



Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: HU/05675/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 27 June 2018

Decision and Reasons Promulgated
On: 19 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MISS CHITAL MEHTA
(ANONYMITY DIRECTION NOT MADE)

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Chakmakjian, counsel, instructed by Deccan Prime Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India, born on 25 July 1978. She appeals with permission against the decision of First-tier Tribunal Judge Cameron, who in a decision promulgated on 4 July 2017, dismissed her appeal against the decision of the respondent to refuse her application for indefinite leave to remain in the UK on the basis of ten years' continuous lawful residence in the UK [1]. The respondent had contended in the refusal letter that she submitted a TOEIC certificate that she had fraudulently obtained and thus used deception in her application dated 4 May 2012.
2. Judge Cameron was not satisfied that the respondent had discharged the evidential burden relating to the allegation that she had used deception in an English language test by proxy [32].
3. He went on to consider whether the requirements under paragraph 276B of the Immigration Rules – ten years' lawful residence – could be met.

4. Judge Cameron noted that the appellant arrived in the UK on 9 August 2005. It was not disputed that she had valid leave up until 24 February 2014.
5. He found that the appellant made an application within the period of her existing leave, namely on 21 February 2014. However, this application was invalid and the in time application made in February 2014 did not appear to be a decision which is covered by s.3C of the 1971 Immigration Act. That is because the application itself was not a valid one. The fact that she then made a further application on 27 April 2014 within 28 days of the original decision being held to be invalid, did not of itself assist her in extending her leave under s.3C [37].
6. He stated that even if he is incorrect in that respect and her application made on 27 April 2014 is deemed to be covered by s.3C, that application was refused on 22 October 2014. There was no information indicating whether she appealed that decision or that an appeal is outstanding and on that basis the appellant's leave, even if it were extended by s.3C would have expired when her appeal rights became exhausted. Therefore, when she made her application of 26 August 2015, she did not have leave and had not had leave for some nine or ten months [38].
7. Nor was he satisfied that the appellant has an application outstanding which was subject to s.3C which could be varied by her application made on 24 August 2015 [40]. The appellant therefore could not meet the requirements of paragraph 276B in relation to 10 years lawful residence in the UK [41].
8. Judge Cameron then considered her human rights appeal at the date of hearing. He accepted that she came to the UK on 9 August 2005 as a student and that she had leave until 24 February 2014. She has completed the English language test and has now completed a post-graduate diploma in Management Studies as well as an Advanced Diploma in Hotel Management, as well as having completed a BA in India.
9. She has also worked in the UK at McDonalds as a crew member and then as a crew trainer. She became a floor manager and a shift manager. She also worked at Tesco as a night shift shelf-filler and subsequently in administration. She has worked at the Hilton Hotel as a receptionist and also in Dominos [43-45].
10. She was not in a serious relationship. She has a son who is 17 years old who lives with her parents in India [46].
11. He found that she did not have family life which would engage Article 8 but did have a substantial private life [47]. He referred to the assertions from her witness statement that there would be insurmountable difficulties in re-adapting to life in India [48]. She would face serious challenges such as the availability of work, accommodation and finance to establish herself after 12 years' absence.
12. Judge Cameron noted that she was 27 years old when she came to the UK and had spent the majority of her life in India. She had previously worked there after completing her BA. She had also stated that she worked in the State Bank of India and had undertaken a computer course to assist her in her job in the bank [51].

13. She is in good health. All her qualifications and experiences in the UK would be able to assist her in finding employment in India [54]. She produced no evidence other than assertions that employment would not be available to someone with her qualifications.
14. He was not satisfied that she had shown that there would be very significant obstacles to her re-establishing herself on return in India. She therefore did not meet the requirements of paragraph 276ADE of the Rules.
15. He considered her claim outside the Rules. He adopted the Razgar approach. He did not accept, following a decision by the Supreme Court in Agyarko [2017] UKSC 1, that it would be unjustifiably harsh or unreasonable to expect her to relocate to India. Nor were there any compelling circumstances [64–65]. The decision was accordingly lawful and proportionate.
16. Mr Chakmakjian, who did not represent the appellant before the First-tier Tribunal, submitted in his second set of written submissions, that the respondent's argument before the Tribunal focussed on s.3C leave. However, the appellant's challenge is that in an Article 8 analysis outside the rules, there was a “wholesale failure” to consider the nature of the appellant's residence in the UK, (in terms of whether or not it was unlawful), and furthermore, to appreciate that the short period of overstaying between the invalid notice and the out of time application is a matter that would not be penalised under the Rules.
17. Mr Chakmakjian sought to rely on the respondent's policy relating to long residence as at 8 May 2015, which he set out at paragraph 5 of his submissions.
18. The 28 day period of overstaying is only calculated from the latest of the point that a migrant is deemed to have received a written notice of invalidity, in line with paragraph 34C or 34CA on the Immigration Rules, in relation to an in time application for further leave to remain. Rule 34C further provides that the Notice of Invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day, unless the contrary is proved.
19. He submitted that in the Rule 24 response it was conceded that the appellant had leave, albeit not s.3C leave, until 10 April 2014. In fact at paragraph 5 of the response it is asserted that the appellant has not had leave since April 2014, either the 8th or 10th April. That is because an application made out of time does not resurrect the s.3C leave (or any leave to remain for that matter).
20. In the letter to the Home Office at F1 of the respondent's bundle, it was noted by the appellant's solicitors that the appellant's previous leave to remain was valid until 24 February 2014. Her application for further leave to remain was made prior to the expiration of the visa and the requirements in s.3C were met. The leave then expired without the application for variation having been decided so that the requirements of s.3(1)(C) were met and the appellant's previous application still remains pending.
21. Mr Chakmakjian submitted that the appellant overstayed between 10 April 2014 and the date of her submission of the out of time application on 27 April 2014. This period of overstaying, being under 28 days, is to be forgiven. After her application was rejected on 8 April 2014 as invalid, she made a further application on 27 April 2014 which was then

refused and certified on 22 October 2014. That was reconsidered in August 2015 and was again refused.

