



IAC-AH-SAR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/10294/2019

THE IMMIGRATION ACTS

**Heard at Manchester
Via Skype for Business
On 14 August 2020**

**Decision & Reasons Promulgated
On 26th August 2020**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**YEJIDE OLUWAKEMI OSHODI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Okunowo

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 11 March 1972 and is a female citizen of Nigeria. She appealed to the First-tier Tribunal against a decision of the respondent dated 8 March 2019 to refuse her human rights claim in the context of an application for indefinite leave to remain on the grounds of 10 continuous years' lawful residence in the United Kingdom. The First-tier Tribunal, in a decision promulgated on 9 April 2020, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.
2. Both parties agree that the appellant was continuously and lawfully resident in the United Kingdom under the Immigration Rules from 1

September 2007 until 27 April 2012. On 16 August 2012, the appellant made an application for an EEA residence card. A card was issued to her on 24 January 2013 and remained valid until 24 January 2018. The card was issued to the appellant on the basis that she was married to an EEA citizen who was exercising Treaty Rights. The appellant claims, therefore, that she has resided lawfully in the United Kingdom for 10 years from 2007 - 2017.

3. Both parties agree that it was possible for the appellant in law to require 10 years' continuous residence made up, as she claims, by 5 years under the Immigration Rules and a further 5 years as the spouse of an EEA citizen exercising Treaty Rights. The appellant had married on 10 March 2012. An application which she made immediately following her marriage for an EEA residence card was refused and her appeal dismissed; she became appeals rights exhausted on 19 July 2012. As noted above, she made a further application for a card which was successful on 16 August 2012. It would appear, therefore, that there is at least one break in the period of the appellant's lawful residence between 19 July 2012 16 August 2012. Before the First-tier Tribunal, the appellant sought to bridge that gap by relying on section 3C of the Immigration Act 1971; the appellant claims that she either had (i) valid leave under the Immigration Rules or the EEA Regulations 2016 or (ii) was in the process of making an application or bringing an appeal when leave had been refused. Judge Pooler, who heard the appellant's appeal in the First-tier Tribunal did not agree; At [15], he wrote:

“[the appellant's representative] submitted that the appellant could rely on section 3C of the immigration act 1971. In my judgement, section 3C is not relevant does not assist the appellant. The effect of section 3C is to extend leave a person is applied for a variation of leave to enter remain before the existing leave has expired and the leave expires without the application for variation having been decided. The appellant cannot benefit from these provisions in relation to the period after 27 April 2012 because she did not make an application for a variation of her leave. She made instead an application for an EEA residence card. Such an application is not made under by reference to the Immigration Rules and is not an application for variation of leave.”

In my judgement, the judge was correct. The relevant Home Office guidance, *Leave extended by section 3C (and leave extended by section 3D in transitional cases) Version 9.0* provides at [6]:

‘EEA applications Section 3C does not extend leave where an application is made for a residence card under the EEA Regulations Immigration (European Economic Area) Regulations 2006. An application for a residence card is not an application to extend or vary leave, it seeks confirmation that rights under the EEA Regulations are being exercised therefore the applicant does not require leave to enter or remain.’

Section 3C(a) states that the provision applies to ‘a person who has limited leave to enter or remain in the United Kingdom [and who] applies to the Secretary of State for variation of the leave.’ An application for and the issue of an EEA residence card did not confer limited leave to enter or remain in the United Kingdom upon the appellant. The appellant,

therefore, experienced a break in her lawful residence in excess of 28 days.

