Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09073/2017**

THE IMMIGRATION ACTS

Heard at Field House
On 30 November 2018

Decision & Reasons Promulgated
On 12 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAZIA BANO
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr Z Nasim (counsel) instructed by M-R solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal

Judge Housego, promulgated on 11/07/2018 which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was born on 14/08/1979 and is a national of Pakistan. On 18/08/2017 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Housego ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 08/10/2018 Judge Lambert gave permission to appeal stating inter alia

> 2. The issue was whether the appellant had continued to have section 3C leave following an application made on 17 February 2017 for administrative review of a refusal of tier 1 general ILR. The Judge found the original application to have remained live, by virtue of the respondent's agreement on judicial review to reconsider a decision of 4 February 2017 to refuse the tier 1 application. The decision concludes that the appellant's lawful residence remained uninterrupted until the appeal was determined; she could meet the immigration rules and therefore there was a breach of article 8.
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> 3. The grounds take issue with the findings made by the Judge on the same basis as argued at the hearing. The primary issue appears to be whether and at what point the original application has been decided; and whether on the facts of this case the scenario under section 3C(2)(d) applied, or whether there was an extension of section 3C leave under section 3C(2)(a)-(c). It is arguable that the Judge's reasoning in particular the analogy drawn at paragraph 31-32 with employment law may be in error.
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> 4. There is therefore an arguable error of law disclosed by the application.

The Hearing

5. For the respondent, Mr Bramble adopted the terms of the grounds of appeal. He read from the Home Office guidance, which the Judge quotes at [25] of the decision. He took me to [31] to [33] of the decision and told me that there the Judge misinterprets the provisions of section 3C of the 1971 Act. He told me that if the Judge had properly interpreted section 3C of the 1971 Act the appellant could not have succeeded. He asked me to allow the appeal and set the decision aside.

6. For the appellant, Mr Nasim told me that the respondent has now reconsidered the decision made in February 2017. The respondent has adhered to that decision and the appellant has again applied for administrative review of the fresh decision. He took me through the history of applications and told me that the appellant has

enjoyed leave to remain throughout the entirety of her time UK, and that section 3C leave was created by the application made on 8 January 2016. He told me that, as a matter of fact, at the date of the hearing before the First-tier Tribunal the appellant was awaiting a decision on the application made in January 2016. He took me through the decision and told me that the Judge's logic is flawless and that his interpretation of section 3C(2)(a) is correct. He emphasised that the appellant enjoyed leave because of the operation of section3C(2)(a), and told me that the grounds of appeal are misconceived because they focus on s3C(2)(d), from which the appellant does not benefit.

7. At the conclusion of the hearing both Mr Bramble and Mr Nasim agreed that the question I have to answer is whether or not there is a gap between the respondent's administrative review decision of 17 March 2017 and the start of judicial review proceedings on 3 May 2017, and, if there is, whether the gap is bridged by the outcome of the judicial review proceedings.

Analysis

8. The history of the appellant's applications is accurately set out by the Judge at [2] of the decision. The respondent's position has always been that the appellant's lawful residence ended on 17 March 2017. It is beyond dispute that the appellant entered the UK on 9 August 2007. She made various applications which were granted & which resulted in leave between 9 August 2007 and 11 January 2016.

9. On 5 October 2015 the appellant made an application for indefinite leave to remain which the respondent refused on 8 October 2015. The appellant applied for administrative review of that decision because it did not carry a right of appeal. The respondent adhered to the decision on 4 November 2015.

10. On 8 January 2016 the appellant made a second application for tier 1 general indefinite leave to remain. The respondent refused that application on 4 February 2017. The respondent's decision did not carry a right of appeal. The appellant unsuccessfully sought administrative review. On 17 March 2017 the respondent adhered to the decision.

11. On 29 March 2017 the appellant submitted an application for further leave to remain. On 5 August 2017 the appellant submitted an application for settlement on the basis of 10 years long residence. It was that application which led to the decision under appeal dated 18 August 2017.

