Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/23214/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 2nd October 2015	**On 12th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

GAMAGE RAMESH JUDE WIJETUNGE

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Pinder (counsel) instructed by Polpitiya & Co, solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

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. This is the appellant's appeal against a decision of First-tier Tribunal Judge Clarke, promulgated on 28 April 2015, in which he found that the appellant does not have a valid right of appeal.

Background

3. The appellant was born on 24 April 1993. He is a Sri Lankan national.

4. On 16 October 2013 the appellant submitted an application for leave to remain in the UK. The appellant's existing leave to remain was due to expire on 2 November 2013. On 4 December 2013 the appellant wrote to the respondent explaining that his biometric information had been submitted with his application form as part of the package of documents sent with the parallel applications of his parents on the same date. On 11 March 2014 the respondent wrote to the appellant rejecting his application as invalid, stating that the appellant had not provided biometric information to support his application.

5. The appellant tendered a notice of appeal against the respondent's rejection of his application (dated 11 March 2014). In a decision dated 9 April 2014 First-tier Tribunal Judge D Birrell found that the respondent's decision of 11 March 2014 is not an immigration decision as defined in section 82(2) of the Nationality Immigration and Asylum Act 2002. The appellant's notice of appeal was rejected in terms of rule 9(1A)(b) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

6. On 17 April 2014 the appellant submitted a fresh application for leave to remain in the UK. On 19 May 2014 the Secretary of State refused that application for leave to remain in the UK.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Clarke ("the Judge") found that the appellant did not have a valid right of appeal against the Respondent's decision.

8. Grounds of appeal were lodged and on 02/06/2015 Judge Robertson gave permission to appeal stating inter alia

> "… This issue should have been determined by the judge on its merits pursuant to Basnet and he should not have simply relied on Judge Birrell's decision on 9 April as determining whether or not the appellant had extant leave when the May decision was appealed. This ground is arguable for the reasons set out at para 9(vi) of the grounds, applying Ved and another(appealable decisions; permission applications; Basnet) [2014] UKUT 00150 (IAC)"

The Hearing

9. Ms Pinder, counsel for the appellant took me through the history of the appellant's applications, and told me that the respondent's decision had been made in error because the respondent did not understand that the appellant's biometric data had been submitted timeously. She argued that although FtTJ Birrell's decision had gone without challenge, the appellant's position was protected by the operation of s.3C of the Immigration Act 1971. Because he had resubmitted his application 17 April 2014 FtTJ Birrell's decision (which pre-

dated resubmission of the application) is irrelevant and the principals in Basnet (validity of application - respondent) [2012] UKUT 00113(IAC) and Ved and another (appealable decisions; permission applications; Basnet) [2014] UKUT 00150 (IAC). She urged me to allow the appeal and remit the case to the First Tier Tribunal, as no fact finding exercise had been undertaken.

10. Ms Everett, for the respondent, told me that FtTJ Birrell's decision was determinative of this case, and that the Judge's decision does not contain a material error of law. She argued that the appellant cannot have a right of appeal because his leave to remain in the UK had expired before he submitted his application. She argued that there is not a sufficient link between the application dated 17 April 2014 and the application submitted on 16 October 2013 for the appellant to enjoy the protection of s. 3C of the Immigration Act 1971. She urged me to dismiss the appeal and allow the Judge's decision to stand.

Analysis

11. In Basnet (validity of application - respondent) [2012] UKUT 00113(IAC) the Tribunal held that (i) if the respondent asserts that an application (not an appeal) was not accompanied by a fee, and so was not valid, the respondent has the onus of proof; (ii) The respondent's system of processing payments with postal applications risks falling into procedural unfairness, unless other measures are adopted; (iii) When notices of appeal raise issues about payment of the fee and, consequently, the validity of the application and the appeal, Duty Judges of the First-tier Tribunal should issue directions to the respondent to provide information to determine whether an application was accompanied by the fee.

12. In Ved and another (appealable decisions; permission applications; Basnet) [2014] UKUT 00150 (IAC) it was held that the findings of the Upper Tribunal in Basnet (Validity of application – respondent) [2012] UKUT 00113 (IAC) depended upon there being an appealable immigration decision, which in that case can only have been a refusal to vary leave to remain within section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002. The Secretary of State's rejection of an application for leave as invalid is not an immigration decision within section 82 of the 2002 Act and cannot as such be appealed to the First-tier Tribunal.

