Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001607
UI-2021-001608
[HU/01628/2020, HU/12393/2019 & HU/12392/2019]

THE IMMIGRATION ACTS

Heard at Field House (Hybrid)
On: 23 June 2022

Decision & Reasons Promulgated
On: 21 September 2022

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MC
CC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs, counsel instructed by Liberty Legal Solicitors LLP
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge J C Hamilton, promulgated on 24 June 2021. Permission to appeal was granted by First-tier Tribunal Judge Monaghan on 9 December 2021.

Anonymity

2. An anonymity direction was made previously and is reiterated below because protection matters were raised during the course of the human rights appeals.

Background

3. The appellants are a married couple and nationals of Bangladesh. MC, the first appellant, hereafter referred to as the appellant, entered the United Kingdom with leave to enter as a Tier 4 migrant on 12 September 2009. The second appellant (CC) entered the United Kingdom on 20 July 2012 with leave to enter as a Tier 4 dependent partner. Thereafter she was granted leave in line with the appellant and thereafter was his dependent in his unsuccessful applications.

4. The appellant extended his leave as a Tier 4 migrant until 19 October 2015. On 16 October 2015, he applied for leave to remain outside the Immigration Rules on compassionate grounds. On 12 April 2016, that application was varied to a human rights application which was refused in a decision dated 3 September 2016 and certified as clearly unfounded, with the effect that the appellant was only permitted to appeal once he had left the United Kingdom.

5. On 29 September 2016, the appellant made a further application for leave to remain outside the Rules which was varied to a human rights application. Further submissions were subsequently made in support of that application, which was refused on 10 July 2017 with no right of appeal as the respondent did not consider that the further submissions amounted to a fresh human rights claim.

6. On 4 April 2018, the appellant was granted permission to judicially review the decision of 10 July 2017. During July 2018, the appellant and respondent agreed a consent order on the basis that the appellant would withdraw his judicial review proceedings and the respondent would reconsider the decision of 10 July 2017.

7. There was no reconsideration of the decision 10 July 2017. Instead, the respondent reconsidered the human rights claim made on 12 April 2016 and which was refused on 3 September 2016. A decision was made on 4 July 2019 to refuse the appellants' human rights claim, which attracted a right of appeal. The appellants lodged appeals against that decision (HU/12392/2019 & HU/12393/2019).

8. On 19 September 2019, the appellant made a further human rights claim based on his claim to 10-years' residence in the United Kingdom. That

application was refused with no right of appeal on 9 October 2019. Following judicial review proceedings, the respondent reconsidered that decision and substituted it with an appealable decision dated 16 January 2020. The appellant appealed (HU/01628/2020).

The decision of the First-tier Tribunal

9. The First-tier Tribunal considered the appeals against the decisions of 4 July 2019 and 16 January 2020. The judge found that the respondent had mistakenly reconsidered the wrong decision and had thus failed to comply with the terms of the consent order of July 2018. The judge did not accept that this meant that the appellant should be treated as having accrued 10 years continuous lawful residence in the United Kingdom notwithstanding the respondent's guidance to that effect.

10. The judge also rejected the appellants' claim that there were very significant obstacles to their reintegration in Bangladesh and declined to allow the appeals.

The grounds of appeal

11. The grounds of appeal are as follows.

12. Firstly, there was an error in the judge's consideration of the respondent's policy, secondly the judge's reasons for finding that the policy did not assist the appellants were inadequate and/or irrational and thirdly, the judge erred in his interpretation of section 3C of the Immigration Act 1971.

13. Permission to appeal was granted on the basis sought.

14. The respondent did not file a Rule 24 response.

15. On 20 June 2022, the Upper Tribunal sent an email to the respondent requesting an indication of their response to the appeal. No written reply was received to that request. On 22 June 2022, Ms Ahmed, on behalf of the Secretary of State, sent an email to the Upper Tribunal seeking an adjournment on the basis that the tribunal and both parties would benefit from a skeleton argument from the respondent dealing with the salient points as well as that the respondent may need to make enquiries as to her position. The appellants opposed the adjournment request mainly owing to its lateness as well as owing to the fact that counsel had been instructed to attend the hearing. The adjournment request was refused for the reasons put forward by the those representing the appellant as well as the respondent's persistent failure to provide a Rule 24 response.

