Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA313282015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 May 2017	**On 22 May 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS LIKEZO SERA LUTOMBI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr M Adophy, Solicitor instructed by Rana & Co Solicitors

DECISION AND REASONS

1. The appellant (hereafter the Secretary of State for the Home Department or SSHD) has permission to challenge the decision made by First-tier Tribunal Judge (FtTJ) Cameron sent on 3 October 2016 allowing the appeal of the respondent (hereafter the claimant), a citizen of Namibia, "to the

limited extent that a lawful decision is still to be made". Judge Cameron considered that the SSHD had been wrong to refuse the claimant's application for indefinite leave to remain (ILR) on the basis of ten years' lawful residence under para 276ADE of the Immigration Rules. The reasoning of the SSHD had been that the claimant had only had lawful leave to remain (first as a working holidaymaker, then as a student) from 11 June 2004 to 30 June 2008. Thereafter she has acquired a right to reside as the spouse of an EEA national, being issued a residence card on 3 July 2008 with an expiry date of 3 July 2013, but not renewed as they had divorced. On 6 June 2013 the claimant applied for permanent residence on the basis that she had retained an EEA right of residence upon divorce. The SSHD refused this application on 9 October 2013. The claimant's appeal against this refusal was dismissed by a Tribunal judge on 9 September 2014.

2. FtTJ Cameron considered that the SSHD's refusal of the claimant's application for ILR incorrectly rejected the claimant's submission that her "leave under the EEA Regulations gave rise to s.3 leave". The judge also considered that the SSHD had wrongly considered "the issue of human rights".

3. The thrust of the SSHD's grounds of appeal was that recognition of the right to reside under the EEA Regulations does not constitute a grant of leave for the purposes of s.3C of the Immigration Act 1971 as amended. The claimant's Rule 24 notice averred that the requirement of ten years' lawful residence was satisfied "for at no time was her right to remain in the UK unlawful or specifically revoked by the [SSHD] or by operation of law". Section 3C(2)(b) was said to extend leave where there is an appeal under s.82(1) NIAA 2002 with reference to Regulation 36(ii) EEA Regulations 2016". In the alternative the Rule 24 notice contended that in the event that s.3C(2)(b) does not apply "the [claimant's] right to remain in the UK does not become unlawful as the [SSHD] cannot lawfully remove during the pendency of an appeal, Regulation 40(2) EEA Regulations 2017".

4. At the hearing I raised with the parties whether, even if I accepted that the claimant had the benefit of s.3C leave I could avoid finding that the FtTJ materially erred in law. I pointed out that in order to qualify for ILR under para 276B, the claimant had to be able to show she had continuous lawful residence for ten years. It was not in dispute that her husband had been removed from the UK on 9 August 2011 following a conviction and prison sentence for importation of class A controlled drugs. His absence broke his personal right of residence and that of the claimant too. At best the claimant could only pray in aid approximately four years of limited leave to remain between 11 June 2004 and 30 June 2008 and a further period of EEA residence up to 9 August 2011 i.e. a total of just over seven years.

5. Mr Adophy's response was that the point I identified had not been raised as a ground of appeal and it was not one which was therefore before me.

My Decision

6. I am in no doubt that the FtTJ materially erred in law.

7. I do not find Mr Adophy's invocation of Regulation 36(ii) and 40(2) of the Immigration (European Economic Area) Regulations 2016 helpful since they concern appeal rights. More to the point is Regulation 29(2) which provides that a person who is a family member of an EEA national is to be treated as if that person were a person seeking leave to enter the UK. Even however if that provision and its predecessors sufficed to establish that the claimant was to be treated as continuing to have leave to enter or remain in the years and months between 2008 and 9 August 2013, the resultant period of residence fell well short of ten years.

8. Mr Adophy has submitted that I disregard this point as it as not raised in the SSHD's grounds of appeal. I reject that submission. Whether or not the decision of the FtTJ was vitiated by legal error depends upon a correct application of the law. The claimant could not meet the requirements of the Immigration Rules governing ILR even assuming her EEA period of residence were treated as leave to remain. Hence the only conclusion the judge could have reached was to dismiss the claimant's appeal under the Immigration Rules. The Upper Tribunal is not barred from applying the law simply because an obvious point regarding it is not taken by a party: see RM (Kwok on Tong, HC 395 para 320) India [2006] UKAIT 00039.

9. I note that in any event the SSHD's refusal decision relied, *inter alia*, on the failure of the claimant to demonstrate that she had continued, after August 2009, to be residing in the UK in accordance with the 2006 Regulations (see pp3-4 of refusal decision); so this point was in play and was one which the judge should have addressed in any event.

10. The FtTJ also purported to allow the appeal (to a limited extent) because the respondent had "not properly considered the issue of human rights". However, the SSHD did address the claimant's human rights in detail in her refusal decision. The SSHD specifically noted that the claimant had not raised anything that led her to believe she had any children in the UK. At the hearing before FtTJ Cameron, when the claimant sought to rely on a witness statement indicating that the claimant had given birth to a daughter in December 2012, the Presenting Officer's confirmed that the SSHD did not consent to this matter being raised as a new issue. The FtTJ gave no reasons for rejecting this information. The submission regarding that information was properly based on s.85 of the NIAA 2002 and the FtTJ was wrong to reject it.

11. For the above reasons the FtTJ materially erred in law.

12. In light of the reasoning set out above, it will be apparent that the only decision I can re-make is to dismiss the claimant's appeal. She could not succeed under the Immigration Rules on the basis of long residence. Her human rights claim was properly considered by the SSHD and she had singularly failed to show that there were compelling circumstances warranting a grant of permission outside the Rules. As regards the claimant's attempt to raise as a new matter the existence of a child born to her in December 2012, the SSHD has not consented to it being raised in this appeal.

    To conclude:

    The FtTJ materially erred in law:

    The decision I re-make is to dismiss the claimant's appeal.

No anonymity direction is made.

Signed Date: 18 May 2017

Dr H H Storey
Judge of the Upper Tribunal