IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000788

First-tier Tribunal No: HU/54886/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of April 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Promise Lynda Ijeoma Obioha
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr H Broachwalla of Counsel, instructed by Sun Rise Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard remotely at Field House on 12 April 2024

DECISION AND REASONS

1. By the request of the appellant's legal representatives in their letter of 15.3.24, this matter has been listed as an expedited remote hearing because of her constrained and difficult living circumstances and health issues, and that she is represented by counsel pro-bono. For the same reasons, she also sought any remaking of the decision be done at the same hearing, should an error of law be found.

2. Following the helpful submissions of both legal representatives, I reserved my decision.

3. The Upper Tribunal has received Mr Broachwalla's skeleton argument dated 12.4.24 and the respondent's Rule 24 Reply, dated 29.2.24. Both documents were only received on the day of the hearing but have been taken into consideration together with the oral submissions.

4. By the decision of the First-tier Tribunal (Judge Hollings-Tennant) dated 23.2.24, the appellant, a national of Nigeria who last entered the UK as a student on 30.9.14, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Cary) dated 30.1.24 dismissing her appeal against the respondent's decision of 28.3.23 to refuse her application made on 9.3.23 for Leave to Remain (LTR) on long residence grounds pursuant to paragraph 276B of the Immigration Rules.

5. There is a lengthy immigration history as set out in the papers before the Upper Tribunal. Most relevant is that the appellant's last leave expired on 29.1.20. On 20.1.20, she made an in-time application for LTR on private and family life grounds, refused on 18.2.20. The appellant successfully appealed that decision to the First-tier Tribunal (Judge Malone) which allowed the appeal on 25.10.21 but this was in turn overturned by the Upper Tribunal on 26.9.22. Permission for onward appeal to the Court of Appeal was refused by the Upper Tribunal on 9.11.23. At issue in this appeal is whether the appellant's lawful leave continued under s3C to 2023, so that she qualified for ILR on the 10 years' continuous lawful residence provisions under paragraph 276B of the Immigration Rules.

6. The respondent's case at the First-tier Tribunal was that the continuity of residence was broken on 18.2.20 when her LTR application made on 20.1.20 was refused, as detailed further below. The application was additionally refused on article 8 ECHR private and family life grounds outside the Rules, which is not directly relevant to the issues in this appeal and was not addressed in the submissions made to the Upper Tribunal.

7. In summary, the grounds argue that the First-tier Tribunal erred in finding that the appellant does not benefit from s3C leave under the 1971 Act in accruing 10 years' continuous lawful residence and in doing so misapplied Marepally v Secretary of State [2022] EWCA Civ 855.

8. In granting permission, Judge Hollings-Tennant considered it arguable that as the judge had accepted (at [15] of the decision) that the appellant had accrued 10 years' residence comprising 7 years between 12.2.13 and 29.1.20 and thereafter by virtue of s3C, "*It is at least arguable the judge erred in finding that the appellant is not entitled to rely on the full period of lawful residence she accrued under section 3C for the reasons set out.*"

9. However, Judge Cary did not make a finding at [15] that the appellant had accrued 10 years' continuous lawful residence. The judge merely noted that at the time of expiry of her leave on 29.1.20, she had been in the UK for 7 years and that any further leave was under s3C.

10. There is also an important correction to be made to the chronology at [4] of the First-tier Tribunal decision, where it is stated that the appellant's further LTR application was made on 18.2.20, which would be beyond 14 days after the expiry of her leave on 29.1.20. However, Mr Wain informed me that the application was made on 20.1.20, before expiry of her leave, as I have stated above.

11. The respondent's Rule 24 reply concedes that there was a material error of law in the decision of the First-tier Tribunal and suggests that it should be set aside with no findings preserved. At [3] of the Reply it is accepted the judge was in error in finding that s3C leave cannot count towards 10 years' continuous lawful residence. Reference is made to page 23 of the Long Residence Guidance V19.0 of 5.10.23, which states at section 4 that, "*Time the applicant has spent in the UK with 3C leave also counts towards lawful residence*." That has now been replaced by V20.0 issued on 11.4.24, but the relevant passage is to the same effect:

"*Leave which is extended by virtue of section 3C of the Immigration Act 1971, counts as lawful presence for the purposes of long residence.*"

12. However, the Rule 24 Reply goes on to argue that following the Upper Tribunal's refusal of permission to appeal to the Court of Appeal the 3C leave ceased and that therefore the appellant was to be treated as having had no leave to remain since the expiry of her previous grant of leave on 29.1.20 and the continuity of her leave was broken by the refusal of her application on 18.2.20. In his submissions, Mr Wain relied on [4] of the Reply to argue that the point taken in the refusal decision rests on the fact that the appellant's previous appeal proceedings were ultimately unsuccessful. It was agreed that her s3C leave continued until the Upper Tribunal's decision of 9.11.23, refusing of permission to appeal to the Court of Appeal, but then ceased so that she was to be treated (for purposes of long residence) as having had no leave to remain since the expiry of her previous leave on 29.1.20.

