Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: HU/08355/2019 P

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing on 28 June 2020

Decision & Reasons Promulgated On 7 September 2020

Before

Upper Tribunal Judge Gill

Between

Ms Emiola Mabayoje — Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department — Respondent

This is a decision on the papers without a hearing. Neither party objected. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 10-18 below. The documents described at para 8 below were submitted. The order made is set out at para 42 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation **(by submissions in writing):**

For the appellant: OJN Solicitors.
For the respondent: Ms J Isherwood, Specialist Appeals Team.

Decision

1. The appellant, a national of Nigeria born on 12 February 1968, appeals against a decision of Judge of the First-tier Tribunal Buttar (hereafter referred to as the "judge") who, in a decision promulgated on 7 October 2019 following a hearing on 20 September 2019, dismissed her appeal against a decision of the respondent of 24 April 2019 to refuse her human rights (Article 8) claim of 11 July 2018.

2. The issues before the judge were as follows:

   (i) whether the appellant had lived in the United Kingdom continuously for a period of at least 20 years, so that para 276ADE(1)(iii) of the Immigration Rules was satisfied;

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(ii) if not, whether there were very significant obstacles to the appellant's reintegration in Nigeria for the purposes of para 276ADE(1)(vi) of the Immigration Rules; and

(iii) if not, whether the appellant's removal would nevertheless be disproportionate.

3. The evidence that the appellant relied upon in order to establish that she had lived continuously in the United Kingdom for at least 20 years was, in part, that she had been treated in hospital for cancer after being diagnosed with breast cancer in 2014 and that she had used the name "*Sola Motolani"* (according to her witness statement) to obtain the diagnosis and the treatment.

4. The judge heard evidence from the appellant and three witnesses. However, the judge noted, inter alia, that the appellant and one of her witnesses (Ms Barbara Tinubi, the appellant's aunt) said in oral evidence that the name in which the appellant had obtained cancer treatment was "*Solomon Salani"*.

5. The judge found that the appellant had not established that she had lived in the United Kingdom continuously for a period of at least 20 years or that there were very significant obstacles to her reintegration in Nigeria. He found that the decision was proportionate, having followed the step-by-step approach in R (Razgar) v SSHD (2004) UKHL 27 and the balance sheet approach in Hesham Ali v SSHD [2016] UKSC 60.

The issues

6. I have to decide the following issues (hereafter the "Issues"):

(i) whether it is appropriate to decide the following questions without a hearing:

(a) whether the decision of the judge involved the making of an error on a point of law; and

(b) whether the judge's decision should be set aside.

(ii) if I conclude that it is appropriate to proceed without a hearing and if the answer to both questions (a) and (b) above is "*yes*", then whether the appeal should be remitted to the First-tier Tribunal or whether the decision on the appeal should be re-made in the Upper Tribunal.

7. A lockdown was imposed on 23 March 2020 due to the Covid-19 pandemic. On 30 April 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" issued by Upper Tribunal Judge Mandalia. Para 1 of the "*Note and Directions*" stated that, in light of the need to take precautions against the spread of Covid-19, Judge Mandalia had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (i)(a) and (b) above without a hearing. He gave the following directions:

(i) Para 2 of the "*Note and Directions*" issued directions which provided for the party who had sought permission to make submissions in support of the assertion of an error of law and on the question whether the decision of the First-tier Tribunal ("FtT") should be set aside if error of law is found, within 14 days of the "*Note and Directions*" being sent to the parties; for any other party to file and serve submissions in response, within 21 days of the "*Note and Directions*" being sent; and, if such submissions in response were made, for the

party who sought permission to file a reply no later than 28 days of the "*Note and Directions*" being sent.

(ii) Para 3 of the "*Note and Directions*" stated that any party who considered that despite the foregoing directions a hearing was necessary to consider questions 1(a) and (b) may submit reasons for that view no later than 21 days of the "*Note and Directions*" being sent to the parties.

8. The Upper Tribunal has received the following documents since permission to appeal was granted:

(i) from the appellant in response to the directions given in the "*Note and Directions*", a document entitled "*Further Submissions*" submitted by OJN Solicitors under cover of an email dated 14 May 2020 timed at 15:27 hours;

(ii) from the respondent in response to the "*Note and Directions*", a document entitled: "*Respondent's submissions on error in law*" dated 20 May 2020 by Ms J Isherwood submitted under cover of an email dated 20 May 2020 timed at 13:10 hours.

(iii) from the respondent in response to the grant of permission and pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, a document dated 26 February 2020 entitled *"Secretary of State's response to the grounds of appeal under Rule 24"* (the "Rule 24 Reply").

