



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/24778/2016

**THE IMMIGRATION ACTS**

Heard at Newport  
On 9 November 2018

Decision & Reasons Promulgated  
On 30 November 2018

Before

MR CMG OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE GRUBB

Between

IFEANYI [C]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr P Richardson instructed by Liberty Legal Solicitors

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, a citizen of Nigeria who was born on 31 March 1988, appeals against a decision of the First-tier Tribunal (Judge S Meah) dismissing the appellant's appeal under Art 8 of the ECHR against a decision of the Secretary of State dated 19 October 2016 refusing his application for Indefinite Leave to Remain ("ILR") under para 276B of the Immigration Rules (HC 395 (as amended)).

## **Background**

2. The appellant entered the United Kingdom on 23 September 2006 with entry clearance as a student valid until 31 August 2007. On 30 August 2007, he applied for leave to remain as a student which was subsequently granted until 31 October 2010. The appellant's leave then expired.
3. On 5 January 2011, the appellant applied for leave to remain as a Tier 4 (General) Student which was granted on 10 February 2011 until 15 October 2012.
4. On 13 October 2012, the appellant applied for further leave to remain as a Tier 4 (General) Student which was granted until 1 February 2015.
5. On 8 October 2014, however, the appellant's leave was curtailed until 12 December 2014.
6. On 12 December 2014, the appellant made an in-time application for further leave to remain based upon Art 8. This application was refused on 31 March 2015.
7. On 10 April 2015, the appellant appealed to the First-tier Tribunal and that appeal was dismissed on 4 April 2016. On 18 April 2016, the appellant sought permission to appeal to the Upper Tribunal but permission was refused by the First-tier Tribunal on 6 October 2016. The appellant did not, thereafter, renew his application to the Upper Tribunal and he became appeal rights exhausted, as a consequence, on 20 October 2016.
8. However, on 12 October 2016, the appellant made the application for ILR based upon ten years' lawful residence under para 276B of the Immigration Rules which is the subject of this appeal following the refusal of that application on 19 October 2016.

## **The Judge's Decision**

9. Before Judge Meah, it was accepted that the appellant could not succeed under para 276B. He could not establish a period of ten years' continuous lawful residence since he entered the UK on 23 September 2006.
10. That is, undoubtedly, correct and was common ground between the parties before us. There is a 'gap' in the appellant's leave following the expiry of his leave as a student on 31 October 2010 and the subsequent grant of leave to the appellant as a Tier 4 Student on 10 February 2011. That gap, between 1 November 2010 and 10 February 2011 is 101 days. In his decision letter, the respondent stated that the gap was between 1 November 2010 and 5 January 2011 and was, therefore, a gap of 66 days. However, since the appellant was only granted leave, on the basis of that application, from 10 February 2011, the gap in his lawful residence extended to that latter date, there being no backdating of the grant of leave to the date of application.
11. It was also common ground before us that para 276B(v), so far as relevant to this appeal, did not apply. It would have allowed a period of overstaying to be "disregarded" if the appellant's application (made on 5 January 2011) had been made "within 28 days of the expiry of [his] leave". Of course, it was not as his leave had expired on 31 October 2010.

