



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02874/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8th March 2019

Decision & Reasons Promulgated
On 13th May 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

MR KAZEEM ADEBAYO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Himself.

For the respondent: Ms J Isherwood, Senior Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Nigeria. He came to the United Kingdom on 14 September 2007 with a student Visa, valid until 28 February 2009. His leave was extended on various occasions.

2. On 19 July 2017 he applied for indefinite leave to remain on the basis of long residence. That application was refused on 10 January 2018. His application was considered under paragraph 276B of the immigration rules which requires an applicant to have had at least 10 years continuous lawful residence.
3. The respondent contended that his lawful residence was broken between 27 January 2011 and 21 March 2011. The respondent referred to his leave expiring on 27 January 2011 and that he had 28 days in which to submit a valid application in order for his leave to be continuous. His next application was made on the 21 March 2011 and leave was granted until 23 August 2013. Consequently, the subsequent application of 21 March 2011 was 52 days out of time.
4. On 26 July 2016 he made another application for leave to remain which was refused on 15 May 2017. He then sought an administrative review and the refusal was upheld on 26 June 2017. The respondent took the view that his most recent application made on 19 July 2017 was out of time for continuous leave to be preserved.
5. Reference was made to the appellant's article 8 rights and the section 55 duty. At the time of decision his wife was pregnant. The decision-maker concluded that the refusal did not breach those rights, concluding only private life was engaged.

The First-tier Tribunal.

6. The appellant's appeal was heard on 25 October 2018 at Taylor House before First-tier Tribunal Judge D Ross. In a decision promulgated on 30 November 2018 it was dismissed.
7. Regarding the 1st period in contention, 27 January 2011 and 21 March 2011, the presenting officer accepted the decision was incorrect because the appellant had extant post study leave until 17 December 2011.
8. Relevant to 3C leave, he lodged a judicial review application following the refusal of his 26th July 2016 application. The respondent agreed to reconsider the decision but the fresh decision was on the same terms as the previous refusal. On 13 January 2018 the respondent wrote to the appellant advising that they would withdraw and reconsider their decision.
9. First-tier Tribunal Judge D Ross wrote:

“19. Looking at the published guidance on the subject of 3C leave, this states that the purpose of 3C leave is to prevent a person who makes an in-time application to extend their leave from becoming an over stayer

while awaiting a decision on the application and while any appeal or administrative review their entitled to pursue is pending. Where a decision is withdrawn by the Secretary of State after 3C leave comes to an end withdrawal of the decision does not mean that the person once again has 3C leave. 3C leave cannot be resurrected. A subsequent grant of leave is treated as if the appellant was lawfully present in the UK in any subsequent application. In this case the appellant agrees that the respondent have made a decision on 26th of June 2017 refusing his administrative review. He subsequently did not make a further application for judicial review until 14 August 2017 he made the parallel application for indefinite leave to remain on 19 July 2019.

20. On 7 November 2017 Upper Tribunal Judge Allen gave a judgement which is concerned with the application for judicial review in this case in which he said” The respondent has agreed to reconsider the decision under challenge and I consider that, even bearing in mind the points made in the applicant’s letter of 11 of October, 2017, and that even if the decision of where withdrawn, if it is right, as it appears to be, that section 3C leave comes to an end on 26 of June 2017, it is clear from the respondent’s policy that even where decision is withdrawn, section 3C leave that has been lost cannot be revived

21. It is clear from this decision that the Upper Tribunal considered that the 3C leave and come to an end on the 26 of June 2017, and could not be revived...

22. I therefore consider that the appellants leave to remain expired on 26 May 2017 which is less than 10 years after he 1st entered the United Kingdom on 14 September 2007. He therefore cannot succeed on the basis of long residence...”

