Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13731/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34	**Decision & Reasons Promulgated**
On 30th August 2020	**On 02nd September 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MORENIKE TOLULOPE ONAYEMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The Upper Tribunal issued directions on 2 June 2020 indicating a provisional view that in light of the need to take precautions against the spread of Covid-19 and the overriding objective, it would be appropriate in this case to determine the issue of whether the First-tier Tribunal's decision involved the making of an error of law and if so whether the decision should be set aside without a hearing. The Appellant made written submissions and raised no objection to the determination of the issues without a hearing. There has been no response from the Respondent either as to the means of determination of the error of law issues or as to the substance of the appeal, however, the issues are clear in the appeal and no further submissions from the Respondent are required to justly determine the matter without a hearing.

2. In circumstances where no objections were made to the issues being determined without a hearing and where the Appellant has made written submissions and nothing further is needed from the Respondent; it is in the interests of justice to proceed to determine the error of law issues on the papers in light of the written submission available and the full appeal file.

3. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Davies promulgated on 23rd January 2020, in which the Appellant's appeal against the decision to refuse her human rights claim on the grounds of 10 years' continuous lawful residence dated 19 August 2019 was dismissed.

4. The Appellant is a national of Nigeria, born on 11 June 1976, who first entered the United Kingdom on 24 January 2009 with entry clearance as a student to 31 May 2010; following which she was granted continuous periods of leave to remain as a Tier 1 post study worker and as a Tier 1 General Migrant to 3 July 2016. On 1 July 2016, the Appellant applied for indefinite leave to remain as a Tier 1 General Migrant, which was refused on 18 December 2018 and unsuccessfully sought Administrative Review of the same out of time on 9 April 2019. On 18 April 2019, the Appellant applied for leave to remain on long residence grounds under paragraph 276B of the Immigration Rules, the refusal of which is the subject of this appeal.

5. The Respondent refused the application the basis that the Appellant's last period of leave to remain ended on 1 January 2019, short of 10 years' continuous lawful residence and that her application for leave to remain was made more than 14 days after the end of that period. In addition, the application was refused on general grounds under paragraph 322(5) of the Immigration Rules on the basis that the Appellant's presence was undesirable due to her conduct, namely dishonesty either to the Respondent over stating income in a previous application for leave to remain or to HRMC in under declaring income for tax purposes. In relation to private life, the Appellant did not meet the requirements for leave to remain set out in paragraph 276ADE of the Immigration Rules and nor were there any exceptional or compassionate factors to warrant a grant of leave to remain.

6. Judge Davies dismissed the appeal in a decision promulgated on 23rd January 2020 on all grounds, albeit in the Appellant's favour it was found that she did not use deception against either the Respondent in connection with an earlier application for leave to remain as a Tier 1 migrant or against HMRC in connection with her tax returns, such that the refusal under paragraph 322(5) of the Immigration Rules could not be maintained. However, the First-tier Tribunal found that the Respondent's previous refusal of indefinite leave to remain as a Tier 1 migrant on 19 August 2018 remained valid because it had been refused on additional grounds and as such, the Appellant's continuous lawful residence came to an end on 1 January 2019, with an out of time unsuccessful application for

Administrative Review being made on 18 April 2019 and her application for indefinite leave to remain on long residence grounds not being made until 18 April 2019. The Appellant could not therefore meet the requirements of paragraph 276B of the Immigration Rules because she was short of 10 years continuous lawful residence and was in the United Kingdom in breach of the law at the time of her application.

7. Separately, the First-tier Tribunal considered the Appellant's private life in the United Kingdom, finding that she did not meet the requirements for a grant of leave to remain on this basis under paragraph 276ADE of the Immigration Rules and further found that her removal would not be a disproportionate interference with her right to respect for private life (with no family life having been established in the United Kingdom) and therefore no breach Article 8 of the European Convention on Human Rights.

The appeal

8. The Appellant appeals on two grounds. First, that the First-tier Tribunal materially erred in law in failing to properly consider whether the Appellant met the provisions of the Immigration Rules for indefinite leave to remain as a Tier 1 migrant, specifically as to whether she had submitted the specified documents in paragraph 19(a) and 19-SD(a) of Appendix A in relation to her income. The Respondent refused the application on the basis that the Appellant had not provided all of the payslips and bank statements for the required one year period of earnings but it is submitted that she had provided original payslips under paragraph 19-SD(a)(i)(1) and personal bank statements under paragraph 19-SD(a)(i)(ii); satisfying the requirements for two sources of evidence and in addition, P60 documents were also submitted. The Appellant accepts that three months of bank statements were missing but paragraph 245AA of the Immigration Rules allowed for evidential flexibility for these to have been requested. On this basis, the First-tier Tribunal should have found that the Appellant met the requirements of the Immigration Rules for indefinite leave to remain as a Tier 1 migrant and therefore should be treated as having continuous lawful residence to the date of the hearing.

9. Secondly, that the First-tier Tribunal materially erred in law in its assessment of proportionality for the purposes of Article 8 of the European Convention on Human Rights and in its application of the factors in section 117B of the Nationality, Immigration and Asylum Act 2002. Specifically, that having found a number of positive factors in the Appellant's favour, including those in section 117B, the First-tier Tribunal failed to give adequate reasons as to why the public interest outweighed the Appellant's private life.

