Upper Tribunal
(Immigration and Asylum Chamber)

CHH (Notices Regulations – right of appeal – leave to remain) Jamaica [2011] UKUT 00121 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 February 2011	

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Before

SENIOR IMMIGRATION JUDGE McKEE

Between

CHH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Mohamed Jaufurally of Callistes Solicitors

For the respondent: Miss Julie Isherwood of the Specialist Appeals Team

A person under the Nationality, Immigration and Asylum Act 2002 who has under the statute, only a restricted right of appeal, has, by reason of the Immigration (Notices) Regulations 2003, a right of appeal that is unrestricted as to time.

Where an appeal can only be brought on restricted grounds because of section 88 of the 2002 Act, the Notices Regulations 2003 lay down a complicated procedure. The notice of decision need not be accompanied by a notice of appeal. But if the recipient of the notice claims that the decision is contrary to the Race Relations Act, the Human Rights Convention or the Refugee Convention, then the notice of decision must be re-served, this time with a notice of appeal, and the time for giving notice of appeal to the Tribunal only begins to run from the deemed date of service of this re-served notice, no matter how long a period has elapsed since the date of the original notice.

If the 'immigration decision' in question is refusal to vary leave, the application for leave to remain having been made before the expiry of existing leave, then the leave is extended by section 3C(2)(a) of the 1971 Act until the application is decided, and is further extended by section 3C(2)(b)"during any period when an appeal could be brought" under section 82(1)of the 2002 Act against the decision. The period when an appeal could be brought must be taken to include the time between service without

an appeal form and service with an appeal form, as contemplated by the Notices Regulations. Otherwise, an appellant would be unable to give notice of appeal before his leave ran out, despite being able to make an 'in time' appeal as far as the Procedure Rules are concerned.

DETERMINATION AND REASONS

1. This appeal raises two quite distinct questions. One is technical, and concerns the right of appeal that the appellant wishes to exercise. The other is practical, and concerns the private and family life of the appellant in the United Kingdom. The technical question must be addressed first, since the first-instance judge thought that the appellant had no right of appeal at all.

2. I shall start with some background. The appellant is a 50-year old Jamaican lady who came here just before Christmas in the year 2000, and has stayed here ever since. Initially she had six months' leave to enter as a visitor, which was varied to leave to remain as a student until September 2001. Thereafter the appellant was an overstayer. She married a British citizen, E L H, in January 2002, and eventually, on 29 November 2005, she was granted discretionary leave to remain for three years on the basis of this marriage. A week later, the appellant left her husband, and there are letters on file dating from 2006 – from the Fairfield Medical Centre, from Catford Citizens Advice Bureau, from Lewisham Housing Office and from Greenwich Women's Aid – showing that she was admitted to a women's refuge after suffering domestic violence.

3. In October 2008, before her discretionary leave ran out, the appellant applied for further discretionary leave, at which point she informed the Home Office that she had left her husband. This was backed up by letters from Greenwich Women's Aid, saying that the appellant had suffered terrible domestic violence for two years before plucking up the courage to leave the matrimonial home in 2005. The application was refused, however, on 18 February 2009, the 'Notice of Immigration Decision' telling the appellant that her right of appeal was limited by section 88(2)(d) of the Nationality, Immigration and Asylum Act 2002, because she was seeking to remain for a purpose which is not " permitted in accordance with immigration rules ." In that circumstance, section 88(4) permits an appeal to be brought only on racial discrimination, asylum or human rights grounds. The notice was not accompanied by an appeal form, and no appeal was in fact lodged.

4. On 28 June 2009, however, E L H wrote to the Home Office that, although still separated from his wife, he hoped that their differences could be resolved. By February 2010, according to another letter from Mr H, the couple had finally been reconciled, and were living together again. There had in the meantime been an exchange of correspondence between the appellant's representatives (first Huka & Co., then Callistes Solicitors) and the Home Office concerning the appeal which had not been lodged against the decision of 18 February 2009 and the failure of the Home Office to provide an appeal form. Finally, on 17 February 2010, a 'Reasons for Refusal Letter' was drafted, addressing the further representations which had been made. The author adverted to the limited evidence that Mr and Mrs H were cohabiting, and did not accept that the appellant currently enjoyed family life in the United Kingdom. As the appellant could reasonably be expected to return to Jamaica, the decision not to grant further discretionary leave was maintained. But this time, an appeal form was enclosed with the letter.

