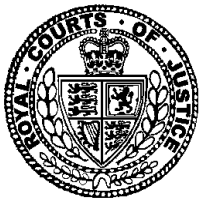

Neutral Citation Number: [2019] EWCA Civ 264

Case No: C8/2018/0216

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Pitt
JR/7731/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE FLOYD
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

CHINNI PALLA	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Ian Macdonald QC (instructed by Rainer Hughes) for the Appellant
David Blundell (instructed by the Government Legal Department) for the Respondent

Hearing date: 20 February 2019

- -

Approved Judgment

Lord Justice McCombe:

1. We heard this appeal brought by Mr Chinni Palla ("the Appellant") on 20 February 2019. At the conclusion of the hearing we informed the parties that the appeal was dismissed and that we would give our reasons in writing at a later date. These are my reasons for deciding that the appeal had to fail.

2. The appeal was from the decision of the Upper Tribunal (Immigration and Asylum Chamber) ("the UT") (Upper Tribunal Judge Pitt) of 17 November 2017. The UT dismissed the Appellant's claim for permission to apply for judicial review of the decision of the Secretary of State for the Home Department ("SSHD") of 20 June 2016 in which she found that the Appellant was a person in the United Kingdom without leave to remain and liable to removal.

3. The Appellant contended that he had leave to remain in this country under s.3C of the Immigration Act 1971, having made an application for leave to remain ("LTR") in March 2014 which had not been determined. Thus, his right to remain had been extended by the section. The SSHD maintained that the Appellant did not have LTR when he left the United Kingdom for the Republic of Ireland in June 2016 and had no right to be in the United Kingdom when he re-entered the UK from the Republic a few days later.

4. A further argument arose as to whether, if the Appellant did have valid LTR under s.3C when he left the UK for the short period in June 2016, that LTR lapsed on his departure from the UK in that month: s.3C(3) (see below). The Appellant argued that leaving the UK for the Republic of Ireland did not cause his LTR to lapse in view of the statutory provisions creating a "Common Travel Area" ("CTA") between the UK, the Republic of Ireland, the Channel Islands and the Isle of Man. The SSHD contended that the CTA provisions did not help the Appellant in this case, even if he did have a valid LTR in June 2016. This was because s.3C(3) expressly provides that LTR extended under that section lapses on the person's departure from "the United Kingdom" and the words were not to be read as if departure from the UK to a CTA territory prevented the application of subsection (3).

5. The relevant parts of s.3C of the 1971 Act provide 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), ...
>
> (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).
>
> or
>
> (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."

6. A pre-condition of the application of the extension of LTR under s.3C, of course, is that there should be an existing LTR to extend: see s.3C(1)(a). Therefore, if the Appellant did not have such leave there was nothing to extend and he was merely an illegal over stayer in this country.

7. The UT agreed with the SSHD that the Appellant's last valid LTR expired in April/May 2013 and, therefore, that the question as to the construction of s.3C(3), and any link with the CTA provisions, was entirely academic. It also decided, however, that the Appellant's case on construction of s.3C(3) was unarguable as the section expressly provides that LTR extended under s.3C lapses on departure from the UK (i.e. whether to a CTA territory or otherwise). The UT refused permission to appeal.

8. The Appellant then applied to this court for permission to appeal. In presenting the application the grounds of appeal said this:

> "The Upper Tribunal erred in law in refusing the Appellant's application for permission for judicial review which was argued on the grounds which are annexed.
>
> The Judge erred in finding that the Appellant did not have leave under Section 3C Immigration Act 1971.

> The Judge erred in finding that the Republic of Ireland is not part of the United Kingdom for the purposes of the Immigration Act 1971.
>
> The Judge erred in finding that the Appellant did not make an in time application to for leave to remain."

However, the skeleton argument in support dealt with the "leaving of the UK" point but ignored the anterior question of whether the Appellant had valid LTR in June 2016 and said:

> "8. There is only one issue in this appeal:
>
> > Whether the extension of A's leave to remain by virtue of section 3C of the 1971 Act lapsed on his leaving the UK to travel to the Republic of Ireland or whether it continued by reason of section 1(3) of the 1971 Act read with section 11(4) of the same Act."

On 2 May 2018, Irwin LJ granted permission to appeal on that issue, based entirely on the skeleton argument. In those circumstances, it is perhaps questionable whether the Appellant has ever had permission to argue that he did have LTR capable of extension under s.3C.

