



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/11596/2015

THE IMMIGRATION ACTS

Heard at: Manchester  
On: 30<sup>th</sup> November 2017

Decision & Reasons Promulgated  
On: 8<sup>th</sup> December 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Chibwe Abigail Kapempe  
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant:

Mr Salam, Salam & Co Solicitors

For the Respondent:

Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Zambia born on the 7<sup>th</sup> March 1981. She appeals with permission the decision of the First-tier Tribunal (Judge A. Simmonds) to dismiss her appeal on human rights grounds.
2. On the 13<sup>th</sup> August 2015 the Appellant made an application for Indefinite Leave to Remain on the grounds that she had spent ten years lawfully in the

United Kingdom. The application was refused by the Respondent on the 10<sup>th</sup> November 2015 and the Appellant duly appealed to the First-tier Tribunal.

3. The matter in issue before the First-tier Tribunal was whether there had been gaps in the Appellant's lawful residence such that she was unable to qualify under the operative paragraph of the Immigration Rules, 276B. The accepted chronology, with the periods of overstaying highlighted in italics, is as follows:

1.9.05	Appellant entered the UK with leave to enter as a student
29.8.05	She submitted an in-time application to extend that leave - granted
30.11.07	Appellant's leave expired
4.12.07	<i>Appellant makes an out-of-time application for leave</i>
21.12.07	<i>Application rejected</i>
3.1.08	<i>Appellant makes an out-of-time application for leave</i> <i>[Total period overstaying: 58 days]</i>
28.1.08	Leave granted
27.9.08	Appellant makes an in-time application for further leave
31.10.08	Further leave granted
31.10.09	Appellant's leave expired
4.11.09	<i>Appellant makes an out-of-time application for leave</i>
11.1.10	<i>Refused with a right of appeal</i>
27.1.10	<i>Appellant makes an out-of-time application for leave</i> <i>[Total period overstaying: 135 days]</i>
16.3.10	Leave granted
14.2.11	Appellant makes an in-time application for further leave-granted
1.3.13	Appellant makes an in-time application for further leave
3.4.15	Leave expired (following curtailment)
25.4.15	<i>Appellant makes an out-of-time application for leave</i>
6.9.16	Leave granted
13.8.15	Appellant makes an in-time application for further leave

4. In its consideration of this chronology the First-tier Tribunal was satisfied that the periods of overstaying were such that the rule, which requires continuous lawful residence, could not be satisfied. Submissions made by the Appellant's representative to the contrary were rejected and the appeal was dismissed.

5. Permission was granted by Deputy Upper Tribunal Judge Mandalia on the 7<sup>th</sup> August 2017, who considered it arguable that the First-tier Tribunal applied the wrong version of the rule. The crux of the Appellant's case is that the version of the 'long residence' rule, paragraph 276B, that applied at the time that she made her application – and by virtue of transitional provisions continued to apply in her case – was materially different from the later version that was applied by the First-tier Tribunal.

### **Discussion and Findings**

6. At paragraph 10 of the determination the First-tier Tribunal set out paragraph 276B of HC1994, this being the version of the rule in force at the date of the appeal on the 30<sup>th</sup> November 2016. It was accepted that the Appellant met all of the requirements save those set out at sub-paragraph (i) read with (iii) and (v):

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

...

(iii) the applicant does not fall for refusal under the general grounds for refusal.

...

(v) 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. Any previous period of overstaying between periods of leave will also be disregarded where –

(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

7. Applying that rule, which had been amended as of the 24<sup>th</sup> November 2016, the Tribunal was not satisfied that the Appellant could meet the requirements of 276B(i)(a) because her periods of overstaying were not such that they could be disregarded. Consideration is given to whether the factors in paragraph 39E come into play and it is concluded that they do not (for the purpose of this decision I need not elaborate on this point). The Tribunal noted the representative's submission that the 'clock stopped' every time that the Appellant made an application, but declined to take that approach since it had not been referred to any legal authority on the point.

8. On appeal the point made by Mr Salam, considered arguable by Judge Mandalia and agreed as correct by Mr Harrison, is that the legal authority that the Tribunal was looking for derived from the wording of the rule as it

stood at the date that the Appellant made her application, and at the date of decision. The version of the rule contained in HC1039 read, where relevant, as follows:

(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, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days **and any period of overstaying pending the determination of an application made within that 28 day period.**

9. If this was the rule that had been applied, the three periods of overstaying highlighted above in italics would all have been disregarded; on each occasion the Appellant made her application within 28 days and the remaining periods of overstaying were “pending determination of an application”. Before me it was agreed that this version *was* the operative rule, by virtue of the transitional provisions set out in HC667. Following a schedule of sections and commencement dates, none of which apply here, that statutory instrument reads:

The other changes set out in this statement shall take effect from 24 November 2016. However, in relation to those changes, if an application has been made for entry clearance or leave to enter or remain or administrative review before 24 November 2016, **the application will be decided in accordance with the Immigration Rules in force on 23 November 2016.**

10. The parties are now in agreement that under the terms of the Immigration Rules in force on the 23<sup>rd</sup> November 2016 the Appellant would succeed: see above. Since her application was made before the 24<sup>th</sup> November 2016 the transitional provisions in HC667 applied, the old version of the rule was the operative one, and her appeal should have been allowed.
11. I therefore substitute the decision of the First-tier Tribunal, setting it aside for legal misdirection and finding that the Appellant meets the requirements of the operative version of paragraph 276B. Since the Respondent accepts this to be a ‘human rights decision’ it follows that the appeal must be allowed.

### **Decisions**

12. The decision of the First-tier Tribunal contains a material error of law and it is set aside.
13. I remake the decision by allowing the appeal on human rights grounds.
14. There is no order for anonymity.

Upper Tribunal Judge Bruce  
24<sup>th</sup> November 2017