5. Notice of appeal was duly given on 1 March 2010, and when the appeal came before Immigration Judge Belayeth Hussain at Hatton Cross on 28 June 2010, both the appellant and her husband gave oral evidence, which is set out in the hand-written Record of Proceedings. This evidence does not appear in the Determination, however, because Judge Hussain had formed the view (apparently after the hearing) that there was no valid appeal before the First-tier Tribunal. The refusal letter of

February 2010 was not, he reasoned, notice of an appealable immigration decision. The only 'immigration decision' which had been made was communicated in the notice of February 2009, and the appellant could only lodge an appeal against that decision during the ten working days following the receipt of that decision. After that, Judge Hussain continued, her leave to remain expired, so that she could not appeal on 1 st March 2010 against the refusal to vary her leave, there no longer being any leave to vary.

6. Callistes Solicitors sought permission to appeal to the Upper Tribunal, praying in aid the Immigration (Notices) Regulations 2003. Leave was granted, and when the matter came before Senior Immigration Judge Kekić on 17 November 2010, it was conceded on behalf of the respondent that the appellant did have a right of appeal, and that Judge Hussain should have raised the validity of the appeal at the hearing, and sought the parties' views, rather than deciding of his own motion after the hearing that he was without jurisdiction. A material error of law having been established, Judge Kekić adjourned the hearing, so as to give a proper opportunity for the appellant's Article 8 claim to be ventilated (again).

7. When the matter came before me on 17 December, however, there was a letter from Mr H to say that he could not attend the hearing, because of work commitments. Although this did not seem to tally with a strong commitment on Mr H's part to his wife's cause, I agreed to Mr Jaufurally's request for an adjournment. This would give an opportunity for greater clarity to be brought to the issue of the validity of the appeal, which I thought needed to be explored in more depth than the respondent's concession at the previous hearing had permitted. It was the failure to include an appeal form with the Notice of an Immigration Decision in February 2009 which prompted the HOPO to concede that the appellant still had a right of appeal when an appeal form was issued in February 2010. That seemed to me a rather weak basis for the persistence of a right of appeal. The parties were therefore directed to serve skeleton arguments on the issue in time for the next hearing, on 10 th February 2011.

8. By the time the proceedings resumed before me, a most impressive skeleton argument had been prepared on behalf of the respondent, while for his part Mr Jaufurally refined the argument which he had adumbrated in the application for permission to appeal and then before SIJ Kekić. During oral submissions it became apparent that the parties were ad idem in respect of the persistence of a right of appeal, in light of the Immigration (Notices) Regulations 2003. I agree, and shall set out below the relevant paragraphs of regulation 5 of those Regulations, which explain that persistence. Regulation 5 prescribes the contents of the notice which, under regulation 4, must be given to the recipient of an appealable immigration decision or EEA decision.

"(3) Subject to paragraph (6), the notice given under regulation 4 shall also include, or be accompanied by, a statement which advises the person of –

(a) his right of appeal and the statutory provision on which his right of appeal is based;

(b) whether or not such an appeal may be brought while in the United Kingdom;

(c) the grounds on which such an appeal may be brought; and

(d) the facilities available for advice and assistance in connection with such an appeal.

(4) Subject to paragraph (6), the notice given under regulation 4 shall be accompanied by a notice of appeal which indicates the time limit for bringing an appeal, the address to which it should be sent or may be taken by hand and a fax number for service by fax.

(5) Subject to paragraph (6), where the exercise of the right is restricted by an exception or limitation by virtue of a provision of Part 5 of the 2002 Act, the notice given under regulation 4 shall include or be accompanied by a statement which refers to the provision limiting or restricting the right of appeal.

(6) The notice given under regulation 4 need not comply with paragraphs (3), (4) and (5) where a right of appeal may only be exercised on the grounds referred to in section 84(1)(b), (c) or (g) of the 2002 Act by virtue of the operation of section 88(4), 89(3), 90(4), 91(2), 98(4) or (5) of that Act.

(7) Where notice is given under regulation 4 and paragraph (6) applies, if the person claims in relation to the immigration decision or EEA decision that –

(a) the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (discrimination by public authorities);

(b) the decision is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the Human Rights Convention) as being incompatible with the person's Convention rights; or

(c) removal of the person from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the person's Convention rights,

the decision maker must as soon as practicable re-serve the notice of decision under regulation 4 and paragraph (6) of this regulation shall not apply.

