



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

Appeal Number: HU/09679/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 26 January 2018**

**Decision & Reasons Promulgated
On 21 February 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**ARSHAD ALI KHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim, Counsel, Instructed by Legal Rights Partnership

For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mr Ali Khan is a citizen of Pakistan. His date of birth is 15th October 1972.
2. The appellant made an application on 9th November 2015 for indefinite leave to remain on the basis of long residency. This application was refused by the Secretary of State on 28th March 2016. The appellant appealed against this decision. His appeal was dismissed by First-tier Tribunal Judge Hawden-Beal on 22nd May 2017. The appellant was

granted permission to appeal. On 23rd August 2017 Upper Tribunal Judge King TD found a material error of law and set aside the decision.

3. The matter came before me on 26th January 2018 to hear submissions with a view to remaking the decision. I heard representations from both parties.
4. It is necessary to set out the appellant's immigration history. He came to the UK in 2006 as a student. He made in-time applications for leave which were granted up until 16th November 2010 when he made an in-time application for leave to remain as a Tier 1 (Post -Study) Migrant. This application was refused on 24th January 2011. The application was refused giving the appellant an in-country right of appeal. On 28th January 2011 the appellant lodged an appeal. It is the respondent's position that he withdrew this appeal on 28th April 2011. On 27th April 2011 the appellant made a further application for leave as a Tier 4 (General) Student. This application was rejected on 16th June 2011. It was, according to the respondent, invalid because it was made whilst there was an outstanding appeal. On 25th July 2011 the appellant made an application for leave to remain as a Tier 4 (General) Student. This application was rejected as invalid on 8th August 2011 because of the non-payment of a fee.
5. On 24th August 2011 the appellant made another application for leave to remain as a Tier 4 (General) Student. This application was rejected as invalid on 27th September 2011 as a result of the failure to complete a form.
6. On 3rd April 2012 the appellant made an application for leave to remain as Tier 1 (Post-Study) Migrant. He was granted leave from 2nd January 2013 until 2nd January 2015.
7. On 31st December 2014 the appellant made an application for leave to remain under the Human Rights Act relying on Article 3. This application was varied on 9th November 2015 to an application for indefinite leave to remain on the basis of long residence. This application was refused on 28 March 2016 and is the subject of this appeal.
8. The respondent's position is that the appellant withdrew his appeal on 28th April 2011. He had 28 days to re-submit an application. However, he failed to do so. He submitted an application on 25th July 2011. The appellant was without lawful leave for 614 days from 28th April 2011 until 2nd January 2013. The respondent decided not to exercise discretion in favour of the appellant.
9. The grounds of appeal argue that the appellant withdrew his appeal on 27 April 2011, the same day as he made a new application and applying the relevant policy (set out below) 3C leave continued. The appellant produced a copy of the Home Office Policy entitled "Leave extended by Section 3C (and leave extended by Section 3D in transitional cases), version 8.0 of 6th March 2017. The policy provides:-

“Withdrawal of appeals in the First-tier Tribunal

“An appellant may withdraw an appeal:

- Orally, at a hearing
- At any time, by filing written notice with the tribunal

An appeal is treated as withdrawn on the day that the appellant requests that the appeal be withdrawn. If a person makes a new application to the Secretary of State on the same day that they have withdrawn their appeal then the new application should be accepted. For these purposes, the person is to be treated as if they did not have section 3C leave on the date they withdraw their appeal”

10. Judge King found that the FtT had concluded that the new application and the withdrawal were made on 27th April 2011 with reference to the applicant’s letter to the FtT (a copy of which was before the judge) and the policy. Judge King concluded as follows:-

“13. It has been noted that the application of 27th April was considered on the basis of tier 4 migrant whereas the application of 3rd April 2012 which was granted, was on the basis of being a tier 1 migrant. Whether it could be safely said that the application of 27th April would have succeeded as a matter of speculation as indeed when it might have been rejected. The view of course that is relied upon by the appellant is that if it were a valid application it remains so until such time as it was properly dealt with and that event has not yet happened.

14. It seems to me in all the circumstances, given the fact of the policy, that the decision should be set aside to be re-made in the light of such evidence that may be forthcoming. It is of importance to clarify whether there was a similar policy in existence in 2011 and if not why the policy that is now in existence came to be so in those terms. There is no issue as to credibility in this matter. It is an assessment of the various evidential elements within a relatively short compass. In those circumstances I see no purpose in remitting the matter to the First-tier Tribunal but rather retain it in the Upper Tribunal.

