Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28167/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 16th May 2014	**On: 18th July 2014**
Prepared 11th July 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MOHAMMED IBRAHIM MAKINTAMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Schwenk, Counsel
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Nigeria born on 3rd May 1983. On 18th June 2013 a decision was made to refuse to vary leave to allow the Appellant to remain in the United Kingdom and to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The Appellant had first arrived in the United Kingdom on 26th August 2003

with leave to enter as a student valid until 31st August 2004. Subsequent to that the Appellant was granted four extensions to stay in the United Kingdom as a student and on 28th November 2012 had applied for leave to remain outside the Rules and on compassionate grounds. It was that application that was refused by Notice of Refusal dated 18th June 2013.

2. The Appellant appealed and the appeal came before First-tier Tribunal Judge Holt sitting at Stoke-on-Trent on 11th November 2013. In a determination promulgated on 26th November 2013 the Appellant's appeal was dismissed and no anonymity direction was made.

3. On 6th December 2013 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 20th December 2013 First-tier Tribunal Judge Sharp granted permission to appeal. Judge Sharp noted that the grounds of application averred that the judge failed to consider and make any finding as to the unlawful nature of the Section 47 notice including the initial refusal referred to in the Ground of Appeal. The judge noted that the determination contained a detailed review of the merits of the Appellant's case under Article 8 but made no mention of no finding in relation to Section 47. Judge Sharp concluded that the failure to deal with Section 47 was a clear error of law and permission was granted on that ground alone.

4. On 8th January 2014 the Secretary of State lodged a response to the Grounds of Appeal under Rule 24. That response indicated that the Secretary of State opposed the Appellant's appeal. The response noted that there appeared to be a Section 47 decision issued on 18th June 2013 and in that event there was no doubt that the removal decision was legal and therefore there was no error of law on this point. The Secretary of State sought the matter be disposed of on the papers.

5. That clearly did not take place and it is on that basis that the matter comes before me in the Upper Tribunal. The Appellant appears by his instructed Counsel Mr Schwenk. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Preliminary Issue

6. At the hearing Mr Schwenk applies under Rule 5(3)(c) of the Upper Tribunal Rules to amend his application for permission to appeal. In making his application Mr Schwenk relies on the authority of *Ferrer [2012] UKUT 00304* at paragraphs 24 to 29. His proposed amendment is

> "The Appellant respectfully submits that FTTJ Holt erred materially in law when refusing the Appellant's appeal on the basis that he does not qualify for leave to remain in the UK under paragraph 276 of the Immigration Rules. The Appellant submits that he has achieved ten years' lawful residence in the UK and that he qualifies for an extension of stay in the UK on that basis. The Appellant submits that the FTTJ has erred by finding to the contrary."

7. Mr Harrison notes the position and does not seek to challenge it and in the interest of justice permission is granted to allow the amended application.

Submissions

8. Mr Schwenk submits that the determination is flawed as the First-tier Tribunal Judge has failed to consider the Appellant's application under paragraph 276B(i)(a) namely that the requirements to be met by an applicant for indefinite leave to remain on the grounds of long residence in the United Kingdom are that he has had at least ten years' continuous lawful residence in the United Kingdom.

   He submits that had the judge given due consideration to this paragraph of the Rules that she would have allowed it. He appreciates paragraph 16 of the determination pointing out that the Appellant's Counsel was wrong to have conceded that the Appellant could not succeed under the Rules and that the judge has failed to analyse and take into account the relevant Rule when making her determination.

9. Mr Harrison submits that there was no application formally made for indefinite leave to remain and therefore the Appellant could not succeed at the time when he applied under paragraph 276B although he concedes that he could have done so at the time of the hearing. However he does concede that the issue is "*Robinson* obvious" to the judge at the date of hearing and as such that the case must fall to be considered under paragraph 276B(i)(a) and therefore he concedes that there is a material error of law and that the Appellant can meet the Immigration Rules. He too concedes that the representative of the Appellant was wrong in his concession that the Rules could not be met and the matter was aired before the First-tier Tribunal.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion

is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

12. The First-tier Tribunal Judge has considered this application pursuant to paragraph 276ADE rather than paragraph 276B. This application is based very largely on one of long residence. Indeed the application to appeal based on private life was refused by Judge Sharp when granting permission. I acknowledge that the format of the appeal has changed due to the late application for permission to appeal. However Mr Harrison has taken an extremely sensible and pragmatic approach. The First-tier Tribunal Judge has failed to give any analysis to paragraph 276B. It is conceded by Mr Harrison that the Appellant had at least ten years' continuous lawful residence in the United Kingdom and that there were no reasons why it would be undesirable for him to be given indefinite leave to remain on the grounds of long residence taking into account the factors set out in paragraph 276B. In failing to look at this matter under the relevant Rule the judge made a material error of law. Bearing in mind the concessions made by the Secretary of State I consequently find that there was a material error of law in the decision of the First-tier Tribunal and I remake the decision allowing the appeal under the Immigration Rules.

Decision

13. The decision of the First-tier Tribunal contained a material error of law and is set aside. The appeal is now allowed under the Immigration Rules.

14. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date 11th July 2014

Deputy Upper Tribunal Judge D N Harris