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Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16405/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 27 October 2022	**On the 1 November 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

NATALIE FRANCES ISABEL CHASE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P R Collins, legal representative, Addison & Khan Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of an appeal against the decision of the Secretary of State dated 20 September 2019, in which the appellant's human rights claim, made on 28 May 2019, was refused.

Anonymity

2. No direction has been made previously, and there is no obvious reason for one now.

Background

3. The appellant first entered the United Kingdom on 16 September 2000 with leave to enter as a student, valid until 30 September 2002. She left the UK and returned on 6 September 2002 with a further entry clearance as a student, valid until 6 November 2002. The appellant obtained a series of grants of further leave to remain in the United Kingdom as a student valid until the following dates - 30 October 2004; 31 October 2005; 30 November 2006 and 31 October 2007. Thereafter, the appellant left the United Kingdom during the validity of her leave and returned on 25 November 2007 with entry clearance as a student valid until 31 October 2008. Her leave was extended until 30 September 2009 in the same capacity.

4. On 11 September 2009, the appellant made an-in time application for further leave to remain in the United Kingdom under Tier 4 of the Rules. That application was refused on 2 November 2019, with a right of appeal, which the appellant exercised. On 4 January 2010, the appellant wrote to the Presenting Officers Unit in Feltham withdrawing her appeal, which was listed for 14 January 2010. In her letter, the appellant explained that she was returning to Barbados to spend time with her family over the holiday, that she had been offered a place to study for a master's degree in International Human Resource Management, commencing 17 January 2010, and that she would be submitting a new application for entry clearance to the United Kingdom under Tier 4.

5. As her letter indicated, the appellant left the UK and re-entered on 25 January 2010 with entry clearance as a Tier 4 student, valid until 31 May 2011. It appears that the judge considering the appellant's appeal was unaware that she had withdrawn it, as it was dismissed on 27 January 2010.

6. On 27 May 2011, the appellant unsuccessfully applied for indefinite leave to remain on long residency grounds. Her appeal against that decision was dismissed, and her appeal rights were exhausted on 11 November 2011. Thereafter, the appellant made applications for an EEA residence card and on the third application this was granted until 3 June 2018. Since then, the appellant made four unsuccessful applications for permanent residence as the spouse of an EEA national, the last of which was refused on 4 March 2019.

7. On 28 May 2019, the appellant made a human rights application. The substance of that application was the appellant's claimed continuous residence since first entering the UK on 16 September 2000, which at the time of the application came to eighteen years and eight months.

8. In a decision dated 20 September 2019, the respondent refused the human rights application, noting that the appellant was not claiming to have a partner or dependent children and concluding that her residence in

the UK was limited to just nine years, since she last entered on 25 January 2010.

9. The respondent considered that there were gaps in the appellant's continuous residence, evidenced by the fact that she had sought visas in Barbados on several occasions. She did not meet the requirements of the Rules and there were no exceptional circumstances.

10. The appellant appealed. It suffices to say that the decision of the First-tier Tribunal dismissing her appeal was set aside by the Upper Tribunal, at a hearing which took place on 27 May 2022, owing to the existence of material errors of law. The appellant's appeal was retained in the Upper Tribunal for remaking.

The hearing of 27 October 2022

11. Mr Collins described email correspondence with Mr Deller, who represented the respondent on the last occasion. At the outset, Mr Avery was of the preliminary view that the 10-year requirement was not met in 2010 and that the appellant may have been 7 months short. In addition, Mr Collins stated that the appellant was a few months short of acquiring twenty years residence at the time of her human rights application and consequently, as there was no family life to be considered, he would just be making submissions under paragraph 276ADE(1)(vi) of the Rules.

12. Mr Avery was given additional time to go through the relevant documents with Mr Collins prior to the start of the hearing. Upon the appeal resuming, Mr Collins clarified that he was relying on the 10-year rule point. He referred to the appellant's letter of 4 January 2010 withdrawing her appeal and the subsequent grant of entry clearance. For his part, Mr Avery stated that the Home Office accepted that the appellant entered the United Kingdom on 25 January 2010 with leave to enter as a student until 31 May 2011. He added that the judge dismissed the appeal at a time when the appellant already had an overlapping student visa which went to her argument that she had lawful leave for ten years.

13. Mr Avery said that he was in difficulty in having a 'defendable position,' and that by his calculation the appellant had acquired ten years continuous lawful residence. Mr Collins clarified that the longest the appellant had spent outside the United Kingdom was 55 days on an occasion when she returned to Barbados to apply for further entry clearance. All other occasions had been short visits to Barbados or Europe.

14. Mr Avery accepted that the appellant left the United Kingdom before her appeal rights were exhausted and that either way it made no difference to the calculation of the period spent outside the United Kingdom.

