Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/29009/2014
IA/29012/2014

THE IMMIGRATION ACTS

Heard at Glasgow
19 November 2015

Promulgated on
24 February 2016

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

FUAD HOSSAIN
NAZIA KUMKUM

Appellants.

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr H Ndubuisi of Drummond Miller Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellants appeal to this Tribunal against the determination of Judge Balloch dismissing their appeals against a decision of the respondent refusing the first appellant further leave as a student and the second appellant, his wife, further leave as his dependant.

2. The facts are as follows. The first appellant (whom we shall call "the appellant") had leave to remain as a student, due to expire on 30 January 2014. On 29 January 2014 he made an application for further leave. It appears to be the case (and is not contested by the appellant) that the documents submitted with that application were insufficient to meet the requirements of the rules. On 21 February 2014, as part of the process of dealing with the application, the Secretary of State required him to submit biometric information within 15 days at the most. The appellant did not comply with that requirement, and on 3 April 2014 the Secretary of State informed him that for that reason his application was deemed to be invalid. On 27 March 2014, however, the appellant had sent to the Secretary of State a new application form for further leave to remain as a student, this time, it is said, accompanied by documents which were sufficient to meet the requirements of the rules.

3. The Secretary of State's position is that the first application having been invalid, the appellant's leave to remain expired on 30 January, and so the second application was made after the expiry of his leave. The refusal of it therefore carried no right of appeal. The appellant's position is that the making of the first application sufficed to extend his leave until it was declared invalid; before that had happened he had varied his application, the decision upon which accordingly carries a right of appeal. The appellant further argues that the application is to be treated for all other purposes as made on 27 March 2014, the date of the second application form.

4. As is well known, s 3C of the Immigration Act 1971 extends the period of leave where a person makes an application for further leave during the currency of existing leave. For present purposes the only relevant period of extension is that in sub-s 3(a): the leave is extended until the Secretary of State's decision on the application. Clearly an application which is invalid, (for example because it does not meet the formal requirements for the application being made) it is not an "application" for the purposes of s 3C, and cannot have the effect of extending leave. In the present case, however, the application was on its face formally valid (even if certain to be unsuccessful). It became invalid only subsequently, when the appellant failed to comply with the Secretary of State's requirements to provide biometric information. The judge decided that, under those circumstances, leave was extended by the making of the application which was on its face valid. She then concluded that it became invalid only on the notification of the consequences of the failure to provide the information. That is to say, first, she decided that the invalidity arose on the notification of the consequence, rather than on the expiry of the time limited for providing the information; and she decided that the invalidity was not retrospective. She therefore treated the application as valid during the period up to 3 April, with the consequence that on 27 March, when the second form was submitted, the appellant's leave was extended by s 3C. It would clearly be possible to doubt the judge's conclusions, but we are not asked to do so in this appeal. We proceed on the basis that, on

27 March, the appellant had leave as extended by s 3C. Section 3C(4) and (5) are as follows:

> "3C (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 already made."

5. In the light of those provisions, the appellant does not claim that he made a new application when the second application form was submitted; he characterises that event as a variation of the original application. Judge Balloch accepted that submission. It therefore followed in her judgement that, contrary to the Secretary of State's assertions, the appellant had a right of appeal against the substantive decision following the submission of the second form, which appeal she proceeded to determine on its merits. In doing so she treated the application as having been made not on 27 March but on 29 January 2014, and found that the documentation was not sufficient to justify the granting of leave on the basis of an application made at that date. The grounds of appeal to this Tribunal, on the basis of which permission was granted, are in essence that, having accepted that the claimant had made a s 3C(5) variation of his application, she should have treated the application as made at the date of the variation: if she had done so, she would have found that the documents available established the claimant's entitlement under the rules, viewed from that date.

6. In making his submissions, Mr Ndubuisi referred us in particular to paragraph 34E-34G of the Statement of Changes in Immigration Rules, HC 395 (as amended). This part of the rules deals with the process for making applications. Paragraphs A34, 34 and 34A-34D make provisions as to the use of forms, the sending of forms, the documents which need to accompany forms, and the consequences of failing to comply. After 34D there is a heading, and two further paragraphs as follows:

> "Variation of applications or claims for leave to remain
>
> 34E. If a person wishes to vary the purpose of an application or claim for leave to remain in the United Kingdom and an application form is specified for such new purpose or paragraph A34 applies, the variation must comply with the requirements of paragraph 34A or paragraph A34 (as they apply at the date the variation is made) as if the variation were a new application or claim, or the variation will be invalid and will not be considered.
>
> 34F. Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made. "

Paragraph 34G has provisions for the calculation of the date of an application or variation.

7. Paragraph 34E does not apply to this claim, because there was no variation of the purpose of the application: the event identified by Judge Balloch as a variation was simply a repetition of the application. As she decided that that event was a "valid variation", however, paragraph 34F clearly does apply. But that does not entail the acceptance of Mr Ndubuisi's submission. The grant of permission to appeal is in terms of which Mr Ndubuisi would no doubt approve:

> "Arguably, the judge having accepted that the appellant had made a valid variation application on 27 March 2015 should have considered whether the appellant met the requirements of the immigration rules at that date, not at the date of the original application on 29 January 2014."

8. That, however, is not what paragraph 34F says. It says that the variation will be decided in accordance with the immigration rules in force at the date of the variation. In the present case there is no suggestion that the relevant rules changed between the original application and the variation. Further, it is clear from ss 3C(4) and (5) that the variation is not a new application. There is one application, which has been varied. It is to that application, as varied, that the relevant immigration rules have to be applied.

9. The appellant needed to meet the requirements of paragraph 245ZX of the rules, including that at sub-paragraph (d), but he must have 10 points under paragraphs 10 to 14 of Appendix C. Those points can only be attained by the submission of specified documents, the specification of which is in paragraph 1B of Appendix C. Those relevant to this appeal are financial documents including bank statements, building society, passbooks or financial letters. In each case there is a requirement that the document or most recent document "must be dated no earlier than 31 days before the date of the application". There are other references to the date of the application. There is no suggestion that the date of any variation is to be treated as the date of the application for these purposes.

10. The amount of money to be evidenced varies between applications, but all cases are covered by paragraph 1A of Appendix C, which requires at 1A(a) the funds to have been held at the date of the application, and at 1A(c) for the funds to have been held for a consecutive 28-day period of time if the applicant is applying as a Tier 4 Migrant, as the appellant was. Again, the references to the date of the application, not to some other date.

11. The only application in this case, the only application permitted by s 3C, was made on 29 January 2014. If it was validly varied, it is to be determined by the immigration rules in force at the date of the variation, but they were the same as those in force at the date of the application. Those rules require the financial conditions to be met by reference to the date of the application. Those requirements were not made by reference to that date. The fact (if it be a fact) that they would have been met by reference to the date of the variation does not assist the appellant.

12. For these reasons it appears to us that, given Judge Balloch's decision that the application had been validly varied, she was correct to dismiss the appeal for the reason she did. She made no error of law in doing so.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 28 January 2016