The hearing

16. Mr Biggs submitted a succinct skeleton argument shortly before the hearing commenced. Ms Ahmed was given time to consider it. Ms Ahmed renewed her application for an adjournment because the respondent

wished to cross-appeal and/or seek an extension of time for submitting a Rule 24 response. She suggested that there had been a failure to prepare a Rule 24 response owing to a lack of resources and outlined what the respondent would wish to say about the judge's decision. Mr Biggs objected to the applications, noting that the delay was serious and significant and that the Secretary of State had more resources available to her than many.

17. I declined to adjourn the appeal for an out of time Rule 24 notice to be submitted. Even by the time of the hearing, no such notice was available and as such there was nothing to be admitted. The respondent was on notice from 9 December 2021 that the appellant had been granted permission to appeal and no real explanation has been given as to why no Rule 24 notice was provided during the subsequent six months. Nonetheless, Ms Ahmed had clearly had time to prepare the case as she was able to formulate the respondent's criticisms of the judge's findings in some detail and had submitted authorities in advance of the hearing.

18. Furthermore, Mr Biggs expressed no difficulty in addressing her arguments. I therefore proceeded with the hearing, allowing Ms Ahmed to make her points orally.

19. Thereafter, Mr Biggs delivered his submissions. He relied on his skeleton argument and confirmed that he was no longer able to advance the third ground owing to the judgment in *Akinola* [2021] EWCA Civ 130. He made the following points in respect of the first ground. The Secretary of State failed to follow correct approach in respect of Section 3C leave and the judge acknowledged the submission that appellant fell within the 3C Leave policy. That meant that the appellant should be treated as if he had lawful residence for the purpose of paragraph 276B of the Rules and more generally and the judge erred in failing to make that finding. The finding was relevant to the evaluation of Article 8(2) as it would not be in accordance with the law for the appellant to be removed pursuant to either decision because this would be inconsistent with his entitlement under the policy. This public law error meant that his removal would not be lawful. The significance of the policy availing the appellant is apparent when considering proportionality. While the respondent had discretion whether to apply the 3C leave policy, she needed to show good reason why it should not be complied with, and no good reason had been suggested in this case.

20. The second ground was that the judge's reasoning was irrational and inadequate. The key passage was at [102] where the judge had found that it 'fanciful' to expect the respondent to comply with her policy. No reason was given as to why it is fanciful, given that the Home Office is expected to follow relevant policies. The judge thought the respondent had an unfettered discretion.

21. Mr Biggs asked me to set aside the decision of the first-tier Tribunal and allow the appeal of the first appellant outright as he was entitled to a grant of leave to remain. He suggested that the appeal of the second appellant would need to be reheard because she had not achieved ten years' lawful residence, however if the first appellant was entitled to ILR, this was a significant factor regarding the proportionality of her proposed removal. He invited me to either allow the appeal of the second appellant outright or list it for a continuance hearing before the Upper Tribunal.

22. Ms Ahmed made the following points in respect of the cross-appeal. Firstly, the judge erred in finding that the Home Office withdrew the decision of 12 April 2016 and gave inadequate reasons for doing so. It was accepted that the respondent did not reconsider the decision of 10 July 2017 as required to do via the consent order and this was recognised by the judge.

23. The respondent did not accept that the 2016 decision was withdrawn. Had she done so she would have made it clear in the decision of 16 January 2020. Secondly, the judge failed to consider that the Home Office can only reconsider a decision if there is no right of appeal. The 2016 decision afforded the appellant a right of appeal and thus was not susceptible to the reconsideration process. There was no express withdrawal of the 2016 decision, and it was relied upon in the decision of 2020. *Akinola* did not say that reconsideration results in a withdrawal of the earlier decision and the guidance did not say that there is an automatic withdrawal.

24. A positive step must be taken to withdraw a decision and that step was never taken. Thirdly, the 2019 decision letter did not have a paragraph which informed the appellant that his 3C leave was reinstated as stated in the guidance. This reinforced the view that the 2016 decision was not withdrawn. These errors infected the judge's findings on Section 3C.