13. In R (on the application of Woodward) v SSHD [2015] EWHC 470 (Admin) it was held that when an incorrect fee was paid the application was invalid under Reg 7 of the Immigration and Nationality (Fees) Regulations 2012. It did not therefore extend leave under section 3C of the 1971 Act.

14. This case does not involve arguments concerning payments of fees. The respondent rejected the appellant's application because the respondent could not trace the appellant's biometric information (even though it had been supplied). FtTJ Birrell's decision dated 9 April 2014 brought the appellant's application submitted on 16 October 2013 to an end. The appellant chose not to challenge that decision. Instead he submitted a fresh application on 17 April 2014.

15. The relevant part of s.3C of the Immigration Act 1971 is in the following terms:-

> "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) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.
>
> (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)."

16. The application made by the appellant may have extended leave to remain until FtTJ's Birrell's decision dated 9 April 2014. A further 8 days passed until the appellant's fresh application was submitted on 17 April 2014.

17. In JH (Zimbabawe) v SSHD (2009) EWCA Civ 78 the Appellant incorrectly applied for indefinite leave instead of limited leave to remain as the spouse a person present and settled here. By the time the correct application form was submitted her original leave to enter as a visitor had expired. The Court of Appeal said that, although the Appellant's application for indefinite leave was doomed to failure, it was nonetheless a valid application which had the effect of extending her original leave by virtue of section 3C of the 1971 Act. The later application was capable of being treated as a variation of the first application even though it was for a different purpose and on a different form and even though the later application was not put forward as a variation of the first, nothing having been said or inferred about actually withdrawing the first.

It was not accepted by the Court of Appeal that a variation could only arise where the later application was for the same purpose but with different details.

18. It is the respondent's position that the appellant does not enjoy a right of appeal against the respondent's decision because the application was submitted after the appellant's leave to remain expired. The appellant argues that the application of 17 April 2014 is a variation of the application originally submitted on 16 October 2013, and that the application of 16 October 2013 extended leave to remain because of the operation of section 3C of the immigration act 1971.

19. Between [16] and [28] the Judge carefully (and accurately) sets out the history of applications by the appellant. At [28] & [29] the Judge records the submissions of counsel for the appellant, which were driven at FtTJ Birrell's decision of 9 April 2014. At [31] the Judge succinctly focuses the determinative issue in this case – which is that the only possible interpretation of the history of applications is that there is a gap between FtTJ Birrell's decision on 9 April 2014 and the submission of the appellant's (second) application on 17 April 2014. The Judge concludes that at the time of the second application the appellant did not have leave to remain in the UK. As the appellant did not have leave to remain in the UK on 17 April 2014 (when he submitted the application which lead to the decision of 19 May 2014) then he does not have a right of appeal.

20. If the appellant's leave to remain was extended by submission of an application on 16 October 2013, then that extension of leave to remain came to an end on 9 April 2014. There is a gap of eight days between 9 April 2014 and 17 April 2014. During that period the appellant did not have leave to remain in the UK. The application submitted by the appellant was submitted after his leave to remain expired. He does not therefore enjoy a right of appeal.

21. On 11 March 2014 the respondent rejected the appellant's application as invalid. There is a dispute between the appellant and the respondent about the quality of that decision. The appellant still insists that his application contained all of the necessary supporting documents and so should not have been rejected as invalid. The problem for the appellant is that the decision of 11 March 2014, which rejected the application as invalid, has not been challenged and still exists. For the appellant to benefit from section 3C of the 1971 act he must submit a valid application before leave expires.

22. The undisputed evidence before me indicates that the appellant's application submitted on 16 October 2013 is an invalid application. That means that the appellants leave to remain expired on 2 November 2013.

23. The appellant did not have leave to remain in the UK when he submitted his application on 17 April 2014. The appellant does not therefore have a right of appeal against the decision of 19 May 2014. The judge's decision does not contain a material error of law.

CONCLUSION

24. I therefore find that no errors of law have been established and that the Judge's determination should stand.

DECISION

25. The appeal is dismissed.

Signed Date 9 October 2015

Deputy Upper Tribunal Judge Doyle