13. I raised with the two representatives whether, if the respondent's argument was correct, the respondent's concession of an error of law was properly made as being material to the outcome of the appeal. If the respondent's argument is correct, the appeal should still have been dismissed in the First-tier Tribunal. However, both representatives agreed that whether or not the appeal is set aside and remade, the legal arguments as an error of law remain identical and that, if necessary, the decision in the appeal can be remade without needing any further evidence or submissions.

14. As Judge Cary correctly identified, paragraph 276B(i)(a) requires an applicant to demonstrate that they have had at least 10 years continuous lawful residence in the UK at the date of application. There are other requirements, including that under 276B(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where paragraph 39E applies.

15. Paragraph 39E provides exceptions for overstayers where the application was made within 14 days of leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in time; or the application was made following the refusal of a previous application for leave which was made in time; and within 14 days of the refusal of that previous application, or the expiry of any leave extended by s3C; or the expiry of the time limit for making an in time application for administrative appeal or appeal being concluded, withdrawn, abandoned or lapsing.

16. In addition to the Long Residence Guidance referenced above, the respondent's Guidance: '*Leave extended by section 3C (and leave extended by section 3D in transitional cases)*', V12.0 issued on 8.8.23, explains that where an in-time application is made by a person holding LTR and the application is not decided before existing leave expires, s 3C extends the person's existing leave until the application is decided (or withdrawn).

17. Both the respondent's Review of 9.8.23 and the grounds of appeal refer to Marepally, which applied R (Akinola) v SSHD [2021] EWCA Civ 1308 and held at [9] that:

> *"The purpose of section 3C of the 1971 Act is to protect the immigration status of those with existing leave to remain who have applied for a variation of that leave and who are awaiting a decision on the application or who are exercising appeal or review rights in respect of that decision.*

> *Continuing a person's existing leave during that period will prevent the person becoming an overstayer and being subject to the disadvantages faced by those who remain in the United Kingdom without leave. The purpose of the section is not to enable persons to be able to rely on continuations of leave for the purpose of building up 10 years' continuous lawful residence in order to claim indefinite leave under paragraph 276B of the Immigration Rules although the fact that section 3C extends periods of lawful residence may have an impact on that issue."*

18. Judge Carey correctly summarised this at [16] of the decision, citing Marepally. There the judge concluded that the appellant could not fill the gap from 29.1.20 by relying on s3C to extent her leave to acquire 10 years' continuous lawful residence. Mr Brochwalla argues that the judge has misinterpreted Marepally. That is the issue in the appeal.

19. As stated in Marepally, the purpose of s3C is to prevent the situation where a person would otherwise become an unlawful overstayer on the expiry of their original leave, whilst waiting for the outcome of an application for variation of leave, etc. For the same reason, the illustration offered by Mr Broachwalla in his submissions, that if the clock was reset to the expiry of leave on 29.1.20 any employment of the appellant during the period of 3C leave would have been rendered unlawful, does not assist his argument. 3C leave prevents continued presence including such activity, if permitted under the original leave, being rendered unlawful.

20. However, the appellant relies in particular on [41] of Akinola, where Sir Stephen Smith stated that, "*section 3C also has a potentially important part to play in the accumulation of the 10 years continuous lawful residence in the UK which is a requirement for the grant of indefinite leave to remain under paragraph 276B of the Immigration Rules. Whilst I do not think that that can be said to be a purpose of the section, it is plainly an important aspect of it and provides the context for each of the cases now before us*." What that part is, is precisely what is at issue in this appeal.

21. I note that Akinola turned on a different point, the Court of Appeal holding that where time is extended and permission granted to pursue an out of time appeal, 3C leave is revived retrospectively to the date of the application for an extension of time and not from the date of the grant. In fact, none of the appellants in Akinola could have had 10 years' continuous lawful residence. I am satisfied that Sir Stephen Smith's observations as to the 'part to play' at [41] of Akinola must be read in that context.

22. I asked Mr Wain to explain how the respondent's argument is consistent with the apparently clear statement in the Long Residence Guidance that "*Time the applicant has spent in the UK with 3C leave also counts towards lawful residence*," and in what way 3C leave could be said to count towards long residence, as the Rule 24 Reply concedes. He relied on the reference to the clock being reset in the decision of the Supreme Court in R (on the application of Afzal) v Secretary of State [2023] UKSC 46, where at [88] Lord Sales, with whom the other judges agreed, stated that "… *if the application for further leave was made in time within the 28 day period, section 3C would extend the original period of leave until the determination of the application, and any appeal or administrative review of a refusal, but unless the application was ultimately successful the clock would then re-set*."

