Upper Tier Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/27706/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 December 2015	**On 4 January 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

M A
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr J Middleton, instructed by Magne & Co Solicitors
For the respondent: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, M A, date of birth 22.8.77, is a citizen of Zimbabwe.

2. This is her appeal against the decision of First-tier Tribunal Judge Oliver promulgated 14.2.14, dismissing her appeal against the decision of the Secretary of State, dated 19.6.13, to refuse her application made on 12.12.12 for indefinite leave to remain (ILR) under the 10-year long-residence Rules. The Judge heard the appeal on 20.1.14.

3. First-tier Tribunal Judge Pirotta refused permission to appeal on 10.3.14. Similarly, Upper Tribunal Judge Goldstein refused permission in the Upper Tribunal on

11.4.14. However, the matter went to the Court of Appeal and was remitted to the Upper Tribunal, whereupon the Vice-President granted permission to appeal on 21.4.15, stating, "The parties are reminded that the Upper Tribunal's task is that set out in s.12 of the 2007 Act."

4. Thus the matter came before me on 7.12.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Oliver should be set aside. For the reasons set out below, I find that there is no material error of law and that the decision of the First-tier Tribunal should stand as made.

6. The relevant background can be briefly summarised as follows. The appellant first came to the UK in 2001 as a visitor, with leave limited to 6 months. She was later granted further LTR as a student until 30.8.02. An out of time application for further leave made on 27.12.03 resulted in a grant of leave on 19.1.04, valid to 30.9.05.

7. Thereafter, she was refused further leave to remain as a student but her in time application was not refused until 8.12.05 and she made an in time appeal against that decision. That appeal was dismissed on 11.4.06 and from that date the appellant as Appeal Rights Exhausted (ARE). However, whilst her appeal was still pending, on 27.3.06 she made an application for an EEA Residence Card, granted on 12.7.07, on the basis of a relationship with a Norwegian partner, valid until 12.7.12. On that same date, she lodged an application for ILR under the 10-year continuous lawful residence provisions of the Immigration Rules. This was refused on 19.6.13, on the basis that there were two breaks in leave. The first between 31.8.03 and 18.1.04, and the second between 1.10.05 and 11.7.07. The application was also refused on failure to submit evidence of family life with a partner or child. Neither did she meet the requirements of paragraph 276 ADE in respect of private life. The Secretary of State considered that there were no exceptional (compelling) circumstances to justify granting leave to remain outside the Rules on the basis of article 8 ECHR, and decided to remove the appellant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

8. The grounds of appeal included the argument that at the time she made her application on 27.3.06 for an EEA Residence Card she had continuing leave by virtue of section 3C of the Immigration Act 1971, awaiting the outcome of her appeal against the decision made on 8.12.05 to refuse to grant further LTR as a student.

9. §12 of Judge Oliver's decision purports to record a concession by the Home Office Presenting Officer that the second gap "was cited in error in the refusal because the appellant had section 3C leave at the time." The Judge also concluded that the time the appellant spent in Zimbabwe, between July and December 2004, should be disregarded because she had leave both at the date of leaving and return and was for a period under 6 months.

10. Judge Oliver concluded, however, that there remained two breaks in the continuity of lawful residence. The first was a clear gap between 1.9.03 and 18.1.04, when her student leave had expired and her out of time application was not granted until 19.1.04, a period in excess of 28 days. The second was that commencing 12.7.07, when she was granted an EEA Residence Card as an extended family member. Her argument was that in order to meet the 10-year continuity period she could aggregate her leave under the Immigration Rules from 2002, extended under section 3C pending her appeal against the refusal decision of 8.12.05, together with the grant of the Residence Card on 12.7.07, in order to meet the long residence requirement.

11. Judge Oliver rejected this argument, noting that her application was made under the Immigration Rules and not under the EEA Regulations, and concluded that she could not combine leave under one regime with leave under another and thus her claim under the Rules fell to be dismissed.

12. For separate reasons, set out in the First-tier Tribunal decision, Judge Oliver noted that the appellant could not meet the requirements of the Rules in respect of private or family life and that removal was proportionate to the appellant's human rights. Thus the appeal was dismissed on all grounds.

