



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/48752/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

**Heard at Field House
On 20 January 2015**

**Determination Promulgated
On 19 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS CAROLINE MORETSELE
NO ANONYMITY DIRECTION MADE**

Respondent

Representation

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

For the Respondent: Mr J Font, counsel (instructed by RP Curtain LLP)

DETERMINATION AND REASONS

- 1.** For the sake of convenience I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
- 2.** The secretary of state appeals with permission against the decision of First-tier Tribunal Judge Flynn, promulgated on 27 October 2013, allowing the claimant's appeal against the secretary's decision to remove her from

the UK, having refused her application for leave to remain. The claimant is a national of South Africa, born on 29 April 1963.

- 3.** Judge Flynn found that the short gaps in the claimant's lawful residence should be disregarded in accordance with the secretary of state's guidance - v10.0 - relating to long residence and private life. The claimant had demonstrated a period of ten years' continuous lawful residence and met all the requirements under paragraph 276B. She accordingly allowed the appeal under the immigration rules.
- 4.** The secretary of state had contended that the claimant's leave expired on 4 January 2006. There was thus a gap in continuous lawful residence from 4 January 2006 until leave was granted on 3 March 2006. This application was made out of time. She was thus not entitled to leave pursuant to s. 3C(1) of the Immigration Act 1971.
- 5.** The secretary of state contends that the Tribunal identified three gaps in continuous lawful residence in 2012. Her leave expired on 28 February 2012 and the claimant failed to submit a valid application for further leave until 20 November 2012. As such, she did not have leave to remain since her leave expired on 27 February 2012.
- 6.** It was also contended that the Judge erred by failing to consider the requirements under paragraph 276B (ii) to (v).
- 7.** Mr Duffy submitted that the "2006 point" referred to by the Judge was a red herring. That is because the appellant's leave expired on 27 February 2012. She came into the UK on 21 April 2004. Since February 2012, however, she never had leave to remain.
- 8.** Mr Duffy referred to the long residence and private life guidance. That provides for breaks in lawful residence. This sets out the circumstances where there is a gap in lawful residence. The application may be granted if an applicant has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days and meets all the other requirements for lawful residence.
- 9.** The decision maker can "use judgement and exercise discretion" in cases where there may be exceptional reasons why a single application was made more than 28 days out of time. That would include for example a hospital strike, hospitalisation or an administrative error made by the home office.
- 10.** The guidance also refers to s.3C of the Immigration Act 1971. Section 3C extends leave when a person with leave to enter or remain makes an in time application, that is, one made before their leave expires but one in which their leave expires before a decision on that application is reached. If a person has s.3C leave and their application is refused, s.3C leave continues until their appeal rights are exhausted. Mr Duffy emphasised that s.3C only applies to in time applications.

- 11.** If a person submits an out of time application they will have a gap in continuous lawful residence, from the date their leave expired until the date they are next granted leave, regardless of how long it takes for the decision to be made.
- 12.** A person cannot make a fresh application for leave while they have 3C or 3D leave pending the outcome of a decision on their outstanding application. Accordingly, someone who reaches the ten year threshold during this leave cannot apply for indefinite leave. Mr Duffy submitted that the First-tier Judge considered that her making of an out of time application extended s.3C leave.
- 13.** Mr Duffy did however accept that the Judge had failed to consider the claimant's appeal under Article 8. It is clear from the determination itself that counsel made an application to amend the grounds of appeal to make it clear that the claimant wished to rely on Article 3 as well as Article 8. [9] Permission was given to amend the grounds to include Articles 3 and 8 [11]. Mr Font had made submissions before the First-tier tribunal that the appeal should be allowed on Article 3 grounds [27]. The claimant had also built up family and private life here. She was a dependent relative of her sister.
- 14.** In reply, Mr Font submitted that the First-tier Tribunal Judge's findings should be upheld. She was entitled to arrive at the decision she made. The policy is clear. The examples she cited were relevant. There was no miscalculation.
- 15.** He agreed that in the event that the Secretary's appeal is allowed, the matter should be remitted to the First-tier Tribunal for a decision to be made under Article 8 of the Human Rights Convention.

Assessment

- 16.** Section 3C of the 1971 Act extends leave when a person who has leave to remain makes an in time application. If their leave expires before the decision on that application is made, when the applicant has s.3C leave, that leave continues until the appeal rights have been exhausted.
- 17.** It is evident that s.3C only applies to in time applications – page 24 of the guidance. An applicant cannot make a fresh application for leave at the time they have s.3C or 3D leave pending the outcome of a decision on the outstanding application. Accordingly, someone who reaches the ten year threshold during this leave cannot successfully apply for indefinite leave.
- 18.** The appellant's leave to remain expired on 28 February 2012. When she made her application on 20 November 2012, she did not have leave to remain.
- 19.** The appellant was issued a one stop warning in the decision to remove her under s.10 of the Immigration and Asylum Act 1999.

20. As noted, the claimant successfully amended the grounds of appeal to make it clear that she wished to rely on Articles 3 and 8. However, the Judge did not address the human rights claim at all.
21. The appellant's leave to remain expired on 27 February 2012. Accordingly, she did not have leave to remain since her leave expired on that date. She was not assisted by s.3C or 3D of the 1971 Act.
22. I accordingly find that the decision of the First-tier Judge involved the making of material errors of law. That decision is accordingly set aside and re-made. As the claimant had not shown that she had at least ten years' continuous lawful residence in the UK, her appeal is dismissed. To that extent the Secretary of State's appeal is allowed.
23. However, as agreed by both representatives, the First-tier Judge did not consider either the Article 3 or Article 8 claim at all, despite the fact that Mr Font made detailed submissions relating to her family and private life built up in the UK.
24. In the circumstances, both parties agreed that the appellant's outstanding human rights claim should be remitted to the First-tier Tribunal for a fresh determination.
25. Applying the Senior President's guidelines in this respect, I accept that this is an appropriate case for this appeal to be remitted. Not only will there be substantial fact finding involved, but it is evident that the appellant's claims under Articles 3 and 8 were not considered at all.

Decision

The decision of the First-tier Judge involved the making of material errors of law and is substituted for a decision allowing the Secretary of State's appeal under the Immigration Rules.

The appeal of the claimant under the immigration rules is dismissed.

The claimant's human rights appeal is remitted to the First-tier Tribunal (Taylor House) for it to be determined.

No anonymity direction is made.

Signed

Date 12/2/2015

Deputy Upper Tribunal Judge Mailer