IN THE UPPER TRIBUNAL

R (on the application of Ashfaq Ali) v Secretary of State for the Home Department (s3C extended leave: invalidation) IJR [2014] UKUT 00494(IAC)

Field House,
Breams Buildings
London

Given orally at Field House on 8 October 2014

BEFORE

UPPER TRIBUNAL JUDGE PETER LANE

Between

ASHFAQ ALI

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr P Richardson, instructed by Worldwide Solicitors, appeared on behalf of the Applicant.

Mr R Dunlop, instructed by the Treasury Solicitor, appeared on behalf of the Respondent.

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APPLICATION FOR PERMISSION

JUDGMENT

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Leave that has been extended by virtue of section 3C of the Immigration Act 1971 is invalidated by section 10(8) of the Immigration and Asylum Act 1999 where a decision is made under section 10 to remove the person having such leave.

JUDGE PETER LANE: This is a renewed application by Mr Ashfaq Ali for permission to challenge a decision of 5 August 2014 to remove him from the United Kingdom. Permission was refused on the papers on 12 August 2014 by Upper Tribunal Judge Kekić.

2. I have today granted permission for Mr Richardson, who appears on behalf of the applicant, to argue his amended grounds, there being no objection to that course from Mr Dunlop, who represents the respondent. Those grounds were sent to the Tribunal under cover of a letter dated 7 October 2014.

3. The circumstances giving rise to the decision under challenge are as follows. The applicant, a citizen of Pakistan born on 10 March 1984, arrived in the United Kingdom on 21 November 2011 as a student. His leave was subsequently extended to expire on 17 February 2014. On 15 February 2014 the applicant applied for further leave to remain. In order to prove certain of the requirements necessary to obtain such leave he supplied an ETS TOEIC certificate which purported to show that he had taken an exam on 19 November 2013.

4. However, the respondent was informed by the test facilitator, ETS, that the applicant's test score had been cancelled as invalid due to evidence of fraud. This applicant's case bears similarities with a large number of other cases that the Upper Tribunal and the Higher Courts have seen.

5. On 5 August 2014 the applicant was arrested and served with forms IS.151A, IS.151 part 2, IS.91R, IS.86, IS.98 and IS.98A and a decision refusing an application for leave to remain. Directions were set for his removal on 13 August 2014. These proceedings were brought on 11 August.

6. The challenge mounted by Mr Richardson essentially comes down to the following proposition: that on what at least is an arguable reading of the relevant legislation, the applicant is entitled to an in-country right of appeal; and in those circumstances it is no answer at all to suggest that the applicant could bring an appeal from abroad.

7. I deal first with the "chronology" argument put forward on behalf of the applicant. The applicant needs to show that the decision to refuse to grant him leave to remain was in fact made before the decision pursuant to section 10 of the Nationality and Immigration Act 1999 to remove him as a person who had breached his conditions and/or attempted to use deception in connection with an application.

8. Mr Richardson points to the immigration factual summary set out at page 24 of the bundle, where we see it recorded that on 15 February 2014 a decision was said to have been taken in the applicant's case marked "refused with no right of appeal". If correct, this was, of course, considerably before the notice of immigration decision dated 5 August, comprising the decision to remove pursuant to section 10 of the 1999 Act.

9. I do not consider in the circumstances that the applicant can derive any arguable benefit from the immigration factual summary. I say this for two reasons. First, the actual decision to refuse to grant leave to remain, to be found at pages 21 and 22 of the bundle, categorically states as follows:

> "This decision is not an immigration decision under section 82. Section 82(2)(d) concerns a 'refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain.'

> This is not the situation in this case as the effect of the prior section 10 decision means that any existing leave to enter or remain in the United Kingdom was invalidated under section 10(8) so you have no leave to enter or remain at the time the decision to refuse to vary leave to remain was notified."

10. The key word in that quotation is "prior". It makes plain that the removal decision came first. That is logical, when one looks at the sequence of events that needed to be pursued by the respondent in order, first, to invalidate the leave which the applicant had as a student, and then to make a decision to refuse to grant leave to remain, which importantly is not an immigration decision.

11. The second reason why I find against the applicant on this issue is because I accept the submission of Mr Dunlop that immigration decisions are given when they are served and one looks in vain for any service of a relevant immigration decision in this case.

