



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04488/2015

THE IMMIGRATION ACTS

Heard at: Birmingham
On: 7th March 2018

Decision and Reasons Promulgated
On 16th April 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

EO
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Howard, Fountain Solicitors
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Nigeria. She appealed to this Tribunal, with permission, against the decision of the First-tier Tribunal (Judge J.W.H Law) to dismiss her human rights appeal, at that stage still linked to the appeals of her husband and two minor children (IA/04499/2015, IA/04508/2015 and IA/04483/2015).

2. In a written decision dated the 6th July 2017 I found that the First-tier Tribunal had erred in its approach to s117B(6) of the Nationality, Immigration and Asylum Act 2002 and to that limited extent set the decision aside. I upheld the reasoning of the First-tier Tribunal when it rejected the Appellant's case under 276ADE(1)(vi): she had not demonstrated that there were "very significant obstacles to her integration" in Nigeria and there was no error in the First-tier Tribunal's approach to that issue.
3. The linked appeals were adjourned for re-making. In my 'error of law' decision I noted that the First-tier Tribunal had made unchallenged findings of fact in respect of the length of time that the Appellant and her husband had spent in the UK. It was accepted that in both cases, the appellant had entered the UK sometime during 1997 and had remained here continuously ever since. In the case of the Appellant's husband 'AMMO', there was a precise date of entry: the 10th May 1997. It was no doubt for that reason that the directions I gave in July of last year focused on his position:

"I note the unchallenged finding of fact by the First-tier Tribunal that both adults have lived in this country since 1997. [The Appellant's husband AMMO] gives his precise date of arrival as 10th May 1997. It appears to me that absent any 'suitability' issues he *prima facie* now qualifies for leave to remain under the terms of paragraph 276ADE(1)(iii) of the rules:

"(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment);"

I direct that the Respondent now give urgent consideration to whether AMMO should now be given leave to remain pursuant to this provision, taking into account the terms of paragraph 276A0 of the Rules:

276A0. For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:

(i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;

(ii) where a migrant is in immigration detention. A migrant in immigration detention or their representative must submit any application or claim raising Article 8 to a prison officer, a prisoner custody officer, a detainee custody officer or a member of Home Office staff at the migrant's place of detention; or

(iii) in an appeal (subject to the consent of the Secretary of State where applicable).

The Respondent is to advise the Tribunal in writing no later than 4pm on the **4th August 2017** as to whether leave to remain is to be granted to AMMO on the basis of the long residence provision currently in the rules at paragraph 276ADE(1)(iii).

The Appellants will have until 4pm on the **11th August 2017** to advise whether they wish to pursue this appeal.

Liberty to apply.

Subject to the responses to my directions the matter will be set down for rehearing in Birmingham on the first available date in September 2017.

4. Regrettably that timetable was unduly optimistic on my part, since for reasons unknown the Tribunal administration did not send my decision to the parties until the 15th August 2017 and the appeal was not re-listed until the 7th March 2018.
5. The Secretary of State's response to my directions was set out in an email from SPO Mr Mills on the 13th September 2017. The contents of that email can be summarised thus:
 - i) The Respondent does not accept that either of the adult Appellants should now be given leave to remain in light of paragraph 276ADE(1)(iii);
 - ii) The rule requires the applicant to have accrued 20 years residence *at the date of application*. Notwithstanding what 276AO might suggest to the contrary, this requirement of the rule must be complied with. If the adult Appellants in this case wish to avail themselves of the 'long residence' provision in 276ADE(1)(iii) they need to make fresh applications;
 - iii) In any case AMMO may not be granted leave to remain under that provision because he has two criminal convictions such that the 'suitability' requirements under paragraph 276ADE(1)(i) would be engaged.

Sub-section (i) requires that the applicant "does not fall for refusal under any of the grounds in section S-LTR 1.2 to S-LTR 2.3 and S-LTR 3.1".

S-LTR 1.6 states that an application will be refused where:

"The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within the paragraphs S-LTR 1.3 to 1.5) character of associations, or other reasons, make it undesirable to allow them to remain in the UK"

AMMO was convicted on the 9th April 2010 of an offence under the Fraud Act 2006 and received a sentence of 6 months in prison. On the 27th March 2012 he was convicted of an offence under the Identity Documents Act 2010 and received a further custodial sentence of 6 months in prison.

