Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29981/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th February 2015	**On 5th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR SARSHAR AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Saleem, Solicitor
For the Respondent: Miss K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 18th March 1977. On 28th February 2014 his solicitors applied on his behalf for indefinite leave to remain on the basis of ten years' continuous lawful residence in the United Kingdom. The Appellant has a very extensive immigration history. It starts with confirmation on his passport that he entered the United Kingdom on 24th September 2003 with entry clearance as a student. The full detail of the Appellant's immigration history is set out in the first main section of the Secretary of State's Notice of Refusal which is dated 1st July 2014.

2. The Appellant appealed against the refusal and the appeal came before Judge of the First-tier Tribunal Stott sitting at Birmingham on 4th November

2014. In a determination promulgated on 12th November 2014 the Appellant's appeal was allowed under the Immigration Rules.

3. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 20th November 2014. Those grounds stated that the judge had erred in finding that Section 3C leave under the Immigration Act 1971 applied to removal directions and as the Appellant was in the UK unlawfully when he made his application the application could not succeed. On 6th January 2015 Designated First-tier Tribunal Judge Murray granted permission to appeal. In granting permission Judge Murray stated that as a removal decision is not a variation of leave Section 3C has no application to the Tribunal's finding that the removal directions were not in accordance with the law. The Appellant therefore could not satisfy the requirements of the Immigration Rules as he was in the UK unlawfully when he made his application and that therefore there was an arguable error of law in the judge's determination.

4. Albeit late on 18th February 2015 the Appellant's solicitors lodged an extensive Rule 24 response extending to some 42 paragraphs. It is on the aforementioned basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal. For the purpose of continuity throughout the proceedings albeit that this is an appeal by the Secretary of State the Secretary of State is referred to herein as the Respondent and Mr Ahmed as the Appellant. The Appellant appears by his instructed solicitor Mr Saleem. The Secretary of State appears by her Home Office Presenting Officer Miss Pal.

Submissions/Discussion

5. Miss Pal submits that the Secretary of State's starting point is the Notice of Refusal of 11th August 2014 and takes me through the Appellant's immigration history pointing out that it is the Secretary of State's position that the Appellant's appeal for further leave to remain as a Tier 4 General Student having been dismissed and with the Appellant's appeal rights becoming exhausted on 22nd August 2013 that the outstanding application for leave to remain as a Tier 4 General Student was then voided on 30th September 2013. She points out that the Appellant did not seek to regularise his position in the United Kingdom until his application dated 14th January 2014 and that that application was also refused with no right of appeal on 12th February 2014. It therefore remains the Secretary of State's position that the Appellant did not have any lawful leave to remain in the United Kingdom since his application was voided on 30th September 2013. She thereafter relies on the conclusion reached in the Notice of Refusal that whilst at the date of refusal it was accepted that the Appellant had completed ten years' continuous lawful residence in the United Kingdom as the Appellant did not have any valid leave to remain in the UK since 30th September 2013 his current application was considered out of time and therefore he could not satisfy the requirement of paragraph 276B(v).

6. Miss Pal submits that the Appellant did not challenge the variation and therefore his 3C leave expired five working days after receipt of the determination and therefore on 22nd August 2013 the Appellant's appeal rights became exhausted and his rights under Section 3C came to an end.

7. She takes me at some length to paragraph 5 of the Grounds of Appeal contending that the judge has erred in finding that Section 3C leave applies to removal directions. Miss Pal takes me to the Statute stating that Section 3C 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*."

She then states that the leave is extended by virtue of Section 3C during any period when -

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

8. It is therefore the submission of the Secretary of State that a removal decision is not a variation of leave and therefore Section 3C has no application to a Tribunal's finding that the removal directions were not in accordance with the law and consequently the Secretary of State maintains that the Appellant cannot satisfy the requirements of the Immigration Rules. She submits in explanation of the above Rules that Section 3C(1) relates to applications of the Secretary of State and (2) now relates to when a variation is refused i.e. the appeal stage. She refers specifically to paragraph 3C(2)(b) pointing that the dismissal for variation by the First Tribunal was not challenged and therefore the removal is not an appeal. She submits therefore on the dismissal of the appeal that the Appellant's 3C leave came to an end and that is a decision that the Secretary of State was mandatorily entitled to reach and therefore for the purpose of the Appellant's current appeal 3C leave has no application. It is Miss Pal's submission therefore that in August 2013 the Appellant had no lawful leave and became an overstayer and therefore the judge erred materially when finding that the Appellant had satisfied the long-term residency provisions of paragraph 276B of the Immigration Rules. Further she points out that even if the Tribunal was right to find leave continued to

the second decision the appeal could only be allowed to the extent that it went back to the Secretary of State to enable the Secretary of State to consider the appeal under paragraph 276B(2). In such circumstances she asked me firstly to find a material error of law in the decision of the First-tier Tribunal Judge and secondly to re-make the decision dismissing the Appellant's appeal.

