Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22080/2018

THE IMMIGRATION ACTS

Heard at Field House
On 9 September 2021

Decision & Reasons Promulgated
On 15 October 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWAKEMI OLUFUNMILAYO LEIGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation
For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M. Adophy, Counsel instructed by Atlantic Solicitors

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. There were initial difficulties with Mr Adophy's internet connection but these were resolved and neither party expressed any concern with the process.

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2. This is an appeal by the Secretary of State against the decision of Judge of the First-tier Tribunal Andrew ("the judge") promulgated on 13 January 2020.

3. For convenience I will refer to the parties as they were designated in the First-tier Tribunal.

4. The appellant is a citizen of Nigeria who was born on 4 September 1965. She claims that she entered the UK clandestinely in September 1999 and has remained continuously since then without leave.

5. On 23 September 2017 the appellant applied for leave to remain in the UK on the basis of her family life with her partner and her partner's child. On 15 October 2018 the application was refused.

The decision of the respondent on 15 October 2018 ("the refusal decision")

6. The refusal decision noted that the appellant had applied for leave on the basis of her family life with her partner and his child.

7. The first issue considered in the refusal decision was whether the appellant was entitled to leave on the basis of her family life under Appendix FM of the Immigration Rules. The respondent accepted that the appellant had a genuine and subsisting relationship with a partner who was settled in the UK but not that there were insurmountable obstacles to the relationship continuing in Nigeria. It was not accepted that the appellant had a relationship with her partner's child.

8. The refusal letter then considered whether the appellant was entitled to leave on the basis of her private life under paragraph 276ADE(1) of the Immigration Rules. It was stated that the appellant did not satisfy any of sub-paragraphs (iii)-(vi) of paragraph 276ADE(1). With respect to sub-paragraph (iii) (living continuously in the UK for 20 years), the refusal letter stated:

> "From the information you have provided, it is noted that you are a national of Nigeria and you claim to have entered the UK on 5 September 1999.
>
> You have failed to provide evidence that you entered at this point of time and it is not accepted that you have lived continuously in the UK for at least 20 years. Consequently you fail to meet the requirements of paragraph 276ADE(1)(iii) of the Immigration Rules."

9. The refusal letter then considered whether there were exceptional circumstances which would render refusal of leave a breach of article 8 ECHR because it would result in unjustifiably harsh consequences. It was not accepted that there would be harsh consequences as both the appellant and her partner have experience living in Nigeria, the appellant does not have a parental role with her partner's child, and her partner only sees the child three times a year.

Decision of the First-tier Tribunal

10. The judge rejected the appellant's "family life" argument. The judge accepted that the appellant and her partner have a genuine and subsisting relationship but found that there was no reason this could not continue in Nigeria. The judge also found that the appellant does not enjoy a family life with her husband's son and that her husband only has indirect contact (by letter and card) with his son which could continue from Nigeria.

11. The focus of the judge's decision was on the length of time the appellant has lived in the UK. The judge accepted that she had lived in the UK continuously since 1999 and found that, although at the date of the application she had not lived in the UK for 20 years (which would be necessary to satisfy paragraph 276ADE(1)(iii)), by the time of the hearing she had accrued 20 years of continuous residence. The judge's concluding paragraph (paragraph 23) states:

> "Having weighed the matter carefully I find that the fact the appellant has been in the United Kingdom continuously for 20 years weighs heavily in her favour and outweighs the requirement for effective immigration control given that the respondent has taken no action in the past when he could have done so and for those reasons I allow her appeal."

12. The question of whether the length of time the appellant has lived in the UK was a "new matter" under section 85(6) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") was not explicitly addressed by the judge. Nor did the judge expressly state whether, if this was a new matter, the respondent had, pursuant to section 85(5) of the 2002 Act, consented to it being considered. On these issues, the judge stated in paragraphs 6 and 7 of the decision the following:

> 6. During the lengthy course of the proceedings the appellant's representative had raised that the appellant has now been continuously in the United Kingdom for a period of 20 years and that I should allow the appeal under paragraph 276ADE(1)(iii). However, the respondent's representative had previously indicated that the respondent would consider this to be a new matter and would not consent to it being considered. The matter had previously been adjourned.
>
> 7. When the matter came before me, I referred the representatives to the guidance in OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC). I indicated that I would hear the evidence and if I found that [the] appellant had shown she had been in the United Kingdom continuously for a period of 20 years then this was a matter that I would take into consideration when considering my decision under article 8. If I was satisfied and allowed the appeal then it would be up to the respondent to decide whether or not to grant the appellant ILR or simply to grant a shorter period of leave to allow the appellant now to make a proper application on the basis of 20 years continuous residence. Both representatives accepted this.

13. Although not raised by either party, I pause to note that it is unclear why the judge, in paragraph 7 (quoted above), indicated that the appellant might be granted ILR on the basis of having lived in the UK for 20 continuous years when paragraph 276BE(1) stipulates that the period of leave granted to a person who satisfies the requirements of paragraph 276ADE(1) must not exceed 30 months.

