact or weight. When conducting a proportionality assessment, provided a judge has taken into account all relevant factors and has given reasons that were properly open to the judge on the evidence before the First-tier Tribunal, the Upper Tribunal will not interfere.

That leads me to the following preliminary observations about the substance of the grounds of appeal. The most significant difficulty that Ms Victor-Mazeli

faces in seeking to advance her primary case on behalf of the appellant is that it was not an argument that was put to the judge in the First-tier Tribunal. It will rarely be an error for a judge not to consider something that he or she was not invited to consider. In certain circumstances, an error may properly be categorised as being *Robinson* obvious. In such circumstances it may be necessary for a judge to identify an “obvious point” which may favour an applicant, in order to avoid inadvertently placing the United Kingdom in breach of its international obligations under the Human Rights Convention. In my judgment these proceedings are not in that territory.

The term “*Robinson* obvious” has its origins in R v Secretary of State for The Home Department, ex parte Robinson [1998] Q.B. 929, referring to the obligation on a tribunal to consider an “obvious” point of refugee law not raised by an appellant. At 946, Lord Woolf MR said:

“[w]hen we refer to an obvious point we mean a point which has a strong prospect of success if it is argued.”

At its highest, the submission advanced by Ms Victor-Mazeli is that there was a point in the past when the appellant appeared to meet the requirements of paragraph 276B and that, although she did not take action in response to her apparent satisfaction of the criteria at the time, her passing attempt to do so twelve months later means that it would now be disproportionate for her to be removed, even though she did not expressly rely on the point before the First-tier Tribunal.

The premise of Ms Victor-Mazeli’s submissions is flawed. At the time of the hearing before the First-tier Tribunal, the appellant did not meet the requirements of paragraph 276B, nor did she at the time of her application. That is because subparagraph (v) of paragraph 276B provides as follows:

“The applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded.”

Rule 39E of the Immigration Rules provides a number of exceptions to the above immigration status requirement, but none is applicable in this case, and none provides for a grace period extending to anything like the duration that would be necessary for the appellant to be able to have satisfied the immigration status requirements at the time of her (out of time) application or the hearing before the First-tier Tribunal.

Bearing those points in mind, and recalling that this was not a point that was raised before the First-tier Tribunal, the question for my consideration is was it irrational or otherwise perverse, for the judge to fail to take into account the fact that at a point twelve months or so before making her application to the Secretary of State, the applicant appeared to satisfy the requirements for indefinite leave to remain, but by definition could not do so at the time the application was made. In my judgment it was not irrational for the judge to approach the Article 8 proportionality assessment on that basis.

The point was not *Robinson* obvious, as the appellant's failure to meet the immigration status requirements meant that it did not have the required "strong prospect of success".

Not only will this Tribunal be reluctant to interfere with proportionality findings reached by judges of the First-tier Tribunal, especially in circumstances where it is said that the judge fell into error by not considering something they were not invited to consider, but the fundamental premise of Ms Victor-Mazeli's submission is flawed for the reasons set out above. There is no near-miss principle in the Immigration Rules. Although the proportionality assessment conducted by the judge did need to take into account all relevant factors, it is clear, as Ms Victor-Mazeli submits, that the judge was mindful of the total length of the appellant's lawful residence. Indeed, the appellant had been given the benefit by the judge of an additional two years of residence in this country which she did not accrue.

Although it was suggested in the grounds of appeal that the judge fell into error by recording the appellant as having arrived in 2004, that was an error which could only have benefitted the appellant. It meant that, in the eyes of the judge, the appellant's residence had been longer than it was in reality.

The length of the appellant's lawful residence was a factor which the judge took into account, reading the decision as a whole. It was not irrational for the judge not to consider something that was not raised before him, in circumstances when the point is not the silver bullet which Ms Victor-Mazeli contends it is. There may have been good reason for the appellant's representative not to pursue the point before the First-tier Tribunal. The decision of the First-tier Tribunal Judge did not involve the making of an error of law on that account.

Grounds 2 and 3 were parasitic on ground 1. As I have already outlined, ground 2 was based on the false premise that the judge erred in assessment concerning the appellant's alleged dishonesty. Once again, there was no suggestion of dishonesty and the grounds of appeal, which appeared to have been prepared from a template document, fail to engage with the facts of the decision. In relation to the third ground of appeal, to the extent that the proportionality assessment conducted by the judge may be said to have been flawed, for the reasons outlined in relation to my analysis of ground 1, that is not a submission that can be sustained.

While one cannot speculate how this judge or another judge may have resolved the case had the submission been made and expressed in the manner outlined by Ms Victor-Mazeli, what is clear is that on the basis of the submissions advanced to the judge, and pursuant to the Rules as they were in force at that time, the judge did not fall into error when reaching the proportionality assessment that he did. The fact that another judge may have approached matters differently had they been invited to do so does not mean that this judge fell into error.

This appeal is dismissed.

Notice of Decision

The decision of Judge Lodge did not involve the making of an error of law. The appeal is dismissed.

No anonymity direction is made.

Signed *Stephen H Smith*

Date 10 February 2021

Upper Tribunal Judge Stephen Smith