UPPER TRIBUNAL
(Immigration and Asylum Chamber)

R (on the application of Patel) v Secretary of State for the Home Department (s.3C(4): simultaneous application – withdrawal) IJR [2015] UKUT 0273 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Field House
London

Heard: 15 April 2015

Before

UPPER TRIBUNAL JUDGE GILL

THE QUEEN (ON THE APPLICATION OF
Sonalben Samirkumar Patel) Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

Representation:
For the Applicant: No appearance by or on behalf of the applicant.
For the Respondent: Ms F Scolding, of Counsel, instructed by the Government Legal Department.

S.3C(4) of the Immigration Act 1971 prohibits an application for leave to remain that is made on the same day as, and even if said to be simultaneous with, the applicant's withdrawal of his appeal before the First-tier Tribunal (Immigration and Asylum Chamber).

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JUDGMENT
Handed down on 5 May 2015

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Judge Gill:

Introduction and background facts:

1. The applicant is a national of India. By an order dated 14 November 2014, the Upper Tribunal granted her permission to challenge a letter dated 4 January 2014 (hereafter the "invalidity decision") from the respondent by which the respondent rejected her application of 2 July 2013 for leave to remain as a Tier 4 (General) Migrant on the ground that s.3C(4) of the Immigration Act 1971 (the "1971 Act") precluded her from making the application whilst her leave was extended under s.3C. The respondent considered that she had made her application of 2 July 2013 whilst she had an outstanding appeal before the First-tier Tribunal (Immigration and Asylum Chamber) ("FtT"). The appeal in question was an appeal under reference: IA/06726/2013.

2. The applicant's case (in summary) is that she withdrew her appeal and *simultaneously* made her application for leave and therefore her application was not precluded by s.3C(4). The relevant chronology (insofar as appears from the file) is as follows:

27 Oct 2009	Applicant entered the U.K. with entry clearance valid from 27 October 2006 until 25 June 2011 as a Tier 4 (General) Migrant
16 Apr 2011	Application for leave to remain as a Tier 4 (General) Migrant
2 Sept 2011	Licence of sponsor-college revoked
5 Nov 2012	Respondent allowed the applicant a period of leave of 60 days to find another sponsor-college and submit a new application
13 Feb 2013	Application refused with a right of appeal
28 Feb 2013	Appeal lodged (IA/06726/2013)
2 July 2013	Email from applicant's representatives to respondent timed at 12:40 stating that they had instructions from the applicant to withdraw her appeal which was listed for hearing on 3 July 2013 before the FtT
2 July 2013	Letter sent at 15:21 by the applicant's representatives to the FtT, stating: *"…our client would like to withdraw this appeal as they wanted to make [sic] fresh application to the UKBA to extend her status as a Tier 4 (G) student …"*
2 July 2013	Application made for leave to remain as a Tier 4 (General) Migrant
4 July 2013	"Notice of Withdrawal" (form IA52) sent by the FtT to the parties in appeal number: IA/06726/2013
4 Jan 2014	Date of invalidity decision

3. The decision of the Upper Tribunal granting permission states that notice of withdrawal was made by email at 12:40 on 2 July 2013. In fact, this email could not operate as a withdrawal because it was sent to the respondent. However, the facsimile message sent to the FtT on 2 July 2013 at 15:21 did operate as a withdrawal.

Reasons for proceeding in the absence of the applicant

4. The applicant sent an email to the respondent on 10 April 2015 stating that she wished to withdraw her claim for judicial review. On 14 April 2015, when administrative staff of the Upper Tribunal telephoned her, she informed the Upper Tribunal that she wished to withdraw her claim and would not be attending the hearing. She was advised to submit an application notice in order to withdraw her claim. She said she was unable to attend the Upper Tribunal's fees office to submit the application notice on the same day. I did not consider it appropriate to treat the claim as withdrawn given that there was nothing in writing from the applicant to the Upper Tribunal to that effect.