To the extent that any of the above submissions were late, I extend time for compliance with the relevant direction and admit them.

9. Although the "*Respondent's submissions on error in law*" dated 20 May 2020 post-dated the appellant's "*Further Submissions*" of 14 May 2020, the respondent merely relied upon her Rule 24 Reply which pre-dated the appellant's "*Further Submissions*" and the date of Judge Mandalia's "*Note and Directions*". Accordingly, I did not consider it necessary for me to postpone consideration of the Issues and give directions to enable the appellant to respond to the "*Respondent's submissions on error in law*".

Issue (i) - whether it is appropriate to proceed without a hearing

10. Neither party has objected to the Upper Tribunal proceeding to decide the Issues without a hearing.

11. Whilst the limitations imposed during the lockdown have been relaxed to a certain extent since the *"Note and Directions"* was sent to the parties, the Upper Tribunal is not yet listing appeals for hearing (whether remotely or face-to-face) at the capacity that it had been prior to the lockdown being imposed. Resolution of the appellant's appeal may therefore be unduly delayed if it is to be listed to be heard remotely or at a face-to-face hearing.

12. I have the benefit of the parties' detailed submissions on the Issues. I have considered the grounds, the parties' submissions on the Issues and the decision of the judge in order to decide whether it is appropriate for me to decide the Issues without a hearing. I have also considered the guidance at para 2 of the judgment of the Supreme Court in Osborn and others v Parole Board [2013] UKSC 61.

13. The grounds contend, at para 3, that the appellant and her witnesses had correctly said, when asked under cross-examination, that the name the appellant had used for her cancer treatment was *"Sola Motolani"*. Paras 3 and 4 of the grounds read:

> "3. It is noted that the appellant and her witnesses, correctly answered when asked under cross-examination that the name she used for her cancer treatment was Sola Motolani. That was the name she had already mentioned in her witness statement and it is inconceivable that she would give a different name. It appears that the FTJ, probably, did not hear the appellant's and her witness' answer properly, in which case she ought to have sought clarification, but did not.
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> 4. It is also worthy to note that the respondent's presenting officer did not mention that the appellant or her witness gave a different name to the one she had used for cancer treatment. If the appellant had given such incorrect answer, surely, the respondent's presenting officer would have mentioned it, in her submissions."

14. Whilst paras 3 and 4 of the grounds suggest that the judge had misapprehended the evidence before him and therefore, on one view, it may be suggested that there is some dispute as to a fact (i.e. whether or not the appellant and/or her witness(es) had given an incorrect name in cross-examination), the reality is that no evidence whatsoever has been produced in support of the assertion at para 3 of the grounds. Grounds do not prove themselves.

15. In addition, no evidence was adduced with the grounds to support the assertion at para 4 that the respondent's representative did not mention that the appellant or her witness(es) had given a different name.

16. In the absence of evidence to support the assertions at paras 3 and 4 of the grounds, there is in fact no factual dispute because the only evidence on the point is the judge's record of the proceedings ("RoP") which he relied upon in reaching his adverse assessment of the appellant's credibility. Accordingly, I concluded that there was nothing in the grounds which made it unfair or inappropriate for me to decide the Issues without a hearing. I deal further with paras 3 and 4 of the grounds, at paras 23-30 below.

17. Given that my decision is limited to the Issues, there is no question of my making findings of fact or hearing oral evidence at this stage.

18. In all of the circumstances, and taking into account the overriding objective and having considered Osborn and others v Parole Board, I have concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing.

Issues (i) (a) and (b) - whether the judge erred in law and whether his decision should be set aside

19. I have already set out the issues that were before the judge at para 2 above.

The grounds

20. There are two grounds, as follows:

    (i) The first ground (ground 1) is raised at para 3 and 4 of the grounds which I have set out at para 13 above and which concern whether or not the judge had misapprehended the evidence when he said that the appellant and one of her witnesses (Ms Barbara Tinubi) had given an incorrect name in cross-examination when asked the name in which the appellant had received

treatment for breast cancer. I have summarised part of the evidence that was before the judge, at paras 3-4 above.

(ii) The second ground (ground 2) is that the judge erred in finding (at para 40 of his decision) that the appellant had returned to Nigeria and made an entry clearance application in 2004. In this regard, para 7 of the grounds relies upon the "*respondent's own admission in their record, which was presented to the [judge], … that there was no trace on their system of the appellant making any entry clearance application*."

21. The grounds do not challenge the judge's finding that the appellant had not shown that there were very significant obstacles to her reintegration in Nigeria (paras 46-49 of the judge's decision) or his assessment of her Article 8 claim outside the Immigration Rules (paras 50-59 of the judge's decision).

22. The judge considered the evidence that was before him concerning the appellant's case that she had lived in the United Kingdom continuously for a period of at least 20 years, at paras 37-45 of his decision which read:

> "37. I have considered all of the evidence provided to me in both bundles submitted and the oral evidence I have heard today. Essentially the issue is whether I can be satisfied whether it is more likely than not that the appellant has been continuously resident in the UK since her arrival in 1988 or 1989 or for a period of at least 20 years. It is accepted by the appellant that she cannot evidence through documents alone a period of 14 years between 1992-2006 when she says she has been in the UK and that reliance should be placed instead on her own evidence to the tribunal and that of her witnesses to establish both her presence in the UK and the reason for a lack of any documentary evidence to support this.
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> 38. I did not find that the appellant gave a credible account to establish that she had been in the country continuously for 20 years. She told the Home Office she had been in the country since the 13th March 1989 but Home Office records showed that she had in fact been in the country since 1988. She stated that she was staying with friends and family to avoid detection since her appeal was dismissed in 1990 and therefore did not have any documents to show she was present in the country during this time. She admitted in her statement that she had used false documents to work as a carer, which was also confirmed at page 91 of the bundle, where the case record sheet confirms that she was working as a carer and had purportedly produced a false ID in order to do so. She also said that her account to the immigration officer in interview, again at page 91, had been misunderstood. She said she had not applied for an entry visa in 2004 having left the country on a previous occasion. However, in the same interview she admitted not disclosing her previous adverse immigration history when applying for an entry visa, having "previously overstayed", which by implication suggests she had left the country before applying for an entry visa in 2004. I found her explanation that she had been misunderstood when she said she had applied for entry clearance was not credible in light of the account she gave to the immigration officer of having previously overstayed. I find that it is more likely than not that she returned to Nigeria in this period as she impliedly told the interviewer.
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> 39. In relation to her involvement with police, she admits to a caution for theft in 2006 and a conviction for shoplifting in 2010. I note that these are both offences involving dishonesty. She also relies on medical records showing she had breast cancer treatment in 2014 under a false name. Today in court she did not remember the name Sola Motolani and instead said the name she had used was Solomon Salani. I found it incredible that having used this false name to obtain medical treatment on an ongoing basis in relation to her cancer diagnosis, she would not be able to recall this name.
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> 40. I find that based on her continual use of false identities to obtain work and medical treatment, her lack of disclosure to immigration authorities when applying for an entry visa in 2004 and her caution and conviction for dishonest offences, her account of being in the UK continuously for 20 years is not credible. For these reasons I do not accept on her

account and on the balance of probabilities that she has been present in the UK continuously since her arrival.

41. Turning to the witnesses who gave evidence today. Barbara Tinubi, her aunt, stated that the appellant had used the name Solomon Salani when she received breast cancer treatment. This was not the name used. Although she gave evidence to confirm that the appellant had remained in the country since her arrival, prior to 2014 the appellant had lived with her "on and off". She accepted in her statement that it was unusual for the appellant not to have any documents but said this was because she was living in hiding. The witness in court said she knew where the appellant was when she was not living with her. I found the witness' evidence to be lacking in detail in relation to where the appellant had been in the period where the appellant cannot provide any documentary evidence. I was not given much specific detail about where the witness was staying prior to 2014 or told how the witness knew she had been present in the UK apart from explanations such as "I knew where she was" and she lived with me "on and off" and was with "friends and family". This lack of detail and her relationship with the appellant meant I did not find her evidence demonstrated that it was more likely than not that the appellant had lived continuously in the UK since her arrival.

42. Ms Ibironke Tinubu gave evidence that was also lacking in detail. I did not know which family or friends the appellant had stayed with apart from Edith Mabayoje or this witness "sometimes" or even when. Her evidence in court today was based on her saying she visited the appellant in hospital when she was receiving breast cancer treatment during 2014. I did not find her evidence assisted me in establishing whether the appellant had been in the UK continuously prior to 2014. However, I found her evidence credible in relation to having visited the appellant in hospital. She knew the name that had been used and was specific about her visits.

