IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000853
First-tier Tribunal No: HU/51416/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Appellant

and

AYOMIDE MUNIRAT KARIM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Ms Sonia Ferguson, Counsel, instructed by Freemans Law LLP
For the Respondent: Mr Kevin Ojo, Senior Presenting Officer

Heard at Field House on 19 April 2024

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State from the decision of First-tier Tribunal Judge Hawden-Beal promulgated on 8 January 2024. By that decision, the Judge allowed the appeal brought by Ms Ayomide Munirat Karim from the Secretary of State's decision to refuse her human rights claim made in an application for indefinite leave to remain on the grounds of long residence.

Factual background

2. Ms Karim is a citizen of Nigeria and was born on 5 July 1994. She arrived in the United Kingdom on 8 September 2012 and remained here ever since. She made an application for indefinite leave to remain on the grounds of long residence on 14 November 2022. The Secretary of State refused that application on 25 January 2023 on the basis that she did not have 10 years continuous lawful residence for the purpose of Paragraph 276B(i)(a) of the Immigration Rules. The Secretary of State accepted that she had leave to enter or remain from 8 September 2012 to 8 May 2020 and from 28 October 2021 to 25 January 2023. She had no leave to enter or remain from 9 May 2020 to 27 October 2021. The Secretary of State held that the period of overstaying from 9 May 2020 to 19 May 2020, 31 May 2020 to 19 June 2020 and 31 July 2020 to 11 May 2021 should be disregarded. These periods, the Secretary of State noted, could not be considered as forming part of her continuous lawful residence. She was on immigration bail from 11 May 2021 to 27 October 2021. The Secretary of State, accordingly, held that she only had 9 years and 6 months continuous lawful residence. The Secretary of State found that the requirements of the Immigration Rules were not met and her removal from the United Kingdom would companiable with Article 8 of the European Convention on Human Rights. The Judge heard her appeal from the Secretary of State's decision on 2 January 2024. The Judge followed the analysis in *Asif (Paragraph 276B - disregard - previous overstaying)* [2021] UKUT 96 (IAC) and concluded that the period of overstaying could not be discounted from the calculation of continuous lawful residence. The Judge found that her continuous lawful residence, on that approach, was in excess of 10 years as at the date of the application. The Judge held that the requirements of the Immigration Rules were met and the Secretary of State's decision was incompatible with Article 8. The Judge, accordingly, allowed the appeal by a decision promulgated on 8 January 2024. Permission to appeal from the Judge's decision was granted on 1 March 2024.

Grounds of appeal

3. The short point made in the Secretary of State's grounds of appeal is that the Judge erred in following *Asif* in the circumstances where the Supreme Court, in *Afzal v Secretary of State for the Home Department* [2023] UKSC 46 [2023] 1 WLR 4593, upholding the Court of Appeal in [2021] EWCA Civ 1909 [2022] 4 WLR 21, departed from its analysis.

Submissions

4. I am grateful to Ms Sonia Ferguson, who appeared for Ms Karim, and Mr Kevin Ojo, who appeared for the Secretary of State, for their assistance and able submissions. Mr Ojo developed the point made in grounds of appeal in his oral submissions. He invited me to set aside the Judge's decision. Ms Ferguson accepted that the Judge's decision to follow *Asif* was an error but submitted that it was not material. Ms Ferguson and Mr Ojo also addressed me on the question

of re-making of the decision. Ms Ferguson invited me to substitute a fresh decision allowing the underlying the appeal. Mr Ojo assisted me with various aspect of the case but I am not sure if he positively invited me dismiss the underlying appeal.

Immigration Rules

5. Paragraph 276B of the Immigration Rules sets out the requirements for indefinite leave to remain on the grounds of long residence. So far as relevant, it provides:

> "The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom …"

6. The phrase "lawful residence" is defined in Paragraph 276A(b) of the Immigration Rules in these terms:

> "(b) lawful residence means residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain; or
>
> (ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or
>
> (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."

7. This provision was amended by Statement of Changes in the Immigration Rules HC 1160, paragraph 7.1, with effect from 13 April 2023. However, the amendment does not apply to this case because the transitional provisions, at page 4, provided:

> "In relation to those changes, if an application for entry clearance, leave to enter or leave to remain, has been made before 13 April 2023, such applications will be decided in accordance with the Immigration Rules in force on 12 April 2023": see page 4 of HC 1160.

8. Ms Karim's application, as noted above, was made before 12 April 2023 and fell to be decided by reference to the provisions as they were on that date.

