Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00218/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 February 2018	**On 29 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR FAISAL BIN HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Nadeem, Solicitor of City Law Immigration Ltd
For the Respondent: Miss J Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, date of birth 27 May 1975, appealed against the decision of First-tier Tribunal Judge Parkes, dated 13 April 2017, who dismissed his appeal against the Secretary of State's decision of 2 September 2015 to refuse an application based on ten years' long residence made on 12 January 2015. Key to Judge Parkes' decision were two earlier decisions, first of First-tier Tribunal Judge Hague at Stoke-on-

Trent on 15 May 2014, and the decision of Designated Judge Taylor of 3 February 2015. The decision of Judge Hague related to issues which included the Appellant having made a false claim as to his employment and used false documents purportedly from HMRC and claimed an employer who was indeed false. For reasons given by Judge Hague, adverse findings were made in connection with the Appellant's claim and he made adverse comments on the Appellant's credibility.

2. The Appellant had then, as in country right of appeal, the right to challenge that adverse decision which needed to be exercised within fourteen days, unless time was extended. No such appeal was made, as a fact, until an application was made, possibly at the end of 2014, in December, or in January 2015, to extend time and for permission to appeal the decision of Judge Hague. That appeal came before Designated Judge Taylor who, on 3 February 2015, dismissed the application, but had extended time for the purposes of considering the application. The view taken by Designated Judge Taylor in refusing the application for permission to appeal was on the basis that Judge Hague had been entitled to find on the evidence the Appellant had used deception and that the grounds put forward had no merit. It appears, but no-one has a copy of the 3 February 2015 decision and no-one knows what was said, but that a renewed application for permission to appeal to the Upper Tribunal was made and refused.

3. The history shows that on 12 January 2015 when the application for long residence based on ten years in the UK was refused on 2 September 2015, an appeal was heard on 4 January 2016 and dismissed by Immigration Judge Parkes on 13 April 2017 on the basis, amongst other things, that the Appellant had not, for the purposes of his application, shown that he had the benefit of 3C leave to accrue the necessary period. Equally it is clear that the Appellant was not lawfully in the United Kingdom at the material time so as to be able to make the in country application on long residence grounds. The point was taken that the 3C leave which the Appellant had originally had, had come to an end when Judge Hague had resolved the

matter in the decision promulgated on 15 May 2014 and no appeal had been lodged in time, nor had time been extended and permission given to appeal. The provisions of Section 3C of the Immigration Act 1971 provide as follows:-

> "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".

4. Under Section 3C(2) it states as follows:-

> "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) (my emphasis),
>
> (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 (NIAA)), or
>
> (d) [relates to judicial review considerations]".

5. Under Section 104 of the 2002 Act the definition of a pending appeal is stated as an appeal is pending during the period beginning when it is instituted and the ending when it is finally determined, withdrawn or abandoned or when it lapses under Section 99.

6. Under Section 104(2) an appeal under Section 82(1) is not finally determined for the purposes of sub-section (1)(b) while:-

> "(a) an application for permission to appeal under Section 11 or Section 13 of the Tribunal's Courts and Enforcement Act 2007 could be made or is awaiting determination,
>
> (b) permission under either of those Sections has been granted and the appeal is awaiting determination ..."

7. Mr Nadeem points to the difference between Section 3C(2)(b) and (c) in that he points to the absence of the words in sub-section (c) of the words "ignoring any possibility of an appeal out of time with permission". It seems to me that is not a good point. The difference between sub-section (b) and (c) is clear and it does not need the words to be repeated in sub-section (c) to give meaning to that sub-section. Rather, it seemed to me the point is contained within Section 3C(2)(b): Those additional words are included to remove in the context of appeals under Section 82 that future possibility that circumstances might at some time arise so as to prevent 3C leave continuing in a vacuum when no appeal has actually been made and therefore is not a pending appeal in any event.

8. I conclude that the relevant date was the date when time to appeal the decision of Judge Hague expired without an appeal because then, bearing in mind when the notice of Judge Hague's decision was received by the applicant, the fourteen day time period ran. Once that period was over there was no extension of time or permission to appeal granted. In the circumstances time stopped then. I find Judge Parkes made no material error of law in his assessment of that matter. Rather, it seemed to me, he

did a thorough exercise in looking at the case and looking at the merits as well as concluding that he did not accept that there had been any appeal in time against Judge Hague's decision.

9. It is not entirely clear whether Judge Parkes accepted the Appellant's explanation of how it came to pass that no appeal was made and there was no evidence advanced from the former representatives to support the claim that they were responsible for the failure to appeal. It may or may not be right, but it makes no difference to the decision because, as a fact, when the Appellant finally came to make his application he was not in a position to do so within the terms of the Rules. For reasons that the Judge gave, in paragraph 17 of the decision he concluded that there was nothing raised which indicated that an Article 8 claim could succeed and there was nothing to suggest that removal was disproportionate.

10. The grounds of appeal to the Tribunal against the decision of Judge Parkes do not raise Article 8 ECHR grounds. There is no argument advanced on those grounds as to any error by the Judge in that decision. It seemed to me that the reason for that is quite simply the claim stood or fell on what was believed to be the construction of Section 3C by the Appellant's representatives with which I do not agree. Accordingly it seemed to me the Original Tribunal made no demonstrable Robinson obvious error of law in the assessment of the Article 8 claim and so even though it was not raised in the grounds upon which permission was not given, it does not seem to me that its omission demonstrates any measure of unfairness towards the Appellant. For these reasons therefore, even if Article 8 had been raised, no other Tribunal properly addressing the material evidence and considerations, bearing in mind the length of time that the Appellant had been in the UK lawfully, could have reached a favourable decision on Article 8 ECHR grounds.

11. I bear in mind that the Appellant for a significant period of time had of course been a student in the United Kingdom, but that status had changed until it expired from being a student to Tier 1 (Post-Study Worker) and that

of course was refused as long ago as June 2013 with an appeal lodged and finally determined by Judge Hague on 15 May 2014.

12. In those circumstances it does not seem to me that the case presents any demonstrable evidence of the kind of circumstances that indicate that some claims can succeed outside of the Rules on Article 8 ECHR grounds. I do not find the Original Tribunal made any material error of law and the appeal is dismissed.

ANONYMITY

No anonymity direction was made and none is required.

Signed Date 20 March 2018

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT
FEE AWARD

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

Signed Date 20 March 2018
Deputy Upper Tribunal Judge Davey