23. The point at issue in Afzal was rather different to the present case, the discussion turned on the effect of out of time applications and any period to be

disregarded. However, both representatives referred me to the hypothetical examples cited by Counsel for the Secretary of State in Afzal, accepted by the court and recorded at [89] of the decision.

24. In the first example, it was said that the continuous lawful residence was broken when the 3C leave comes to an end, "*The clock is re-set and A would not be eligible for ILR on grounds of 10 years continuous lawful residence until 1 March 2026*." However, the reference to the clock being re-set here is to the clock starting again on the date when the hypothetical out of time application was granted on 1.3.16, with a calculation of 10 years from that date to reach 1.3.26. As there was an out of time application in this example, which is not the case in the present appeal, it is not of much assistance in the respondent's argument, which is in effect one that the clock goes back, rather than re-sets or re-starts.

25. The second hypothetical example is more pertinent as on the dates provided, leave is broken not when an out of time application, made within 28 days of the expiry of leave, is refused on 15.1.15, but is broken on the expiry of the original leave on 1.1.14. That would be consistent with Mr Wain's argument that time to be counted for long residence goes back to the last expiry of valid leave. However, the issue in these examples was as to the effect of the provisions to disregard the period out of time application where it is made within 28 days, a rather different point to 3C leave in this case.

26. In his submissions, Mr Brochwalla referred me to [6] and [7] of the respondent's Review document, where the respondent's case was that continuous leave was broken on and entirely different date, that of 22.11.22, when the appellant became Appeal Rights Exhausted (ARE). In response, Mr Wain explained that the Review was drafted on the misunderstanding that 22.11.22 was the date of the original refusal decision. Whether that can be right or not, and whether there was a misunderstanding, in any event I am satisfied that the Review does not assist the appellant's case. It is clear from [5] of the Review that the respondent's case was that "*3C leave is not a grant of leave but only extends existing leave whilst an application/appeal remains unresolved*."

27. In Marepally, the issue was also different to that in the present appeal and addressed whether 3C leave continued because a defective notice of decision had failed to inform the appellant of a right of appeal. He had entered the UK on 21.2.09 and argued that as a notice informing him of a right of appeal had not been served by 21.2.19 he qualified at that date for ILR on the basis of 10 years' continuous lawful residence. However, the Court of Appeal concluded that a valid refusal decision had been served on 11.1.19 bringing any 3C leave to an end so that he did not have 10 years' continuous lawful residence on 21.2.19. With regard to the reliance on Marepally in the present case, it is important to point out that at [56] of the decision, Lewis LJ stated in the circumstances of that case it was not necessary to resolve the question of whether the appellant's leave actually expired earlier than 2019, in January or April 2014, when his leave was curtailed and an application for further leave was determined to be invalid.

28. It follows from the above, that Mr Brochwalla's arguments are misconceived. They run directly counter to the view of the Court of Appeal in both Marepally and Akinola that "*The purpose of the section is not to enable persons to be able to rely on continuations of leave for the purpose of building up 10 years' continuous lawful residence in order to claim indefinite leave under paragraph 276B of the Immigration Rules*…"

29. In so far as the appellant's reliance on the phrase concluding the above sentence, *"…although the fact that section 3C extends periods of lawful*

residence may have an impact on that issue,"and the argument at [7] of the grounds that Marepally "*never says that it cannot count towards accruing 10 years' continuous lawful residence*," I am satisfied that there is no inconsistency at [9] of Marepally or in the respondent's Rule 24 Reply, when it is recognised that only if an appellant's ultimate appeal is successful, can 3C leave count towards a period of continuous lawful residence. The practical effect of 3C in that situation is that leave was never broken as the refusal was made in error and the appellant's appeal ultimately allowed. In other words, the appellant's lawful leave should have continued and is continued by the operation of 3C; otherwise, there would be an injustice to the appellant. It follows that such a period of leave may count towards 10 years' lawful residence but only where the underlying leave did or should be deemed to have continued. That certainly makes sense of the reference in both Akinola and Marepally to the effect of 3C on periods of lawful residence.

30. On the other hand, if and when the underlying appeal is dismissed or an application properly refused, any valid leave necessarily ceased on its expiry or curtailment, etc. and was only extended for the purpose of the protection referred to in Marepally during the period awaiting the outcome of an application or appeal or review. In that situation the appellant is protected from any allegation of being present unlawfully, or working unlawfully, etc. during the period of 3C leave. He cannot, however, take advantage of the 3C leave to accumulate lawful residence for the purpose of 276B when the leave properly ended at the earlier date. There is no injustice in such a consequence.

31. In the circumstances and for the reasons outlined above, I am satisfied that there was no material error in the decision of the First-tier Tribunal. The judge correctly applied the law to the facts of the case. Despite the concession in the respondent's Rule 24 Reply, I find no such error of law and can see no reason to set aside the decision. To make it clear, even if I did set the decision aside, I am satisfied that I would be obliged to remake it by dismissing the appeal without the need for any further argument.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands as made.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 April 2024