(8) Where a notice is re-served under paragraph (7), the time limit for appeal under the Procedure Rules shall be calculated as if the notice of decision had been served on the date on which it was re-served."

9. Applying the above regulations to the facts of the present case, we see that the notice of an immigration decision, which was served on the appellant in February 2009, was not accompanied by a notice of appeal, such as is normally required under reg 5(4). That was because the right of appeal was restricted to the grounds specified in section 88(4) of the 2002 Act, namely race discrimination, asylum or human rights. Regulation 5(6) therefore allowed the respondent to dispense with including a notice of appeal when the notice of an immigration decision was served. But if, on receipt of such a notice, the recipient raises a discrimination, asylum or human rights claim – in the present case, it was a human rights claim - then the respondent must re-serve the notice of decision under reg 5(7), and this time must include a notice of appeal. The ten working days for lodging an in-country appeal with the Tribunal under rule 7 of the Procedure Rules 2005 will not begin to run until the deemed date of receipt of the re-served notice. There is no question of the appeal being out of time because it was not made after the original service of the notice of decision.

10. There are two noteworthy features of this rather complicated process. One is that the presumption appears to be that people will not want to appeal against an immigration decision if the grounds on which they can do so are restricted. Given the popularity of human rights grounds nowadays, that was perhaps an optimistic view on the part of whoever drafted the Notices Regulations. The other feature is that no time limit is set, either for raising a human rights claim after receipt of a 'restricted' notice of decision, or for the Home Office to respond to this by re-serving the notice of decision along with an appeal form. In the instant case, a year went by between service of the refusal to vary leave in February 2009 and re-service of that decision in February 2010. Not but what, the notice of appeal

served on the First-tier Tribunal at the beginning of March 2010 complied with rule 7 of the Procedure Rules, and was in time.

11. It must be appreciated that the timeliness of the appeal notice in these circumstances does not depend upon the appellant's leave to remain continuing under section 3C of the Immigration Act 1971. In order to have a 'variation' appeal under section 82(2)(d) of the 2002 Act, the appellant must have applied for a variation before his current leave expired. If he does that, his right of appeal is not affected by the expiry of any statutorily-extended leave under section 3C. That indeed is contemplated by section 3C(2)(b) of the 1971 Act, which extends leave during any period when -

"(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the 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)".

12. If an appeal is lodged with the Tribunal out of time, the Tribunal may still entertain it by extending the time under rule 10 of the Procedure Rules. It does not matter that the appellant's leave will have lapsed on the expiry of the period for giving notice of appeal in time. A person whose leave has lapsed is not precluded from appealing to the Tribunal. Whether he will be allowed to appeal does not depend upon the continuance of his leave, but upon whether, in the words of rule 10(5), " by reason of special circumstances it would be unjust " not to extend the time for appealing.

13. By parity of reasoning, Miss Isherwood in the instant case argues that the appellant had no leave to remain when she lodged her notice of appeal on 1 March 2010, her leave having expired on the expiration of the ten-day period for giving notice of appeal under the Procedure Rules, after notice of the immigration decision had been served in February 2009. That would normally be the situation where the notice of appeal is late. Mr Jaufurally's position, on the other hand, is that the appellant's leave has never come to an end, and although I was not with him at first, I think on reflection that that must be right.

14. The reason is this. Section 3C(2)(b) extends a person's leave " during any period when an appeal … could be brought ." Regulation 5(6), (7) and (8) sets out the procedure for appealing on restricted grounds, and no time limit is laid down either for raising a human rights claim in response to the notice of decision, or for re-serving that notice and thus causing time to run for giving notice of appeal in time. This is all a " period when an appeal could be brought ", although potentially it could be very long. In the instant case, it was a year.

15. One objection to this interpretation is that it leaves it open to a person whose leave apparently expired long ago to say that his section 3C leave is continuing, because he was served with a notice of decision giving only a restricted right of appeal and he has not yet exercised that right, which he can defer for as long as he wants. But such is the bizarre, yet logical, outcome of a statutory provision which allows an appeal to be brought without setting any time limit for bringing it. The difficulty could be avoided by amending the Notices Regulations, or more simply by ensuring that appeal forms are sent off with immigration decisions which attract restricted as well as full rights of appeal. Regulation 5(6) says that the notice " need not comply " with the requirement to include an appeal form. It is not a prohibition.

