Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07975/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 August 2017	**On 01 September 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FRANCIS GOMES
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Armstrong, Home Office Presenting Officer
For the Respondent: Mr S Karim, Counsel, instructed by Law Lane Solicitors

DECISION AND REASONS

1. The application for permission was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr Gomes as the appellant and the Secretary of State as the respondent.

2. First-tier Tribunal Judge Cameron promulgated a decision on 6th December 2016 allowing the appellant's appeal under paragraph 276B of the Immigration Rules. The judge, however, dismissed the appeal in

relation to Appendix FM and paragraph 276ADE and on Article 8 grounds under the European Convention on Human Rights.

3. The appellant had entered the United Kingdom on 24th August 2005, and with extensions, had uninterrupted leave from 24th August 2005 until 11th April 2014 as a Tier 4 (General) Student. On 5th April 2014 he applied for an EEA residence card but his application was refused on 29th July 2014. On 26th August 2014 the appellant applied for leave to remain on the basis of family and private life and that application was refused by the Secretary of State on 3rd November 2014. That timing is critical.

4. As the judge recorded at paragraph 21 of his decision, the appellant appealed the refusal decision of 3rd November 2014 and in a decision promulgated on 4th June 2015 First-tier Tribunal Judge Hodgkinson dismissed the appeal. Permission to appeal to the Upper Tribunal was refused on 2nd September 2015.

5. The appellant's further application for indefinite leave to remain, this time on the basis of ten years' lawful residence, was dated 22nd September 2015 and stated to have been received by the respondent on 25th September 2015. The Secretary of State refused the application on 2nd October 2015.

6. The judge rejected the Secretary of State's contention in her refusal decision dated 2nd October 2015, that the EEA application made on 5th April 2014, which was within the appellant's then extant leave, should be disregarded. As such the appellant had 10 years lawful and continuous residence.

7. The judge reasoned at paragraphs 23 and 24:

> *"23. Section 3C of the Immigration Act 1971 sets out the relevant provisions. It notes that the section applies if 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. But there is nothing within the Immigration (EEA) Regulations 2006 which would indicate that the application under the EEA regulations would exclude an appellant relying on section 3C.*
>
> *24. The appellant therefore did make an application which would engage section 3C. That application was determined on 29 July 2014 without a right of appeal and that therefore would become the relevant date. It is however then necessary to consider paragraph 276B which sets out the requirements for long residence."*

8. In the Secretary of State's application for permission to appeal, she pointed out that the judge had failed to have regard to the guidance set out in **AS (Ghana) v Secretary of State for the Home Department [2016] EWCA Civ 133**:

"21. It is common ground that there are two regimes potentially in play for those in this country who are not UK citizens. The first is that under the 1971 Act which requires a grant of leave by the Secretary of State. The second is that under the Free Movement of Citizens Directive 2004 and the 2006 Regulations. As is perhaps clear from the discussion above, the question to be asked in each category is different. Under the 1971 Act a person requires leave and if he or she does not have it, that person has no status in this country. Those who have status pursuant to a grant of leave may have that leave extended if an application to vary the leave is refused and there is an appeal against the immigration decision that is refusing the application [my emphasis].

22. The position of those claiming to have EEA rights differs. Their rights result from their position and, in the case of their dependants, the position of the EEA citizen. They either have those rights or they do not have those rights. The EEA citizen only has those rights so long as he or she remains a qualified person within regulation 6 of the 2006 Regulations. Although there is provision for an appeal against the decision refusing an application under the Regulations, no provision has been made in the Regulations for a right to remain in this country pending the exercise of such an appeal.

23. I do not accept that the Regulations and in particular paragraph 1 of Schedule 1 and paragraph 1 of Schedule 2 can be construed to mean that there is a different answer. Mr Kannangara's submission that a person 'should' have a status in effect similar to that given by section 3C of the 1971 Act is in effect a submission as to a reform designed to put such a person in a similar position to a person with leave under the 1971 Act. That process, however, is one for the legislature and not for the court. In the particular circumstances of this case where the appeal under the Regulations was abandoned and it appears that the appellant's right to be in this country as a dependant of an EEA national may have ceased before the divorce in 2011 and thus before his application for permanent residence on 16 November 2011, his argument is, in my judgment, without merit.

24. It follows from this consideration of the Directive and the UK statutes and regulations that the appellant did not have leave to remain at the time he made his application via the 'private life' route. It follows from this that the decision of the Secretary of State dated 16 August 2013 refusing that application could not have been an immigration decision.

25. As well as the provisions to which I have referred, paragraph 4(2) of schedule 2 to the 2006 Regulations expressly provides that a person who has been issued with a residence card shall have no right of appeal under section 82(1) of the 2002 Act, and

regulation 19(5) recognises the distinction between the right to reside under EU law and the right to remain under the 1971 Act. It provides that a person must not be removed as a person who does not have or ceases to have a right under the 2006 Regulations it he has a right to remain by virtue of leave granted under the 1971 Act."

