



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/33294/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**On 16 June 2017**

**Promulgated**

**On 19 June 2017**

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**AMENAHT RACHEL YOBOUE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the appellant: Mr P Nath, Senior Home Office Presenting Officer

For the respondent: Mr A Chakmakjian, Counsel, instructed by David A Grand

**DECISION AND REASONS**

1. The Secretary of State appeals against the decision of Judge of the First-tier Tribunal Callow (FtJ), promulgated on 17 November 2016, allowing the respondent's appeal against the appellant's decision of 07 October 2016 to refuse her human rights claim (in the form of an application for settlement under paragraph 276B of the immigration rules based on 10 years continuous lawful residence).

## **Factual Background**

2. The appellant is a national of the Ivory Coast, date of birth 18 February 1981. Her immigration history was accurately summarised by the FtJ at paragraph 4 of his decision.

The [respondent] arrived in the UK on 2 June 2003 with entry clearance as a student valid until 21 November 2003. Thereafter she made in time renewals to extend her student leave until 31 May 2011. She was then expecting to re-sit an examination but a university considered that her circumstances did not warrant the issue of a sponsorship letter. It was in these circumstances that she sought relief to remain outside the rules in order to settle the outstanding examination. On 31 May 2011 she submitted an application for leave to remain outside the rules. This was rejected as invalid on 20 June 2011 as the form had not been signed by the [respondent]. As a result of the application was returned and arrangements were made to return the application fee. On 24 June 2011 she made another application founded on the same grounds but which was refused by the [appellant] on 21 July 2011. Her appeal (IA/22882/2011) to the First-tier Tribunal was dismissed on 16 September 2011. She was granted permission to appeal to the Upper Tribunal which was listed for hearing on 20 February 2012. As the [respondent] had received her MBA degree certificate four days before the hearing in the Upper Tribunal, she decided to make an application for a Post-Study visa and notified the Upper Tribunal that she wished to withdraw her appeal which was consented to on 17 February 2012. On 16 February 2012 the [respondent] submitted an application for leave to remain as a Tier 1 Post Study Work Migrant which was refused on the 24 September 2012 with no right of appeal as it was then believed the [respondent] had an extant appeal before the Tribunal. Subsequent to the receipt of a pre-action protocol letter the [appellant] agreed to reconsider the said application of 16 February 2012 leading to the grant of leave to remain as a Tier 1 Post Study Migrant on 9 July 2013 until 9 July 2015. On 31 March 2015 the [respondent] made application [SIC] for indefinite leave to remain on the basis of 10 years continuous lawful residence.

## **The Reasons For Refusal Letter**

3. In her decision dated 7 October 2015 the appellant noted that the respondent's application of 24 June 2011 had been submitted out of time and was refused with no right of appeal on 21 July 2011. The appellant acknowledged that the respondent lodged an appeal with the Asylum and Immigration Tribunal (AIT) but maintained that it erroneously accepted jurisdiction on 3 August 2011. Where an appeal is lodged, whether 'in' or 'out-of-time' against the refusal of an out-of-time application, leave was not be extended by virtue of section 3C of the Immigration Act 1971 as there was no valid leave to extend. The appellant noted that following the expiry of the respondent's leave on 31 May 2011 she did not seek to vary her leave with a valid application until 24 June 2011. Throughout her appeal process she was without lawful leave. As she was not granted a further period of leave until 19 July 2013 she had remained an overstayer for approximately 2 years. The appellant explained that, for the purposes

of the grant of leave to remain on 9 July 2013, she had exercised her discretion and overlooked the procedural errors. In reaching her decision the appellant considered whether to exercise her discretion in accordance with her published guidance 'Long Residence and Private Life' but concluded, given the length of overstaying, that it was not appropriate to exercise discretion in the respondent's favour.

### **The decision of the First-tier Tribunal**

4. The FtJ heard brief evidence from the respondent and the parties' submissions. at [8] of his decision the FtJ stated,

Save for the issue as to whether or not the [respondent] had a right of appeal following the decision of 21 July 2011 addressing the [respondent's] application of 24 June 2011, the facts in this matter of common cause. In the absence of evidence that there was no right of appeal, I attach weight to the fact that an appeal was noted and heard and was therefore the subject of a further appeal to the Upper Tribunal.