The Upper Tribunal

10. Permission to appeal to the Upper Tribunal was granted on the basis it was arguable there was a material error in determining when his leave expired. The grounds argue that First-tier Tribunal Judge Ross was wrong in concluding the appellant’s leave to remain ended on 26 June 2017. It was argued the judge failed to properly consider the respondent’s guidance in relation to section 3C which provides at page 7:

‘...where a person has section 3C leave at the time a decision was made and that decision was withdrawn after section 3C leave has ended, the person should not be disadvantaged by the fact that their section 3C leave has ended and cannot be resurrected. This means that the outstanding application should be made as if the person still had section 3C leave...’

11. The appellant's representatives submitted that even if the 3C leave was broken the appellant should not be prejudiced.
12. A further ground related to the appellant's eldest child. At the time of hearing she had resided in the United Kingdom for more than 7 years and as such was a qualifying child. Reference was made to the decision of the Supreme Court in KO (Nigeria) [2018] UKSC 53.
13. At hearing the appellant was not represented but had made some preparation himself for the appeal. He maintained that he had continuous leaves throughout and referred to delay occurring because the proper postage was not paid by the respondent. The presenting officer contended that the First-tier Tribunal decision did not err and that section 3C leave did not assist the appellant.

Consideration

14. It is unfortunate that the appellant did not have legal representation at hearing because the question of section 3C leave was complex.
15. The appellant's former representatives did prepare a skeleton argument for the appeal sent with a covering letter dated 1 March 2019. It refers to the review decision of 26 June 2017 maintaining the refusal. There was a judicial review of that decision on 14 August 2017. On 21 September 2017 the respondent agreed to reconsider the decision. It is contended that in light of this Upper Tribunal Judge Allen refused permission in the judicial review application. However, on 15 December 2017 the further decision issued by the respondent maintained the refusal. It goes on to state on 30 January 2018 the appellant's administrative review succeeded.
16. The skeleton argument refers to a letter from the respondent advising his existing leave and conditions were extended under section 3C. Reference was made to page 7 of the published guidance of 15 January 2019. The 3rd paragraph from the bottom states that where a person has section 3C leave at the time a decision was made and that decision is withdrawn after section 3C leave has ended the person should not be disadvantaged. The outstanding application should be considered as if the person still had section 3C leave.
17. At paragraph 19 First-tier Tribunal Judge Ross referred to the published guidance but does not make reference to the person being disadvantaged. It is my conclusion that the judge failed to factor this as this appears to be precisely what did happen. It also has to be borne in mind that the appeal is not directly under the rules but through the prism of the rules in assessing the proportionality of the decision.

18. I turn to the section 55 obligation. The appellant's eldest child, Halimat, is a qualifying child. She was born on 22 September 2011 in the United Kingdom and is 7 years of age. No separate decision was issued in respect of her but she forms part of the appellant's appeal by virtue of the respective article 8 rights. The refusal letter refers to the fact that none of the family are British and so cannot benefit from appendix FM. The claim therefore was only being considered in the context of private life.
19. At hearing the appellant had produced tax records and stated he had been supporting himself. First-tier Tribunal Judge Ross deals with article 8 at paragraph 23 onwards. Again, the judge looked at matters in the context of private life and had regard to paragraph 276 ADE(iv) of the immigration rules in respect of the eldest child. The issue was whether it would be reasonable to expect her to leave the United Kingdom. The respondent's intention was to remove the family as a unit.
20. The approach in the First tier was that because the family would be returned as a unit, family life is not engaged and the issue relates solely to private life. The judge accepted that the respondent's decision interfered with the family's private life. Into this was introduced the notion of this private life developing when their leave was precarious.
21. The judge correctly self-directed that the best interests of the children was a primary consideration. The judge refers to this as being part of the proportionality exercise whereas in fact their best interests are quite distinct from this exercise.
22. At paragraph 32 the judge refers to section 117 B (6). At paragraph 34 the judge referred to KO (Nigeria). The judge stated there was no reprehensible conduct on the part of the appellant or his wife. At paragraph 35 the judge then pointed out that neither parent had the right to live in the United Kingdom. The judge found that the eldest child was not at a particular educational milestone and concluded it was entirely reasonable for her to leave with both of her parents. They were described as enterprising and had a long association with Nigeria. The conclusion was that it was in the best interests of the eldest child and the rest of the family to return to Nigeria.