4. As Judge Pooler noted [16], in the alternative the appellant sought to rely upon a period of residence as the spouse of an EEA national. She points to the fact that, following a second application, she was issued with a residence card. However, as the judge observed (and I agree) the appellant has misunderstood the nature and legal meaning of a residence card. Whilst a residence card is issued prospectively to the appellant for a period of five years, that does not mean that she was, in effect, provided by the respondent with five years towards a period of continuous lawful residence. As the judge noted [18], 'the appellant must prove that she had been exercising Treaty Rights throughout the period in which she seeks to rely for the purposes of meeting along residence rules.' As Mr Bates, who appeared before the Upper Tribunal for the Secretary of State, submitted, the issue of a residence card, although it may be for a future period of years, is declaratory only; the issue of the card is an acknowledgement by the Secretary of State that, in this instance, the appellant was legitimately married to an EEA national exercising Treaty Rights on the date of issue. The judge went on to consider the evidence advanced by the appellant with a view to proving that her husband (from whom she had subsequently separated) but exercised Treaty Rights throughout the period 2012 - 2017. The judge considered documentary evidence which appeared to show that the appellant's husband had been a director of a company between 2017 - 2018. As the judge noted, 'that evidence has not proven that he was exercising Treaty Rights as a self-sufficient person or on another basis such as an employee or a self-employed person.' Judge concluded that, 'the appellant has failed to prove that a husband was exercising Treaty Rights and she has also failed prove that she was resident in the UK in accordance with the EEA regulations' [23].
5. On the facts, therefore, the judge has not erred in law by concluding that the appellant (i) did not enjoy section 3C leave when she switched from the Immigration Rules to the EEA Regulations and that (ii) she had not been present lawfully during the period 2012-2017 under those regulations.
6. There remained a further issue which the judge addresses at [32] *et seq.* In January 2019, an earlier appeal by the appellant before the First-tier Tribunal had been withdrawn on the basis of a concession made at the hearing by the presenting officer. The concession is recorded in the judge's record of proceedings in which references are made to a policy having been 'met' and that 'indefinite leave to remain would be granted' to the appellant. Judge Pooler considered the relevance of this 'concession' in the balancing exercise under Article 8 ECHR; he considered whether the statement made by the presenting officer was 'sufficient to outweigh the public interest in the removal of the appellant.' He concluded that the person making the concession had lacked the authority to bind the Secretary of State. He noted also that the presenting officer had misunderstood the effect of the Immigration Rules. Thirdly, he considered that there was 'no evidence to indicate that the appellant has taken any

steps to her detriment in reliance on the statement that indefinite leave to remain would be granted.'

7. I find that the judge's reasoning is legally accurate. Mr Bates directed me to the judgement of the Court of Appeal in *Rauf* [2019] EWCA Civ 1276 at [28-29]:

"The only other basis for the contention that the UT fell into error is that it did not consider the law relating to withdrawals of concession. Mr Turner did not pursue this with any particularity. He would have had difficulty doing so considering the general principles to which we were referred in *CD (Jamaica)* [2010] EWCA Civ 768. The facts of that case are very different from this and the ultimate decision that was appealed was a refusal to allow a concession to be withdrawn that was overturned in this court. The principle to be applied was extracted from a decision of Goldring LJ in *NR (Jamaica) v SSHD* [2009] EWCA Civ 856 which is summarised at [18] of *CD (Jamaica)* in the following terms:

"The real question that the tribunal had to determine was whether all the essential issues in the case could fairly be resolved by allowing the concession to be withdrawn or whether the prejudice was such, and the damage to the public interest such, that the Secretary of State should not be allowed to withdraw the concession."

Putting to one side any more sophisticated examination of the law, Mr Turner could not have got past first post in any complaint that a concession which was simply an erroneous reading of the Immigration Rules which is mandatory and a proper reflection of the legislation has any prospect of not being withdrawn in the circumstance where there was no prejudice. There was no prejudice on the facts of this case because, on his own case, the best Mr Rauf could have achieved was 60 days grace and he had already had 7 months of the same."

The concession was granted on a misunderstanding of the legal provisions. As is now clear, the appellant had ceased to reside lawfully and had become an over stayer while she has been unable to show that she was legally resident as the spouse of an EEA national. The appellant was never granted leave to remain nor was any leave terminated as a result of the mistake/concession. The judge correctly concluded that the appellant had suffered no detriment and, in turn, that the public interest would not be damaged by allowing respondent to withdraw the concession. That was a conclusion wholly consistent with the law.

8. In the circumstances, this appeal is dismissed.

Notice of Decision

This appeal is dismissed.

Signed
2020
Upper Tribunal Judge Lane

Date 23 August