



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal number: IA/40016/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11 November 2015**

**Decision Promulgated
On 21 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR AFSAR HUSEN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Pennington-Benton, counsel instructed by Lincoln's Chambers solicitors

For the Respondent: Ms Fijiwala, Home Office Presenting Officer

DECISION & REASONS

1. The Appellant is a national of Bangladesh, born on 1 January 1982. He arrived in the United Kingdom on 19 January 2008 with entry clearance conferring leave to enter until 30 April 2010 as a student. This leave was subsequently extended as a Tier 4 student until 31 May 2012. The Appellant made an in-time application to further extend his leave and this was refused on 9 January 2013 but on appeal the First-tier Tribunal allowed his appeal in a decision dated 17 May 2013. The Respondent then sought permission to appeal to the Upper Tribunal which was granted and on 27 November 2013 the

Respondent's appeal was allowed. The Appellant sought permission to appeal to the Court of Appeal which application was refused by the Upper Tribunal on 2 January 2014. On 18 January 2014, the Appellant made a further Tier 4 application. This application was refused on 19 September 2014 and in identical terms on 22 September 2014, at which time a decision was also made to remove the Appellant from the United Kingdom by way of directions under section 47 of the Immigration, Asylum & Nationality Act 2006. A right of appeal was provided pursuant to section 82(1) of the NIAA 2002 and the Appellant sought to appeal this decision.

2. His appeal came before Judge of the First-tier Tribunal Bowes for hearing on 27 January 2014. In a decision promulgated on 10 February 2015, the Judge requested that the parties address him on whether the Appellant had a full right of appeal and having heard submissions he held that he had no jurisdiction to hear the appeal in light of the provisions of section 3C(4) of the Immigration Act 1971 because whilst the Appellant had extant leave under section 3C when he made the Tier 4 application on 18 January 2014, he was not permitted to apply to vary it [18]. He further held at [19] that in light of the decision in Virk v Secretary of State for the Home Department [2013] EWCA Civ 652 that statutory jurisdiction cannot be conferred by waiver or agreement and the Respondent did not have discretion to disregard section 3C(4) and the application that was made by the Appellant in January 2014 was not valid.

3. An application for permission to appeal to the Upper Tribunal was made in-time on 19 February 2015. The grounds in support of the application asserted that the appeal raises a short but important point of construction, namely whether section 3C(4) of the Immigration Act 1971 prevents the Respondent from considering an application for leave to remain made while the applicant is on 3C leave and the Respondent retains discretion to consider an application for leave and to waive reliance upon section 3C(4). It was submitted that the First Tier Tribunal Judge erred in finding the appeal to be a nullity.

4. In a decision dated 15 June 2015, permission to appeal was granted by First-tier Tribunal Judge Astle on the basis that the Respondent's decision was made under section 47 of the 2006 Act which generates a right of appeal under section 82(2)(ha) of the NIAA 2002 and as such it is arguable that the Judge erred in refusing to accept jurisdiction.

5. The Respondent's rule 24 response states:

"The judge of the FTT did not misdirect himself in law in respect of the immigration decision before him. The appellant's first appeal that was dismissed by the Upper Tribunal and permission to appeal refused by the Court of Appeal on the 2nd January 2014 was finally determined on that date for the purposes of s.104 NIA 2002. The first appeal was not longer pending for the purposes of S.3C(2)(c) of the same Act. The appellant made no further application to appeal after that date to the Court of Appeal. Accordingly the appellant's second application was made out of time, without any leave, substantive or under section 3C. The resultant immigration decision was therefore not a refusal to vary leave but just a refusal to grant leave to remain. It was a decision that did not fall under

section 82 NIA 2002 the judge was correct in not accepting jurisdiction in respect of the immigration decision.”

Hearing

6. At the hearing before me, Mr Pennington-Benton made concerted efforts to persuade me that the First-tier Tribunal Judge had jurisdiction because, notwithstanding the Appellant having made his application during leave extended by section 3C, the Secretary of State treated the application as having been validly made. He submitted, in line with the grounds of appeal and supplementary argument on behalf of the Appellant that:

(i) there is unarguably scope for the Secretary of State to grant leave to remain outside the Rules *cf.* Munir at [44] under the general residual power contained in section 3C of the Immigration Act 1971;

(ii) it would be wrong to construe section 3C(4) as a fetter on the Secretary of State’s power to consider and respond as a matter of substance to an application for leave that would otherwise be formally invalid;

(iii) the Secretary of State’s broad powers in section 3 trump the procedural protections of section 3C(4) and Parliament did not intend, by providing the protections in section 3C(4) to lessen the general powers in section 3C;

(iv) the purpose of section 3C(4) is to protect the Secretary of State from being compelled to deal with multiple applications, however, if the Secretary of State decides to waive the invalidity and decide the application that is a matter for her *cf.* Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850;

(v) in respect of the decision in R (Bhagat) v SSHD [2014] 1 WLR 3710, Claire Moulder, sitting as a Deputy High Court Judge held at [38] that: “*the Secretary of State was bound by the statutory provisions and had no discretion to treat the application as valid*” but it was submitted that her conclusion was *per incuriam* and on the facts of that case the Secretary of State had decision to refuse to decide the application.

7. In response, Ms Fijiwala submitted that:

(i) the decision made by the Judge is correct: he had no jurisdiction and no discretion in relation to section 3C(4).