43. Finally, Ms Osungbesan gave evidence. She said to her knowledge the appellant had not left the UK since arrival. In her statement she said had known her for 20 years but her statement focussed particularly on the last ten years. In particular the appellant helping her out with her wedding in 2009 and the appellant's circumstances thereafter. Today in court I was unaware of how long the appellant had been looking after the children of the witness or indeed how old her children were. The fact that she had looked after Ms Osungbesan's children as regularly as was described in court today was not mentioned in her statement. She gave a detailed account of the appellant's medical conditions but today in court said she had not gone to visit her and did not know the alias name that had been used by her to obtain treatment despite weekly contact by phone during this period. Her evidence did not assist in establishing whether the appellant had been in the UK continuously for a period of 20 years as it was not specific in relation to the appellant's whereabouts between 1999-2009. For these reasons I attach little weight to her evidence including whether the appellant has been in country continuously since 2009.

44. Based on the findings I have made and as I have found the appellant's account to be unreliable and found that her witnesses do not assist me in establishing a period of continuous residency for the reasons given above, I do not find on the balance of probabilities that the appellant has been resident in the UK continuously as she has claimed. In coming to this finding, I take into account all of the evidence presented to me in the round, including the lack of a credible account and the absolute lack of documentary evidence for a period of 14 years at least between 1992-2006. I do find however taking into account Ms I Tinubu's evidence that it is more likely than not that the appellant received medical treatment for breast cancer in the UK.

45. For the reasons given above the appellant is unable to satisfy me on the balance of probabilities that she meets the requirements of paragraph 276ADE(1) because I have found that she has not lived continuously in the UK for a period of 20 years."

Assessment of ground 1

23. It is clear from the judge's decision that he considered that, when questioned in cross-examination, the appellant and her witnesses gave the following evidence concerning the name in which the appellant had allegedly obtained a cancer diagnosis:

(i) the appellant who said that the name was "*Solomon Salani*" (para 39 of the judge's decision);

(ii) Ms Barbara Tinubi who said that the name was "*Solomon Salani"* (para 41);

(iii) Ms Ibironke Tinubu knew the name that had been used (para 42); and

(iv) Ms Osungbesan who did not know the alias name that had been used by the appellant to obtain treatment (para 43).

24. In the appellant's "*Error of law*" submissions, it is contended, again, that the appellant was very clear about the name she had used during her cancer treatment, being "*Sola Motolani"*, that the same was confirmed by her, that the appellant was not mistaken in her evidence and did not tell an untruth about this.

25. However, as I have said, no evidence whatsoever has been adduced in support of the factual assertion at para 3 of the grounds that the appellant had given the correct name in cross-examination whereas the judge took contemporaneous notes of the oral evidence.

26. I have consulted the judge's RoP which is in typed form and on file. This clearly records the relevant part of the oral evidence as follows:

The appellant's oral evidence (on the first page of the RoP, at the end of cross-examination):

> "Solomon Salani - is the name used for breast cancer diagnosis. Have I been diagnosed under Emiola Mabayoje? No"

Ms Barbara Tinubi's oral evidence (on the second page, second paragraph under the heading "XX":

> "Known by a different name? yes, but I know her as her real name Emiola Mabayoje. What other name do I know her by? Solomon Salani but I know he[r] as Emiola Mabayoje."

Ms Ibironke Tinubu (second page, first paragraph under the heading "XIC"):

> "At para 6 - app diagnosed with cancer in 2014. What name did she use? Shola Mutalani…"

Ms Maria Osungbesan (third page, fifth paragraph under the heading "EIC"):

> "In 2014 she was diagnosed with cancer. I don't know under what name. I know her a Emi, Emiola."

27. As I have said, the appellant has adduced no evidence to substantiate the assertion in ground 1 that the judge had misapprehended her evidence and the evidence of her witnesses whereas the judge took a contemporaneous note of the evidence. His record of the evidence of Ms Ibironke Tinubu assisted the appellant because her answer tallied with the name given by the appellant in her witness statement. It is therefore quite clear that he was taking a careful record.

28. Furthermore, there is no evidence to support the assertion at para 4 of the grounds that the respondent did not mention that the appellant or her witnesses gave a different name, as I have said. To the contrary, para 4 of the grounds ignores not only the fact that the appellant and all of her witnesses were cross-examined on this very

point but also para 28 of the judge's decision where he summarised this aspect of the submissions of the respondent's representative as follows:

> "... In relation to the breast cancer diagnosis there were no documents she was being treated under her current name. The medical fact of the diagnosis is not accepted but even if it were then the use of a false ID adversely affects her credibility."

29. Accordingly, it is clear that it was indeed part of the respondent's case before the judge that the respondent did not accept that the person who had obtained medical treatment in the name of "*Sola Motolani*" was the appellant. It follows that it was part of the respondent's case that the evidence given by the appellant and her witnesses under cross-examination about the identity of the person who received medical treatment was not credible.

