Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12912/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8th April 2019

Decision and Reasons Promulgated
On 15th May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MS DAPHNEY CHRISTIE CAMPBELL
(ANONYMITY DIRECTIONS NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr M Jafurally, Solicitor, Callistes,Solicitors.
For the respondent: Mr I Jarvis, Senior Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Jamaica, born on 19 June 1953. She came to the United Kingdom on a visit Visa on 26 March 2001 with leave until 24 September 2001. She remained and subsequently obtained various leaves as a student, the last of which expired on 31 December 2006.

2. On 12 June 2017 she applied for leave to remain. This was on the basis that she had been living continually in the United Kingdom since 2001. She also claimed to have had an application pending from 2004/2005. On this basis she was claiming she had section 3C leave since.

3. She said she lived with and was the carer of her friend, Florette. Florette was originally from Jamaica and had acquired British nationality. She indicated her son and grandchildren were in the United Kingdom and she had no family ties with Jamaica.

4. Her application was refused on 1 June 2018. In relation to the immigration rules, no family life was identified. In relation to private life, the appellant had not been here the necessary time. The respondent felt that she could reintegrate into her home country. Outside of the rules, reference was made to her care for Florette. It was pointed out it that Social Services have an obligation to do this. Regarding her son and grandchildren, the respondent did not find the relationship came within the concept of family life for the purposes of article 8.

5. Her appeal was heard by First-tier Tribunal Judge Beg at Taylor house on 10 January 2019. In a decision promulgated on 22 January 2019 it was dismissed. The appellant was represented by Mr M Jafurally, as she is now. It was stated that her friend Florette had died in November 2018 and the appellant will have to leave the accommodation shortly as the rent was not being paid. She indicated she had been receiving payment as her carer.

6. Her son gave evidence. He was granted indefinite leave to remain on 1 November 2006, having obtained entry as a spouse. He said he had a brother in Kingston who worked as a farmer and that the appellant has a brother in America as well as her former husband. He said he would see his mother every other week. He said his wife returned to Jamaica and his children are by his present partner.

7. The judge refers at paragraph 13 to the skeleton argument which states the appellant applied on 28 November 2005 for further leave to remain as a student. This accords with the respondent's evidence whereby she was granted leave until 31 December 2006. Mr Jafurally argued it had not been demonstrated she had received notice of this and as far as she was concerned the November 2005 application was still pending.

8. At paragraph 18 Judge Beg found as a fact that the decision was communicated to the appellant by post on 16 February 2006 via Premier Training and Assessment Centre and the appellant's passport was returned at that stage. The judge asked the appellant if that was the college she had been attending and she nodded in apparent agreement. The judge made the point that if the

appellant thought her application was still outstanding she would have contacted the respondent. There is no such correspondence until early 2017 where her solicitor wrote to the respondent for an update on the 2005 application. The judge did not accept that the appellant had section 3C leave.

9. The judge did not find that her relationship with her son went beyond the normal emotional ties to be expected. Whilst no doubt she was the fond of her grandchildren, family life did not exist between them. The judge did not find the appellant's evidence generally credible. The judge concluded she had attempted to distance herself from her son in Jamaica and also concluded she was in contact with her relatives in America. The conclusion was that she could reintegrate into Jamaica.

Upper Tribunal

10. Permission to appeal was granted in relation to the section 3C leave issue raised.

11. At hearing, Mr Jafurally's argument centred on the appellant not having received a decision on her application of 2005. To this end, he relied upon the Upper Tribunal decision of Syed (curtailment of leave-notice) [2013] UKUT 001444 IAC.

12. By virtue of section 3C of the Immigration Act 1971 if a person who has limited leave to remain applies to vary that leave before the leave expires and then the existing leave expires before the application is determined, leave to remain will be extended whilst the issue of whether or not the variation should be granted is being determined.

13. There is a succinct and accurate summary of Syed (curtailment of leave-notice) [2013] UKUT 001444 IAC (1) at paragraph 14 of the decision of First-tier Tribunal Judge Beg. The decision held the Immigration (Notice)Regulations 2003 did not apply if the decision was not an immigration decision within the meaning of section 82 of the 2002 Act. This meant the Secretary of State had to prove that a decision had been communicated to the person in order for it to be effective. This can occur if given to a person authorised to receive it on the person's behalf but the respondent cannot rely upon deemed postal service.

14. Mr Jarvis accepted that if it were accepted the appellant had an outstanding application and was therefore entitled to section 3C leave this was relevant to consideration of the question of lawful leave and her appeal outside the rules.