12. On 3 May 2017 the appellant applied for judicial review of the decision of 4 February 2017. On 11 January 2018 the Upper Tribunal made a consent order, sealed on 16 January 2018, recording that the respondent has agreed to reconsider his decision of 4 February 2017 within three months of the date on which evidence is submitted. At the date of hearing before the First-tier Tribunal, that process was ongoing so that at the date of hearing there was no decision on that reconsideration.

13. The Judge took the view that the judicial review proceedings kept the application made on 8 January 2016 alive. The respondent still argues that the 3C leave dependent on the application of 8 January 2016 ended on 17 March 2017, when the respondent adhered to the decision of 4 February 2017.

14. s. 3C of the 1971 Act says

> Continuation of leave pending variation decision
>
> (1) This section 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.
>
> (2) The leave is extended by virtue of this section 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),
>
> (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).
>
> (d) an administrative review of the decision on the application for variation—
>
> (i) could be sought, or
>
> (ii) is pending.
>
> (3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

15. Home Office policy Guidance states that

> (a) Where there is a judicial review against the Upper Tribunal's refusal to grant permission to appeal, the person will not have section 3C leave while the claim is brought, or if it is successful, even if the outcome means that an appeal to the Upper Tribunal proceeds.

> (b) Where a decision is withdrawn by the Secretary of State and the person has section 3C leave because of a pending appeal or administrative review, their section 3C leave will continue but will revert to leave under section 3C (2)(a) instead of section 3C(2)(b) as a decision on the original application will be outstanding.
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> (c) Where the decision is withdrawn after section 3C leave has come to an end, withdrawal of the decision does not mean that the person once again has section 3C leave. This is because section 3C leave can arise and exist only where it is a seamless continuation of leave, either extant leave or section 3C leave. Where there is a break in that leave, such that section 3C leave has come to an end, section 3C leave cannot be resurrected.

16. Section 3C is written in straightforward terms. It is argued for the appellant that the Judge was correct to find that the appellant meets s.3C(2)(a). The Judge finds at [27] that the focus is on s.3C(2)(a). The error that the Judge makes is at [29] and [30] where the Judge finds that the judicial review procedure breathed new life into the application made on 8 January 2016, so that the application had not been "*finally decided*". At [30] the Judge imports the word "*finally*" into s.3C(2)(a).

18. The word *finally* does not feature in section 3C(2)(a) of the 1971 act. S.3C(2)(a) says

> (2) The leave is extended by virtue of this section during any period when –
>
> (a) the application for variation is neither decided nor withdrawn,

19. The appellant's application was decided on 17 March 2017, after administrative review, when the respondent adhered to the decision of 4 February 2017. The fact that the appellant's judicial review procedure met with some degree of success does not revive s.3C leave which has come to an end. There is no provision for reviving s.3C leave, although the respondent's guidelines instruct the respondent to treat the termination of s.3C leave as nothing more than neutral in this appellant's circumstances.

20. The fact that the respondent will not consider the termination of section 3C leave as a negative factor in the reconsideration of the decision of 4 February 2017 does not alter the wording, meaning or effect, of section 3C of the 1971 act. The Judge falls into material error of law at [29] and [30] of the decision. That error renders [31] to [33] of the decision irrelevant, and fatally undermines the conclusion at [34].

21. The appellant cannot rely on section 3C(2)(d). The administrative review of decision could not be sought and was not pending between 17 March 2017 and 3 May 2017. That gap between the conclusion of the first administrative review and the start of judicial review proceedings brought section 3C leave to an end. There is a finality in the termination of section 3C leave. It cannot be revived by success in judicial review proceedings.

22. Because the decision contains a material error of law, I set it aside. The appellant's article 8 ECHR grounds of appeal have not been fully considered. I cannot substitute my own decision. A further fact-finding exercise is necessary to carry out proper proportionality assessment.

Remittal to First-Tier Tribunal

23. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

24. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

25. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge Housego.

Decision

The decision of the First-tier Tribunal is tainted by material errors of law.

I set aside the Judge's decision promulgated on 11 July 2018. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Date 7 December 2018

Deputy Upper Tribunal Judge Doyle