16. If, on the other hand, a person makes a late appeal after the period when an appeal could be brought, and he is given permission to appeal out of time, his leave is not reinstated. Section 3C(2)(c) of the 1971 Act provides for leave to be extended while an appeal is pending. But if the leave has lapsed, it cannot be extended. So a person appealing out of time does not have leave to remain. Miss

Isherwood's contention is that this appellant's leave also lapsed after the normal ten-day period following receipt of the original notice of decision, regardless of the fact that she was still able to make an in-time appeal. If that is right, then people who go through the procedure outlined in regulation 5(6)-(8) of the Notices Regulations will invariably have seen their leave expire by the time they give notice of appeal. First they have to communicate a human rights or asylum claim to the UK Border Agency, then they must await re-service of the original decision. No doubt they could short-circuit this procedure by obtaining an appeal form from elsewhere as soon as they receive the notice of decision and sending it to the Tribunal straight away, their appeal being based on one or more of the restricted grounds permitted by section 88(4) of the 2002 Act. But if it is possible to cut out the procedure at reg 5(6)-(8) of the Notices Regulations altogether, why have such a procedure at all? Reading section 3C(2)(b) with regulation 5(6)-(8), I still feel driven to the conclusion that leave does not lapse in this scenario. The brief Immigration (Continuation of Leave)(Notices) Regulations 2006 offer no assistance on this point.

17. I turn now to the second question. Whether the appellant has continuing leave or not, she certainly has a right of appeal on Article 8 grounds. It was expected that today's hearing would be attended by Mr H, but again he did not turn up, and this time his non-appearance was attributed by his wife to the fact that he did not respect the Tribunal, and that he felt it was none of the Tribunal's business to pry into his married life. The appellant became tearful as she gave her oral evidence, describing how her husband's behaviour had become very strange of late. He was smoking marijuana heavily, talking to himself, and having paranoid delusions that people were coming to murder him – although he was still holding down a job as a Prison Officer at one of Her Majesty's Prisons.

18. Reconciliation had been effected, the appellant continued, by a mutual friend, one L R, who was now back in Jamaica. She had no relatives left in Jamaica, but had no evidence of friendships or social activities in this country either. She had, she said, worked at one time for the City of Westminster, but she had no documentary evidence of that.

19. Mr Jaufurally did his best, in his oral submissions, to persuade me that his client's Article 8 rights would be infringed if she had to go back to Jamaica. But in truth, I cannot see that there is any extant family life between Mr H and the appellant in Article 8 terms. There is a very brief, undated and unsigned statement from Mr H, saying that he and his wife are reconciled. There are documents showing that they live at the same address, but apart from sleeping in the same bed, the appellant was unable to name any activities which she and her husband do together. Indeed, her very frank description of Mr H's current erratic behaviour raises the distinct possibility that the domestic violence which drove the appellant from the matrimonial home in 2005 might recur.

20. As for private life, the appellant can hardly have lived in this country for ten years without acquiring a private life with which removal would interfere, but it is a surprisingly exiguous private life. The appellant would appear to have made few friends here, and none have come forward to support her application to stay in the United Kingdom. There is no documentary evidence before me of any social, educational or work-related activities. The letters from Greenwich Women's Aid say that Mr H kept the appellant very isolated when they were living together up until 2005, and the isolation seems to have continued. It is indeed a sad case.

21. All in all, the appellant does not have much of a life in this country. On the other hand, she has her friend, L R, in Jamaica, and I doubt whether she has no relatives at all left in that country. But I remind myself that no decision has been taken to remove the appellant to Jamaica, or anywhere else. In FK (Kenya) [2010] EWCA Civ 1302, Lord Justice Sullivan doubted whether it was appropriate for

the Tribunal to consider Article 8 in appeals against the refusal of leave to remain, when no removal decision had yet been made. Not but what, as an appeal on Article 8 grounds is before me, I cannot see that the appellant has established such strong private life ties in the United Kingdom that it would be disproportionate to expect her to move back to Jamaica. The possibility of the appellant's coming under the 'Ten-Year Rule' at paragraph 276B of HC 395 was raised at one point, but as the appellant was here unlawfully for four years between September 2001 and November 2005, that possibility is ruled out.

DECISION

22. The appeal is dismissed.

Signed

Senior Immigration Judge McKee

Judge of the Upper Tribunal