15. Ultimately, both representatives were content for me to allow the appeal on human rights grounds, with reference to paragraph 276B of the Rules. In these circumstances, there was no need for me to hear evidence or submissions in support of paragraph 276ADE(1)(vi) of the Rules. At the

end of the hearing, I announced that the appeal was allowed. I give my reasons below.

Decision on remaking

16. The only issue raised by the respondent in the decision letter which is relevant to whether the appellant had acquired the 10 years continuous residence in the United Kingdom as required under paragraph 276B(i)(a) of the Rules related to the period after her appeal rights were said to have been exhausted on 4 February 2010, as stated in page 2 of the said letter. Had this been an accurate description of events, the appellant would have lived continuously in the United Kingdom for only 9 years and 5 months. It is no longer in contention that the appellant left the United Kingdom upon withdrawing her appeal on 4 January 2010 and that she successfully applied for entry clearance as a Tier 4 migrant on 12 January 2010. At the time the appeal was erroneously considered on 27 January 2010, the appellant was already back in the UK with leave to enter.

17. In relation to the appellant's absence from the United Kingdom between withdrawing her appeal and re-entering with entry clearance, both representatives referred to paragraph 20A of the Rules says as follows:

> *"Leave to enter or remain in the United Kingdom will usually lapse on the holder going to a country or territory outside the common travel area. However, under article 1.3 of the Immigration (Leave to Enter or Remain) Order 2000 such leave will not lapse where it was given for a period exceeding six months or where it was conferred by means of entry clearance (other than a visit visa)."*

18. At the time the appellant left the United Kingdom her existing leave as a student had been extended by virtue of section 3C of the 1971 Act, until she withdrew her appeal, and she returned with entry clearance under Tier 4. Furthermore, the respondent's Long Residence Guidance published on 17 October 2014, confirms that continuous residence is not broken provided an applicant,

> *"departed the UK before 24 November 2016, but after the expiry of their leave to remain, and applied for fresh entry clearance within 28 days of that previous leave expiring, and returned to the UK within 6 months."*

19. The appellant withdrew her appeal on 4 January 2010 and from that moment no longer had any leave to remain in the United Kingdom, extended by section 3C or otherwise. She sought leave to enter this country on 12 January 2010, that is within 8 days of her leave expiring, returning to the United Kingdom on 25 January 2010, a mere 13 days later. Her continuity of residence was not broken because she applied for fresh entry clearance within 28 days of withdrawing her appeal and did not remain outside of the United Kingdom for more than six months.

20. The only other matters raised in the decision letter related to eligibility under the various requirements of paragraph 276ADE (1) of the Rules. The respondent did not apply her mind to paragraph 276B of the Rules. At the

error of law hearing, Mr Deller confirmed that he had no objection to this being raised as a new matter. As indicated above, both representatives agreed that the appellant met the residence requirements of paragraph 276B of the Rules and I have found likewise.

21. I have been guided by the decision in *OA and Others (human rights; 'new matter;' s.120 Nigeria* [2019] UKUT 65 (IAC) which is on all fours with the appellant's case.

22. Headnotes 3 and 4 have particular application in this case:

> *(3) Where the judge concludes that the ten years' requirement is satisfied and there is nothing to indicate an application for indefinite leave to remain by P would be likely to be rejected by the Secretary of State, the judge should allow P's human rights appeal, unless the judge is satisfied there is a discrete public interest factor which would still make P's removal proportionate. Absent such factors, it would be disproportionate to remove P or require P to leave the United Kingdom before P is reasonably able to make an application for indefinite leave to remain.*
>
> *(4) Leaving aside whether P has any other Article 8 argument to deploy (besides paragraph 276B) and in the absence of any policy to give successful human rights appellants a particular period of limited leave, all the Secretary of State is required to do in such a case is grant P a period of leave sufficient to enable P to make the application for indefinite leave to remain. If P subsequently fails to make such an application, P will continue to be subject to such limited leave as the Secretary of State has granted in consequence of the allowing of the human rights appeal.*

23. The appellant has been residing in the United Kingdom since September 2000 apart from short visits abroad during the currency of her leave. She has clearly established a significant private life here and the decision of the respondent refusing her leave to remain on human rights grounds amounts to a substantial interference with that private life. Given the appellant satisfied the residence requirements of paragraph 276B, the respondent cannot point to the importance of maintaining immigration control as a factor in the proportionality balance. Furthermore, the appellant's conduct in the United Kingdom has been exemplary and no suitability issues have been raised. It follows that the removal of the appellant from the United Kingdom would amount to a disproportionate interference with her private life and consequently, her human rights appeal is allowed.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the following reason. The appeal was allowed on a different basis to that made in the appellant's human rights application.

Signed: T Kamara Date: 28 October 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email