12. Before Judge Meah, relying upon Art 8 outside the Rules, it was contended on the appellant's behalf that in assessing proportionality it was relevant that the respondent had previously condoned the appellant's period of overstaying by granting him leave from 10 February 2011. In particular, discretion had been exercised in his favour based upon his personal circumstances at that time, namely that his grandfather in Nigeria had been kidnapped and murdered with consequent impact upon the appellant.
13. The judge dealt with this argument and rejected it at paras 29-33 of his decision as follows:
  - "29. Mr Hussain made much of a previous grant of leave to the appellant by the respondent from 10 February 2011 until 15 October 2012. This was granted to him despite him being an overstayer at the time of that application by over 2 months. The appellant had stated that his grandfather in Nigeria, to whom he was very close, had been kidnapped and murdered around that time and this affected him causing him stress, and resulted in him not doing well in his exams.
  30. This was put to the respondent in that application, and a subject access request by those acting for the appellant revealed that this was considered by the respondent when she decided to grant that leave to the appellant. It appears discretion was exercised in the appellant's favour, despite him having overstayed by over two months by the time of that application, when his leave was granted to him, which Mr Hossain stated should be considered when assessing the break in the lawful leave for the purposes of the application made by the appellant under Rule 276B. This was despite Mr Hossain already conceding that the Rules had not in fact been met.
  31. I surmised that what he meant was that this should be a factor to be considered in the wider assessment of proportionality rather than it being a submission to support a contention that the Rules were satisfied, which they clearly were not in this instance.
  32. Accordingly, in considering this in the context of my consideration of the appellant's claim under the wider jurisprudential assessment being carried out here, I do not find the fact the appellant previously benefited from an exercise of discretion by the respondent in his favour when he was granted, that leave, creates some kind of legitimate expectation that discretion should therefore have been exercised when the appellant's Indefinite Leave to Remain application was considered over 5.5 years later, and specifically that that discretion should have entailed the respondent disregarding the fact that he had a major gap exceeding 28 days breaking his lawful continuous leave for the purposes of Rule 276B(v).
  33. I find no merit in this line of contention whatsoever despite Mr Hossain seemingly being at pains to persuade me that there was merit in that which he was attempting to advance on behalf of the appellant. In other words, just because discretion was exercised previously based on what appear to have been a particular set of circumstances does not give rise to any expectation that a similar discretion will be exercised in the future, over 5 years later, in an application which is being made on an entirely different premise."

14. The judge went on to find that the appellant could not establish that there were “very significant obstacles” to his integration in Nigeria under para 276ADE(1)(vi) of the Immigration Rules or that his removal would be a disproportionate interference with his private and family life.
15. Accordingly, he dismissed the appellant’s appeal.

### **Discussion**

16. In his skeleton argument and oral submissions, Mr Richardson on behalf of the appellant raised a number of points which, he submitted, demonstrated that the judge had erred in law in dismissing the appellant’s appeal under Art 8 outside the Rules. He accepted that the appellant could not succeed under para 276B in establishing 10 years’ continuous lawful residence and he did not suggest that the judge’s adverse finding in respect of para 276ADE(1)(vi) was flawed.
17. Instead, Mr Richardson relied upon the fact that the Secretary of State had, in his submission, condoned the appellant’s period of overstaying between 1 November 2010 and 10 February 2011 when granting him leave to remain as a Tier 4 Student on 10 February 2011. He relied upon the GCID Case Records, obtained by the appellant as a result of a Subject Access Request, which noted:

“APS grandfather had been kidnapped and murdered last year which caused a lot of stress and meant AP did not do as well in the exams. He has appealed to UNIV and is now continuing the course”.
18. Mr Richardson sought to rely upon guidance (valid from 28 September 2012) (“applications from overstayers (non-family routes)”) which permitted discretion to be exercised in “exceptional circumstances” even where the period of overstaying exceeded 28 days and no application had been made for further leave (which was subsequently granted) within that time. Mr Richardson acknowledged that this policy post-dated the grant of leave to the appellant on 10 February 2011 but, he submitted, he was unable to find the relevant archive policy for that date but it was reasonable to presume it existed. He submitted that the terms of that policy reflected the respondent’s policy applicable to the appellant in assessing his “long residence” claim which also allowed for a period of more than 28 days overstaying to be condoned in “exceptional circumstances”. The former policy referred to: “serious illness (supported by appropriate medical documentation)”. The latter policy referred to: “serious illness which meant the applicant or their representative was not able to submit the application in time – this must be supported by appropriate medical documentation”.
19. Mr Richardson submitted that neither the respondent nor the judge took into account the “exceptional circumstances” which had led to the respondent granting the appellant leave on 10 February 2011 despite his period of overstaying when assessing whether, outside the Rules, it was established that his removal was not proportionate. Mr Richardson relied upon the decision in SF and Others (guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) for the proposition that consistent compliance with guidance was relevant in a human rights claim (see [10]-[12]).