Jurisdiction

14. I raised with the parties, as a preliminary matter, whether the judge had jurisdiction to consider the question of whether the appellant had lived in the UK for a continuous period exceeding 20 years ("the 276ADE(1)(iii) issue"). Mr Adophy argued that there was no basis for me to consider this point as it was not raised in the grounds of appeal. I disagree. Jurisdiction must be determined by a court or tribunal for itself, irrespective of whether the issue has been raised by a party. See, for example, *Mahmud (S. 85 NIAA 2002 – 'new matters')* [2017] UKUT 00488 (IAC) at [42].

15. Sections 85(4)-(6) of the 2002 Act provide:

> (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 the 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.

16. There are two issues relevant to the jurisdiction question in this appeal: the first is whether the 276ADE(1)(iii) issue was a new matter as defined in section 85(6) of the 2002 Act; the second, which only arises if it was a new matter, is whether the respondent consented to the First-tier Tribunal considering it pursuant to section 85(5) of the 2002 Act.

17. Under section 85(6)(b)(i), the 276ADE(1)(iii) issue will not be a new matter if it was "previously considered" in the refusal decision. It is necessary, therefore, to understand what is meant by the phrase "previously considered" in section 85(6)(b).

18. Mr Adophy argued that the 276ADE(1)(iii) issue was not a new matter because it was referred to, albeit briefly, in the refusal decision. He submitted that the reference to the issue in the refusal decision meant it had been "previously considered." Mr Melvin argued that in the refusal decision

the respondent merely mentioned, in a boilerplate way, the obvious fact, which required no consideration, that the appellant could not meet the requirements of paragraph 276ADE(1)(iii). The respondent had not therefore "considered" the 276ADE(1)(iii) issue.

19. The respondent did not need to determine the 276ADE(1)(iii) issue as the appellant did not, in her application, claim to have met the conditions of that sub-paragraph (which plainly she could not have met). The respondent could, for example, have stated in the refusal decision that the matter was not before her. However, in language that leaves no room for doubt, the respondent did in fact determine the issue; as she stated in the refusal decision that the appellant "fail[s] to meet" the requirements of paragraph 276ADE(1)(iii).

20. I am sympathetic to Mr Melvin' argument that although the 276ADE(1)(iii) issue had been determined it had not been "considered", given that it was mentioned only briefly by the respondent and there is no conceivable way the appellant could have met the conditions of paragraph 276ADE(1)(iii). However, this argument cannot succeed because it is, in my view, impossible for the respondent to determine an issue without considering it first.

21. If the respondent determines in a refusal decision that an applicant does not meet the conditions of a particular Immigration Rule, it follows that the respondent must have considered the matter of whether that Immigration Rule was satisfied. This is the case even if the applicant did not claim to meet the Rule in question and there is no conceivable way it could be have been met; and even if no reasons are given in the decision. The very fact of the respondent determining, or setting out a conclusion on, a particular issue in a refusal decision means that it must have been considered. It is irrelevant that the consideration was otiose: if it was decided by the respondent, then it was also considered by the respondent.

22. In this case the respondent decided the 276ADE(1)(iii) issue in the refusal decision. It follows that the matter was "previously considered" and therefore that it was not a "new matter" under section 85(6).

23. As the 276ADE(1)(iii) issue was not a new matter under section 85(6) there was no need for the respondent to give consent under section 85(6). It is not material to my decision, but for completeness I note that, if this were a new matter under section 85(6), I would not have found that the respondent gave consent. On this issue, Mr Adophy argued, in summary, that it is tolerably clear from paragraphs 6 and 7 of the decision that the respondent consented to the 276ADE(1)(iii) issue being considered, as it is apparent that the judge gave the parties an opportunity to object to the course of action she proposed and they did not do so. He noted that the appeal had previously been adjourned and stated that he inferred from this that the purpose of the

adjournment was for the respondent to consider whether to give consent. He also informed me that there was correspondence from his instructing solicitors to the respondent seeking their consent but acknowledged that he was unaware of any response from the respondent. Mr Melvin stated that there was nothing on his file to indicate that consent had been given and submitted that it was apparent from the decision that the judge had proceeded to consider the new matter without the respondent's consent. Consent under section 85(5) cannot be inferred or implied from a course of conduct, and it cannot be assumed because the respondent does not object to an approach adopted by a judge. The consent must be express and explicit. See *Mahmud* at [40]. There is no indication in the decision that the respondent expressly gave consent to the 276ADE(1)(iii) issue being considered and neither party was able to identify any correspondence from the respondent stating that consent was given. That said, as explained above, the absence of consent is irrelevant because I agree with Mr Adophy that this was not a new matter.

Grounds of appeal and submissions

24. The grounds of appeal make two arguments. The first is that the judge used article 8 as a "general dispensing power" and failed to have adequate regard to the public interest in effective immigration controls.

