Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48993/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2014	**On 1 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MR OMAR EL MOKHTAR TAHA ABBAS SHALABY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Saeed of Aman Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Egypt whose date of birth is recorded as 4 May 1987. On 16 July 2013 he made application for indefinite leave to remain in the United Kingdom on the basis of ten years continuous lawful residence but on 6 November 2013 a decision was made to refuse the application on the basis that in 2011 the Appellant could not meet the requirement of 276B(v) of HC395 (as amended) which provides that:

> *"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 to any period of overstaying pending the determination of an application made within that 28 day period."

The Appellant had made applications rejected by the Secretary of State in 2011 resulting in a period in excess of 28 days when it was said he did not have leave and it was on that basis that it was said that the Appellant did not meet the general requirement of paragraph 276B of ten years continuous lawful residence.

2. The Appellant appealed and his appeal was heard on 5 March 2014 by Judge Nightingale in the First-tier Tribunal. It was argued that although the applications had been rejected by the Secretary of State that did not mean on the particular facts of this case that the Appellant was not entitled to take advantage of the provisions of Section 3C of the Immigration Act 1971 which would allow leave to be extended whilst there was an application pending. The issue therefore was whether the applications which had been rejected by the Secretary of State were indeed applications at all. Judge Nightingale found that Section 3C did not assist the Appellant. He went on to consider the Appellant's private life having regard to paragraph 276ADE but found that the Appellant did not satisfy its requirements and the appeal was dismissed on all grounds.

3. Not content with the determination, by Notice dated 14 March 2014 the Appellant made application for permission to appeal to the Upper Tribunal. That application was initially refused but on a renewed application dated 20 March 2014, Upper Tribunal Judge Grubb granted permission.

4. Mr Saeed on behalf of the Appellant submitted in rather bold terms that an application was valid if it was made in writing using a form. Mr Saeed did not specify what kind of form.

5. It is helpful in considering the submissions made to have regard to Section 3C of the Immigration Act 1971. It provides:-

"This section applies if –

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

b) *The application for variation is made before 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,

b) An appeal under Section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought [while the Appellant is in the United Kingdom] against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or

c) An appeal under that section against that decision [or brought while the Appellant is in the United Kingdom] is pending (within the meaning of Section 104 of that Act).

(3) Leave extended by virtue of this section shall lapse if the Appellant 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) Sub-section (4) does not prevent the variation of the application mentioned in Sub-Section (1)(a).

(6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations-

a) May make provision by reference to receipt of a notice,

b) May provide for a notice to be treated as having been received in specified circumstances,

c) May make different provisions for different purposes or circumstances,

d) Shall be made by statutory instrument and

e) Shall be subject to annulment in pursuance of a resolution of either House of Parliament."

6. Mr Saeed submitted that when Section 3C was first enacted, any application would have sufficed; there was no concept of valid or invalid application. It followed in Mr Saeed's submission that the Appellant had a vested right which applied to any application made prior to the expiry of leave. The argument seems to me rather circular because what needs to be determined is the meaning of "application." Mr Saeed's essential submission is that the term "application" means both valid and invalid applications. That would mean however that an invalid application is a valid application.

7. In support of his submission that the long residence rule is to be interpreted generously, he observes that whereas paragraph 276B(v) provides:-

"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 up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period. Other provisions are less generous. As an example he refers to Paragraph 134 of the Immigration Rules which relates to indefinite leave to remain for work permit holders which provides at 134(viii) that 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."

Rule 134 did not point to any periods of overstaying between periods of entry clearance or leave to enter or leave to remain.

8. I did not find it necessary to call on Mr Walker. The notion that an application which is not capable in law of being accepted as valid is still to be treated as valid until the Secretary of State rejects it simply cannot be right. It may be different if an application is capable of being accepted but it was common ground between Mr Walker and Mr Saeed that the statutory provisions were such that the requirements attaching to the application were mandatory. Put simply, in my judgment, an application to be an application must be a valid application and the submission of Mr Saeed that it would be sufficient if the application were made on a form in writing leads to uncertainty. The submission could lead to ludicrous "applications" being sufficient. I am bound to ask what kind of form would suffice? There is, I find no merit in this part of the appeal.

9. Permission was granted on a very limited basis but Mr Walker was content to allow the grounds be amended in order that paragraph 276ADE (which deals with private life applications) might be revisited. I am bound to observe that Mr Walker for the Secretary of State dealt with this matter in any extremely fair and proper way given the sequence of events as he saw them. The chronology of events set out in the skeleton argument of Mr Saeed on behalf of the Appellant was accepted by Mr Walker. The Appellant had made "application" on 19 April 2011. That was met with a letter from the Secretary of State dated 7 May 2011 which was received on the 9 May 2011. The Appellant was told that the application was being refused because the appropriate new fee had not been received. He was told that without the appropriate fee the application was being returned with all supporting documents. The Appellant was also advised to use the current version of the form although he was not told that the form that he had used was a form that had been valid but was now only being accepted because it was submitted during a 28 day period of grace allowed in the case of the now out of date form being submitted. The focus on that letter was on the fee.

10. On the Respondent's case provided a valid application had submitted by 19 May 2011 the Appellant would have been able to benefit from the 28 day period of grace (for the avoidance of doubt not in respect of the correct form but within the meaning of paragraph 276B(v). On 12 May 2011, a week prior to that 28 day period of grace expiring, the Appellant

reapplied, though on this occasion using the wrong form because though he had used precisely the same form that he had used on the previous occasion he was not aware that the form that he had used was incorrect and it is of note that a letter dated 16 May 2011 again prior to 19 May when the 28 day period of grace would have expired, the Appellant was thanked for his recent application. He was not told at that time that he had used the wrong form. He was told for the first time that he had used the wrong form after the 28 day period had elapsed on 14 June 2011.

11. I rose for a short period in order that Mr Walker could consider his position in the light of his own observation that there had been inherent unfairness in not informing the Appellant when he applied with the wrong fee that he had also applied on the wrong form rather than simply inviting him to ensure that he used the correct form given the letter was capable of being read to imply that the only objection being made was to the fee. This was all the more so given that the application had been made by the Appellant on a form after the date of change of form which was capable of reinforcing the Appellant's view that there was no reason for him to doubt that he had used the correct form.

12. Although the Appellant could not succeed, in my judgment in his "3C" point, that did not mean that consideration should not be given to Paragraph 276ADE or the wider application of art. 8 ECHR. Mr Walker agreed.

13. Paragraph 276ADE provides for the relief sought by the Appellant but only after 20 years. However Mr Walker agreed that given the peculiar facts of this case it was appropriate to look beyond paragraph 276ADE to the wider application of Article 8 and he further agreed that given the unfairness, which he conceded, it was right to allow the Appellant's appeal on private life grounds against the decision to remove him. Whilst I told Mr Walker that I would not make any direction it seemed to me and Mr Walker did not disagree, that the only way to put right this unfairness was in fact to grant to the Appellant the very relief that he had sought in the first place, namely indefinite leave to remain and I told Mr Walker that I would make such a recommendation and indeed I do so.

14. I conclude this determination by observing that it does Mr Walker great credit that he approached this appeal in the very pragmatic manner in which he did.

Decision

There was an error of law in the determination of the First-tier Tribunal. The decision of the First-tier Tribunal is set aside. The appeal is allowed on the limited basis that it succeeds on human rights grounds (Article 8).

Signed **Date**

Designated First Tier Tribunal Judge
(Sitting as a Deputy Judge of the Upper Tribunal)