Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20685/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 August 2017	On 16 August 2017

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Anusha Gokool Appellant
(ANONYMITY DIRECTION NOT MADE)

And

Secretary of State for the Home Department Respondent

Representation:
For the Appellant: Ms L Appiah, of Counsel, instructed by Inayat Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a national of Mauritius born on 13 February 1983, has been granted permission to appeal to the Upper Tribunal against a decision of Judge of the First-tier Tribunal N Haria who (following a hearing on 7 October 2016) dismissed her appeal under the Immigration Rules and on human rights grounds against the respondent's decision of 18 May 2015 to refuse her application of 16 March 2015 for indefinite leave to remain based on long residence (i.e. ten years' lawful residence).

2. As the appellant's application was made on 16 March 2015 and the Secretary of State's decision on 18 May 2015, the appellant did not have a right to appeal on immigration grounds. She could only appeal on human rights grounds. This is

because ss.82 and 84 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") were amended by s.15 of the Immigration Act 2014 with effect from 20 October 2014 and because the transitional provisions do not apply.

3. In relation to Article 8, the judge purported to consider whether the appellant's appeal should be allowed under para 276ADE of the Immigration Rules. She found that there would not be very significant obstacles to the appellant's reintegration in Mauritius. She then considered the Article 8 claim outside the Rules and concluded that the decision was not disproportionate.

4. In her consideration of the Article 8 claim outside the Rules, the judge did not consider the submission advanced on the appellant's behalf, that her leave was extended under s.3C of the Immigration Act 1971 (the "1971 Act") as a consequence of which she had ten years' lawful residence in the United Kingdom as at the date of her application of 16 March 2015. Para 12 of the judge's decision, where she set out her reasons for refusing an adjournment request made on the appellant's behalf, suggests that she considered that the respondent had correctly stated in the decision letter that the total period of the appellant's lawful residence was 7 years 7 months, i.e. from 4 September 2003 (the date when she entered the United Kingdom with leave as a student) and 20 April 2011, this being the date to which she was granted leave upon the Respondent's reconsideration of an earlier decision which was appealed successfully.

5. It follows that, in assessing proportionality outside the Rules, the judge considered that the period of lawful residence was 7 years 7 months.

6. It was not in dispute before the judge that the appellant had leave from the date of her arrival in the United Kingdom on 4 September 2003 until 20 April 2011. This was a period of 7 years 7 months.

7. The appellant's previous appeal was an appeal against a decision of 9 July 2010 to refuse her application of 29 May 2010 for leave to remain as a Tier 4 student. In allowing the appeal on 16 November 2010, the First-tier Tribunal (Immigration and Asylum Chamber) concluded that the decision was not in accordance with the law. The respondent reconsidered her decision. On 20 January 2011, the respondent issued a biometric residence permit ("BRP") which stated that leave was granted until 20 April 2011. The respondent accepted before the judge that this was sent to the wrong address. Before the judge, it was argued that the fact that the BRP had been sent to the wrong address meant that her leave continued under s.3C of the 1971 Act.

8. Before me, Mr Tarlow accepted that the judge had erred in law by failing to consider whether the appellant's leave was extended under s.3C so that she continued to have leave as at the date of her application. If she did have such leave (and Mr Tarlow accepted before me that she did), the error was material because the fact that the appellant had lawful residence for a continuous period of 10 years was material to the balancing exercise in the assessment of the Article 8 claim outside the Rules.

9. Accordingly, Ms Appiah and Mr Tarlow agreed that the judge's decision to dismiss the Article 8 claim outside the Rules should be set aside and that the Upper Tribunal should proceed to re-make the decision on the appellant's appeal.

10. I am satisfied that the judge did materially err in law by failing to consider the submissions advanced before her on the appellant's behalf that the appellant's leave was extended under s.3C up until the date of her application of 16 March 2015. I therefore set aside her decision to dismiss the appeal on human rights grounds and proceed to re-make the decision.

11. There is no dispute between the parties that the appellant has established private life within Article 8(1), that the decision will interfere with her private life and that the decision is in accordance with the law for the purposes of Article 8(2). I therefore proceed to the balancing exercise to decide whether the decision is disproportionate.

12. I pause here to explain the reason why Mr Tarlow accepted that the appellant's leave was extended under s.3C notwithstanding that her appeal was finally determined on 16 November 2010. Given that the First-tier Tribunal allowed the appellant's appeal on the ground that the decision of 9 July 2010 was not in accordance with the law, he accepted that the respondent's guidance entitled: *"Leave extended by section 3C (and leave extended by section 3D in transitional cases)"*, version 6.0, dated 21 March 2016, applied. Insofar as relevant, this reads:

> "Position following an allowed appeal
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> Where an appeal has been allowed the Tribunal in allowing the appeal may have found that the Secretary of State's original decision was unlawful such that the refusal decision is set aside. This means that Secretary of State has to re-make the decision. The effect on section 3C leave is that it reverts to leave under section 3C(5) during the period between the appeal being allowed and a new decision being made. As the decision is set aside, it is possible for the outstanding application to be varied during the period before it is decided."

13. Accordingly, Mr Tarlow accepted that the previous decision of 9 July 2010 was set aside and that the appellant's s.3C continued and that, as at the date of her application of 16 March 2015, she had more than ten years' lawful residence.

14. I am satisfied that, as a matter of legal construction (and not merely as a result of the respondent's guidance quoted above), the respondent's decision of 9 July 2010 was set aside. The respondent was therefore required to make a new decision on the appellant's application of 29 May 2009 which remained outstanding and which was varied by her application of 16 March 2015, as is permitted pursuant to s.3C(5). The fact that the respondent issued a BRP on 20 January 2011 was irrelevant. It was not a decision on the appellant's application of 29 May 2009.

15. Thus, the appellant's leave was extended under s.3C in the period between her appeal being allowed on 16 November 2010 and her application of 16 March 2015. She therefore had more than ten years' lawful residence as at the date of her application of 16 March 2015.

16. The fact that the appellant has more than ten years' of lawful residence is relevant to the balancing exercise in considering her Article 8 claim outside the Rules.

17. After taking instructions, Mr Tarlow confirmed that the respondent does not take issue with any of the factors in para 276B(ii) of the Immigration Rules. He requested me to take this into account in re-making the decision on the appellant's appeal.

18. The fact that the respondent does not take issue with any of the factors in para 276B(ii) means that, if the appellant had available to her a ground of appeal to

challenge the decision under para 276B, I would find that, having regard to the public interest, there are no reasons why it would be undesirable for her to be given indefinite leave to remain on the ground of long residence. This means that, if the appellant had available to her a ground of appeal to challenge the decision under para 276B, I would allow her appeal under the Immigration Rules.

19. This is relevant to the balancing exercise in relation to Article 8 outside the Rules, although the type and duration of leave to be granted is a matter for the respondent given that the appellant only has the human rights ground of appeal.

20. For the reasons given above, I am satisfied that the decision is disproportionate. I therefore allow the appellant's appeal on human rights grounds outside the Rules (Article 8).

Decision

The decision of Judge of the First-tier Tribunal Haria involved the making of a material error of law such that her decision to dismiss the appeal on human rights grounds (Article 8) is set aside. Her decision to dismiss the appeal under the Immigration Rules stands.

The Upper Tribunal has proceeded to re-make the decision on the appellant's appeal against the respondent's decision. Her appeal is allowed on human rights grounds outside the Rules (Article 8).

Upper Tribunal Judge Gill Date: 15 August 2017