9. Mr Saleem states that his starting point are the arguments pursued by the representative at the appeal on 4th November before Immigration Judge Stott that no fresh decision had been made and consequently there had been no final determination of the appeal and that in accordance with Section 3C(2) of the 1971 Act the Appellant's leave was extended during any period when the application for variation was neither decided nor withdrawn and therefore the Appellant's leave meant that he had completed ten years' lawful residence on 23rd September 2013 and therefore met the provisions of the Immigration Rules. On the basis that no fresh Section 47 compliant decision was made against the Appellant following the decision of the First-tier Tribunal of 11th August 2013 to allow the appeal to the limited extent that the Section 47 decision issued in that case was unlawful and not in accordance with the law, he contends there is no material error of law.

10. He takes me to the decision of First-tier Tribunal Judge Talbot prepared on 11th August 2013 where the judge found that the appeal was allowed as being not in accordance with the law and the application was remitted to the Respondent for further consideration under the Immigration Rules in the light of his findings. He submits that that is what is expressed in paragraphs 8 and 9 of Judge Stott's determination and that there is no need to appeal that decision and that there is no appeal extant.

11. He notes that the Secretary of State contends Section 3C does not apply but relies on Section 3C(2)(a) (recited above) namely that leave is extended when the application for variation is neither decided nor withdrawn. He submits that there was no decision by the Secretary of State therefore the decision was not decided nor was it withdrawn. He refers me to the Special Appeal Team's Minute of 15th August 2013 reciting the authority of *Ahmadi [2013] EWCA Civ 512* where the Court of Appeal dismissed Home Office appeals on serving Section 47 decisions consideration should be given to making a further decision to remove under Section 10 of the Immigration Act 1999 once an Appellant's appeal rights are exhausted. He therefore submits that there is an ongoing appeal and refers me to the letter from the Home Office dated 30th September 2013 which acknowledges that the Appellant has an outstanding appeal albeit that it is contended by Miss Pal that the author of that letter was not aware that the Appellant's appeal had been determined before Judge Talbot.

12. Mr Saleem continues saying that letter is written on 13th September 2014 and whilst noting that Miss Pal has indicated that the Secretary of State contends that the Appellant's appeal rights were exhausted in August

2013 the application has to be considered on the due date namely 30th September 2013 and that the Secretary of State cannot, to use his words, "have it both ways" in that you cannot refuse the Appellant's appeal as an overstayer and not accept that there is an ongoing appeal because to do so would be a contradiction in terms.

13. He takes me to the ongoing correspondence pointing out that the detailed reply was submitted with the Secretary of State promptly on 4th October 2013 and that this was replied to on 28th October. He takes me in some detail to the content of that letter

> "Your client was refused leave to remain on 25th March 2013 and subsequently appealed the decision. According to our records, the appeal was not withdrawn by your client as the appeal was concluded rather than withdrawn. The appeal determination is enclosed and dated 15th August 2013. Therefore, when your client submitted the application on 23rd July 2013, he had an outstanding appeal as stated in my letter of 30th September 2013."

14. He submits therefore that the position as stated namely that there was an outstanding appeal is actually reaffirmed by the Secretary of State in their letter of 28th October 2013.

15. Mr Saleem explains that the history of the matter shows that on 14th January 2014 the Appellant formally withdrew the appeal that was at that stage outstanding. This is accepted by the Secretary of State. He submits that the logic therefore is that if the Secretary of State accepts that the appeal was withdrawn then they must logically accept that between August 2013 and January August 2014 that the appeal was ongoing and therefore their current contentions must fall away. He submits that the Secretary of State cannot have it both ways. He acknowledges that there is correspondence from the Court and Tribunal Service confirming that the appeal was allowed in August 2013 and that therefore it cannot be withdrawn.

16. He thereafter takes me to paragraph 276B pointing out that the requirement of ten years' continuous lawful residence in the United Kingdom was accepted by the Home Office Presenting Officer at the first hearing by the decision maker on 1st September 2014. Paragraphs (ii) to (iv) are not in dispute but that it is paragraph 276B(v) that is the issue. He reminds me for the benefit of the appeal of the exact wording of that paragraph.

