IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001777
First-tier Tribunal Nos:
HU/53672/2022
IA/05679/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 July 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

WILLIAN BENITO LUDENA TANDAZO
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Thoree, Solicitor from Thoree and Co Solicitors
For the Respondent: Mr A Basraa, Senior Presenting Officer

Heard at Field House on 6 July 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Beg (the Judge), dated 3 May 2023 following a hearing on

2 May 2023. By that decision the Judge dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim.

2. The Appellant is a citizen of Ecuador born in 1990. He came to the United Kingdom in April 2019 in possession of an EEA family permit under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), which was valid until 14 September 2019. He then applied for a residence card on 3 September 2019. That application was refused and the Appellant appealed. The appeal was then withdrawn in May 2021. Meanwhile the relationship on which the issuing of the family permit had been based (with a Ms Carrillo) ended, on the Appellant's own evidence, on 2 December 2019. He then began a relationship with another EEA national, Mrs Montes, but did not make any further application for a residence card under the 2016 Regulations, or, if he had, no residence card was issued by the Respondent.

3. On 27 May 2021 the Appellant made an application for pre-settled status under the EUSS which was refused in October of that year. He apparently appealed against that decision and then withdrew it in May 2022. The last application made was for leave to remain on Article 8 grounds. This was made on 29 April 2022.

The Judge's decision

4. The Judge concluded that the Appellant had not had leave under section 3C of the Immigration Act 1971 at any material time and could not satisfy the immigration status requirement under Appendix FM to the Immigration Rules. She took account of a variety of factors and directed herself to relevant authorities on Article 8 relating to, in particular, the well-known Chikwamba principle and the test for insurmountable obstacles to family life being enjoyed outside of the United Kingdom. The Judge concluded that there were no insurmountable obstacles to the Appellant and Mrs Montes living together in Ecuador and that the Appellant could not satisfy the requirements of EX.1. under Appendix FM. There were no very significant obstacles to integration and the Appellant

could not satisfy paragraph 276ADE of the Rules. On a wider proportionality exercise, the Judge concluded that removal would not be disproportionate. The appeal was accordingly dismissed.

The grounds of appeal

5. The grounds of appeal asserted that the Appellant had in fact had the benefit of section 3C leave because he had had a pending appeal against the EUSS refusal at the time of making his latest human rights claim. Further, the grounds asserted that by virtue of the family permit, the Appellant had been the relevant EEA national's "family member" under regulation 7(3) of the 2016 Regulations. He therefore had a right to remain in the United Kingdom and had had until 30 June 2021 to make an application "for leave to remain in order to preserve his rights". An application within that time had been made.

6. Permission having been granted by the First-tier Tribunal, the Respondent provided a detailed rule 24 response which sought to explain why the Judge had been correct and that the grounds of appeal were misconceived.

The hearing

7. At the hearing, Mr Thoree relied on the grounds. He submitted that the Appellant had always been lawfully in the United Kingdom and had had section 3C leave. If I were against him on this, he submitted that there was a "lacuna in the law" because the Appellant had always abided by the law and had made an application before 31 December 2020. Mr Thoree submitted that the Judge should have allowed the appeal on Article 8 grounds. The Appellant had had a right under EU law which was extended by making applications and lodging an appeal. The rights under EU law had been recognised whilst the Appellant was in Ecuador and when he was issued with the family permit. Those rights "could never expire unless the Respondent made a decision to stop those rights". The right as a "family member" was, submitted Mr Thoree,

"inalienable". Mr Thoree had no comment to make on the rule 24 response.

8. Mr Basraa relied on the rule 24 response and submitted that there were no material errors of law.

9. At the end of the hearing I reserved my decision.

Decision

10. I conclude that the Judge did not materially err in law when dismissing the Appellant's appeal.

11. With respect, the grounds of appeal and submissions at the hearing fail to acknowledge the fundamental distinction between direct family members and extended family members under both EU law itself and by virtue of the 2016 Regulations. In respect of the former, the rights are automatic; in respect of the latter, the rights only came into being upon application by an individual and the issuing of a family permit and/or residence card. Such rights are not "inalienable", nor is it the case that the rights would continue indefinitely until and unless the Respondent made some form of further decision to cease those rights. Under regulation 7(3) of the 2016 Regulations an individual would only continue to be a family member for as long as the requirements of regulation 8 were satisfied.

12. In the present case, on the Appellant's own evidence the family permit expired on 14 September 2019 and the relationship on which it had been issued broke down permanently on 2 December 2019. The rights enjoyed as a result of the issuing of the family permit ceased as at the latter date at the latest. The application for a residence card and subsequent appeal (which was then withdrawn) made no difference to this. Therefore, contrary to Mr Thoree's position, the Appellant had no EU law rights after 2 December 2019 at the latest.

13. In respect of the section 3C issue, the Judge was plainly correct to conclude that the Appellant had not benefited from that provision at any point in time. She correctly directed herself to what was said in Ali & Ors (EU law equivalents; s276B; s3C) [2022] UKUT 00278 (IAC) and nothing in the grounds of appeal identifies any error in respect of her conclusion. There is no "lacuna" in the law as regards the Appellant's circumstances. He may have made a number of applications and lodged appeals but none of this resurrected any EU law rights, nor did it engage section 3C. The Withdrawal Agreement added nothing to the Appellant's case.

14. In respect of the substance of the Judge's assessment of Article 8, there has been no challenge in the grounds of appeal, and in any event the Judge was plainly entitled to conclude as she did, with reference to what is said at [20]–[37] of her decision.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any error of law and that decision stands.

The appeal to the Upper Tribunal is accordingly dismissed.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 18 July 2023