30. In all of the circumstances, I reject the bare assertion in ground 1 that the judge had misapprehended the evidence as wholly unsubstantiated and untenable.

31. Ground 1 also contends that it is inconceivable that the appellant would give a different name from the name that she had mentioned in her witness statement. This submission is also untenable. It is the experience of judges who hear oral evidence that witnesses can and do give oral evidence which is not consistent with the evidence in their witness statements and also that witnesses can and do give evidence that is entirely consistent.

32. I therefore reject ground 1.

Assessment of paras 7 and 8 of the appellant's "Error of law" submissions

33. Before turning to ground 2, I shall deal with paras 7 and 8 of the appellant's "*Error of law"* submissions. These contend that the fact that the appellant might have used false identities to work in the United Kingdom and has a conviction for offences of dishonesty, ought not to have been accorded significant weight as the judge did, given that it is common knowledge that those who apply for leave to remain on the ground of long residence of at least 20 years usually have a history of some of contravention of law. Accordingly, it is contended that minor unlawful acts ought not to count against persons applying under the 20 years' residence requirement in para 276ADE(1)(iii).

34. However, the appellant did not seek or obtain permission on the issue raised at paras 7 and 8 of her "*Error of law*" submissions. Further, and in any event, paras 7 and 8 are devoid of substance, for the following reasons:

    i) Firstly, the context in which the judge considered the evidence concerning the alleged use by the appellant of a false name in order to obtain a cancer diagnosis and cancer treatment was that it was part of the appellant's case in establishing that she had lived in the United Kingdom continuously for at least 20 years. The judge found that the appellant had not established this aspect of her case. Therefore, it was the appellant who was advancing a positive case that she had used a false identity as going in her favour. That is the context in which the judge considered this aspect of the evidence.

    ii) Furthermore, the criminal record in question concerned a caution for theft and a conviction for shoplifting, as opposed to any conviction for the use of a false identity in order, for example, to secure employment or accommodation both of which may be rendered more difficult if a person lacks immigration status. That

a different scenario from that presented by a person who engages in theft and shoplifting. In my judgment, the judge was fully entitled to take account of the appellant's caution and conviction in considering the reliability of her evidence.

Assessment of ground 2

35. The appellant's "*Error of law*" submissions place reliance upon the fact that the respondent had confirmed that searches on her database had been carried out and that nothing had been found on her system to show that the appellant had departed or re-entered the United Kingdom. In addition, reliance is placed on the fact that the respondent had not suggested before and/or during the hearing that the appellant had used or could have used a different identity for the alleged entry clearance application and that this has never been the respondent's position.

36. However, para 28 of the judge's decision, where the judge summarised part of the submissions on behalf of the respondent, reads (insofar as relevant) as follows:

> "28. [The Presenting Officer] relied on the refusal letter when addressing me. She said that between 1990-2006 there was no evidence to show that the appellant was present in the UK, apart from the caution for theft…. There was insufficient evidence to show that the appellant had been resident in the UK continuously for the last 20 years. At the very least there was a gap of 16 years. She may have left the UK especially as she had told the Home Office she would be returning to Nigeria…"

37. It is therefore clear that the respondent's case was that the appellant may have left the United Kingdom at some point and thus interrupted her residence in the United Kingdom, notwithstanding the fact that the respondent had not been able to produce any evidence of the appellant having departed or re-entering.

38. The appellant's representative, Mr Jeyede, drew the judge's attention to the fact that the respondent had not produced evidence of departure and re-entry. The judge summarised this aspect of his submissions at para 32 of his decision which reads:

> "32. On numerous occasions solicitors had asked the respondent to show that the appellant had not left and then re-entered the UK. The tribunal should make an inference on the basis that the respondent had failed to provide any evidence to this effect, having offered to do so at one point."

39. Accordingly, the question whether the appellant had departed the United Kingdom was a factual issue before the judge which he had to decide on the whole of the evidence, including the fact that the respondent had not been able to produce any evidence of departure or re-entry. That is precisely what the judge did. In effect, ground 2 amounts to no more than a disagreement with the judge's reasoning and findings. It does not disclose any error of law.

40. I therefore reject ground 2.

41. For all of the reasons given above, I have concluded that the judge did not err in law.

Notice of Decision

42. The decision of the First-tier Tribunal did not involve the making of any error on a point of law. The appellant's appeal to the Upper Tribunal is dismissed.

Upper Tribunal Judge Gill Signed: 28 June 2020