



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

Appeal no: **IA/43931/2014**

**THE IMMIGRATION ACTS**

At **Field House**  
On **07.01.2016**

**Decision & Reasons Promulgated  
On 05.02.2016**

Before:

Upper Tribunal Judge  
**John FREEMAN**

Between:

**Glory Nyong AKPAN**

appellant

and

**Secretary of State for the Home Department**

respondent

Representation:

For the appellant: Shaheen Haji (counsel instructed by Dias)

For the respondent: Mr Keith Norton

**DETERMINATION AND REASONS**

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Anthony Higgins), sitting at Taylor House on 22 April 2015, to dismiss a long residence appeal by a citizen of Nigeria, born 28 December 1973. The basis of the appeal will be clearer when the history is explained.

*NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.*

*(2) persons under 18 are referred to by initials, and must not be further identified.*

- 2. History** On 4 October 2002 the appellant arrived as a student, and she stayed with student leave till 2009, and graduate or post-study work migrant leave till 8 May 2010. On that day she applied for leave to remain as a tier 2 (general) migrant; but that was refused, first on 19 July 2010. Following the first judicial review claim in this case, a consent order was signed on 2 December 2011, under which the respondent undertook to review the decision, resulting in a fresh refusal on 2 October 2012. By 4 October that year the appellant had completed ten years' lawful residence here; however, what she did on 6 November, was to appeal the tier 2 refusal. That appeal was dismissed on 15 February 2013, which became final when she was refused permission to appeal by the Upper Tribunal on 24 April 2013.
- 3.** The next thing the appellant did, on 24 July 2013, was to file a second claim for judicial review, this time of the Upper Tribunal's refusal of permission to appeal. The respondent had failed to reply to a 'pre-action protocol' letter on 16 May, or a follow-up on 18 July; but this was the very last day for a judicial review claim. It met with an acknowledgement letter on 19 August, but no formal acknowledgement of service. However, judicial review, entirely predictably, since this was a *Cart* [2011] UKSC 28 case, was refused on 4 March 2014. The appellant received notice of that decision on 7 April, but did not make her application for indefinite leave to remain till 19 June.
- 4.** That application was refused on 9 October: it was accepted that the appellant had been lawfully here till 24 April 2013, so for the necessary ten years since her arrival. So her application was considered under paragraph 276B (i) (a) of the Rules; but it was refused on the basis that she had waited for more than 28 days before making her application for indefinite leave to remain. Her application was also refused under the 'new Rules', as amended on 9 July 2012; but it has not been suggested that she could have qualified for leave to remain under those. There was a third ground for refusal, to the effect that she could not show the 'exceptional and compelling circumstances' required for a claim under article 8 to succeed outside the Rules, under *MF (Nigeria)* [2013] EWCA Civ 1192 and authorities since then, and I shall come to that in due course.
- 5. Issues** The refusal letter reckoned the appellant's delay in making her claim as 532 days, which was clearly wrong; but that mistake was not adopted by the judge, so it is neither here nor there. The relevant rule dealing with delay was at paragraph 276B (v):

'... the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded'

The effect of that rule was modified by the Immigration Directorates' Instructions [IDIs], which at the relevant time were as follows:

'When refusing an application on the grounds that it was made by an applicant who has overstayed by more than 28 days, you must

consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.

The threshold for what constitutes 'exceptional circumstances' is high, but could include delays resulting from unexpected or unforeseeable causes.'

A number of examples are then given, including serious illness, travel or postal delays, loss of or delay in returning travel documents by the Home Office, or loss of them by theft, fire or flood.