Conclusions

23. The First-tier Tribunal judge was presented with a particularly complex decision. The judge had to consider 2 periods when it was asserted the appellant's leave had been broken. Added to that were issues about his finances. The 1st period of leave and the financial issue were resolved at hearing. The bulk of the hearing was directed to the 2nd period, when there was a query as to whether the appellant's leave had been broken.

24. I find the judge failed to apply the respondent's policy in relation to 3C leave and the guidance at page 7 that the person should not be disadvantaged where their leave has ended and cannot be resurrected. It has to be borne in mind that on appeal the judge was not tied to considering whether the rules were met to the letter. The guidance that a person should not be prejudiced was relevant to the proportionality exercise.
25. The decision in KO (Nigeria) was given on 24 October 2018. The judge did well to incorporate this decision in a hearing the following day. There has been a period since when decision makers have sought to apply the guidance given. There have now been subsequent decisions giving further guidance, recent examples being JG (S117B(6) 'reasonable to leave the UK') [2019]UKUT 00079 and SA and others [2018] CSIH 7. Having the benefit of the jurisprudence since KO Nigeria it is my conclusion the judge did not properly deal with the best interests of the children and the application of para 276(ADE(iv)) and section 117B(6).
26. I find the judge materially errs in consideration of the position of the appellant's eldest child and the reasonableness of expecting her to leave. There is no suggestion that the appellant did not have a genuine and subsisting parental relationship with his children. The question of reasonableness had to be viewed from the perspective of the child. I find this has not been adequately considered. It is of note that the respondent's guidance to caseworkers on this point has been revised since, the most recent being in February 2019. There is no reference to the earlier guidance in the decision

Disposal

27. In the Upper Tribunal the bulk of the argument again related to the application of 3C leave. I did not have the benefit of legal submissions at hearing for the appellant on the technicalities of 3C. Given that there are further factual findings to be made in relation to the children it will be necessary to remake the decision to the First-tier Tribunal. I remit the appeal to the First-tier Tribunal for a de novo hearing. That hearing can consider afresh the article 8 rights engaged, including the guidance on 3C in relation to the appellant and also the development in the case law in relation to section 117 B(6).

Decision

The decision of First-tier Tribunal Judge Ross materially errs in law and is set aside. The matter is remitted for a de novo hearing in the First-tier Tribunal.

Deputy Upper Tribunal Judge Farrelly

Directions

1. Realist for a de novo hearing in the First-tier Tribunal at Taylor House, excluding First-tier Tribunal Judge Ross.
2. In relation to compliance with paragraph 276B of the immigration rules, there had been no challenge to the First-tier Tribunal's finding that he came to the United Kingdom on 14 September 2007 and had leave until 26 June 2017. In respect of the period thereafter the parties should consider if he had lawful residence to complete the necessary 10 years either by virtue of 3C leave or whether he can benefit from the respondent's guidance at page 7 that he should not be disadvantaged.
3. The financial details set out in paragraph 5 and 6 of the decision have not been challenged. An up-to-date statement in respect of the family finances and prospects should be prepared.
4. The parties should consider whether in addition to private life, family life is engaged. There is no dispute that the appellant has a genuine and subsisting relationship with his children.
5. Regard should be had to the developing case law in relation to section 117B(6), paragraph 276 ADE(iv) and the respondent's policy of February 2019 in respect of qualifying children.
6. The appellant should provide details about the progress of his children.
7. The appellant would benefit from legal advice.
8. There is no need for an interpreter.
9. A maximum hearing time of 1 ½ hours is anticipated.

Deputy Upper Tribunal Judge Farrelly

Date: 13 May 2019