9. In his skeleton argument for the SSHD of 17 July 2018, Mr Blundell argued that the appeal was without merit for two reasons:

> "(1) The Appellant did not, after 12 April 2013, have any leave which could be extended by section 3C of the 1971 Act and, accordingly, his submissions on the interaction of section 3C of the 1971 Act and the CTA provisions are academic; and
>
> (2) The Appellant's arguments about the interaction between section 3C of the 1971 Act and the CTA provisions are, in any event, wrong."

It was not until an application was made on 18 February 2019 (two days before the hearing of the appeal) to rely on an additional skeleton argument that the Appellant sought to advance argument upon the question of whether or not the Appellant did have LTR at any time after 12 April 2013.

10. As I ventured to point out to Mr Blundell in argument, it is very unfortunate that, yet again, the SSHD failed to respond to the permission and encouragement to respondents, given in CPR Practice Direction 52C paragraph 19, to file and serve a brief statement of why permission to appeal should be refused. If such a statement had been filed in this case pointing out the failure by the Appellant to address the UT's decision that the Appellant's leave had expired in 2013 and that, accordingly, there was nothing to extend under s.3C, in my view, it is highly likely that permission to appeal would have been refused and significant costs would have been saved.

11. Without opposition from Mr Blundell, however, we permitted Mr Macdonald QC for the Appellant to rely upon the new skeleton argument and to raise the additional submissions upon which his s.3C case depended.

12. Mr Macdonald accepted before us that if the Appellant did not have LTR in June 2016 on leaving for the Republic of Ireland, then the UT had been right to find that the argument on the application of s.3C(3) was academic and the appeal would have to be dismissed.

13. Having heard the argument on the question of whether or not the Appellant had had a valid LTR in June 2016, we were all of the view that the Appellant had not had such leave and that the appeal had to fail for that reason. Therefore, we did not hear argument on the s.3C(3) point. It seemed to us that that argument, should await an occasion when the result is more than of academic interest.

14. I turn to the factual background to the case.

15. The Appellant is an Indian national. On 29 January 2008 he was granted leave to enter the UK as a student. That leave was granted for the period up to 20 September 2009. He entered the country on 11 February 2008.

16. On 21 March 2009, the Appellant applied for LTR in the UK as a post-study migrant. On 9 April 2009, that application was granted for a period up to 9 April 2011. On 5 April 2011 he applied for further LTR as a Tier 1 General Student with a Confirmation of Acceptance ("CAS") for Studies at an institution called, "Graduate School of London". That application was also granted up to 7 August 2014.

17. On 24 November 2012, the school's licence was revoked and on 8 February 2013, the Appellant's LTR was curtailed with effect from 12 April 2013, i.e. after the expiry of 60 days. On 11 April 2013, the Appellant applied for further LTR as a Tier 4 General Student. The application was not accompanied by the proper fee and on 22 May 2013 the application was rejected on the basis that the fee had not been paid. The Appellant was so informed by letter on the same day. Pursuant to the Immigration and Nationality (Fees) Regulations, reg. 37, the application was invalid.

18. In my judgment, as a result of these events, I consider that the SSHD is right to contend that the Appellant's LTR expired on 12 April 2013 at the end of the curtailed LTR brought into effect by the letter of 11 February 2013. Indeed, Mr Macdonald did not seek to argue otherwise. Subject to later events to which I now turn, the Appellant's LTR had ended and there was no leave to which s.3C could apply.

19. On 3 June 2013, however, the Appellant made another application for LTR as a Tier 4 General Student with a CAS from "Mancunia College Ltd.". The application was refused on 26 June 2013. The Appellant lodged an appeal on 8 July 2013. On 23 September 2013 the SSHD withdrew the refusal decision on the basis that the Appellant had not been given 60 days to find a new educational establishment to take him. Nothing at that stage is said by the Appellant to have conferred LTR. However, on 14 January 2014, the SSHD wrote to the Appellant informing him that the SSHD had revoked the licence of Mancunia College, explaining that the Appellant's CAS was no longer valid and that his application would fall to be refused on that basis. The letter contained the following passage:

> "Before the final decision is made, and in line with our Rules and guidance, we will suspend consideration of your application for a period of 60 calendar days.
>
> During this 60 day period it is open to you withdraw your application and submit a fresh application in a different category or to leave the United Kingdom. If you do decide to withdraw your application, you will need to confirm this by writing to us at the address given at the top of this page.
>
> However, if you wish to remain in the UK as a Tier 4 Student, it is open to you to obtain a new CASE for a course of study at a fully licensed Tier 4 educational sponsor and then submit an application to vary the grounds of your original application."

On 17 March 2014, the Appellant provided to the SSHD a new CAS.

20. On 24 March 2014 the SSHD was informed by the organisation providing approved English language testing that the Appellant's test result had been cancelled owing to evidence of invalidity.