25. Responding to Mr Biggs' submission, Ms Ahmed added the following. The judge referred to the 3C Leave guidance and made a sound analysis, that the appellant's leave did not resurrect but resumed from 4 July 2019, applying *Niaz (NIAA 2002 s. 104: pending appeal)* [2019] UKUT 399 by analogy. The judge's finding that reconsideration did not indicate withdrawal of an earlier decision was supported by the findings in *Akinola*. The judge's use of the term 'fanciful' needed to be read with his findings at [72]. An appeal could not be allowed on the basis that the decision was not in accordance with the law. I was invited to dismiss the appellant's appeal and allow that of the Secretary of State.

26. Mr Biggs briefly responded to Ms Ahmed's submissions. On the cross appeal, he argued that it was open to the First-tier Tribunal to conclude for the reasons it gave that the Home Office had in fact withdrawn the 2016 decision, albeit mistakenly, in the course of making the 4 July 2019 decision. Deference was due to the judge who had a wide range of

decisions available to him. There was no error of law. The judge gave reasons for his findings including that it was illogical to have two decisions on the same application under the statutory scheme. The July 2019 decision was not a supplementary decision but a complete reconsideration. The judge gave very careful reasons largely based on the respondent's reconsideration guidance to explain why on facts of this case the 2016 decision had been withdrawn. These findings were open to the judge.

27. As for the lack of mention of the withdrawal of the 2016 decision in the 2020 decision letter, Mr Biggs argued that this was irrelevant if as a matter of fact the respondent withdrew the 2016 decision. In *Akinola*, the comments regarding a positive step being required for withdrawal of a decision were obiter and used the word 'normally.' In this case the judge found that the respondent made a positive decision to reconsider the earlier decision. There was no assumption by the judge that the earlier decision was withdrawn. He provided reasons which were entirely consistent with *Akinola* and the decision was one which was open to him.

Decision on error of law

28. It makes sense to start the assessment of this case with reference to the respondent's grounds for cross-appealing. In summary, the respondent argues that the decision of 12 April 2016 was never withdrawn, and the judge erred in finding that it was. Furthermore, the Secretary of State could not, in any event, reconsider a decision which had a right of appeal as the April 2016 did and lastly the 2019 decision letter made no reference to the appellant's 3C leave being reinstated, as required by the respondent's guidance.

29. Ms Ahmed placed reliance on various paragraphs from *Akinola*, albeit she did not develop her arguments. It is therefore necessary to begin with an examination of that judgment. At {39} of *Akinola* the main issues raised were the 'effect under section 3C of an appeal out of time for which an extension is granted and a withdrawal and/or reconsideration of a refusal decision.' The second scenario considered by the Court of Appeal, is relevant here, in that the judgment considered (in relation to the claimant Abbas) the position under section 3C where an application has been made for a variation of existing leave, it has been refused and subsequently the Secretary of State either withdraws and/or reconsiders the decision.

30. It was common ground in the appellant's case, that the Secretary of State wrongly reconsidered the decision of 3 September 2016 rather than the decision of 10 July 2017. Ms Ahmed argued that the decision of 3 September 2016 was never withdrawn and that the First-tier Tribunal erred in finding that it had been, whereas Mr Biggs argued that the judge was right to find that it was withdrawn, and therefore no such error occurred.

31. The decision of 3 September 2016 was, like the decision which was reconsidered relating to the claimant Abbas in *Akinola*, a refusal of a variation application with no in-country right of appeal. At {80} of *Akinola*, it was held that Section 3C leave was extended beyond the date of the original decision only if the reconsideration '*had the consequence of depriving the original decision of legal effect*.' The Court of Appeal decided that on the facts of Mr Abbas's case, the original decision was not withdrawn and the new decision, which again both refused the applicant and certified it on the same basis, '*did not deprive the original decision of its legal effect*' including that of bringing the section 3C leave to an end. At {69}, the Court considered the position regarding reconsiderations and concluded, with reference to the respondent's reconsiderations guidance,

> *'Caseworkers are instructed by the reconsiderations guidance (page 36) that if they reconsider the case and decide that it should have been refused for different reasons they must withdraw the original decision and issue a new decision notice. But I do not read the guidance as meaning that the issue of a new decision notice carries with it a necessary implication that the original decision has been withdrawn.'*

