



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/37425/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

Determination

Promulgated

On: 21 July 2014

On: 7 August 2014

Prepared: 2 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

**MR AHMED SULEIMAN
NO ANONYMITY DIRECTION MADE**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr H Kannangara, counsel (instructed by Jade Law Solicitors)

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Ghana, born on 17th August 1978. He appealed against the decision of the respondent refusal to grant him leave to remain in the UK pursuant to paragraph 276 ADE of the Immigration Rules. In the notice of decision, the respondent contended that he had no right of appeal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002 as he had no leave to enter or remain at the date that he made his application under the rules.
2. His appeal before the First-tier Tribunal was considered as a preliminary issue as to whether or not there was a valid appeal.

3. In a determination promulgated on 29th April 2014, First-tier Tribunal Judge Kamara found that the appellant entered the UK with leave to enter as a working holiday maker, which leave was valid until 10th March 2007. That leave was never varied or extended after that as the appellant had been issued with an EEA Residence card valid from 17th November 2006 until 17th November 2011.
4. The parties separated and the appellant applied for the grant of permanent residence as a non-EEA national who had retained rights of residence after divorce.
5. His application of 16th November 2011 was refused by the respondent on 2nd February 2012 on the basis that he had failed to forward evidence that his ex-wife had exercised Treaty rights in the UK. He was granted a right of appeal. He was “in the appeals process” until he was refused permission to appeal to the Upper Tribunal on 12th July 2013, which he received on 15th July 2013.
6. The appellant then submitted an application under the “private life” route of the Immigration Rules. He did not institute judicial review proceedings.
7. That application was refused on 25th July 2013.
8. It was contended that his leave was extended by virtue of s.3C of the Immigration Act 1971 (as amended). However, Judge Kamara did not accept that he had leave to enter or remain in the UK since as long ago as March 2007. The issue of a residence card to the appellant did not confer leave to remain under the Immigration Acts. It merely provided evidence of his pre-existing rights as the family member of an EEA National exercising Treaty rights in the UK.
9. Accordingly, she did not accept that the appellant either had leave to enter or remain in the UK or that his leave had been extended or varied by his applications or appeals under the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”).
10. It was also noted from the refusal notice that the appellant was told that if he failed to leave, enforcement action would be taken against him. Further consideration could be given to his case at that stage which could result in his being served with an enforcement decision which may generate a right of appeal.
11. In the event, she found that there was no valid appeal.
12. On 28th May 2014, First-tier Tribunal Judge Shimmin granted the appellant permission to appeal. He noted the argument that the

appellant had extant leave under s.3C and that his application should therefore have been regarded as “in time” and thus attracted a right of appeal; further, he was an EEA residence permit holder and therefore had leave to enter/remain in the UK.

13. Without any analysis, Judge Shimmin found that the issues raised ‘are arguable’.
14. At the hearing before me on 21st July 2014, Mr Kannangara, who appeared before the First-tier Tribunal Judge, repeated his submissions made before the First-tier Tribunal. As the appellant's application under the private life route was made while he had existing s.3C leave on 25th July 2013, he was therefore an “in time” applicant and that should have attracted a right of appeal.
15. Further, the immigration rules now disregard a gap of a period of 28 days between applications and therefore he should have been granted a right of appeal as he had not overstayed by 28 days prior to submitting his application.
16. He also submitted that the Judge's finding that he had no leave to enter or remain after 10th March 2007 as his leave had never been varied or extended owing to the fact that he was issued with an EEA residence card valid until 17th November 2011, was misconceived.
17. He had regard to the Home Office guidance relating to “long residence and private life” (11 November 2013) explaining “lawful residence”. Such residence is defined in paragraph 276A of the rules as a period of continuous residence in which an applicant had one of the following:
 - (a) existing leave to enter or remain;
 - (b) temporary admission within s.11 of the 1971 Act;
 - (c) 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.
18. At paragraph 17 of his grounds for permission, Mr Kannangara contended that as the appellant travelled and returned to the UK during the period of his residence as an EEA permit holder, the appellant had valid leave to enter the UK and therefore remained here legally.
19. On behalf of the respondent, it was submitted that there was no valid appeal before the Judge. There was no immigration decision specifically attracting a right of appeal.

20. Mr Duffy referred to s.3C of the Immigration Act 1971. That provides for the continuation of leave pending a variation decision. The section applies if a person who has limited leave to enter or remain in the UK applies to the Secretary for variation of the leave and the application for variation is made before the leave expires and the leave expires without the application for variation having been decided. It is in those circumstances that the leave is extended by virtue of this section.
21. He emphasised the applicable jurisdictional facts that had to be met, namely that the person who seeks to benefit from this section must have limited leave to enter or remain in the UK.
22. Residence under the 2006 Regulations does not constitute leave to enter or remain.
23. The appellant therefore did not have any leave for s.3C purposes. Accordingly, the decision to refuse to grant him leave to remain was not a refusal to vary leave as he had no leave to remain in the first place.
24. I have also been referred to Regulation 330 under Schedule 2 of the 2006 Regulations. It is provided with regard to leave under the 1971 Act that in accordance with s.7 of the Immigration Act 1988, a person who is admitted to or acquires a right to reside in the UK under the 2006 Regulations shall not require leave to remain in the UK under the 1971 Act during any period in which he has a right to reside under these regulations, but such a person shall require leave to remain under the 1971 Act during any period in which he does not have such a right.

Assessment

25. I find that although the appellant had a right to reside in the UK under the 2006 Regulations, that did not constitute leave to remain in the UK pursuant to the Immigration Acts or rules. He has thus not required leave to remain under the 1971 Act or under the rules.
26. The appellant had appeal rights under Regulation 26 of the 2006 Regulations. The provisions made under the Nationality Immigration and Asylum Act 2002 have effect for the purpose of such appeal under the Regulations to the First-tier Tribunal in accordance with Schedule 1. However, the fact that the appeal is made with reference to the 2002 Act does not thereby provide him with leave to remain in the UK. I accordingly agree with the decision of Judge Kamara and find that the appellant did not have a valid appeal.

Decision

The decision of the First-tier Tribunal Judge did not involve the making of an error of law and shall accordingly stand.

The appeal is dismissed.

No anonymity direction made

Signed

Date:

2/8/2014

Deputy Upper Tribunal Judge Mailer