12. I therefore do not find that there is arguable merit in the submission in the amended grounds that section 78 of the Nationality, Immigration and Asylum Act 2002 (no removal while appeal pending) provides any relief. This is because, so far at least in this analysis, the applicant has not shown that he had an in country right of appeal against the decision to refuse to grant him leave, which could be "pending" while he remains here.

13. I turn to the issue regarding section 3C leave. Mr Richardson submits that the scheme of the legislation is such that section 3C leave enjoys a status which in effect makes it immune from action being taken under section 10, so as to negate it.

14. Section 10(8) provides as follows:

> "When a person is notified that a decision has been made to remove him in accordance with this section the notification invalidates any leave to enter or remain in the United Kingdom previously given to him."

15. Mr Richardson submits that the applicant's leave under section 3C of the Immigration Act 1971 is not leave that was "given to him" by the Secretary of State but, rather, is leave that is conferred by Parliament pursuant to that section. With respect, I do not accept that submission. It is contrary to the Court of Appeal authority in QI (Pakistan) [2011] EWCA Civ 614. As I consider to be unarguably the case in any event, that judgment holds that section 3C does not create a new species of leave but rather, as its language indicates, extends the leave that has already been granted but which would otherwise have expired, in circumstances where an application for variation of that leave has been made but not determined by the respondent.

16. Mr Richardson points to other aspects of section 3C, as supporting the proposition that section 10(8) cannot apply to it. He draws attention to section 3C(3), which provides that "leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom". In particular, he draws my attention to section 3C(2)(a), which states that leave is extended by virtue of section 3C "during any period when the application for variation is neither decided nor withdrawn".

17. I find, however, that the argument fails for the following reasons. First, section 10(8) has application to section 3C leave, for the reason I have already given. Secondly, in the present case, the application for variation within section 3C(2)(a) is no longer extant and therefore section 3C(2)(a) can have no application.

18. I derive support for my findings from what Mr Dunlop says would be the consequences, were Mr Richardson's submission about section 3C to be arguably correct. It would produce anomalous results, as between the position of somebody who was faced with section 10 action before their original leave expired, and a person who may be equally guilty of deception or other misconduct, but whose leave had already expired and been extended by section 3C. I can discern no rational explanation for the anomalies that would ensue. Those anomalies strike me as pointing firmly in favour of the interpretation advanced by the respondent.

19. I do not find the fact that the Court of Appeal has granted permission in the case of Mehmood to be determinative of the arguability of the section 3C submission. Obviously, I have some regard to the fact that the Court of Appeal saw fit to grant permission; but I know nothing of the details of the case. In particular, I do not know whether the respondent was able to play any part in the proceedings, which resulted in the grant of permission or whether relevant case law (such as QI) was cited to the Court of Appeal.

20. Next, I deal with the applicant's submission, which is based on section 47 of the Immigration, Asylum and Nationality Act 2006. The current form of this section is helpfully set out in Mr Richardson's amended grounds. He submits that the decision in this applicant's case was a "pre-removal decision", within the meaning of section 47 and that this means I should at least grant permission, because section 47 applies to the applicant's case. That is to say, the decision to remove is, in reality, a section 47 decision and an appeal against a section 47 decision is appealable in-country (section 82(1)(ha) of the 2002 Act).

21. I agree, however, with Mr Dunlop that section 47 and section 10 have distinct spheres of operation. Section 47 is intended to apply where the decision of the respondent is, in terms, to refuse to vary leave to remain and where, in order to deal with the consequences of the person concerned possibly becoming an overstayer and in the interests of the "one-stop" principle, it is desirable that the Secretary of State should be able to give a removal decision to such a person, at the same time as a refusal to vary leave to remain.

22. In the present case, however, section 10 applies in its own terms because of the allegation that the applicant attempted to obtain further leave by deceptive means (see section 10(1)).

23. The applicant's final argument is that an out of country appeal is not adequate. However, this loses much of its force, once it can be seen that the relevant legislation does not confer an entitlement to an in-country right of appeal. As a result, the applicant merely falls within the general category of person, faced with section 10 decisions, for whom an out of country appeal is an entirely appropriate avenue for him to ventilate any concerns he has about the respondent's decision (R (Lim) v Secretary of State for the Home Department [2007] EWCA Civ 773).

24. For all these reasons, despite Mr Richardson's able submissions, I refuse this application. ~~~~*0*~~~~