6. The judge set out the appellant's solicitor's submissions on this point at paragraphs 16 - 17, but at paragraph 18 he rejected the argument that the facts set out amounted to exceptional circumstances, for reasons he gave in some detail, also explaining at paragraphs 20 and 21 why they did not show any unlawful failure to depart from the Rules or guidance. However, permission to appeal was given, on this point only, by another first-tier judge, on the basis that he had arguably "... failed to give sufficient weight to the Respondent's alleged tardiness in dealing with the judicial review proceedings". The judge also dismissed the article 8 arguments, to which I shall come later.
7. **Conclusions: paragraph 276B** The second judicial review application in this case, challenging the Upper Tribunal refusal of permission to appeal on 24 April 2013, was doomed to failure from the start by the decision of the Supreme Court in *Cart*, as any competent solicitor in this field could and would have advised the appellant. Under present practice, it would certainly have been refused as totally without merit. It was the leisurely progress of this application, whether or not caused or contributed to by the Home Office, which is said, in terms of the IDIs, to have prevented the appellant from applying within the first 28 days of overstaying.
8. There are a number of answers to this point, each of them conclusive on its own, First, there was nothing whatever to prevent the appellant from applying for indefinite leave to remain as soon as her tier 2 appeal was finally dismissed on 24 April, or at any time before 22 May, when the 28 days ran out. Second, if she chose, no doubt on advice, to start off a judicial review by sending a 'pre-action protocol' letter on 16 May, that was her choice, and not something that prevented her from making an application for indefinite leave to remain at any stage as well as, or instead of that. No doubt in that case the judicial review application might have been met by the answer that she both had and was pursuing an alternative remedy; but, since the judicial review application was hopeless anyway, that hardly matters.
9. Third, no delay after the first 28 days is relevant to the issue raised by the IDIs: no doubt an appellant who was prevented from making an application during that time would need to show that by making one as soon as possible afterwards, but neither of those things applied here. Fourth, the 28 days had very nearly run out by the time the appellant set

the judicial review process in motion with the 'pre-action protocol' letter, so that no later delay by the Home Office made any real difference. Fifth, even if it had, the appellant would have been free to file a judicial review claim 21 days after sending the letter, whether there was any reply or not. Sixth, when the claim was filed, the respondent sent the letter of 19 August on the last day for acknowledging service, and, in view of *Cart*, which it cited, it was a perfectly adequate response to the claim, and any further delay was no doubt the result of pressure of business in the Administrative Court.

**10.** It will already be clear that I consider permission to appeal should never have been given on the ground on which it was based. The judge had very clearly pointed out at paragraph 18 why he did not consider there were exceptional circumstances within the terms of the IDIs, and that should have been that. However, the appellant's grounds also challenged the judge's article 8 decision. Since permission to appeal had not been given on that ground, both the respondent and the Tribunal had a right to expect that some notice should have been given of the appellant's intention still to rely on it. However, since Mr Norton did not object to Miss Haji arguing it, I allowed her to do so.

**11. Conclusions: article 8** The judge rejected the article 8 claim after considering s. 117B of the Nationality, Immigration and Asylum Act 2002 (inserted by the Immigration Act 2014 ). This applies to all cases where the , so far as relevant:

'(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) ...

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious

(6) ...'

- 12.** At paragraph 18, the judge gave the appellant credit for speaking English (2), and for not being a burden on the tax-payer (3), even though she was not financially independent, since she relied on the support of her brother. On the other hand, he pointed out (5), that she had established her private life in this country at a time when her immigration status was precarious. That is challenged at paragraph 39 of the grounds, on the basis that she had been legally here throughout. That challenge not only neglects the division between (4), dealing with persons unlawfully here, and (5), with those whose status is precarious; but the decision in *AM* (s. 117B) [2015] UKUT 260\_, published as recently as 17 April 2015.
- 13.** These were the relevant conclusions in *AM*:
- (3) Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK “unlawfully”, and any period of time during which that person’s immigration status in the UK was merely “precarious”.
  - (4) Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person’s immigration status is “precarious” if their continued presence in the UK will be dependent upon their obtaining a further grant of leave.
- 14.** S. 117B applies to all cases where the public interest is in question, and needs, at least in this Tribunal, to be read in the light of *AM*. That is what in effect the judge did, even though he was sitting on 22 April, and the appellant’s solicitor had, perhaps understandably at that stage, not referred him to that decision, which had come out only a few days earlier. The judge did what the Rules, the IDIs, and the statute required, in a clear well-balanced decision, the reasoning for which took up less space to give than I have needed to show it was right. I am glad in one way that permission to appeal was given, because it has enabled me to say that.

**Appeal dismissed**



(a judge of the Upper Tribunal)