Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02170/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 April 2019	**On 17 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MS DIANA SSEMAKULA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chohan, Counsel instructed by iConsult Immigration
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Uganda who appealed to the First-tier Tribunal against a decision of the respondent dated 15 December 2017 (following the appellant's application of 9 August 2017) to refuse indefinite leave to remain. The appellant appealed on human rights grounds. In a decision, promulgated on 30 October 2018, Judge of the First-tier Tribunal Abebrese dismissed the appellant's appeal on all grounds.

2. The appellant appeals with permission from the Upper Tribunal, on the grounds that the Judge of the First-tier Tribunal erred in dismissing the

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appellant's appeal in effect because the appellant had not produced a decision of Immigration Judge Maxwell (promulgated on 17 May 2011). It was contended that Judge of the First-tier Tribunal Abebrese unreasonably dismissed the evidence from the appellant including that Immigration Judge Maxwell had proceeded on the basis that the appeal was made in time and therefore it was unreasonable for Immigration Judge Abebrese to have proceeded on the basis that only the production of the determination would have satisfied him that it was treated as made in time. It was also submitted that it was for the Upper Tribunal to determine whether Section 3C leave applies in circumstances where the First-tier Tribunal treats an appeal as one made in time regardless of the expiry of the fourteen day time limit. The grounds went on to argue that Judge Abebrese failed to correctly apply the provisions of paragraph 276B (such was not pursued by Mr Chohan) and that the judge erred in his consideration of paragraph 276ADE and/or consideration of Article 8 and GEN. 3.1 and 3.2 of the Immigration Rules.

3. I had before me what Judge Abebrese had not, a copy of Judge Maxwell's decision promulgated on 17 May 2011 dismissing the appellant's case. Judge Maxwell in a brief decision noted that the appellant had been refused entry by the respondent on 10 January 2011. There was no discussion of whether or not the appeal was in time or otherwise. Ms Isherwood submitted, with consent, the cover page of the bundle produced to Judge Maxwell considered on 16 May 2011. That bundle is dated 21 April 2011 and indicates that the respondent's decision, the subject of the appellant's appeal was on 11 January 2011, (rather than 10 January as noted by Judge Maxwell, although nothing turns on that) and that the appeal was lodged on 28 March 2011 with the hearing on 16 May 2011.

4. The appellant contends that she made an application for leave to remain outside of the Rules on 19 January 2011. The respondent notes, in the consideration of the timeline of the appellant's case in the decision dated 15 December 2017, that the appellant did make an application on 19 January 2011 for leave on compassionate rules but that this was rejected on 13 March 2011 for non-payment and that therefore this was considered invalid and did not invoke leave under Section 3C of the Immigration Act 1971. Therefore it was the respondent's case that lawful leave was not extended beyond the previous grant of leave, in this case, 24 January 2011, it not being disputed that the appellant arrived on 6 September 2007 and had continuous lawful leave until 24 January 2011 having made an in-time application on 24 October 2010, which was refused with a right of appeal on 10 January 2011. The appellant's previous leave, as a student, was due to expire on 31 October 2010 but was extended, under section 3C, until 24 January 2011.

5. Although Mr Chohan sought valiantly to persuade me otherwise, I am satisfied that the application of statute is clear in this case. Section 3C of the 1971 Act at the relevant time provided as follows:-

"(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.

(2) The leave is extended by virtue of this section during any period when –

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 could be brought, while an appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),

(c) an appeal under that section against that decision brought while the appellant is in the United Kingdom is pending (within the meaning of section 104 of that Act).

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom where that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection 1(a)."

6. The respondent confirms that the appellant had leave until 24 January 2011. The respondent submitted that the appellant only had lawful leave until 24 January 2011. As highlighted in the respondent's 15 January 2019 'Leave extended by section 3C(and leave extended by section 3D in transitional cases)' guidance, section 3C leave ends when the person does not appeal or seek permission to appeal within the relevant time limit even if the relevant Tribunal accepts the appeal or the application for permission to appeal out of time. Once section 3C leave has come to an end, it cannot be resurrected. Section 3C leave exists only where it is a seamless continuation of leave, either extant leave or section 3C leave

7. Although a further application was made by the appellant on 19 January 2011 that application was not valid. The appellant submitted an out of time appeal on 28 March 2011, against the decision dated 10 January 2011 (contrary to the timeline in the grounds for permission to appeal there was no consideration of the invalid application made on 19 January) which was subsequently considered by Judge Maxwell. Although an

application can be made to vary an outstanding application to vary leave (which results in the extension of leave by operation of section 3C) that is not what happened in the appellant's case.

8. In the appellant's case the respondent had refused her application on 10 January 2011 and the appellant made a subsequent, invalid application, on 19 January 2011. Where an application is made in time but for some reason is procedurally defective section 3C leave does not extend to an application which is not validly made in accordance with the Immigration Rules. In addition, section 3C(4) provides that a person may not make an application for variation of his leave to enter or remain while that leave is extended by virtue of this section (see including **R (Iqbal, Mirza and Another) v Secretary of State for the Home Department [2017] 1 WLR 85** and **Ali Bashir [2018] EWCA Civ 2612**). Although section 3C(4) does not operate as a 'bar to justice' such that, for example, the First-tier Tribunal could not consider an appeal (see including **Anwar & another v Secretary of State for the Home Department [2010] EWCA Civ 1275**) that is distinct from the issue in this case. Statutory jurisdiction cannot be conferred by waiver or agreement (**Virk & others v Secretary of State for the Home Department [2013] EWCA Civ 652**).

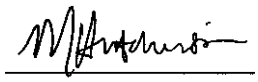
9. Although Mr Chohan submitted that Judge Maxwell must have extended time to appeal, that is a different question and the issue is not whether or not a Tribunal has jurisdiction but whether the statutory extension of leave applies. In this case it cannot, because the appellant's (section 3C) leave expired on 24 January and the attempt to submit an application prior to that leave expiring was not a valid application and therefore leave was not extended. The respondent was correct therefore in the conclusion that the appellant had no leave between 24 January 2011 and 5 July 2011 when her post-study migrant application was granted.

10. Although therefore Judge Abebrese may have erred in placing weight on the absence of Immigration Judge Maxwell's decision, any such error is not material as ultimately Judge Abebrese was satisfied that the respondent was correct in the conclusion that there was a gap in the appellant's continuous leave, for the purposes of consideration of her application under the ten year residence provisions. Equally the reference in the grounds for permission to appeal other sections of paragraph 276B was misplaced and Mr Chohan rightly did not pursue those grounds.

11. In the circumstances there was also no material error in the judge's consideration and dismissal of the appellant's Article 8 claim for the reasons he gave including that very little weight was attached to the appellant's private life (see paragraphs [27] through to [30]).

12. The decision of the First-tier Tribunal does not contain an error of law and shall stand. The appellant's appeal is dismissed.

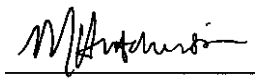
No anonymity direction was sought or is made.

Signed  Date: 15 April 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed, no fee award is made.

Signed  Date: 15 April 2019

Deputy Upper Tribunal Judge Hutchinson