5. Having set out the relevant provisions of paragraph 276A and 276B of the immigration rules, and section 3C of the Immigration Act 1971, and having noted the authority of *JH (Zimbabwe) v SSHD* [2009] EWCA Civ 78, and that the appeal of *Mirza* [2015] EWCA Civ 838 was pending before the Supreme Court, the FtJ concluded, at [13],

I find that there has been no unlawful gap in the continuity of the [respondent's] residence since her arrival in the UK as a student on 2 June 2003. The application of the 24 June 2011 after the expiry of her visa on the 31 May 2011 wherein she then became an overstayer, was made within the grace period of 28 days provided for in 276B(v). As there was an appeal following the refusal of the 24 June 2011 [sic] she had 3C leave up to the withdrawal of her appeal on the 17 February 2012 and thereafter, having immediately applied for the Post-Study Migrant visa, until its issue on 9 July 2013.

### **The basis of the appeal**

6. The appellant contends that the FtJ misapplied the law relating to extension of leave under section 3C of the Immigration act 1971. The FtJ was not lawfully entitled to conclude that the respondent's application of 24 June 2011 was made when she had valid leave to remain. In other words, the FtJ was wrong to conclude that the decision of 24 June 2011 was made *in time*. The grounds relied extensively on the reasoning contained within the appellant's Reasons For Refusal Letter of 07 October 2015, as did Mr Nath in his oral submissions. Permission was granted on the basis that it was arguable that the FtJ made a material error of law in holding that there had been "no unlawful gap in the continuity of the [respondent's] residence since her arrival in the UK as a student on 2 June 2003" given that section 3C can only extend leave to remain where there is valid leave to extend. Mr Nath submitted that the case was not about the 28 day grace period under paragraph 276B (v) but about whether the

respondent had 3C leave or not following her invalid application of 31 May 2011.

7. For his part Mr Chakmakjian submitted that the burden rested with the appellant to demonstrate that the application of 24 June 2011 was not made "*in time*" given the willingness of the AIT to accept jurisdiction, which it could only do if the application to vary leave was made in time. Although the appellant was not represented in the hearing before the AIT she had an opportunity to make written submissions concerning the issue of jurisdiction. The FtJ's findings at [8] concerning the extension of 3C leave when the application of 24 June 2011 was made were rationally open to him. Ultimately it was for the appellant to demonstrate that the AIT did not have jurisdiction and she failed to do so. It was further submitted that the effect of paragraph 276B(v) of the immigration rules was to discount the period of 24 days between the expiry of the respondent's leave on 31 May 2011 and her valid application on 24 June 2011 and to, in effect, bestow upon the respondent valid leave.

## **Discussion**

8. Section 3C of the Immigration Act 1971, at the material time, as substituted by section 118 of the Nationality, Immigration and Asylum Act 2002 (and amended by section 11 of the Immigration, Asylum and Nationality Act 2006), read as follows:

### **3C Continuation of leave pending variation decision**

(1) This section applies if -

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when -

(a) the application for variation is neither decided nor withdrawn, ...

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

9. At the material date paragraph 276B of the immigration rules read as follows:

The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.

10. It is necessary to revisit in some detail the chronology of events in 2011. It is not in dispute that the respondent's leave, granted to her on 19 March 2010 as a Tier 4 (General) Student, expired on 31 May 2011. It is not disputed that the respondent made an application on that date for leave to remain outside the immigration rules. It is not in dispute that this application was invalid and was rejected by the respondent as invalid 20 June 2011. The respondent failed to sign a declaration, a mandatory requirement for a valid application. This factual matrix was accepted by both parties and by the FtJ.

11. In *Mirza* [2015] EWCA Civ 838 the Court of Appeal (at [30]) held that section 3C did not extend to an application which was not validly made in accordance with the immigration rules. This decision was upheld by the Supreme Court (see *R(Mirza) v SSHD* [2016] UKSC 63). In their judgement the Supreme Court stated (at [33]), "In ordinary language an application which is not validly made can have no substantive effect."

