



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16058/2018

THE IMMIGRATION ACTS

Heard at Field House
On 19th July 2019

Decision & Reasons Promulgated
On 25th July 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

MRS SHARON NSANGI
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr A Burnett, Counsel, instructed by Arlington Crown Solicitors

For the respondent: Mr Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Uganda, born on 29 August 1982. She came to the United Kingdom on 8 September 2008 with leave as a student. She obtained two further periods of further leave on this basis until 30 January 2013. She was then granted leave as the spouse of Mr Steven Lukwago, a British citizen

until 8th February 2015. Further leave on this basis was again granted until 7 May 2017.

2. On 4 April 2017 she applied for indefinite leave to remain on the basis of her marriage. This was considered under paragraph 287(a) of Part 8 of the immigration rules. Paragraph 287 (a)(ii) requires an applicant to demonstrate they are still married to their spouse and that the relationship is subsisting. As part of her application she was asked to provide documents spread out over two years to demonstrate this. She submitted some documentation but the respondent referred to gaps in the evidence between May 2015 and July 2016 and September 2016 to December 2016. Furthermore, checks suggested that the parties had not been living together since 2014. Consequently her application was refused on 10 July 2016.
3. A further ground for refusal was based upon a failure to demonstrate adequate maintenance (para 287(a)(v)). Regard was had to the appellant's private life and paragraph 276 ADE(i) but the appellant had not spent the necessary time here and no issues in relation to reintegration were identified. No other basis for the grant of leave was seen.
4. The grounds of appeal contend that the marriage was subsisting albeit there had been a difficult period in the marriage. The appellant stated she had been earning £20,000 per year and so maintenance was not an issue.

The First tier Tribunal

5. The appellant's appeal was heard by First-tier Tribunal Judge Buckwell at Hatton Cross on 5 March 2019. The decision had originally been certified and this was subsequently removed. The appellant was represented by Mr A Burnett, Counsel, as he does now. In a decision promulgated on 27 March 2019 her appeal was dismissed.
6. The appellant's husband did not attend the appeal hearing. The appellant stated that she cohabited with her future husband in November 2011 and that they married were married on 30 December 2011. She described the relationship as being on and off and said that her husband was involved with drugs and alcohol and had consequent criminal convictions. In cross-examination she accepted that she and her husband had not lived together all the time and there was domestic abuse. She also had been unable to produce relevant P60's for 2016/17 and 2017/18. She had no documentation about her husband's income.
7. In submissions the presenting officer continued to rely upon the refusal decision. In response, the appellant's representative referred to an earlier application for indefinite leave to remain in which he said the requirements were met but for the absence of a Life in the UK test.

8. Paragraph 88 of the decision records the appellant's representative in submissions making the point that the appellant has always had leave to remain and there had been a 10 year period of lawful residence. Reference was made to the decision of OA and Others (human rights; new matter; s.120) Nigeria [2019] UK UT 00065.
9. First-tier Tribunal Judge Buckwell rejected the argument that part performance of the immigration rules in an earlier application could be carried forward to the present. The judge also found at the evidence established the appellant and her husband had not been living together for a significant period and found that the marriage had not been subsisting for a number of years. Consequently, the judge found that the immigration rules were not met and she was not entitled to indefinite leave to remain as such.
10. At paragraph 100 the judge went on to consider the alternative argument that the appellant should be entitled to indefinite leave to remain on the basis of her lawful presence for 10 years. The judge made the point that her student leave commenced on 27 August 2008 and the last period of leave granted to her expired on 7 May 2017. The judge found that she did not have leave for at least 10 years. No other basis was seen for allowing the appeal.

The Upper Tribunal

11. Permission to appeal was sought on the basis, inter alia, the judge materially erred in refusing the grant of leave on the basis of 10 years lawful residence. This was on the basis that the judge took the expiry of her last grant of leave on 7 May 2017 as the end date. However, it was argued the judge failed to take into account the fact that her leave continued by virtue of section 3C of the 1971 Immigration Act. Reference was made to OA and Others (human rights; new matter; s.120) Nigeria [2019] UK UT 00065 which held that where the 10 years requirement was satisfied and there is nothing to indicate an application for indefinite leave to remain would be rejected then the appeal should be allowed. This was subject to any specific public interest factor which made the individual's removal proportionate. Section 3C leave continued in the situation where the leave expired without the application for variation having been decided.
12. Permission to appeal was granted on the basis that it was arguable that by the date of the appeal hearing the appellant had established 10 years continuous lawful.
13. At hearing, Mr Walker accepted a material error had been demonstrated in this regard. The appellant indeed had 10 years lawful residence and there were no other contrary factors. The judge had earlier said there were no

section 117 B issues arising. I was invited to set the decision aside and remake it, allowing the appeal.

Conclusion

14. In light of 3C and the agreed chronology I find the judge materially erred in concluding the continuation of time for lawful residence was dependent upon the appeal succeeding. In fact, by the time of the appeal the appellant did have 10 years continuous lawful residence. No other contrary factors arising, the appellant therefore would have been allowed to remain on this basis. Therefore, the respondent's decision to refuse her leave is disproportionate

Decision

The decision of First-tier Tribunal Judge Buckwell materially errs in law and is set aside. I remake the decision allowing the appeal.

Deputy Upper Tribunal Judge Farrelly.

21st July 2019