15. Mr Jarvis has provided a bundle of 3 documents tabbed A through to C. These were not before the First-tier Tribunal but he sought to introduce them under rule 15(2)(a) of the UT procedural rules. He frankly accepted that he

could advance no real reason as to why they but not have been before the First-tier Tribunal. However, he submitted this evidence should be admitted as it clearly relevant to the question of notice. He submitted it was relevant to the error of law point or alternatively for any reconsideration ordered.

16. Mr Jafurally did not forcefully oppose the introduction of the new material, taking the view that it fact assisted his client.

17. I decided to admit this new material as it would be relevant to the issue arising. Whilst Mr Jarvis frankly accepted there was no excuse for its omission before the First-tier Tribunal it was very relevant to the issue arising. It is my conclusion it was in the interests of justice to consider such evidence in seeking to establish the underlying facts. Although notice was not given to the appellant of the application, her representative has adequate time to consider it and is not strenuously objected to its admission, taking the view in assists his argument.

18. Mr Jarvis said the document at tab A was taken from the respondent's computer system and contains the Home Office reference number C 1069772. There is a delivery number DK306348857+GB and dispatch address being the educational establishment. He submitted that this evidence that the decision was sent to the college. At Tab B, I was referred to the bottom of the page under the capital CAFARRELLREY and the reference to a Jamaican passport, bank statements and supporting documents being sent to Premier Training and Assessment Centre. Tab B also includes the application and C contains the 16 February 2006 decision letter. This also refers to the return of the appellant's passport.

19. Mr Jafurally referred me to page 14 of the application form. He referred me to box 6.2 where the college name and address is given as Premier Training UN3,1A Bethwin Road, London SE5 0YJ. He then referred me to a letter from the college dated 29 November 2005 which is after the application form and which contains the same address. I was then referred to tab C, the respondent's decision letter, which is addressed to Premier Training and Assessment Centre,1 Bethwin Road, London, SE5 0YJ. He referred to the 1st page from the computerised records which again showed the address as 1 Bethwin Road.

20. He submitted therefore that the decision had been sent to the wrong address. He suggested this was because of the omission of `unit 3' and `1A'.I was referred to paragraph 6 of the decision in Syed where the appellant said he knew nothing of the attempt to serve him with notice of curtailment of his leave and did not receive a notice from the post office stating that recorded delivery letter was available for collection. He said that the Upper Tribunal found the notification requirement was not met.

21. Mr Jafurally's principal point was that service had not been affected. He referred to the correspondence from page 9 of the appellant's bundle making enquiries. He referred to the 1st letter being dated the 29 November 2016. He acknowledged that it was legitimate to ask why earlier enquiries were not made but ultimately, if service was not effective, he submitted 3C leave. applied.

22. Mr Jarvis acknowledged there were variants upon the address. He accepted that if I accepted a strict service requirement and concluded service had not been effective then applying Said she would have been here with section 3C leave. This in turn was relevant to the proportionality of the decision made in the First-tier Tribunal. He accepted that if the contention of Mr Jafurally was accepted then paragraph 28 of the decision would be undermined. The judge had proceeded on the basis much of the time spent here was unlawful whereas if the service point was found in the appellant's favour she would have been here lawfully.

23. Both representatives agree that the determinative issue is whether the appellant was properly notified of the decision of 16 February 2006 extending her leave. If she was so notified the judge's conclusions at paragraph 28 apply. If she was not properly notified, and she was here lawfully by virtue of section 3C, then paragraph 28 is incorrect.

24. Mr Jafurally submitted that if the appellant had been here lawfully 10 years that he would have been entitled to claim leave under 276 B of the rules. He made the point that the respondent had not raised any negative issues about her character. Mr Jarvis submitted that if the finding was the respondent had not established effective service then he submitted the matter could remain in the Upper Tribunal for submissions on the impact of that.

Consideration

25. On 12 June 2017 the appellant made an application for leave to remain and the decision that has formed the subject matter of the present proceedings. In that application at 4.14 she intimated she was still waiting on a decision in relation to an application she made in 2004/2005. This is repeated at 10.11. The refusal letter does not specifically address this point but it was raised on appeal.

26. At the appeal hearing, the appellant denied she was an over stayer. She said she had submitted her passport with the application in 2005. Paragraph 6 of the skeleton argument before the judge raised the point about the 2005 application and the claim the appellant did not receive the decision (para 13). The decision of Syed was relied upon and it was submitted the respondent had to prove the decision was communicated either to the individual or someone appointed on their behalf.

27. At paragraph 18 the judge concluded that the decision was communicated to the appellant via Premier Training and Assessment Centre by post on 16 February 2006. The judge also found that her passport was returned at that stage. The judge made the point that had the appellant believed she had an outstanding application she would have made strenuous efforts to contact the respondent (para 19). The correspondence raising this not occur until a decade later. The judge generally found the appellant was not a witness to the truth.