32. In the appellant's case, the reconsideration process led to the refusal of his application of 12 April 2016, for different reasons. The decision of 3 September 2016 concluded that his human rights claim was clearly unfounded, whereas the conclusion of the reconsideration of that decision, in the decision of 4 July 2019, was that it was not. The guidance referred to in *Akinola* expresses in mandatory terms that an earlier decision 'must' be withdrawn by caseworkers. This of course does not mean that it has been withdrawn, as decided in *Akinola*. As stated above, on the facts the relevant decision for the claimant Abbas was not withdrawn on the facts. Indeed, the Court of Appeal had the benefit of having the claimant's Home Office records and other documents which clearly stated that no withdrawal had taken place. The judgment in *Akinola* did not state that a reconsidered decision could never be withdrawn, just that on the facts of the case before the Court, it was not.

33. I make the following observations regarding the decision of the First-tier Tribunal. At [59], the judge notes that no statement from the decision maker, copies of logs or records had been provided to support the respondent's case. At [65-73], the judge considers the consequences of the respondent's reconsideration of the 16 October 2015 application which was varied on 12 April 2016. The judge found that the respondent must have withdrawn the 3 September 2016 for the following reasons. It was a logical consequence, there could not be two decisions in existence relating to the same application, there were no formal procedural requirements for the respondent to withdraw a decision, the respondent did not review the earlier decision and the respondent's Reconsideration guidance of 30 July 2018 contained no set procedures to be followed where there had been an agreement for a reconsideration following a Consent Order. Other findings by the judge were in line with *Akinola*, in that the judge found at [71] that the withdrawal of a decision did not have the same consequences as when a decision is quashed following a judicial review. Furthermore, in the same

paragraph, the judge rejected the argument that a withdrawn decision was deemed never to have been made in the first place. Ms Ahmed argued that the Secretary of State was not permitted to reconsider an appealable decision and therefore the earlier decision could not have been withdrawn. I was no referred to no authority for this assertion, which is undermined by the Secretary of State's routine agreement to reconsider cases certified as clearly unfounded in the judicial review sphere.

34. The respondent also relies on the lack of any mention of the withdrawal of the 2016 decision in the decision 16 January 2020. There is no merit in that submission. The 2020 decision letter wrongly implies that the decision of 17 May 2017 was reconsidered when it was not in dispute that the respondent failed to do so and as such, the immigration history set out in the 2020 decision letter cannot be relied upon. Ms Ahmed further relied upon what was said in *Akinola* at {69} that '*withdrawal of the original decision normally requires a positive step, distinct from the making of a new decision.*' She further argued that no such positive step was taken in the appellant's case. The difficulty with this submission is the absence of any Home Office records or a witness statement from the caseworker which might throw light on any steps taken in relation to this issue.

35. The judge's reasons for finding, on balance, that the 3 September 2016 decision was withdrawn were more than adequate. While another judge may have reached a different conclusion, that does not mean that there was an error in the approach of the First-tier Tribunal. The judge considered this issue with care and in detail. He considered all the evidence before him as well as the respondent's reconsideration guidance. His findings were largely based on that guidance and were entirely open to him. Accordingly, the respondent's cross-appeal fails.

36. Turning now to the grounds upon which permission was granted, it is noted that the appellant no longer pursues the third ground of appeal.

37. The first ground was that the First-tier Tribunal gave legally flawed reasons for concluding that the appellant could not benefit from the respondent's reconsideration guidance. The second ground argued that the judge's findings in relation to the said guidance, when considering Article 8, were inadequate or irrational. As both grounds concern the judge's treatment of the guidance, they can be taken together.