12. Given that the respondent's application made on 31 May 2011 was not valid, she ceased to have leave after that date. She was therefore present in the UK without leave from 1 June 2011. Although she made a valid application on 24 June 2011, some 24 days after her leave expired, the fact remains that she had no leave when that application was made. This much is clear from the undisputed and unchallenged immigration history and the ordinary language of section 3C, as interpreted by the Supreme Court in *Mirza*. This was also the view of the appellant when she issued a Notice of Decision refusing to grant the respondent leave to remain on 21 July 2011. This decision read, in material part,

An application was made on your behalf on the 24 June 2011. However, your leave to remain expired on the 31 May 2011. You therefore did not have leave to remain at the time of your application. Your application for leave to remain in the United Kingdom has been refused and you no longer have any known basis of stay here. There is no right of appeal against this refusal.

13. Mr Chakmakjian points to the apparent acceptance by the AIT of jurisdiction to hear the appeal lodged by the respondent on 3 August 2011. He submits that the AIT could not have accepted jurisdiction in relation to that appeal (which related to a refusal to vary leave) unless the respondent's leave to remain had been extended by virtue of section 3C, and that the FtJ was entitled to this finding as the burden rested with the appellant to prove that the AIT did not have jurisdiction.

14. I cannot accept these submissions. Mr Chakmakjian could not produce any authority to support his contention that, in determining an issue of jurisdiction, the burden rests on the appellant. In any event, the question whether leave to remain has been extended pursuant to section 3C is to be discerned by direct reference to the Immigration Act 1971 and the undisputed chronology of events. There is no indication on the papers before me that the issue of jurisdiction was specifically considered by the AIT, although I accept that such consideration should have been given when the appeal was lodged. Even if specific consideration was given by the AIT to the issue of jurisdiction, it is extremely difficult, given the unchallenged factual, chronological and legislative matrix, to discern how the AIT could have legitimately accepted jurisdiction. The lower Tribunal has, albeit on rare occasions, made mistakes in respect of jurisdiction. In any event, and on a proper analysis of the chronology and the relevant provisions of primary legislation, as interpreted by the highest Court, the respondent's leave expired on 1 June 2011. It was therefore not open to the FtJ to conclude that the respondent's leave had been extended pursuant to section 3C on the basis that the AIT had accepted jurisdiction.

15. The fact that the respondent made a valid application on 24 June 2011, within 28 days of her previous leave expiring, does not have the

effect of bestowing upon her leave pursuant to section 3C. The 28 day 'grace period' prevented the respondent's application of 24 June 2011 from being refused merely because it was lodged slightly out of time. It did not have the effect of extending leave when none existed. Although the respondent lodged an appeal within 28 days of the refusal, dated 21 July 2011, of her validly made application, she did not have valid leave at that stage. Given that the respondent had no valid leave on 24 June 2011, she had no leave that could be extended when her appeal was lodged. She did not lodge another application until 16 February 2012, and was not granted law for leave until 9 July 2013.

16. In light of this analysis, I am satisfied that the FtJ materially erred in law in concluding that there had been no unlawful gap in the continuity of the respondent's residence. The FtJ was not entitled to this conclusion based on the legislative framework and the facts before him. Applying the relevant law to the chronology of events I find that the respondent had no leave between 1 June 2011 and 9 July 2013.

17. Although the respondent's application for settlement on the basis of long residence was framed by reference to paragraph 276B, it was properly treated by the appellant, consistently with her Appeals Policy, as a human rights claim. The respondent was entitled to appeal the appellant's decision because it was a refusal of a human rights claim. In her decision of 07 October 2015 the appellant went on to consider the respondent's private and family life with reference to paragraph 276ADE and Appendix FM on the evidence before her. There has been no consideration of these provisions by the FtJ with respect to the respondent's circumstances at the date of the First-tier Tribunal hearing. In these circumstances, and with the agreement of both representatives, it is appropriate to remit this matter to the First-tier Tribunal to enable full consideration of all other relevant factors in respect of the human rights claim.

### **Notice of Decision**

**The First-tier Tribunal made a material error of law.  
The case is remitted back to the First-tier Tribunal for a fresh hearing,  
having regard to the conclusions of the Upper Tribunal, before a judge  
other than Judge of the First-tier Tribunal Callow.**

I make no anonymity direction.



16 June 2017

Signed

Date

Upper Tribunal Judge Blum