22. Mr Chakmakjian also submitted that the degree to which the Rules are satisfied may indicate where the public interest lies. This applies to the respondent's Rules and policy on long residence. Regard should be had to the Rules and policy applicable at the date of decision rather than the date of hearing. In the appellant's case, the respondent failed to apply her own Rules and policies to the application, and had she properly applied them, the application would have been granted. She has accordingly been deprived unfairly of a decision in accordance with the law and it is disproportionate.
23. Mr Chakmakjian submitted that the Judge determined that the out of time application made on 27 April 2014 was refused on 22 October 2014 [38]. However, the Judge drew this conclusion without any evidence and disregarded the appellant's evidence to the contrary, without reason.
24. The appellant did not accept that the certified decision on 22 October 2014 was ever served, if indeed it was ever made. That decision was not produced. There were letters from her solicitor chasing the outcome of that application. It appeared that in response to the last letter sent on 21 August 2015 which raised the long residence issue, the respondent reconsidered and refused the application on 26 August 2015.
25. On behalf of the respondent, Mr Melvin submitted that the appellant's representative has produced "pieces of Home Office policy" which shows that her long residence appeal should be allowed as she benefited from s.3C leave whilst her human rights applications were being considered.
26. The claim is that appellant made a further application, albeit out of time, on 27 April 2014 and that the application was made within the 28 day 'rule' and kept the continuity of her leave in place. Her further applications would be deemed to have been made within s.3C leave.
27. Mr Melvin submitted that in fact, her "legal leave" expired on 24 April 2014 and no leave has been granted since. It is not accepted that the application made out of time is legally capable of providing an appellant with s.3C leave which can be used as legal leave in support of a long residence application. It would be perverse if an appellant could keep putting in non-meritorious applications and expect those to count as s.3C leave.
28. He submitted that the definition of 'continuous lawful residence' is set out in paragraph 276A of the rules. The applicant must have had:
 - existing leave to remain;
 - temporary admission within s.11 of the 1971 Immigration Act where leave to enter or remain is subsequently granted;
 - an exemption from immigration control, including where an extension ceases to apply is immediately followed by a grant of leave to enter or remain.
29. The appellant failed to meet any of the categories for lawful legal residence as her lawful residence ended on 24 February 2014.

30. He submitted that the contention in paragraph 7 of the appellant's skeleton argument with regard to paragraph 276B(v) must be read in context with the Immigration Rules set out in the reasons for refusal letter dated 15 February 2016. The respondent made it clear at page 4 that the appellant cannot meet the requirements of paragraph 276B as leave is not extended by s.3C leave.
31. He submitted that the application, made out of time by the appellant on 27 April 2014, which was refused and certified with no right of appeal on 26 August 2015, cannot count as legal, lawful residence to show that the appellant has had lawful leave between 9 August 2005 and 9 August 2015.

Assessment

32. It is common ground that on 21 February 2014 the appellant submitted an in time application for leave to remain which was rejected as invalid on or about 8 April 2014. The appellant has not contended that she never received the Notice of invalidity.
33. Her application thereafter made on 27 April 2014 was refused and certified on 22 October 2014. Following submissions, the application was reconsidered and refused on 26 August 2015.
34. It was contended on her behalf that her application for further leave to remain was made prior to the expiration of her visa. The requirements under s.3C of the 1971 Immigration Act were met. Whilst the application for variation was being decided, her previous application remained pending.
35. However, I find that although, as found by Judge Cameron, the appellant did make an application within the period of her existing leave, that application was deemed to be invalid. That is not the same as the application having been decided as there was no valid application to make a decision on.
36. For the purpose of long residence "lawful residence" is defined at paragraph 276A(b). The appellant does not meet any of the relevant categories: She did not have existing leave to remain; she did not have temporary admission within s.11 of the 1971 Immigration Act where leave to enter or remain is subsequently granted; nor did she have an exemption from immigration control including where an extension ceases to apply, is immediately followed by a grant of leave to enter or remain.
37. Accordingly, the in time application which was not valid, was not a decision which comes within s.3C. There was thus no application made in time. The fact that she then made a further application within 28 days of the original application being held to be invalid does not of itself assist her in obtaining leave under s.3C. As there was not a valid application, s.3C leave could not continue.
38. The application by the appellant of 27 April 2014 was certified on 26 August 2015. There was no right of appeal. This cannot therefore count as legal lawful residence to show that she has lawful leave between the date she came to the UK and 9 August 2015.
39. Judge Cameron has considered her appeal on the basis of her human rights in detail from paragraphs 42 onwards. He has given sustainable reasons for finding that she had not shown that there would be very significant obstacles to re-establishing herself on her return to India. In his Article 8 assessment he has taken into account the section 117B requirements

under the 2002 Act. He has given sustainable reasons for his conclusion that the decision is proportionate

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed

Date 17 July 2018

Deputy Upper Tribunal Judge C R Mailer