38. The judge found that the decision of 3 September 2016 had been withdrawn and replaced with the 4 July 2019 decision. The judge rightly rejected the argument that section 3C leave revived retrospectively, accepting only that the appellants had leave from 4 July 2019. The respondent's policy 'Leave extended by section 3C (and leave extended by section 3D in transitional cases)" made the following provision at page 7:

> *'Where a decision is withdrawn and there is an application outstanding or a new application is made after the decision has been withdrawn, the person should not be disadvantaged by the break in*

> *their leave in having that application considered. This means you should treat the person as having been lawfully in the UK for the purposes of deciding the immigration application.'*

39. I accept the argument that the outcome of the policy is that, given the judge accepted that the earlier decision had been withdrawn, the first appellant fell to be treated as if he was eligible for ILR which would mean that his Article 8 appeal ought to have been allowed on the basis that he met the lawful residence requirement in the Rules. The respondent has given no reason, let alone good reason, for not complying with her policy. The judge rejected this argument at [102] because he considered the prospects of the respondent '*exercising her discretion'* and treating him as having achieved 10 years lawful residence pursuant to the guidance were '*so remote as to be fanciful*.' That is as far as the reasoning goes. These reasons were inadequate given the judge's finding that the appellant fell within the section 3C policy. The judge's mention of the exercise of discretion indicates that he wrongly understood the respondent to have an unfettered discretion to follow her policy as opposed to an obligation to do so. Furthermore, no good reasons were identified on behalf of the respondent to justify departing from the policy. Indeed, no good reasons were identified by Ms Ahmed.

40. As part of his assessment of Article 8(2) the judge considered whether the first appellant's removal pursuant to the 4 July 2019 decision was in accordance with the law and was proportionate. Yet, in carrying out this assessment the judge failed to consider whether the respondent's policy was determinative of the public interest question in the case of the first appellant or in the alternative, he failed to accord weight to this matter.

41. It follows that grounds one and two are made out and consequently, the decision of the First-tier Tribunal is set aside. I was invited to proceed to remaking in relation to the first appellant at least and I do so regarding both appellants, preserving the findings of the First-tier Tribunal set out at [1-73] of the decision and reasons.

Remaking

42. Ms Ahmed accepted that the decision letter dated 4 July 2019 reconsidered the in-time variation claim made by the appellants on 12 April 2016. Furthermore, she did not dispute the submission that if the decision of 3 September 2016 was withdrawn and was replaced by the decision of 4 July 2019 which afforded the appellants an in-country right of appeal, the first appellant, by virtue of the respondent's section 3C policy, should be treated as though he had accrued ten years' continuous lawful residence. As stated above, I rejected Ms Ahmed's arguments that the judge erred in finding that the decision of 3 September 2016 was withdrawn.

43. The respondent's section 3C policy states at page 7

> *"… where a decision is withdrawn and there is an application for leave outstanding, or a new application is made after a decision has been withdrawn, the person should not be disadvantaged by the break in their leave in having that application considered. This means you should treat the person as having been lawfully in the UK for the purposes of deciding the immigration application."*

44. The effect of the foregoing provision is that the respondent is required by her policy to treat the appellants as if their leave to remain had continued without a break until the conclusion of the instant proceedings. The appellant, who has been living in the United Kingdom since 12 September 2009, is entitled to be treated as if he had accrued ten years' continuous lawful residence. The second appellant entered on 20 July 2012 and at the time of the remaking of the appeals is also entitled to be treated as if she had acquired ten years' residence, under the policy. The effect of the appellants' reliance on the policy, is that they are entitled to settlement because they are to be treated as if they meet all the residence requirements of paragraph 276B of the Rules. The respondent has raised no good reason for not complying with her policy in this instance. In these circumstances, there is no public interest in the appellants removal and for the respondent to do so would be unlawful and therefore not in accordance with the law for the purpose of Article 8(2). It follows, that the removal of the appellants would be a disproportionate step owing to the lack of public interest justification.

Conclusions

The making of the decisions of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decisions to be re-made.

I substitute a decision allowing the appeals on the basis that the removal of the appellants would be a disproportionate interreference with their rights under Article 8 ECHR.

Notice of Decision

The appeals are allowed on human rights grounds.

Direction Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are granted anonymity. No-one shall publish or reveal any

information, including the name or address of the appellants, likely to lead members of the public to identify the appellants. Failure to comply with this order could amount to a contempt of court.

Signed: T Kamara Date: 9 August 2022

Upper Tribunal Judge Kamara

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable for the following reason. The appeals were allowed.

Signed: T Kamara Date: 11 August 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email