20. We do not accept Mr Richardson's submissions for a number of reasons.
21. First, as we pointed out to Mr Richardson during the course of his submissions, the premise upon which they are based is flawed. The policy upon which he placed reliance as the basis on which the Secretary of State "condoned" the 101 days of overstaying in 2010/2011 post-dates the grant of leave to the appellant on 10 February 2011. There is no reason to believe that that policy existed, and was applied, in February 2011. Indeed, there is every reason to believe no such policy existed at the time of the decision in February 2011.
22. At that time, the relevant Tier 4 (General) Student rule relevant to the grant of leave to remain was found in para 245ZX. That did not require an applicant to have existing leave and, therefore, did not exclude a grant of leave to a person who was an overstayer. There was no equivalent of para 245ZX(m) which was inserted from 1 October 2012 by HC 194. That provided, and still today provides:

"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".

There was, therefore, no need for a policy in February 2011 which dealt explicitly with overstayers and, in particular, those who had overstayed in excess of 28 days.

23. Mr Richardson was unable to identify the terms of any such policy in force in February 2011 and, in our judgment, the reason for that is that none existed. The respondent's decision in February 2011 did not, therefore, involve the exercise of discretion to condone the applicant's period of overstaying since 1 November 2010: there was nothing requiring condonation for the purposes of the Rules. At best, the GCID records simply note the appellant's circumstances at the time of that decision. The judge cannot, therefore, be legally faulted in failing to take into account that the respondent had previously "condoned" the appellant's period of overstaying.
24. Secondly, even having regard to the respondent's present guidance in dealing with long residence applications where there is a period in excess of 28 days overstaying, it does not appear that this policy was raised before the judge. The whole of the argument, in relation to the period of overstaying, focused on the importance of the respondent's previous condonation of it.
25. Mr Richardson took us to the evidence that was, nevertheless, before the judge in the appellant's bundle at para 7 of the appellant's witness statement (page 20), and at pages 30-44 attesting to his grandfather's death. In particular, he referred us to a letter from Dr Okocha, a consultant psychiatrist dated 25 September 2012 which refers to a referral to him of the appellant on 18 September 2012 and which notes that he

"presented with symptoms of depressive illness that dates back to well over a year and appear to follow the murder of his grandfather with whom he had a close relationship. The depression was characterised by low mood and tearfulness, loss of appetite, anergia, poor concentration

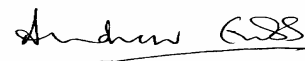
and social withdrawal and isolation. There is no doubt that his study at University was affected by it".

26. As we have said, the appellant's legal representative did not rely upon this evidence before the judge as falling within the respondent's "long residence" policy to which Mr Richardson has referred us. It is difficult, in those circumstances, to criticise the judge for failing to deal with it in a way which was not relied upon before him. But, in any event, we do not consider that that evidence would, taken at its highest, justify the condonation of the 101 days during which the appellant overstayed.
27. The respondent's policy, linking it to para 276B(v), relates to there being "exceptional circumstances" which prevented the applicant from applying within the first 28 days of overstaying. If an application was made within the first 28 days, it would, of course, be "disregarded" because of para 276B(v). Here, the appellant's grandfather was kidnapped and murdered in May 2009. The appellant's leave expired on 31 October 2010, some seventeen months later. The evidence to which we have referred does not, in our judgment, warrant a conclusion that there were "exceptional circumstances" which prevented him making an application for further leave before the end of November 2010. Even if the judge had, in Mr Richardson's words looked at Art 8 through "the prism of the policy", the evidence could not have led him to conclude that there were "exceptional circumstances" to warrant condoning the period of the appellant's overstaying. It would not, in our judgment, have led the judge to find that the appellant's removal was disproportionate.
28. In our judgment, the judge reached a wholly sustainable finding that there was no basis upon which the appellant could succeed either under para 276B or para 276ADE(1) and that there was anything in the appellant's circumstances which were sufficiently compelling to outweigh the public interest such that his removal would be disproportionate.

### Decision

29. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of an error of law. That decision stands.
30. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb  
Judge of the Upper Tribunal

27 November 2018

**TO THE RESPONDENT**  
**FEE AWARD**

The appellant's appeal was dismissed and therefore there can be no fee award.

Signed

A handwritten signature in black ink that reads "Andrew Grubb". The signature is written in a cursive style and is underlined.

A Grubb  
Judge of the Upper Tribunal

27 November 2018