



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03682/2016

THE IMMIGRATION ACTS

Heard at Field House
On 17th May 2018

Decision & Reasons Promulgated
On 31st May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

ASHRA DEVI MUNORUTH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Muhfuz of Counsel, instructed by Visa Direct

For the Respondent: Mr Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Malone made following a hearing at Taylor House on 24th August 2017.

Background

2. The appellant is a citizen of Mauritius born on 10th November 1982. On 10th June 2005 she was granted entry clearance to come to the UK as a student. Her leave was subsequently extended to 30th April 2009. She then made an in time application for

further leave to remain as a consequence of which she was granted leave to 1st June 2010 and subsequently to 31st May 2012. On that date she applied for leave to remain outside the Immigration Rules which was refused on 13th July 2013. She lodged a Notice of Appeal against that decision on 26th July 2013.

3. On 25th September 2013 the appellant lodged a Tier 4 (General) Migrant application for leave to remain and on the same day withdrew her appeal against the respondent's decision of 13th July 2013.
4. The respondent has never made a decision on the appellant's Tier 4 (General) Migrant application.
5. On 11th August 2015 the appellant made an application for indefinite leave to remain based on ten years' continuous lawful residence in the UK. It was the refusal of this application which was the matter before the Immigration Judge.
6. The basis of the refusal was that the appellant has a gap in her lawful residence because the application which she made on 25th September 2013 was invalid. Accordingly she has not accrued ten years' lawful residence as she claims.
7. The appellant contended that, because the application made on 25th September 2013 had never been decided, it remains outstanding awaiting a decision from the respondent. She was therefore lawfully able to vary that application by making one under paragraph 276B. As at 11th August 2015 she had been continuously and lawfully resident in the UK for ten years.
8. The judge agreed with the respondent and found that the application was invalid because of Section 3C(4) of the 1971 Act which reads:

"A person may not make an application for variation of his leave to enter or remain in the UK while that leave is extended by virtue of this Section."

9. The judge relied on the decision in R (On the application of Patel) v SSHD (s.3C(4) simultaneous application - withdrawal) IJR [2015] UKUT 0273. The headnote of that decision reads:

"S.3C(4) of the Immigration Act 1971 prohibits an application for leave to remain that is made on the same day as, and even if said to be simultaneous with, the applicant's withdrawal of his appeal before the First-tier Tribunal (Immigration and Asylum Chamber)."

10. The judge wrote as follows:

"The appellant made her Tier 4 (General) Migrant application on 25 September 2013. She withdrew her appeal on the same date. In accordance with UTJ Gill's dicta, the appellant made her application throughout the whole of 25 September 2013. When she withdrew her appeal on the same date, she therefore had s.3C leave. It follows that her Tier 4 (General) Migrant application was invalid. Her leave to remain in the UK came to an end when she withdrew her appeal on 25 September 2013. The application the appellant made on 11 August 2015, based on

10 years continuous lawful residence in the UK therefore fails. She has not achieved the requisite period of residence. She had only achieved a period of about eight and a half years from 1 July 2005 to 25 September 2013.”

11. The judge then considered whether there were compelling circumstances for the purposes of a consideration of Article 8 outside the Immigration Rules and concluded that there were not. He concluded that he was not satisfied that her removal would constitute an interference with her private life since she could continue to study in Mauritius. Even if it did constitute an interference it would be in accordance with the law and in pursuit of a legitimate aim and proportionate. On that basis he dismissed the appeal.

The Grounds of Application

12. The appellant sought permission to appeal on a number of grounds challenging the assessment of the proportionality of the decision and arguing that the appellant had been prejudiced because she had never been informed that her application was invalid even though requests for updates were repeatedly made. Furthermore the appellant’s fee has never been returned to her.
13. Permission to appeal was initially refused by Judge Blundell on 30th January 2018 but granted upon renewal by Upper Tribunal Judge King on 9th March 2018.

Submissions

14. Mr Muhfuz accepted that the appellant had made an invalid application. However he argued that the respondent had not acted in accordance with her published rules and policy by failing to inform the appellant of the invalidity which in turn had deprived her of an opportunity of making a further application.
15. He relied on the rules in place in September 2013. Rule 34C states:

“Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A such application or claim will be invalid and will not be considered.

Notice of invalidity will be given in writing and deemed to be received on the date it is given except where it is sent by post in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day.”

16. He argued that the appellant had been treated unfairly by the Secretary of State, because no notice of invalidity had been sent. This was a matter which ought to have been considered by the Immigration Judge and was not. Accordingly he had erred in law.
17. Mr Jarvis submitted that Rule 34C specifically refers to Rule 34A which states:

“Where an application form is specified the application or claim must also comply with the following requirements” which are then set out in the Rules.

Rule 34C therefore only applies where there have been administrative failures in relation to the specified nature of the form and not where the invalidity arises by operation of statute as in this case.

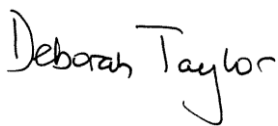
Findings and Conclusions

18. Mr Jarvis’s interpretation of Rule 34C is correct. It refers in terms to paragraph 34A which deals only with cases where the application is invalid because of deficiencies in the form. It does not apply where the application is invalid by operation of law as in this case.
19. Accordingly whilst the Home Office’s conduct of this matter is regrettable, not least in failing to inform the appellant of the invalid application and retaining the fee, she was under no obligation to do so by virtue of the Immigration Rules and policy, and under no obligation to grant the appellant an opportunity to make a further application. Accordingly the appellant is not able to show that she has been prejudiced as a consequence of the respondent’s actions. In fact she has had the opportunity to study further and has had the benefit of a further five years in the UK.
20. The judge therefore did not fail to have regard to any relevant factors in reaching his decision that the appellant could not show compelling circumstances outside the Rules nor that his consideration of Article 8 within the Rules was flawed.

Notice of Decision

The original judge did not err in law. His decision stands. The appellant’s appeal is dismissed.

No anonymity direction is made.



Signed
Deputy Upper Tribunal Judge Taylor

Date 26 May 2018