Discussion

9. The Judge made a plain and obvious error of law in following *Asif*. The Court of Appeal, in *Afzal*, at [71]-[83], expressly departed from the approach taken in *Asif*. The Supreme Court, at [70]-[80], agreed with the Court of Appeal. It is, therefore, beyond doubt that *Asif* is no longer good law. I have little hesitation in finding that Judge's decision is materially wrong in law. I set aside that decision and, having regard to paragraph 7 of the Senior President's Practice Statement for the Immigration and Asylum Chambers, proceed to re-make the decision in the underlying appeal.

10. I have set out the basic background facts and the Secretary of State's decision above. I proceed on the basis that the Secretary of State's calculations are accurate and, on *Afzal*, Ms Karim only had 9 years and 6 months continuous lawful residence as at the date of the Secretary of State's decision. Ms Karim made her application for indefinite leave to remain, as noted above, on 14 November 2022. Accordingly, her leave to remain did not expire on 15 November 2022. It was automatically extended on that day under section 3C of the Immigration Act 1971. She has held continuous lawful residence from that date up until today. It follows that she, on the approach taken by the Secretary of State and excluding the period of overstaying from the calculations altogether, completed her 10 years continuous lawful residence in July 2023. Accordingly, as of today, her continuous lawful residence exceeds 10 years. It exceeds 10 years even if one does not count the period of overstaying as forming part of the calculations.

11. In *OA and Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 65 (IAC), the Presidential Panel gave the following guidance:

> (1) In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.
>
> (2) The fact that P completes ten years' continuous lawful residence during the course of P's human rights appeal will generally constitute a "new matter" within the meaning of section 85 of the 2002 Act. The completion of ten years' residence will normally have a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the Secretary of State to refuse P's human rights claim is unlawful under section 6 of the Human Rights Act 1998. This is because paragraph 276B of the Immigration Rules provides that a person

with such a period of residence is entitled to indefinite leave to remain in the United Kingdom, so long as the other requirements of that paragraph are met.

(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.

12. Mr Ojo did not invite me to depart from *OA*. He took no "new matter" point and was content for me to re-make the decision by following *OA*. He sought to put forward no reason indicating that a fresh application for indefinite leave to remain would be likely to be rejected by the Secretary of State. There is no other discrete public interest point in this case. In the circumstances, I follow *OA*.

13. It is uncontroversial that Ms Karim has established a private life in the United Kingdom and the Secretary of State's decision amounts to an inference with that life and is of such gravity so to engage the operation of Article 8. The interference is in accordance with the law and is necessary in a democratic society in the interests of the economic well-being of the United Kingdom. The ultimate question is whether the interference is proportionate. I take careful account of the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration control, as sub-section (1) provides, is in the public interest. It is also in the public intertest, as sub-sections (2) and (3) provide, that those who seek to enter or remain in the United Kingdom are able to speak English and are financially independent. There is no issue as to Ms Karim's ability to speak English and financial independence. As the Supreme Court held in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58 [2018] 1 WLR 5536, at [56], the phrase financially independent referred to independence of the state. However, as held in *Rhuppiah*, at [49], the matters in sub-sections (2) and (3) cannot positively weigh in favour of Ms Karim in my assessment. Sub-sections (4) and (5) provide that little weight should be given to a private life that is established by a person when that person is in the United Kingdom unlawfully or at a time when that

person's immigration status is precarious. As held in *Rhuppiah*, at [44], everyone who, not being a United Kingdom citizen, is present here and who has leave to reside other than to do so indefinitely has a precarious immigration status. Ms Karim's residence in the United Kingdom has always been precarious in that sense. I recognise, as noted in *Rhuppiah*, at [49], that there is a degree of flexibility within the statutory scheme and it cannot put the decisions-makers in a strait-jacket. Sub-section (6) is of no relevance in this case as Ms Karim does not have a parental relationship with a qualifying child.

14. Taking into account all these considerations, and in line with the guidance in *OA*, I find that it would be disproportionate to remove Ms Karim, or require her to leave, at this point in time. I, therefore, allow the underlying appeal on the ground that the Secretary of State's decision is unlawful under section 6 of the Human Rights Act 1998 as being incompatible with Article 8.

Decision

15. The First-tier Tribunal's decision is set aside and is re-made. Ms Karim's appeal from the Secretary of State's decision is allowed on Article 8 ground.

Anonymity

16. I consider that an anonymity order is not justified in the circumstances of this case having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the overriding objective. I make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Fee award

17. I consider that it would not be appropriate to make a fee award in this case despite my decision to allow the underlying appeal. I make no fee award.

Zane Malik KC
Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 17 May 2024