9. It was submitted on the basis of the above that there was a clear distinction between the right to be in the United Kingdom which is recognised by the issue of a residence card under the Immigration (European Economic Area) Regulations 2006 and the right to remain, where leave is granted under the 1971 Act which is then also extended under the statute. The appellant made an EEA application which was unsuccessful. He did not have a right to be in the United Kingdom at that time and he did not have existing leave to remain which could have been extended after his leave expired on 11th April 2014. Although overstaying for up to 28 days can be disregarded, and it would appear that this is how the judge analysed the case, the appellant's next application under the Immigration Rules and thereby the statute was made on 26th August 2014 and therefore *more than four months after his leave had expired*. On that basis it could not be said that the appellant was lawfully residing in the UK throughout that period and his application under 276B must fail.

10. At the hearing before me Mr Karim submitted that there was a distinction between **AS (Ghana)** and the appellant's case. In **AS (Ghana)** it was the appellant who had status under the EEA Regulations, as distinct from the present appellant, who had leave as a Tier 4 Student and it was the *extant* leave which should be considered rather than the *prospective* leave. As such **AS (Ghana)** had no relevance.

11. In my view, however, Section 3C clearly applies however to those applying for variation of leave – not to those making an application for a declaration of their rights under the EEA Regulations and the Immigration Act 1971 sets out as follows:-

'Section 3C Continuation of leave pending variation decision'

This section applied 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

12. It is clear that there must be an application for variation of *leave* and leave stems from and is governed by the Immigration Act. By contrast this applicant did not apply for variation of leave or for leave. He applied for rights to be declared under the EEA Regulations. That is a crucial distinction.

13. The decision of **AS (Ghana)** does indeed underline the principle that there is a distinction between leave granted under the Immigration Act 1971 and residence by virtue of the EEA Regulations. The legal framework is set out in **AS (Ghana)** and specifically paragraph 8:

> *"8. Sections 1 and 3 of the Immigration Act provide that leave to live, work or settle in the United Kingdom must be obtained by those who have no 'right of abode in the United Kingdom'. Section 3C of the 1971 Act when read with section 4 empowers the Secretary of State to vary the leave of those with limited leave to enter or remain who apply for variation of the leave before their leave expires. It provides that in such a case the leave is 'extended by virtue' of the section during the period pending a decision on the application in which an 'in-country' appeal could be brought, the withdrawal of the application, or where the applicant leaves the United Kingdom; see section 3C(2) and (3). Section 3C(4) prohibits a person from making an application for variation of his leave while that leave is extended by 'virtue of section' 3C(2). It thus prohibits a further application to vary after section 3C has started to operate."*

14. As set out in **AS (Ghana)** there is no similar rule to Section 3C within the Immigration (European Economic Area) Regulations 2006. Rule 15B of the EEA Regulations 2006 states only:

> *"**15B. Continuation of a right of residence***
>
> *(1) This regulation applies during any period in which, but for the effect of regulation 13(4), 14(5), 15(3) or 15A(9), a person ('P') who is in the United Kingdom would be entitled to reside here pursuant to these Regulations.*
>
> *(2) Where this regulation applies, any right of residence will (notwithstanding the effect of regulation 13(4), 14(5), 15(3) or 15A(9)) be deemed to continue during any period in which –*
>
> *(a) an appeal under regulation 26 could be brought, while P is in the United Kingdom, against a relevant decision (ignoring any possibility of an appeal out of time with permission); or*
>
> *(b) an appeal under regulation 26 against a relevant decision, brought while P is in the United Kingdom, is pending."*

15. As set out, 15B only applies where P is entitled to reside here pursuant to the Regulations.

16. The appellant's leave was granted with reference to the Immigration Rules and thus under the Immigration Act 1971 and expired on 11th April 2014. He applied on 5th April 2014 for a residence card and thus a

declaration of rights under EEA Regulations which was refused on 29th July 2014. At no point did the appellant have rights under the EEA Regulations and consequently cannot derive any source of protection from those Regulations. He next applied for '*leave*' on 26th August 2014, some four months after his leave had expired.

17. I therefore conclude that there was an error of law made by the judge in his conclusion at paragraph 23 as cited above.

18. There may be further considerations and findings to be made with respect to paragraphs 276B and 276ADE and indeed regarding Article 8 outside the Rules bearing in mind the findings were made on the basis that it was found that the requirements under paragraph 276B were fulfilled. In view of the nature and extent of the findings to be made I remit with the agreement of both Mr Karim and Mr Armstrong the matter to the First-tier Tribunal for a decision on all grounds.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed

Helen Rimington

Upper Tribunal Judge Rimington Date 31st August 2017