13. The appellant sought to appeal to the Upper Tribunal, as set out in the chronology above. It appears that eventually the matter was remitted by the Court of Appeal, because the Upper Tribunal failed to grapple with the point of principle isolated in §18(iv) of the statement of facts before the Administrative Court, namely, the submission that, "The legal issue on amalgamation of time for extended family members is a novel and important question of law that the UT (IAC) should have considered. It raises an important legal issue about the interplay between EU law and the UK's domestic rules. The number of people in similar circumstances, who might seek to combine time as a holder of an EEA residence document with time holding leave under the Rules in an application for ILR under para. 276B is probably very large. For this reason too the claim should be permitted to proceed."

14. In submissions before me, Mr Middleton confined his arguments to the novel point in relation to the interplay between the Rules and section 3C leave on the one hand and the grant of an EEA Residence Card on the other. He made his submissions consistent with and following his very helpful skeleton argument, dated 8.6.15.

15. I accept Mr Middleton's submission that the first gap, between the expiry of the appellant's leave on 30.8.03 and the grant of leave on 18.1.04 was not essential to the appellant's case at the date of the hearing before the First Tier Tribunal. Following the section 120 notice incorporated into the refusal decision, the Tribunal was required to consider whether the appellant met the 10 years' lawful residence requirement at the date of the appeal hearing of 20.1.14. Thus the necessary period the appellant had to demonstrate was from 21.1.04 to 20.1.14. The first gap identified by Judge Oliver was therefore not relevant.

16. However, for the reasons set out below, I reject Mr Middleton's submissions that the appellant can combine her section 3C leave and what he insisted was the equivalent of 'leave' under the Immigration (EEA) Regulations.

17. Eligibility for ILR on the basis of the ten-year long residence route is set out at paragraph 276B of the Immigration Rules, which requires the appellant to demonstrate that she has had at least 10 years "continuous lawful residence" in the UK, disregarding any period of overstaying of 28 days or less.

18. Paragraph 276A(a) provides that "continuous residence" means residence in the UK for an unbroken period, and excludes absence for a period of 6 months or less, provided the applicant has existing limited leave to enter or remain on both departure and return. Paragraph 276A(b) defines 'lawful residence' as residence which is continuous residence pursuant to: (i) existing leave to enter or remain; or (ii) temporary admission (not relevant to this case); or (iii) and exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain. The appellant did not have any leave to remain in the UK after the expiry of leave.

19. Under the Immigration (EEA) Regulations 2006, as amended, on 12.7.07 the appellant was granted a Residence Card as an extended family member, as defined by regulation 8, which is at the discretion of the Secretary of State. This is not the grant of leave and cannot be residence pursuant to paragraph 276A.

20. As part of his argument as set out in §28 of his skeleton argument Mr Middleton has referenced the IDI applicable at the date of issue of the Residence Card. This relates to long residence applications by third country nationals who have spent part of their time in the UK as the family member of an EEA national exercising Treaty rights. "During their time here under the provisions of the EEA regulations, the individuals would not have been subject to immigration control and would not have required leave to enter or remain. *Therefore, they would not fall within the definition of 'lawful residence' given at paragraph 276A* (my emphasis)." However IDI continues that as family members of EEA nationals exercising their treaty rights to reside in the UK are here in a lawful capacity then, "Provided they meet all of the other requirements, discretion may be exercised to count this time as if it were lawful residence."

21. There was no evidence placed before me to demonstrate whether this policy was still in force at the date of the refusal decision in 2014.

22. In any event, is quite clear, and Mr Middleton accepts, that this discretion is not provided for extended family members. I do not accept his argument that, because the appellant's application was not specifically rejected on the basis of a period of residence under an EEA Residence Card, it was not open to the First-tier Tribunal Judge to dismiss the appeal on the basis that the period of time relied on included that under a Residence Card. As Mr Middleton maintains, arising from the section 120 notice, the judge was required to assess whether the appellant met the long residence requirement as at the date of appeal hearing. It follows that the Tribunal is required to consider whether the appellant has had 10 years continuous lawful residence as at that date, by whatever means.