5. On the hearing day, there was no appearance by or on behalf of the applicant at 10.00 am nor by 11.00 am. I was satisfied not only that the notice of the hearing had been duly given to the applicant but also that she was aware of the hearing date, given the conversation that took place between her and a member of the administrative staff of the Upper Tribunal on 14 April. There was no reason to think that, if the hearing were to be adjourned, the applicant might attend or be represented at the next hearing. In all of the circumstances, and for the reasons given, I decided to exercise my discretion to proceed with the hearing. I heard briefly from Ms Scolding.

The relevant provisions

6. The version of s. 3C of the 1971 Act which is relevant in this claim is the version that was in force from 31 August 2006 to 19 October 2014. This provided as follows:

> **"3C 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), or
>
> (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).
>
> (3) …
>
> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
>
> (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).
>
> (6) …"

7. The relevant version of s.104 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") is the version that was in force from 15 February 2010 until 19 October 2014. This provided as follows:

> **"104 Pending appeal**
>
> (1) An appeal under section 82(1) is pending during the period—
>
> (a) beginning when it is instituted, and
>
> (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99)."

8. As at 2 July 2013, rule 17 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (the "FtT Rules") provided (insofar as relevant) as follows:

> "17. Withdrawal of appeal
> (1) An appellant may withdraw an appeal-
> (a) orally, at a hearing; or
> (b) at any time, by filing written notice with the Tribunal.
> (2) …
> (2A) …
> (3) If an appeal is withdrawn or treated as withdrawn, the Tribunal must serve on the parties a notice that the appeal has been recorded as having been withdrawn."

9. The version of paras 6 and 34G of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs") in force as at 2 July 2013 provided (insofar as relevant) as follows:

> ""date of application" means the date of application determined in accordance with paragraph 30 or 34G of these rules as appropriate."
>
> "30 [Not relevant]"
>
> "Determination of the date of an application or claim (or variation of an application or claim) in connection with immigration.
>
> 34G For the purposes of these rules, the date on which an application or claim (or a variation in accordance with para 34E) is made is as follows:
>
> (i) where the application form is sent by post, the date of posting,
> (ii) …"

Assessment

10. In my judgement and for the reasons given below, s.3C(4) of the 1971 Act prohibits an application for leave to remain that is made on the same day as, and even if said to be contemporaneously with, the applicant's withdrawal of his or her appeal before the FtT. I shall now give my reasons.

11. If an individual who has leave to remain makes an application for further leave before the expiry of his leave and a decision is not made before his leave expires, his leave is extended under s.3C(2). Any application may be varied as long as any such variation is made before a decision on the application is made. Once a decision has been made, S.3C(4) prohibits any further application for leave for as long as leave is extended under s.3C (JH (Zimbabwe) [2009] EWCA Civ 78). This means that, if an adverse decision attracting an in-country right of appeal is made and an in-time appeal is brought, the individual's leave is extended under s.3C(2) for as long as the appeal is pending within the meaning of s.104(1) of the 2002 Act. All of this is well established. A withdrawal of an appeal brings the appeal to an end so that it is no longer

"pending" under s.104(1) and therefore the individual's s.3C leave will come to an end when his or her appeal is withdrawn. An application made after an appeal is no longer pending is not prohibited by s.3C(4). However, as the individual's s.3C leave will have ended, the application will be one that is made at a time when the individual did not have leave. This is not controversial.

12. The principal question in this case is whether the applicant's application of 2 July 2013 was "made" at a time when she had s.3C leave. If so, her application was prohibited by s.3C(4) and the respondent did not err in law in rejecting her application as invalid. The ancillary questions that arise are therefore as follows:

    i. When did the applicant's s.3C leave end? This requires considering when her withdrawal took effect, whether 4 July 2013 (when the FtT sent the notice it is obliged to send under rule 17(3)) or 2 July 2013 (the date that the letter from the applicant's withdrawing her appeal was sent by facsimile to the FtT).

    ii. If the latter, whether it can be said that she had a pending appeal up until the precise moment she withdrew her appeal (in this case, up until 15:31 on 2 July 2013).

    iii. When did she "make" her application for leave dated 2 July 2013 for the purposes of s.3C(4), i.e. whether it is 2 July 2013 or the precise moment on 2 July 2013 when she posted her application?