- iv) Mr Mills was of the view that these convictions, coupled with AMMO's "very poor immigration history", would mean that leave under 276ADE(1)(iii) may well be refused.
6. This response from Mr Mills put the Appellant's representative Mr Howard in some difficulty. He had hitherto been under the impression that the Respondent accepted that the 'suitability' requirements were met. He had not had an opportunity to take instructions on the alleged criminality of the Appellant's husband. For that reason I decided to adjourn the proceedings in respect of AMMO and the children, since the criminal convictions had a relevance not just to his prospects of success under the Rules, but to the question of whether it would be 'reasonable' to expect the children to leave the UK. This would give Mr Howard an opportunity to address this new forensic challenge.
7. In respect of the Appellant, however, I was not satisfied that there was any further need to adjourn her case. At the date of the hearing she had, on the unchallenged findings made by the First-tier Tribunal, lived continuously in the UK for more than twenty years. The Respondent had expressly accepted, in her letter of the 13th January 2015 that the 'suitability requirements' of the Rules were met. The Appellant therefore *prima facie* met the requirements of paragraph 276ADE(1)(iii).
8. Mr Mills accepted that as a matter of fact that was so, but urged me to consider the temporal requirement contained in the opening section of the rule:
- 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that **at the date of application**, the applicant:
- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
 - (ii) has made a valid application for leave to remain on the grounds of private life in the UK; an
 - (iii) **has lived continuously in the UK for at least 20 years (discounting any period of imprisonment)**
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9. Since the Appellant had made her application for leave to remain on human rights grounds in February 2012 she could not, at the date of application, have demonstrated 20 years residence. It was the Secretary of State's position that in order to benefit from this rule, the Appellant would need to make a new application.

Discussion and Findings

10. There is, as far as I am aware, no material difference to the Appellant whether her appeal is allowed with reference to paragraph 276ADE(1)(iii) or on Article 8 grounds 'outside of the rules'. Either way, confirmed Mr Mills, she would be on the 'ten year route to settlement'. I am however satisfied that the appeal could be allowed either way.
11. As I indicated in my earlier directions it seems to me that under the terms of paragraph 276AO it is open to the Tribunal, on appeal, to dispense with the requirement that a formal application is made:

276AO. For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:

- (i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;
- (ii) where a migrant is in immigration detention. A migrant in immigration detention or their representative must submit any application or claim raising Article 8 to a prison officer, a prisoner custody officer, a detainee custody officer or a member of Home Office staff at the migrant's place of detention; or
- (iii) in an appeal (subject to the consent of the Secretary of State where applicable).**

12. Mr Mills argued forcefully that this provision did not apply to the temporal requirement in the opening section of paragraph 276ADE(1); rather it only had the effect of removing the formal requirement at sub-paragraph (ii). What the point of that might be it is difficult to discern. It would mean that 276AO expressly removes the requirement to make an application in the context of 276ADE(1)(ii) but implicitly preserves that requirement in respect of the Rule overall. If an Article 8 claim such as this is only being 'raised' in the context of an appeal it would ordinarily be the case that it could not have been 'raised' in the earlier application. If Mr Mills is correct it is difficult to see in what circumstances rule 276AO might have any utility at all.
13. The more straightforward way of interpreting the provision is that where on appeal the case has developed so that a *prima facie* Article 8 claim is now made out, that is a matter that can be taken into consideration. That is consistent with the 'one-stop' approach to the appellate system. It is also consistent with the wording in the amended version of s85 of the Nationality, Immigration and Asylum Act 2002:

Section 85

- (1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

- (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 the decision appealed against.
- (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
- (4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of decision.
- (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
- (6) A matter is a “new matter” if –
 - (a) it constitutes a ground of appeal of a kind listed in section 84, and
 - (b) the Secretary of State has not previously considered the matter in the context of –
 - (i) the decision mentioned in section 82(1), or
 - (ii) a statement made by the appellant under section 120.

14. If the words in parenthesis at paragraph 276AO(iii) “subject to the consent of the Secretary of State where applicable” are read in conjunction with section 85(5) the scheme becomes clear. The Tribunal is able to approach human rights appeals in a holistic and pragmatic fashion, saving the need for the multiple applications, considerations and possible appeals that the ‘one-stop’ procedure was designed to avoid, whilst the Secretary of State is protected from the unanticipated appellate ambush.

15. The question therefore arises: is the fact that the Appellant has now accrued her twenty years a ‘new matter’ such that the consent of the Secretary of State is required before it can be considered? In Mahmud (s85 NIAA 2002 – ‘new matters’) [2017] UKUT 488 (IAC) the Tribunal gave guidance on what might be considered a ‘new matter’ under the statute, and found itself broadly in agreement with the Respondent’s stated policy position:

1. *Whether something is or is not a ‘new matter’ goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.*
2. *A ‘new matter’ is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.*
3. *In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually*

distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.

16. Mr Mills very realistically conceded that it would be difficult, in these circumstances, to argue that the additional time accrued could amount to a 'new matter'. The original claim was on the basis of the 'long residence' provisions; that matter has now been considered twice by the Secretary of State; the long residence was now a bit longer; that did not amount to a new factual matrix.
17. Drawing all of this together I find that paragraph 276AO enables me to consider, in the context of this appeal, whether the Appellant qualifies for leave under 276ADE(1). On the facts as found by the First-tier Tribunal, she plainly does. I allow her appeal on that basis.
18. In the alternative I allow her appeal on Article 8 grounds. If I am wrong about the operation on 276AO the fact that the substantive requirements of 276ADE(1) are today met effectively removes the public interest in maintaining the refusal. The Appellant qualifies for leave to remain under the Rules and so the public interest in maintaining immigration control expressly protected at s117B(1) of the 2002 Act cannot logically weigh against her.

Decision

19. The appeal is allowed on human rights grounds.

Upper Tribunal Judge Bruce
10th April 2018