28. In summary, the judge was faced with a claim by the appellant that she was awaiting the outcome of application made in 2005.The judge did not accept this. Firstly, there was a letter from the respondent of 16 February 2006 making a decision on the application. There was no evidence of any further enquiry from the appellant for over a decade. The judge took the view that if the appellant genuinely did not receive the notification then earlier enquiries could have been expected. Generally, the judge did not find the appellant to be credible and therefore rejected this claim. I find these conclusions were open to the judge.

29. Mr Jafurally relies upon the decision of Syed and puts the respondent on strict proofs as to notification of the decision. I now have the benefit of the additional material provided by Mr Jarvis. This shows that an application was made by the appellant in 2005 and she asked that communication as per 2.10 of the form be sent to Premier Training, Unit 3, 1A Bethwin Road, London, SE5 0YJ.

30. The decision letter was sent to Premier Training and Assessment Centre at 1 Berwin Road, London SE5 OYJ. Mr Jafurally argues that the address was incorrect in that `Unit 3' was omitted and 1 used instead of `1A'. Mr Jarvis maintains that there was evidence the appellant was notified of the decision. However, he accepted that should I conclude she was not notified and had therefore section 3C leave then the judge's findings that she was here unlawfully at para 28 are not sustainable. Both representatives were in agreement that evaded find a material error of law the medical be relisted in the upper tribunal for the submissions as to the effect of her having ongoing leave.

31. In Syed the appellant entered the United Kingdom on 9th February 2002. He had various leaves until 12th February 2013. In January 2012 he applied for indefinite leave to remain in the United Kingdom on the grounds of long residence under section 276B.However, his leave was curtailed on 20th October 2009. There was no right of appeal. The respondent twice attempted to serve notice on the appellant of curtailment of his leave by recorded delivery but the notice was returned on both occasions. The First-tier Tribunal judge referred to regulation 6 of the Immigration (Notices) Regulations 2003

and said that the appellant was served by recorded delivery at the address which he had given to the Home Office and at which he confirmed in his evidence he was residing at the date the notice of curtailment was served. The First-tier Tribunal judge was therefore satisfied that the notice for curtailment was validly served and that it was communicated to the appellant.

32. The First-tier Tribunal judge in Syed referred to regulation 6 of the Immigration (Notices) Regulations 2003 and said that the appellant was served by recorded delivery at the address which he had given to the Home Office and at which he confirmed in his evidence he was residing at the date the notice of curtailment was served. The appellant's case was that he knew nothing of the attempts to serve him with notice of curtailment and said that it was hardly likely that he would have applied for indefinite leave to remain if he had known that his leave had been curtailed. It was further claimed that by serving the notice on file the respondent accepted that service on the appellant by recorded delivery had not in fact been affected since the letters to the appellant had been returned by the Post Office.

33. Upper Tribunal Judge Spencer concluded the First-tier Tribunal judge made an error of law in believing regulation 7 applied to decisions in respect of which there was no right of appeal. He also found the judge was wrong to find that the decision had been communicated to the appellant, since the respondent's case was that the notices had been returned un-served and service on the file necessarily involved the proposition that there had been no service.

34. At para 28 Upper Tribunal Judge Spencer considered what amounts to communication of a decision to vary leave where there is no appeal. The Secretary of State has to be able to prove that notice of a decision was communicated to the person concerned for it to be effective. Where there is no "immigration decision" the Immigration (Notices) Regulations 2003 do not apply. Communication would be effective if made to a person authorised to receive it on that person's behalf, see Hosier v Goodall [1962] 1 All E.R. 30, but the Secretary of State cannot rely upon deemed postal service.

35. In the present appeal, the First-tier Tribunal judge found as a fact that the body the appellant nominated received the decision of 16 February 2006.I have set out a summary of the judge's reasons for that at paragraph 27. I now have the benefit of additional information provided by the presenting officer. I find that this confirms the judge's decision was correct. Notably, the correct postal code has been used throughout. I find it improbable that the omissions referred to, namely, `Unit 3' and `1' would have prevented the delivery of the decision. This is supported by the lack of subsequent enquiry on behalf of the appellant or any evidence the notice was returned undelivered.

36. The factual situation is also different from that in Syed in that the appellant there had leave covering the period up to the final application. In the absence

of notification in that case he had no reason to make enquiries. The situation here is different in that the appellant's leave was due to expire. Consequently, I find no material error of law established and the judge's conclusions, particularly those at paragraph 28 are sustainable.

Decision

No material error of law has been established in the decision of First-tier Tribunal Judge Beg. Consequently, that decision dismissing the appeal shall stand.

Deputy Upper Tribunal Judge Farrelly.

Dated 13 May 2019