25. The second ground argues that the evidence before the judge did not support the conclusion that the appellant had lived for 20 continuous years in the UK.

26. A further argument is developed in the grant of permission, which is that the judge failed to adequately explain the "private life" basis for the appellant succeeding when she did not meet the conditions of paragraph 276ADE(1)(iii) (as she had not resided in the UK for 20 years when the application was made). This point was emphasised by Mr Melvin, who also argued that the judge fell into error by weighing in the appellant's favour that the respondent had not taken action to remove her. He submitted that a person without a lawful basis to be in the UK should leave voluntarily and it is not a factor weighing in their favour that removal action has not been taken.

27. Mr Adophy argued that the respondent's "general dispensing power" argument lacked any particularisation.

28. With respect to the second ground of appeal, he argued that there was both witness evidence and corroborating documentary (and photographic) evidence to support the judge's conclusion on length of residence. He submitted that the reasons given in the decision were more than adequate to support the conclusion reached.

Analysis

29. There is nothing in the decision indicating that the judge approached article 8 as a "general dispensing power" or that he failed to have regard to the public interest in the maintenance of effective immigration controls, as contended in the first ground of appeal. As is plain from paragraphs 20-23 of the decision, the judge undertook a proportionality assessment under article 8(2) ECHR where he considered factors weighing for, and against, the appellant. The analysis is brief, but it is tolerably clear that the judge weighed the public interest in effective immigration controls (which is referred to in paragraph 23) against the private and family life of the appellant in the UK. It is apparent that he gave substantial weight to the appellant's private life (based on the length of time he found that she spent in the UK) and little weight to her relationship, although it was accepted that it was genuine. This is not, on any view, treating article 8 as a "general dispensing power". The first ground of appeal therefore has no merit.

30. I now turn to the contention that the evidence before the judge did not support the conclusion that she had lived for 20 continuous years in the UK. The judge gave several reasons for accepting the appellant's claim to have lived in the UK since September 1999. These include: (a) witnesses gave a consistent account of her being in the UK since 1999; (b) one of the witnesses was able to "tie in" this date based on her own experiences at that time; (c) there were photographs of the appellant in the UK in pictures developed in November 1999 and October 2000; and (d) medical letters from 2002 corroborate her presence in the UK.

31. It is well established that where, as here, a challenge is being made to a finding of fact, caution must be exercised before interfering with it. See, for example, *Lowe v The Secretary of State for the Home Department* [2021] EWCA Civ 62. However, even without exercising caution I would reject this ground of appeal. The judge has given several cogent reasons for finding the appellant has lived in the UK since 1999 and the grounds do not identify any basis upon which this finding of fact should be disturbed.

32. In a human rights appeal, a finding that an appellant satisfies a particular Immigration Rule is often dispositive of the appeal in the appellant's favour, as the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in her favour in the proportionality balance: *OA and Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 00065 (IAC). In this case, the appellant did not satisfy the conditions of paragraph 276ADE(1)(iii), because paragraph 276ADE(1)(iii) requires that an applicant has lived in the UK for 20 years at the date of application, and at the date of the appellant's application she had lived in the UK for only 18 years (based on her evidence, which the judge accepted). Consequently, if the judge had treated the finding that the appellant had lived for 20 years in the UK at the date of the hearing as

dispositive of the appeal, on the basis that she satisfied 276ADE(1)(iii), that would have been erroneous. However, the judge not fall into this error. In paragraph 15 the judge expressly stated that the appellant had not accrued 20 years residence at the date of the application, and there is no finding in the decision that paragraph 276ADE(1)(iii) was satisfied. The approach taken by the judge, as is evident from paragraph 23 of the decision, was to treat the appellant's length of residence in the UK (which, based on his sustainable finding of fact, was over 20 years at the date of the hearing) as a factor weighing in the appellant's favour.

33. I agree with Mr Melvin that a person in the UK unlawfully is expected to leave voluntarily and that the respondent's inaction in removing the appellant is not a distinct factor that could be said to weigh in her favour in addition to the length of time she has spent in the UK. The judge would therefore have erred had he treated the respondent's inaction in removing the appellant as a distinct factor weighing in her favour. However, reading the decision as a whole, it is tolerably clear that the judge did not fall into this error. The judge gave weight to the length of time the appellant has been in the UK, not to the inaction of the respondent; and the reference to the respondent's inaction is by way of explanation as to how the appellant has managed to remain unlawfully in the UK for so long.

34. In conclusion, the judge approached article 8 ECHR correctly, by balancing the public interest in immigration controls against the appellant's private life. The judge was entitled to find, for the reasons he gave, that by the time of the hearing the appellant had lived in the UK for over 20 years. And in the article 8 balancing exercise, the judge was entitled to give weight to the substantial length of time the appellant had lived in the UK. The judge, therefore, reached a conclusion that was open to him.

Notice of decision

35. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Dated: 17 September 2021