Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04900/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 January 2020	**On 5 February 2020**
Extempore	

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE RINTOUL

Between

MUHAMMAD SAIFUR RAHMAN CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Aslam instructed by Chancery Solicitors
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge G Mitchell promulgated on 21 August 2019, dismissing his human rights appeal.

2. The appellant's case is, in summary, that he is entitled to leave to remain on the basis of long residence. The respondent did not accept that the appellant's residence was continuous or lawful as the Secretary of State took the view that the appellant's residence after 30 August 2014 was unlawful.

3. It is, we consider, sensible to set out the appellant's immigration history at this point as it is a matter to which we will need to return.

4. There is no dispute that the appellant entered the United Kingdom on 19 March 2007 and that he subsequently had leave to remain in different capacities until 30 August 2014 as is set out in the decision of the First-tier Tribunal from paragraphs [9] to [11].

5. The applicant made an application received by the Home Office on 1 September 2014 for a residence card pursuant to the Immigration (European Economic Area) Regulations 2006 for a residence card as the extended family member of his brother-in-law who was a German citizen. That application was unsuccessful and the appeal against that decision was dismissed by Judge Shand QC in a decision promulgated on 16 March 2016. The appellant then applied for permission to appeal to the First-tier Tribunal, which was refused. That was renewed and the matter then came before Upper Tribunal Judge Perkins who refused permission to appeal.

6. The dispute is over the extent to which the appellant was lawfully present after 30 August 2014. He says that on an analogy with section 3C of the Immigration Act 1971, he ought to be treated as having been present lawfully, and that to treat him differently from a person in his position who had been seeking leave to remain would be disproportionate. The respondent did not accept that.

7. We pause at this point to note that there are some disputes as to whether the appeal to the First-tier Tribunal was in time and whether the applications for permission to appeal to the First-tier Tribunal and then to the Upper Tribunal were within time. Although it is clear that First-tier Tribunal Judge Holmes did note in his decision refusing permission in the First-tier that the application was one day out of time, Judge Perkins' decision does not make any reference to that.

8. It is evident that the Counsel for the applicant at paragraph 50 of the decision accepted that the appellant did not have lawful residence after 30 August 2014. That is not disputed before us.

9. It is evident also that the judge did not accept the arguments put forward that there was an unfairness in that, unlike the position of a person who had applied for further leave to remain within time whereby leave would have been extended pursuant to Section 3C of the Immigration Act 1971, the applicant in this case was disadvantaged because under the scheme operated under the EEA Regulations there was no equivalent to Section 3C and thus it was unlawful and disproportionate, bearing in mind the

principle of equivalence in EU law not to treat the appellant as someone who meets the requirements of paragraph 276B.

10. As we have said, having set out the arguments on this issue at paragraphs [59] to [61] the judge did not accept them, but importantly in this case the judge found at paragraph 61(b) in light of his other findings about the history of the appeal's process to which we have already referred, the appellant ceased to have a pending appeal shortly after 6 October 2016, long before the tenth anniversary of his arrival in the United Kingdom. That finding at paragraph 61(d) reflects the findings of the judge at paragraph 28(f) and (g).

11. In short, the judge found that, even had section 3C applied, the appellant's leave to remain had ceased well before the appellant had spent ten years in the United Kingdom because he had received the decision of the Upper Tribunal refusing permission to appeal shortly after it had been issued in October 2016.

12. The grounds of appeal are extensive running to eight separate grounds numbered (a) to (h). We will turn to these in due course.

13. We turn first to the position in law as regards the differences between having leave to remain under the Immigration Rules and the scheme established by the 1971 Act and the position of EU citizens. This is set out in some detail in AS (Ghana) [2016] EWCA Civ 133. We consider that it is important to note what is said there at paragraphs 20 onwards; for the purposes of this appeal it is sufficient to note the conclusion that the position of those claiming that they had EEA rights differs from those seeking leave under the Immigration Rules and that there is no analogy with Section 3C of the 1971 Act.

14. We note also Aibangbee [2009] EWCA Civ 339 in which the Court of Appeal concluded that the rights of residence of an extended family member which is what is contended here arise only when the relevant document has been issued.

15. A further proposition to which we have regard is that the rights of an extended family member under EU law is not to residence; the right conferred by the Directive 2004/38 is for them to have entry facilitated. The Directive does not grant any further rights, for example residence on an analogy with family members and we bear in mind that the clear distinction drawn in Article 3(2) of the Directive between family members and "beneficiaries", that being the term applicable to all those who are described as extended family members in the EEA Regulations, is clear and has been maintained throughout the jurisprudence of the Court of Justice.

