



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number HU/26081/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20th May 2019

Decision and Reasons Promulgated
On 21st May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

SYED MD MORSHED ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Balroop (Counsel, instructed by Shah Jalal, Solicitors)
For the Respondent: Mr D Clarke (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant's immigration history is set out in full in the Tribunal papers. The relevant events for this appeal are that he entered the UK on the 1st of October 2016 as student. Following a number of extensions the Appellant's leave to remain (LTR) was curtailed expiring on the 25th of May 2015. The reasons for curtailment are not relevant. On the 19th of May 2015 the Appellant applied for a residence card as an extended family member (EFM) under the EEA Regulations.
2. It is said that the refusal of the application was not received by the Appellant or his representatives and that after prompting it was varied to a SET(O) application on the 23rd of February 2016. The EEA application was refused on the 25th of February 2016 and the SET(O) application was refused on the 18th of July 2016 which the Appellant appealed. He withdrew that

appeal and applied under the long residence rules which was refused and which formed the basis for this appeal.

3. The Appellant's appeal in the First-tier Tribunal was heard by First-tier Tribunal Judge Beg at Taylor House on the 1st of October 2018. In a decision promulgated on the 4th of October 2018 he dismissed the Appellant's appeal noting the history and finding that the Appellant had not shown that he had 10 years lawful residence for the Immigration Rules and finding that the Appellant's removal would be proportionate in the circumstances.
4. The Appellant sought permission to appeal to the Upper Tribunal on the grounds that the Judge had ignored the evidence that the Refusal Letter in relation to the EFM application had not been received by the Appellant or his representative. In the circumstances it is argued that the Appellant had more than 10 years lawful residence in the UK and accordingly met the requirements of the Immigration Rules referring to the definition of lawful residence. Permission was granted on that basis. The grounds of application challenge the finding that the Appellant did not have 10 years lawful residence but did not challenge the Judge's proportionality assessment simply asserting that he had 10 years lawful residence and had built up a strong private life with his brother and friends.
5. There was no rule 24 response from the Home Office. At the start of the hearing I raised the issue whether section 3C of the Immigration Act 1971 applied to applications under the EEA Regulations as my understanding was that it did not. Mr Balroop was unable to point to any authority to support the implied proposition that it did and my concern reflected the Home Office's position on the point.
6. Section 3C of the 1971 Act provides as follows:
 - 3C Continuation of leave pending variation decision
 - (1) This section applies 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.
7. Paragraph 5 of the Immigration Rules provides as follows: Save where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules.
8. The Appellant's application of the 19th of May 2015 was for a residence card under the EEA Regulations. As is made clear by paragraph 5 of the Immigration Rules those rules are entirely separate from and independent of the EEA Regulations and there is no overlap between them. An application for a residence card is not an application for any form of LTR let alone an application for variation of LTR. The Appellant was not granted a residence card and did not pursue that appeal thereby not contesting the Home Office case that he did not qualify under the EEA Regulations as he had claimed.
9. It follows that the Appellant had not applied for variation of his LTR and so his LTR expired on the 25th of May 2015 and was *not* extended by section 3C of the 1971 Act. Since that date the Appellant has been without LTR in the UK and his presence since that date has not been lawful. In those circumstances his LTR expired with his having only acquired 9 years lawful residence

and the Judge was right to find that the Appellant did not meet the requirements of the Immigration Rules.

10. Whether or not the Appellant received the Refusal Letter for the EFM application is not material as his leave had expired as indicated above and none of the subsequent applications can have had the effect of restoring it retrospectively. Accordingly the Judge was right to continue on the basis that the Appellant did not have 10 years lawful residence and the assessment of proportionality was open to the Judge for the reasons given.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:



Deputy Judge of the Upper Tribunal (IAC)

Dated: 20th May 2019