15. The matter shall be listed in two months time in order to enable the parties to have access to the relevant details and documents. It is important, if at all possible, for the application for 27th April and the letter of 16th June 2011 also to be before the Tribunal”.

11. The appellant’s case in a nutshell is that applying the policy there was no outstanding appeal and therefore the application made by the appellant on 27th April 2011 was wrongly rejected and remains outstanding. It follows that there are no gaps in the appellant’s leave. In any event, the application was not rejected until 16th June 2011 and at that time it was clear that the appeal had been withdrawn.
12. Ms Ahmed stated that there is no copy of the application that was made on 27th April 2011. She submitted that there was no evidence that withdrawal was notified to the respondent on that day. However, Ms

Ahmed in my view did not appreciate that it was as acknowledged by the FtT and Judge King that there was a letter from the appellant to the Tribunal on 27 April 2011 indicating that he wished to withdraw his appeal. The relevant day, according to the policy, is the day the appellant requests the withdrawal of his appeal. There is no requirement under the policy for appellant to notify the respondent that he wishes to withdraw his appeal. I asked Ms Ahmed whether the policy was in existence in 2011 and she was unable to confirm this. She was not able to provide any further documentary evidence to assist with this or explain the purpose of or intention behind the policy which is now in existence.

13. Mr Nasim was not able to assist in this respect either. The appellant produced a further witness statement explaining the problems he has had in obtaining a copy of the application that he made on 27th April 2011. I have taken this into account.
14. It was very disappointing that the parties were not able to assist me in respect of the policy or indeed the substance of the application for leave made on 27 April 2011, particularly in the light of Judge King's comments and the time he allowed for the parties to obtain evidence. There was no evidence that the appellant through his solicitors has made any effort to ascertain whether the policy existed at the material time. The burden of proof rests on the appellant. There is a duty on the Secretary of State to produce material policies. I am not able to conclude from the unsatisfactory position of the Secretary of State that she has failed to discharge a duty in the sense described by the Court of Appeal in *UB (Sri Lanka)* [2017] EWCA Civ 85 with reference to *Mandalia v SSHD* [2015] 1 WLR 4546 [2015] UKSC 59 because there is no evidence that there was a policy in existence at the time. The policy relied on and produced is dated 6 years after the withdrawal of the appeal. There was no application to adjourn to make further enquiries by either party. I proceed on the basis that the Secretary of State is aware of the duty on her.
15. What there is before me which was not before the First-Tier Tribunal (other than a copy of the policy) is a document entitled GCID - Case Record Sheet which is stated as having been created on 13th May 2016. The parts of the document that Mr Nasim relied on state as follows:-

"Minute/Case Notes:

General Student

Application Posted: 27/04/2011

Current visa expired: 17/11/2010

Out of time

Outstanding appeal (Check Appeal Rights Exhausted Date): YES, 28/04/2011"

There is a later entry in the document which reads as follows:-

IMMIGRATION STATUS

Immigration Status points claimed: 20

Immigration Status during period of study: Tier 4 Migrant

Evidence provided: Passport

Immigration Status points awarded: 20

Comments: Leave extended under Section 3C”