(ii) the right of appeal had been given to the Appellant on a mistaken basis;

(iii) in respect of the decision pursuant to section 47, the Appellant would have the right of appeal in relation to the removal but not against the decision because the decision was not valid;

(iv) in light of the decision on JH (Zimbabwe) [2009] EWCA Civ 78 at [35] it is clear that during a period of statutory extension of an applicant’s

original leave by section 3C4 no further application for variation of that leave can be made. It is clear that the Appellant had extant leave after his appeal was dismissed by the Upper Tribunal and he made his application during this period but it is also clear he was not able to vary his application. This is because it is clear from JH (Zimbabwe) at [36] that a variation can only be made before the Secretary of State's decision: see section 3C5 and on that basis the application should not have been accepted

(v) in respect of the question of a waiver, she submitted that there could be no waiver in relation to statute and the discretion under section 3 of 1971 Act only applies to Rules or policy. Alvi [2012] UKSC 33 at [28] makes clear that any power that the Secretary of State would have would be suspended by an Act of Parliament and at [31] that it was clear that in relation to the exercise of residual discretion where an alien does not meet the requirements of the Rules this does not refer to the waiver of a statute and statutory context must be respected. Even the Immigration Rules have to be laid before Parliament and are subject to scrutiny and cannot override statute. She submitted that Munir [2012] UKSC 32 at [29] made the same point as Alvi that the Immigration Act 1971 gives Parliament a degree of control and it makes no sense if the Secretary of State could override an Act of Parliament. She submitted that Odelola [2009] UKHL 25 at [34] makes clear that the Rules are executive and not legislative and at [35] that the Rules are statements of administrative policy. The Supreme Court has made clear that the exercise of discretion is in relation to Rules and not statute: [46] and [50] refer.

(vi) Munir can be distinguished as it refers to discretion outside the Rules viz the policy DP5/96 rather than statute and it is clear from [44] of Munir that even if the discretion is wide it cannot be applied to statute. She referred by way of analogy to the deportation rules and submitted that, if there was discretion in terms of the statute, the Secretary of State could waive automatic deportation.

(vii) in respect of the judgment in Bhagat at [33]-[34] and [37] the submission on behalf of the Secretary of State is that there is a statutory bar to discretion being exercised albeit it was accepted that there is a general discretion to grant leave. It is clear from [38] that the Secretary of State is bound by statutory provision and there is no discretion to treat the application as valid. In R (Rashid) v Secretary of State for the Home Department [2015] 00190 the Court considered itself bound by JH (Zimbabwe) at [28] and following those findings the Appellant was unable to make an application and there could be no waiver.

8. Mr Pennington-Benton responded and also drew my attention to the judgment of the Court of Appeal in R (Iqbal) v Secretary of State for the Home Department [2015] EWCA Civ 838.

Decision

9. I consider the First-tier Tribunal Judge Bowes did not materially err in law in holding that he had no jurisdiction to hear the purported appeal. My reasons are as follows:

9.1. it is well-established by the jurisprudence that section 3C(4) of the Immigration Act 1971 operates so that, once a statutory extension of the original leave has been made pursuant to section 3C, no further application for variation of that leave can be made because "*once a decision has been made, no variation to the application is possible since there is nothing left to vary*": JH (Zimbabwe) [2009] EWCA Civ 78 per Lord Justice Richards at [35]. See also the decision of Upper Tribunal Judge Gill in R (Rashid) v Secretary of State for the Home Department IJR [2015] UKUT 00190 (IAC) at [21]-[33]and [46].

9.2. the Appellant in this case made an in-time application to extend his leave on 31 May 2012 and whilst this application was refused on 9 January 2013, section 3C extended his leave through the appeal process until permission to appeal to the Court of Appeal was refused by the Upper Tribunal on 2 January 2014. Even if, by virtue of rule 52.4(b) of the CPR the Appellant's leave was deemed extended by 21 days to 23 January 2014, during which time he could have made an in-time application for permission to appeal to the Court of Appeal directly, this does not avail him because section 3C(4) prevented him from making a further application to vary his leave.

9.3. Consequently, whilst I consider that the application made by the Appellant on 17 January 2014 for further leave to remain as a Tier 4 student was a valid application, it did not entitle him to the right of appeal when it was refused on 19 or 22 September 2014. This is because it could only be treated as a fresh application and not an application to vary his leave to remain. The fact that there are two identical decisions with slightly varying dates matters not as the contents of the decision letter are the same.

9.4. I note that the grant of permission provides that the Appellant had a valid right of appeal pursuant to section 82((2)(ha) of the Nationality, Immigration & Asylum Act 2002 against the decision to remove him by way of directions under section 47 of the Immigration, Asylum & Nationality Act 2006, however, this would only apply to a person with statutorily extended leave and for the reasons set out in 9.1. above, he no longer had statutorily extended leave at the time of the Secretary of State's decision of 19 or 22 September 2014. Consequently, the grant of permission was misconceived.

9.5. I further find that it was not open to the Respondent to waive the statutory provisions of section 3C(4) and provide the Appellant with the right of appeal where no right of appeal existed as a matter of law. As the Court of Appeal held in Virk v Secretary of State for the Home Department [2013] EWCA Civ 652 per Patten LJ at 23: "*Statutory jurisdiction cannot be conferred by waiver or agreement...*" I accept Ms Fijiwala's submission that the right of appeal was given to the Appellant on a mistaken basis.

10. Therefore, I find no material error of law in the decision of the First-tier Tribunal Bowes that he had no jurisdiction to hear the appeal because there was no valid appeal before him and that statutory jurisdiction cannot be conferred by waiver or agreement. Consequently I dismiss the appeal.

Deputy Upper Tribunal Judge Chapman

16 December 2015