21. On 8 December 2014, the Appellant's June 2013 application for LTR was refused. Further, because of the cancellation of the language test result, the SSHD endeavoured to give notice of liability to administrative removal from the UK. It was subsequently accepted by the SSHD that it could not be shown that these notices were properly served and no reliance has been placed on them subsequently. They have no relevance to the present issue.

22. On 6 June 2016, the Appellant went to the Republic of Ireland. On 13 June 2016, he endeavoured to return to the UK and on 15 June 2016, at the Belfast Magistrates' Court, he pleaded guilty to an offence of illegal entry into the UK, contrary to s.24(1) of the 1971 Act. He was conditionally discharged. He was, however, served with further notice of liability to removal. That notice was challenged by the Appellant, through solicitors, on Article 8 grounds. Those grounds were rejected on 8 July 2016. On 14 July 2016, these judicial review proceedings were issued. On 6 July 2017, the UT (Upper Tribunal Judge Bruce) refused permission to apply for review after a consideration of the papers. On 10 October 2017, amended Grounds of Claim were lodged. These raised the new argument that the Appellant's LTR had been extended by s.3C and that it had not lapsed on his departure to the Republic of Ireland on 6 June 2016.

23. There followed an oral hearing of the Appellant's renewed application for permission to apply for judicial review. That was refused by the UT, in the decision now under appeal, for the reasons that I have already summarised.

24. The success of the appeal required the Appellant, as an initial step, to say that the UT had been wrong to find that the Appellant's LTR had expired in April/May 2013 and that there had been no subsequent LTR granted upon which s.3C could bite.

25. As mentioned, Mr Macdonald did not argue that the original LTR had survived the expiry of the curtailed LTR period notified in February 2013. I agree with Mr Blundell that LTR did expire at the end of that period on 12 April 2013.

26. However, Mr Macdonald argued before us that the letter of 14 January 2014, in the passage which I have quoted above, had the effect of granting a fresh LTR to the Appellant which was then subject to extension under s.3C.

27. He submitted that in the context of the revocation of College licences that was occurring on a large scale at the relevant time, the SSHD, by the grant of 60 days leeway to find new educational providers, was seeking to grant some protection to students in the position of the Appellant. To be effective the leeway granted had to amount to LTR because otherwise the application process and any appeal from refusal could hardly be carried through in a period as short as 60 days. Without LTR, an applicant would be faced with the realities of the "hostile environment" rendering it difficult for him or her to maintain housing, to obtain access to health services, to continue banking facilities and the like.

28. Of course, as discussed in argument, many students affected by revocation of College licences would have had extant LTR and could use the 60 day leeway to find alternative education providers. In such cases, a revised application could be submitted attracting the operation of s.3C. Further, even those without LTR might submit an application in the hope of achieving a grant of LTR outside the Rules. As Mr Blundell pointed out, by reference to rule 246ZX of the Immigration Rules, as then in force, it was not an essential requirement of a valid application that the applicant had LTR at the time of the making of the application, although he or she must have had such leave either then or in the past: see r.245ZX(b)(i).

29. Mr Macdonald submitted that the wording of the January 2014 letter, in its context, should be construed as a self-standing grant of LTR. He relied further upon the case of *R v Immigration Tribunal, ex p. Ahluwalia* [1979-80] Imm AR 1 in which the applicant had applied for a variation of her LTR, pending decision on the application, she was then told by the SSHD this:

> "Meanwhile this acknowledgement may be regarded as an authority for the holder to remain in the UK pending a decision on any application for an extension of stay".

The SSHD argued in that case that "authority" to remain was not a grant of LTR. Not surprisingly, that argument failed. However, it is quite plain that the words used in the letter in the *Ahluwalia* case were far removed from the wording of the letter upon which Mr Macdonald relies in this case.

30. In my judgment, it is impossible to contend that the letter now in issue constituted a grant of LTR to this Appellant. It simply does not so state and there is nothing in the wording, context or purpose of the letter to require it to be so read. As I have indicated, the *Ahluwalia* case does not assist the Appellant.

31. Accordingly, in my judgment, the Appellant's last LTR expired on 12 April 2013. Thereafter, there was no LTR capable of being extended by operation of s.3C of the Act and when the Appellant re-entered the UK on 13 June 2016, he did so illegally. The

argument as to the true meaning and effect of s.3C(3) simply does not arise. The decision that the Appellant was liable to removal from the country was unimpeachable and the UT was correct so to decide.

32. For these reasons, I reached the conclusion that the appeal had to be dismissed.

Lord Justice Floyd:

33. I agree.

Lady Justice Nicola Davies:

34. I also agree.