13. In the summary grounds of defence, the respondent referred to the fact that the FtT only confirmed the withdrawal on 4 July 2013. However, the language of rule 17 of the FtT Rules does not suggest that the withdrawal takes effect on the date that the FtT sends the notice that it is obliged to send pursuant to rule 17(3) as opposed to the date of the withdrawal. In my view, a withdrawal of an appeal takes effect from the date that the FtT is notified of the withdrawal, whether orally or by written notice.

14. However, as to question ii, my attention has not been drawn to anything in rule 17 or the FtT Rules or any other provision or any authority to the effect that for the purposes of s.3C withdrawals take effect only from a specified time on a specified day. The mere fact that the FtT Rules are silent on the point does not mean that a positive inference can legitimately be drawn that a withdrawal takes effect only at a specified time on a specified day. However, the answer to question ii is not determinative of this claim. The answer to question iii is determinative.

15. Turning therefore to question iii, there is nothing in para 34G which provides for an application, if posted, to be taken as being made only at a specified time on the day of posting. The applicant's argument, if accepted, would entail the Upper Tribunal reading words into para 34G of the IRs that are simply not there, i.e. that "*the date and time on which an application or claim …. (i) where the application form is sent by post, at the date and time of posting."* It is not open to the Upper Tribunal to do so. The IRs must be construed sensibly according to the natural meaning of the language employed: Supreme Court in Mahad and others [2009] UKSC 16. In my judgement, para 34G is sufficiently clear. An application is to be taken as having been made, if it was posted, on the *day* it was posted. It is sufficiently clear that this means the whole of the day in question. If it were otherwise, one would expect to see references to the date and time of posting in the rule.

16. In relation to both questions ii and iii, the reason why the grounds contend that s.3C(4) does not prohibit an application that is made contemporaneously with the withdrawal of an appeal is that it is thought – mistakenly – that s.3C(1) and (2) will apply to the new application so the applicant's leave continues to be extended under s.3C for as long as her application of 2 July 2013 awaits a decision or (if an adverse decision which gives rise to a right of appeal is made)

for as long as an appeal may be brought or (if an appeal is brought) for as long as the appeal remains pending.

17. However, this would open s.3C to abuse. It would open the possibility of a series of applications leading to indefinite extension of the original leave. The purpose of s.3C(4), i.e. to prevent a succession of applications for leave leading to indefinite extension of the original leave, would be defeated (JH (Zimbabwe), para 36).

18. For all of the above reasons, I conclude that the applicant's application of 2 July 2013 was "made" on 2 July 2013 and that, for the purposes of s.3C(4), this means that the whole of 2 July 2013 counts as the date of her application. It follows that she made her application at a time when her leave was being extended under s.3C because her appeal was still pending, even on her own case, until a moment before 15:31 on 2 July 2013.

19. The above are my reasons for rejecting the applicant's case in relation to s.3C and the reasons I rely upon in dismissing this claim. However, even if I am wrong in everything I have said, this claim could not have succeeded, given that the applicant has not produced any evidence that she posted the application of 2 July 2013 simultaneously with her withdrawal.

20. The grounds also contend that the respondent erred by failing to consider Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. However, there is nothing to show that the applicant put any case on the basis of Article 8 before the respondent as at the date of the invalidity decision. Accordingly, the respondent was not obliged to consider Article 8. In any event, the applicant had only been in the United Kingdom for a period of about 4 years as at the date of the invalidity decision. She had only ever had leave as a student. Article 8 does not protect the right to study (Patel [2013] UKSC 72, at para 57). The Article 8 ground is therefore hopeless.

Decision

The claim is dismissed.

Signed (22 April 2015)
Upper Tribunal Judge Gill