Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18345/2016**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 10 September 2018	**On 11 October 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MRS MONIJESU OLUWATOYIN FOLAYAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Bircumshaw, Central England Law Centre
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Can the period between the grant of a leave to enter between a date of which an individual is granted leave to enter and that individual's arrival in the United Kingdom be counted towards continuous residence for the purposes of paragraph 276B of the Immigration Rules? The appellant contends that it can; the respondent contends that that is not a permissible interpretation.

2. The appellant appeals with permission against a decision of First-tier Tribunal Judge Heatherington promulgated on 11 September 2017, dismissing her appeal against a decision of the respondent made on 13 July 2016 to refuse her indefinite leave to remain in the United Kingdom on the basis of ten years' long residency.

3. There is no dispute of the essential facts of this case. The appellant was initially granted entry clearance on 18 August 2004, entering on 14 September 2004 with entry clearance as a student valid until 1 October 2006. Leave to remain in that capacity was extended on a number of occasions, it being accepted that her leave did expire on 27 August 2014 and an appeal against that decision was lodged out of time.

4. At the relevant time paragraphs 276A and 276B of the Immigration Rules provided as follows, so far as is relevant:

276A. For the purposes of paragraphs 276B to 276D and 276ADE(1).

(a) "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:

(i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or

(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or

(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or

(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or

(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(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.

(c) 'lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply.

(2). Where leave to enter is granted in accordance with paragraph 276A01(1), paragraph 276BE(1) shall apply to an application for leave to remain on the grounds of private life in the UK as if for "leave to remain under this sub-paragraph" there were substituted "leave to enter in accordance with paragraph 276A01(1)".

5. The appellant's primary submission is that it is not necessary under the Rules for there to be continuous physical presence, and the Rules providing that leave is not broken upon departure and return and indeed at the time overstaying prior to departure did not break continuous lawful residence. It is further submitted that as the Rules on the continuous residence refer to periods of residence pursuant to grants of leave to *enter*, which are usually made to applicants out of country, there is an intent for these to be included. And further, by virtue of paragraph 25A of the Immigration Rules the holder of valid entry clearance has valid leave to enter the United Kingdom thus meeting the requirements.

6. It is submitted also that by analogy with paragraph 245AA and the guidance thereon, whereby periods arising prior to the date of issue of entry to the United Kingdom are considered an allowable absence counting towards the 180 days allowable absence in the relevant twelve-month period. It is, however, accepted that this is not directly relevant to paragraph 276A.

7. In response, the respondent submits that whilst paragraph 276A does expressly provide for periods outside the United Kingdom and without leave not breaking continuity, the purpose of the genuine requirement that once they have been in the United Kingdom lawfully for ten years that as such either they should be entitled to settle but first logically, permitting summary to leave for a few weeks should not interrupt that. It is submitted that permitting up to two or three months before entry makes no sense and in reality one could not say that one is "resident" before one has arrived in the United Kingdom. He submitted further the guidance on points in relation to paragraph 245AA was not strictly relevant to the facts to this case.

8. Properly analysed, "continuous residence" within paragraph 276A of the Immigration Rules requires both residence and, leave to enter or remain. For the purposes of showing continuous residence, "residence" is confined to residence pursuant to leave to enter or remain. If the appellant were right, a physical presence in the United Kingdom would not be necessary for the requirements of the rule to be met, and the need for the exception set out in 276A (a) (v) would not arise as the individual in question still had extant leave to enter and/or remain. The need for exemptions demonstrates that were they not to exist, then there would be a break in continuity not in leave but in residence. Further, were the appellant's submission correct, an individual could in theory obtain multiple grants of entry clearance, accruing 10 years of leave, and qualify yet never have entered the United Kingdom.

9. The general position is that the Immigration Rules must be given their natural meaning. Here, I am satisfied that the natural meaning of "residence" in this case requires physical presence.

10. It follows that the conclusion that leave accrued between the grant of leave and entering the United Kingdom in calculating continuous residence was not in error and accordingly I dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

No anonymity direction is made.

Signed Date 4 October 2018

Upper Tribunal Judge Rintoul