23. The remainder of Mr Middleton's submissions, from §31 onwards, depends entirely on an interpretation of 'lawful residence' so as to include time spent under an EEA Residence Card. He submits that the issue of a Residence Card to an extended family

member "is in substance a grant of leave to remain." I reject that submission noting, as the IDI cited above suggests, such time is not 'lawful residence,' otherwise no discretion would be required for family members (as defined in the EEA Regulations). The grant of an EEA Residence Card is not the grant of leave to remain. It is no more than the recognition of an existing status, the right to reside, with the Regulations giving effect to the Citizens Directive. The issue of the Residence Card does not grant anything at all that did not already exist. I do not accept the argument at §34 of the skeleton argument that because the regime for issuing residence cards to extended family members is discretionary, or permissive, on the part of the Secretary of State following an extensive examination of the personal circumstances of the applicant, it amounts to a grant of leave.

24. Mr Millington's secondary or alternative submission, set out at §35 onwards of the skeleton argument, is that as extended family members require the Secretary of State's permission to enter or reside in the UK that amounts to, is in substance, or is equivalent to the grant of leave to remain. I do not accept this argument, and do not accept that "in substance" the issue of an EEA Residence Card is a grant of leave to remain. In R (Kungwengwe) v SSHD [2005] EWHC 1427 (Admin) Wilkie J held that residence of a spouse of an EEA national exercising Treaty rights could not count as lawful residence for the purpose of the 10 year long residence requirement under the Immigration Rules. It matters not that the refusal decision mistakenly referred to the grant of leave to remain on the issue of the EEA Residence Card on 12.7.07. I am satisfied that in law the issue of an EEA Residence Card is no more than recognition of an existing right based on the relationship between the applicant and the EEA citizen exercising Treaty rights in the UK and the regulations in that regard are intended to reflect the Citizens Directive.

25. I also note that if Mr Millington's argument is correct it would, ironically, place 'extended family members' in a stronger legal position than 'family members' under the Regulations. The IDI directs attention to the exercise of a discretion in their case, but, as cited above, makes clear that even family members do not fall within the definition of 'lawful residence,' and would have to depend on the exercise of discretion.

26. I further note that the relationship on which the Residence Card was issued to the appellant ended in 2010 and thus from that date the appellant was no longer entitled to Residence under the Immigration (EEA) Regulations, regardless as to when the Residence Card was expressed to expire. From 2010 she had no entitlement or leave remain or to reside in the UK, either on the basis of the Citizens Directive, or the Immigration Rules. Further, the EEA Residence Card was only issued in July 2007 and thus the appellant had not completed 5 years residence and could not acquire any right to remain in the UK on that basis. It follows for this reason, additionally, that the appellant could not meet the 10-year lawful residence requirement, even if I am wrong in finding that the issue of an EEA Residence Card to an extended family member cannot count as lawful residence in calculation of the 10-year period required under the Immigration Rules.

27. The appellant became Appeal Rights Exhausted in April 2006 when her appeal against the decision of December 2005 in respect of her student leave. She has had no lawful leave to remain under the Immigration Rules since that date.

28. In the circumstances and for the several reasons set out above, I find that the appellant does not meet the requirements of the 10 year long residence grant of leave sought and thus Judge Oliver was correct to dismiss the appeal on that basis.

29. For completion, I find no identifiable or material error of law in the decision of the First-tier Tribunal dismissing the appeal on human rights grounds. I am satisfied that the judge properly considered the evidence relating to private and family life and reached the conclusion, for which cogent reasons are set out in the decision, that there are no exceptional, by which I take to mean compelling, circumstances justifying allowing the appeal outside the Rules on the basis of family or private life under article 8 ECHR, and that in any event the removal decision is entirely proportionate when balancing on the one hand the rights of the appellant and on the other the legitimate and necessary aim and public interest in protecting the economic well-being of the UK through immigration control. If that assessment were to be conducted today the Tribunal would have to have regard to the significant public interest considerations of section 117B of the 2002, including that immigration control is in the public interest and that little weight should be given to a private life developed whilst the appellant's immigration status was precarious or unlawful, which I find it was for considerable periods, including after 2005 and again after the termination in 2010 of the relationship in respect of which she was granted an EEA Residence Card in 2007. In all the circumstances of this case is abundantly clear that the appellant's private and family life claim was so weak that there was no prospect of success on this ground.

Conclusions:

30. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First Tier Tribunal stands and the appeal remains dismissed.

Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed both in the First-tier Tribunal and in the Upper Tribunal.

Signed

Deputy Upper Tribunal Judge Pickup