10. Pursuant to the directions issued by the Upper Tribunal on 2 June 2020, further written submissions were made on behalf of the Appellant which continued to rely on the written grounds of appeal with some elaboration but nothing further of substance not already contained in the grounds of

appeal. As above, the Respondent did not submit any written submissions in response.

Findings and reasons

11. The first ground of appeal is fatally flawed because it is premised on the First-tier Tribunal's failure to consider matters which were not before it, either by way of evidence or submissions and unless Robinson obvious (which this was very far from being) there can be no error of law in a First-tier Tribunal decision on this basis.

12. The appeal before the First-tier Tribunal was against the refusal of leave to remain on long residence grounds and on human rights grounds only. As identified at the outset of the hearing before the First-tier Tribunal, the issues to determine were expressly agreed between the parties as (i) whether the Appellant met the requirements of the long residence rule, and if not, (ii) whether the refusal of the application would breach Article 8 of the European Convention on Human Rights.

13. As part of the consideration of whether the Appellant had ten years' continuous lawful residence, it was necessary for the First-tier Tribunal to consider her immigration history, including the last refusal of leave on 18 December 2018, which it did. One of the grounds of refusal in that decision was under paragraph 322(5) of the Immigration Rules which was before the First-tier Tribunal to consider in any event because it was, for the same reasons, expressly relied upon by the Respondent in the decision under appeal. That issue and reason for refusal was resolved in the Appellant's favour with a finding that she was not dishonest such that the general ground of refusal could not be relied upon by the Respondent in either of the two previous refusals, in the Tier 1 decision in December 2018 or the more recent refusal of leave on long residence grounds that was the subject of the appeal.

14. In paragraph 68, the First-tier Tribunal sets out the additional ground of refusal of the Appellant's Tier 1 application, that she only scored 75 of the required 80 points because she had not provided sufficient documentary proof of her earnings. The First-tier Tribunal's conclusions on this follow in paragraph 69:

> *"69. No evidence has been provided for this appeal or any submissions made as to why that part of the decision taken by the Respondent was wrong. The Appellant's remedy was Administrative Review and I understand that an out of time application for Administrative Review was made and that it was rejected. I have not been provided with copies of the Administrative Review application. I do not know the reasons why it was made or why it was refused. For the purposes of what I have to decide on this appeal I am satisfied that the Respondent concluded that the Appellant did not qualify for Indefinite Leave to Remain as a Tier 1 (General) Migrant because she did not qualify for the required 80 points due to a lack of*

evidence and that the Appellant has not successfully legally challenged that decision."

15. It is abundantly clear from the paragraph above that the Appellant made no submissions at all in relation to the alternative reason for refusal of her last Tier 1 application; not submitting any relevant or material evidence in relation to it or the Administrative Review that followed and did not set out any reason why this part of the Respondent's decision was wrong. The submissions now relied upon as the first ground of appeal were simply not put to the First-tier Tribunal and nor was any of the evidence which could even arguably support those submissions. The payslips and bank statements referred to in the grounds of appeal as being sufficient to satisfy the requirements of paragraphs 19 and 19-SD of Appendix A to the Immigration Rules, upon which it is said that the First-tier Tribunal erred in not finding were sufficient to satisfy the rules were not in evidence before the First-tier Tribunal; nor were the additional documents which the Appellant implicitly states existed and could have been provided if, in the alternative, paragraph 245AA should have applied such that the Respondent should have requested them before making a decision. In these circumstances, even if the submission had been made to the First-tier Tribunal (which it was not), in the absence of any evidence in support of it and details of the Administrative Review, the First-tier Tribunal could not lawfully have made any findings on this issue in the Appellant's favour. For these reasons, there is no error of law on the first ground of appeal.

16. The second ground of appeal is equally without merit and amounts to no more than disagreement with the findings of the First-tier Tribunal on the proportionality balancing exercise for the purposes of Article 8. The First-tier Tribunal set out its findings about the Appellant's private life and those factors which were in her favour; correctly found (contrary to the suggestion in the grounds of appeal that these carried positive weight) that a number of factors in section 117B of the Nationality, Immigration and Asylum Act 2002 were neutral and set out the public interest in the maintenance of immigration control in circumstances where a person does not meet the requirements of the Immigration Rules for a grant of leave to remain. In particular, the First-tier Tribunal applies the statutory requirement in section 117B, which it is required to do, to attach little weight to private life established while a person's immigration status is precarious and concludes that the little weight that can be given to the substance and quality of the Appellant's private life is outweighed by the public interest in this case. The First-tier Tribunal has properly considered all relevant factors on both sides of the balancing exercise and come to a clearly reasoned conclusion which was open to it on the evidence. The Appellant's ground of appeal framed as a reasons challenge is more akin to a rationality or perversity challenge which falls far short of the high threshold to challenge the finding made, which was lawfully reached and explained. There is no error of law on the second ground either.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed G Jackson Date 30th August 2020
Upper Tribunal Judge Jackson