16. We conclude as follows.

17. First, even if the appellant's arguments with regard to section 3C leave, proportionality and so forth were maintained, then it is difficult to see how he has been treated in any way differently from an EU national, assuming that the appearance of equivalency would apply. That is because, as we have already noted, the appellant's leave to remain extended by 3C, had it applied, would on unchallenged findings of fact made by the First-tier Tribunal have come to an end in October 2016, several months before he had lived in the United Kingdom for ten years. We accept Mr Aslam's submissions that the issue of proportionality must also be taken into account and that is something to which we will turn in due course.

18. If, however, we are wrong about the judge's conclusion that the appellant had not reached the ten year point, we do not consider that this was material. First, as we have already said, the position under EU law is different. It is not contended that section 3C would apply and in light of AS (Ghana) it is difficult to see how it could be said to apply by analogy or otherwise.

19. Second, this is the case of an extended family member. It is difficult to see how any principle of equivalence could arise here because it is difficult to see from the reasons we have given how EU law is engaged in the first place; without it being engaged then the principle of equivalence would also not be engaged.

20. Further, we do not consider that the provisions of the principle of equivalence would be applicable here, despite the submissions set out in Mr Biggs' skeleton argument put before the First-tier. In its essence, that argument is that account should have been taken of the fact that the appellant was not asked to leave the United Kingdom. That is correct; but, as we observed during the course of submissons, that is a similar position to many people who apply under the Immigration Rules for leave to remain and who then subsequently have appeals on human rights bases. Again, they are not required to leave, but it cannot be said that their position is that they have lawful residence. In effect the submission made by Mr Biggs would be to equate one's position being here tolerated and, for example, being given temporary leave or now bail under the Immigration Act 2016 is equivalent to lawful residence: that, we consider, must be wrong.

21. Turning then to the grounds specifically, we do not consider there is any merit in ground (a). We consider that there has been in this case a proper assessment of proportionality. This is a detailed decision. It is a human rights appeal and therefore Section 117A and B apply to this case. It is evident for the reasons we have already given (and as was accepted) that the appellant could not meet the requirements of the Immigration Rules and that is a matter which the judge was required to take into account.

22. Whilst there are challenges to the issue of proportionality set out in the grounds (b) to (h), we find that these do not have merit.

23. Turning to the issue of the appellant's health we consider that this is properly dealt with. The findings of fact are made in section B of the decision and are summarised further on in the decision at paragraphs [63] to [65].

24. In any event, it is difficult to see how the level of impact on the appellant's health is such that it would have made any material difference or could on any reasonable view have made any material difference.

25. Further, with regard to ground (d) of which we have not been addressed in any detail, this ground is lacking in any proper detail. It fails to identify what material should or should not have been taken into account by the judge in assessing what difficulties the appellant would have on reintegration. Nothing is specified in the grounds. Ground (f) we also consider does not identify an error of law. Little weight could be given to the appellant's involvement with the community and there is nothing in this which we consider could conceivably have affected the outcome in a case, whereas here we are dealing with an appellant who has no family life in the United Kingdom, whose position here on any view was precarious, and who did not meet the requirements of the Immigration Rules. Ground (g) is also, we consider, unarguable. At best the factors of the appellant being integrated into society, speaking English or being financially independent are neutral, and ground (h) is we consider also without merit as it fails properly to give any detail of the failure to give reasons referred to.

26. We consider that although some of the reasoning concerning Article 8 may well be brief, it is nonetheless adequate and sustainable.

27. To conclude therefore, we find first that the appellant, even accepting his arguments were correct and that he had lawful presence in the United Kingdom whilst this appeal was pending, at the very latest that came to an end in October 2016 as found by the judge. On that basis it cannot be argued that he has been treated any differently or to his detriment in comparison with somebody who had been holding leave to remain and had made an in-time application for permission to appeal.

28. Further, in the light of AS (Ghana) and Aibangbee it cannot be argued that there were any rights which accrued to the appellant and there can be no proper analogy between his position and that of somebody who had leave to remain under the Immigration Rules or under the Immigration Act.

29. Finally, we do not consider that there was any error in the judge's assessment of proportionality in this case in which he improperly took into account any factors which he should or should not have taken into account, and for these reasons we conclude that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

30. No anonymity direction is made.

Signed Date 30 January 2020

Upper Tribunal Judge Rintoul