Conclusions

16. Mr Wilding representing secretary of state before Judge King indicated that the record showed that the respondent received notification of the withdrawal on 8th May 2011. I have seen no evidence to contradict this. There is in the appellant’s bundle a letter of 27th April 2011 to the Tribunal making a formal request to withdraw the appeal. The appellant indicated in this letter that he is making a fresh application for further leave to remain “under the Tier 4 Category”. It is stated in this letter that “the fresh application for further leave to remain is sent out to the UK Border Agency on the same date as this letter.” The appellant’s case was withdrawn on 28 April 2011 (the date of the notice of withdrawal). If the policy applied, the application would be treated as withdrawn on 27 April.
17. Having considered the evidence before me and the submissions made by both parties, I conclude that it is not reasonably likely that the policy now relied on was in existence in 2011 at the material time. To find otherwise would involve unreasonable speculation.
18. If the policy was in existence in 2011 at the material time, I do not accept that, properly applied, the appellant’s 3C leave would be deemed to have continued. The intention of the policy is not obvious; however, the meaning and application of it was not explored by the representatives at the hearing before me. What it says is that if a new application is made on the same day as a person withdraws an appeal, the new application will be “accepted”. It does not say that section 3C leave continues if the new application is “accepted”. As a matter of fact the final sentence of the policy says that the person will be “treated as if they did not have section 3C leave”. If, having applied the policy, the appellant’s appeal was treated as withdrawn on 27 April 2011 and his new application “accepted,” I have considered whether this would assist the appellant. Whilst the application would not have been rejected as invalid for the reason that he had an outstanding appeal, there is a possibility that it may have been invalid for other reasons. Without sight of the application or the decision of 16 June 2011, it is not possible to conclude that it was a valid application. As a matter of fact, the appellant made two later applications which were rejected as invalid. When the appellant was eventually granted leave it was under a different category. Had the application of 27th April 2011 been “accepted” under the policy and considered substantively it is impossible to speculate what the outcome would have been. Whatever the outcome, applying the policy he would not have had section 3C leave in

any event. Had his section 3C leave continued for any reasons, in spite of the wording of the policy, it cannot be reasonably inferred that had the application been considered substantively this would have seamlessly continued until 2016. The argument is tenuous.

19. I do not accept Mr Nasim's submission that the application of 27 April 2011 remains outstanding because it was unlawfully rejected and that this appellant has leave under section 3C until the application is substantively determined by the respondent. There is no evidence that the decision of 16 June 2011 was unlawful. There has never been a challenge to it made by the appellant. If he was of the view that he had 3C leave, it is not clear why instead of challenging the decision of 16 June, he continued to make further applications. There were no challenges made to the later decisions. Furthermore, the appellant did not make an application within 28 days of 16 June 2011 which may have assisted him. He could have done so. He made an application on 25th July 2011 and this was rejected for non-payment of a fee.
20. I do not accept that there has been any acceptance or recognition by the respondent that the appellant had section 3C leave at the material time. I have considered the reference in the Case Record Sheet to section 3C leave. However, having read the reasons for the decision, which is the subject of this appeal, it is clear that the application for leave to remain as a Tier 1 (Post- Study) Migrant was not dependant on the appellant having leave.
21. The appellant's case is that he has no gap in his leave. I reject this. There is a significant gap in his leave. The respondent properly considered discretion. The gap in lawful residence is significant. I conclude that discretion should not be exercised in favour of the appellant. The appellant's case falls far short of establishing that it is reasonably likely that the respondent made an administrative error. The appellant cannot meet the long residence Rules.
22. Judge Hawden-Beal dismissed the appellant's appeal under paragraph 276ADE and there was no challenge to this. The appellant has not submitted any further evidence in relation to his private life. I find that the appellant has private life here and that the decision interferes with it. The determinative factor is proportionality. I have considered the appellant's evidence in his first witness statement. This was before the First-Tier Tribunal. The appellant has been here since 2006. He came to the UK as a student. He has a wife and children in Pakistan. He speaks English. Judge Hawden-Beal concluded that he was financially independent and there is no reason to interfere with that finding. It may be the case that he has been poorly served by those who were representing him at that time (although I note that there is no evidence of a complaint against the representative having been made). There is now a policy in place that may have helped him had it been in existence in 2011, but the argument is tenuous. There must be a rationale for and intention behind the policy in 2017, but I have not been told about this. In any event, I attach

appropriate weight to this as a factor in the appellant's favour. It is material in this case that the appellant has not advanced evidence of significant private life despite having been here since 2006. I have considered that the appellant was diagnosed with TB in 2013. His evidence is that he has developed ties with the Pashtu community here and that his family in Pakistan is financially dependent on him. There is no evidence to support this. However, I accept that this likely to be the case and attach weight to these factors.

23. Proportionality must be considered through the lens of section 117B of the 2002 Act. The appellant's status has always been precarious. Taking into account the limited extent and depth of private life and all material factors, there are no properly identified compelling or exceptional circumstances in this case to outweigh the public interest. The appellant's appeal is dismissed under Article 8.

Notice of Decision

24. The appeal is dismissed under the Rules and Article 8.

Signed Joanna McWilliam

Date 16 February 2018

Upper Tribunal Judge McWilliam