> "*The requirement to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that ...*
>
> *(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, (as will any period of*

> *overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period)*."

He submits that this scenario does not apply to where an application is made and that if the ten year residence is accepted it actually does not matter if the Appellant is an overstayer as that is not an exclusion set out within the Rules. He takes me to the Home Office guidance for calculating indefinite leave to remain published in January 2014 and to page 25 where reference is made to exceptional cases where there is a break in the continuous lawful period. He submits that exceptional circumstances allow the Secretary of State to disregard applications made more than 28 days after the expiry of leave and if I am persuaded that that period has arisen then I should treat the two letters from the Home Office dated respectively 30th September 2013 and 28th October 2013 as constituting exceptional circumstances due to the fact that they have misled the Appellant and that he has a clear legitimate expectation that he has an extant application and he has relied upon these letters to his detriment which would, if found against him, amount to a conspicuous unfairness. For all these reasons he submits that there is no material error of law in the First-tier Tribunal Judge's determination. Further if I am against him on that premise he asks me to take into account the fact that the applicant has been misled by his legal representatives. He submits that there is no error of law and that all these points were canvassed before the First-tier Tribunal Judge who considered them when making his decision.

17. In response Miss Pal takes me to paragraph 7 of the original determination of Immigration Judge Talbot and the fact that at that stage the Secretary of State's decision was upheld as being in accordance with the Immigration Rules. She submits that it is disingenuous to say that the Immigration Judge was allowing the matter to go back to the Secretary of State. Further she submits the letters of 30th September 2013 and 28th October 2013 do not give the Appellant any future hope or legitimate expectation that his application would be successful bearing in mind that the Secretary of State continued to categorically refute the Appellant's application. She asked me to find a material error of law to set aside the decision of the First-tier Tribunal Judge and to re-make the decision allowing the Secretary of State's appeal.

The Law

18. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

19. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor

is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

20. I have gone to great lengths within this determination to set out the history of this matter and the very extensive submissions of both legal representatives. At the end of the day the issue is one of law. I agree as a starting point that as a matter of law a removal decision is not a variation of leave and that Section 3C would consequently not apply to a finding by a Tribunal that removal directions were not in accordance with the law. The basis upon which Section 3C operates has been set out previously within this determination. Much is made by the Appellant's representatives that when First-tier Tribunal Judge Talbot allowed and remitted the Respondent's appeal in August 2013 that this disposed of the appeals process irrespective of the Appellant's position that the Respondent had an extant appeal. They argue that the Respondent was waiting for a fresh lawful Section 47 compliant decision from the Appellant and that the Respondent's previous solicitor's withdrawal of his appeal was futile because there was nothing to appeal as the First-tier Tribunal had disposed of the appeal and the matter was back in the hands of the Appellant to make a fresh lawful decision. They argue that the decision of 12th February 2014 that was issued in response to the fresh Tier 4 (General) Student application of 14th January was a fresh lawful decision that settled the issue in the Appellant's favour and therefore the Appellant meets the requirements of paragraph 276B(ii)(v).

21. I find that this scenario is not sustainable. I appreciate that there are letters written by the Home Office dated 30th September and 28th October 2013 and that it is submitted that the authors of those letters got it wrong and they were not aware of the proper basis upon which appeals were treated. That however does not in my opinion amount to exceptional circumstances under the Home Office guidance nor does the failure of the Appellant's first solicitors to carry out a proper appeal process negate the Rules. Consideration of the whole history of this matter leads to the inevitable conclusion interpreting Section 3C in particular paragraph 3C(2)(b) that the removal decision is not the variation of leave and therefore the

Appellant's appeal had been finally determined. In such circumstances the Appellant could not meet the requirements of paragraph 276B(v) and I am satisfied that the scenario correspondence does not meet the threshold to bring the case within the exceptional circumstances that could disregard applications made more than 28 days after the expiry of leave. The guidance note gives examples, which I acknowledge may be capable of being expanded beyond those examples, but in this instant case particularly bearing in mind the position of the Secretary of State has been well-documented and set out both in the Notice of Refusal and referred to at paragraph 7 of Judge Talbot's determination I am not satisfied that the Appellant can rely on the Home Office guidance to bring him within an exception to the Rule.

Notice of Decision

22. In all the circumstances there is consequently a material error of law in the decision of the First-tier Tribunal Judge. I set aside the decision and I re-make the decision dismissing the Appellant's appeal.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris