UPPER TRIBUNAL
(Immigration and Asylum Chamber)

R (on the application of Rashid) v Secretary of State for the Home Department IJR [2015] UKUT 00190 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Field House
Heard: 18 February 2015

Before

UPPER TRIBUNAL JUDGE GILL

THE QUEEN (ON THE APPLICATION OF MD MAMUNUR RASHID) Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

Representation:
For the Applicant: Ms S Kansal, of Counsel, instructed by Universal Solicitors.
For the Respondent: Mr G Lewis, of Counsel, instructed by the Treasury Solicitor.

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JUDGMENT
delivered on: 2 April 2015

Judge Gill:

Introduction and background facts:

1. The applicant is a national of Bangladesh. He has been granted permission to apply for judicial review of a decision of the respondent of 20 September 2013 rejecting an application he made on 8 August 2013 for leave to remain as a Tier 4 (General) Student. The respondent refused the application on the ground that the applicant had an outstanding appeal against an earlier decision of 14 January 2013 and he was therefore restricted from making a fresh application for leave whilst his appeal was outstanding in accordance with s.3C of the Immigration Act 1971 (the "1971 Act").

2. The claim was lodged out of time. As this is a matter which goes to jurisdiction, I shall deal with it at the outset (as it had not been dealt with previously). I apply the guidance given by the Court of Appeal in R (Dinjan Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633 which explained that there are three stages in a court's consideration of the question whether time should be extended. The claim was lodged on 23 December 2013, less than a week after the "long-stop" period of 3 months. The reason given in the claim form for the delay was that the letter of 20 September 2013 was received on 25 September 2014. Having regard to the fact that the delay was not substantial and the explanation, I have decided to exercise my discretion and extend time. The application is therefore admitted.

3. The respondent's letter dated 20 September 2013 reads:

> "I write regarding the completed application form your client submitted for consideration to the Home Office on 08 August 2013 for leave to remain on the basis of a Tier 4 (General) Student visa.
>
> Your client already has an outstanding appeal against the Secretary of State's decision to refuse your client's application for leave to remain as a Tier 4 (General) Student. Your client is restricted from making a fresh application whilst your client's appeal is outstanding in accordance with Section 3C of the Immigration Act 1971 (as substituted by Section 118 of the Nationality, Immigration and asylum Act 2002).
>
> Your client may apply to the Asylum and Immigration Tribunal to have your client's application for leave to remain as a Tier 4 (General) Student to be treated as a variation of your client's grounds of appeal. To this end, your client's documents have been retained on the Home Office file as they may be considered as part of your client's existing appeal."

4. The applicant arrived in the United Kingdom on 8 May 2010 with entry clearance as a Tier 4 (General) Student valid until 30 April 2012. On 9 March 2012, his Tier 4 leave was extended until 30 May 2013. On 23 October 2012, his sponsor college informed the Secretary of State that he had failed to enrol on his course of study. The following is the subsequent chronology:

14 Nov 2012	The applicant applied in-time for leave to remain as a Tier 2 (General) migrant.
9 Jan 2013	The applicant's leave to remain was curtailed to expire on the same day as he was no longer studying at the approved sponsor for which the leave had been granted.
14 Jan 2013	The respondent refused the applicant's Tier 2 application with a right of appeal. The applicant appealed to the First-tier Tribunal ("FtT").
3 May 2013	The FtT dismissed his appeal (appeal number: IA/03700/2013). The applicant was granted permission to appeal to the Upper Tribunal ("UT").
29 July 2013	The UT dismissed the applicant's appeal. The determination of the UT was sent by post.
8 Aug 2013	The applicant made a "fresh application" for leave to remain as a Tier 4 (General) student. This is the application that is the subject of the respondent's letter dated 20 September 2013. The application was sent to the respondent. It was not sent to the UT but it was included in the claim bundle for these judicial review proceedings.
14 Aug 2013	Last date on which the applicant could have made an in-time application to the UT for permission to appeal to the Court of Appeal. No such

application was made. This is therefore the date that the applicant exhausted his appeal rights.

5. The Upper Tribunal Judge (UTJ) who granted permission considered it arguable that the respondent erred in law in stating that the applicant was restricted from making a fresh application by virtue of s.3C. The UTJ considered it arguable that the applicant's s.3C leave expired on 29 July 2013 and that the application of 8 August 2013 was made within the period of 28 days provided for in para 245ZX(m) of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs").

The relevant provisions

6. The version of s. 3C of the 1971 Act which is relevant in this claim is the version that was in force from 31 August 2006 to 19 October 2014. This provided 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), 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).
>
> (6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations–
>
> (a) may make provision by reference to receipt of a notice,
> (b) may provide for a notice to be treated as having been received in specified circumstances,
> (c) may make different provision for different purposes or circumstances,
> (d) shall be made by statutory instrument, and
> (e) shall be subject to annulment in pursuance of a resolution of either House of Parliament."

(my emphasis)

7. The relevant version of s.104 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") is the version that was in force from 15 February 2010 until 19 October 2014. This provided as follows:

> **"104 Pending appeal**
>
> (1) An appeal under section 82(1) is pending during the period—
>
> (a) beginning when it is instituted, and
>
> (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).
>
> (2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while—
>
> (a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,
>
> (b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or
>
> (c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.
>
> (4) …
>
> (4A) …
>
> (4B) …
>
> (4C) …
>
> (5) …"

8. The applicant's skeleton argument refers to s.103 of the 2002 Act. The version of s.103 that was in force from 1 April 2003 is set out below. S.103 was repealed with effect from 4 April 2005 (the date when the Asylum and Immigration Tribunal was abolished) subject to transitional provisions which are not relevant in this case:

> **"103 Appeal from Tribunal**
>
> (1) Where the Immigration Appeal Tribunal determines an appeal under section 101 a party to the appeal may bring a further appeal on a point of law—
>
> (a) where the original decision of the adjudicator was made in Scotland, to the Court of Session, or
> (b) in any other case, to the Court of Appeal."

The Grounds:

9. Eight grounds have been advanced. Ground 1 may be summarised as follows:

i) S.104(2) of the 2002 Act only applies to s.104(1)(b). It does not purport to apply to s.3C(2)(c), i.e. it does not apply to s.3C leave.

ii) Accordingly, a proper construction of the words "*when it is finally determined*" in s.104(2) of is that an appeal is "*finally determined"* when the determination is promulgated.

10. Ground 2 contends that the respondent has a discretion to consider the merits of any application by an individual who has lost his or her appeal before the UT for permission to appeal to the Court of Appeal. If it would be hopeless for such an individual to pursue an appeal to the Court of Appeal, then the respondent should exercise her discretion so that any application for leave made by such an individual to the respondent during the period when an application for permission to appeal to the Court of Appeal could be made should be treated as a variation of the original application. Ground 2 is based on the following arguments:

    i) At para 14.i of the skeleton argument (as explained at the hearing by Ms Kansal), it is argued that the words "*could be"* in the phrase *"could be made*" in s.104(2)(d)[1] of the 2002 Act should be construed as conferring a discretion *on the respondent* to consider the merits of any appeal to the Court of Appeal against a determination of the UT dismissing an individual's appeal and the possibility of the individual meeting the second appeal criteria for the grant of permission.

    ii) It is contended that the proposition that the phrase "*could be made*" confers such a discretion on the respondent is "*further compounded*" by the use of the phrase "*may bring a further appeal on a point of law*" in s.103B(1) of the 2002 Act. It is contended that the phrase "*may bring a further appeal on a point of law*" in s.103B(1) denotes that the respondent has a discretion to decide whether the case is one in which permission to appeal could be sought.

    iii) A purposive construction should be given to the words "*could be made*" so that, if the claimant wishes to bring an appeal, his appeal is treated as not "*finally determined*" but, if he takes *"a measured decision not to appeal further*" and chooses instead to vary his application or to submit a fresh application, his appeal is treated as "*finally determined"*.

    iv) It is contended that this purposive construction is necessary in order to safeguard and protect immigrants and that such a construction is also consistent with the common law duty of fairness. In this respect, reliance is placed on the determination of the Upper Tribunal in Thakur (PBS decision – common law fairness) Bangladesh [2011] UKUT 00151 (IAC) and para 7 of the judgment of Sullivan J in Forrester, the full name and citation of which was not provided in the skeleton argument but which I know to be R (Forrester) v Secretary of State for the Home Department [2008] EWHC 2307 (Admin).

    v) The discretion conferred on the respondent by the phrase "*could be made*" should be exercised by the respondent as follows: If it is unlikely that the claimant will be granted permission to appeal to the Court of Appeal, the respondent should exercise her discretion and treat a variation application as validly having varied the original application for leave.

    The implication therefore is that, if the respondent does exercise her discretion in this way, the original application, as varied, remains outstanding and awaits a decision, so that any s.3C leave continues until a decision on the application as varied has been made and any appeal lodged against any adverse decision on the varied application is "*finally determined*".

    vi) It is argued that, in the instant case, if the respondent had considered her discretion, it is likely that she would have formed the view that any further appeal would have been hopeless. The implication (following on from the arguments summarised above) is that the respondent should therefore have treated the application of 8 August 2013 as a variation of the applicant's application of 14 November 2012 and that this application (as varied) therefore awaits a further decision.

[1] This must be a reference to s.104(2)(a), since there is no s.104(2)(d) and the phrase "*could be made*" is only to be found in s.104(2)(a).

11. Ground 3 is that the decision is in breach of the applicant's rights under Article 8. He is a genuine student who has made good academic progress in his studies.

12. Ground 4 is that the applicant was entitled to vary his original application, even after the respondent had made a decision on the original application. This is because s.3C permits one variation. It is contended that the principle that s.3C permits one variation even after the respondent has decided the original application is the ratio of the judgment of HHJ Thornton QC, sitting as a Deputy High Court Judge, in R (Chowdhury) v Secretary of State for the Home Department [2014] EWHC 59 (Admin), at paras 25 and 26. If the applicant's application of 8 August 2013 had been made three days later, it would have been granted. It should *therefore* now be granted.

13. Ground 5 is set out in a document entitled: "*Additional Grounds on behalf of the claimant*" prepared by Ms Kansal by which she sought permission to advance the argument that an application for variation of leave is a continuing application, commencing from the date on which it is first lodged and remaining open until it is decided, in reliance upon the determination of the UT in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC) to the effect that an application can be a continuing application right up until the date it is decided. The "*Additional Grounds on behalf of the claimant*" develops ground 5 as follows (and I quote):

> "3. From this case[2] therefore the following emerges:
>
> a. That applications for variation of leave are continuing applications, commencing from when they are first lodged and remaining open until they are decided.
> b. The application is to be decided as at the date of the decision.
>
> 4. Applying these points to the case in hand the following emerges:
>
> a. That notwithstanding the arguments for the R, if the application had been decided within the 12 day period from the UT dismissing the C's appeal, the R would have been able to put forward the current arguments.
> b. That the situation as at the date of the decision was that the application was continuing and therefore the words 'make an application' in section 3(c)(4) of the 1971 Act are not applicable. As the C did not technically 'make' the application at the date of the decision.
> c. That therefore the C's section 3c leave expired on 11.8.13 (being after 12 days after the determination of the UT was served on 29.7.13). So from 12.8.13 the application was being made effectively not during the period of section 3c leave.
> d. That the R has made a mistake of fact in that there is an appeal outstanding, as the C did not apply for permission to appeal to the Court of Appeal within the 12 days. But for this mistake of fact, the R would have considered the application as though it was a variation of the first and was continuing as up to the date of the decision."

14. Ground 6 (set out at para 5 of the "*Additional Grounds on behalf of the claimant")* runs as follows:

    i) The application of 14 November 2012 *was* varied. This is because the respondent accepted that to be the case in the letter dated 20 September 2013. This (in turn) is because the respondent had not stated that the application of 14 November 2012 had been decided or treated as invalid. Instead, the letter stated that the application "*has been retained on the HO file as they may be considered as part of your client's existing appeal*".

    ii) It is therefore argued that the respondent had a duty to consider the application as part of her residual discretion.

[2] This is a reference to the UT's determination in Khatel and others

15. Ground 7, advanced only at the hearing, runs as follows:

    i) Although the applicant's application for leave to remain dated 8 August 2013 was served on the respondent and not the UT when the application was made on 8 August 2013, it was included in the applicant's bundle for the instant judicial review proceedings and therefore it was served on the UT.

    ii) Accordingly, the application of 8 August 2013 could be construed as an application by the applicant to the UT for permission to appeal to the Court of Appeal against the dismissal of his appeal by the UT of his appeal in IA/03700/2013.

    iii) Indeed, the UT should have treated it as an application for permission to appeal to the Court of Appeal against the dismissal by the UT of the applicant's previous appeal. This is because rule 44 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules") is to the effect that there is no particular form in which an application for permission to appeal to the Court of Appeal is to be made.

    At the hearing, Ms Kansal acknowledged that, if the application of 8 August 2013 was to be construed as an application for permission to appeal to the Court of Appeal, the application for permission to appeal to the Court of Appeal was out of time because it was only lodged with the UT with the claim that was lodged on 23 December 2013. However, she submitted that the applicant could still make an application for extension of time.

16. Ground 8, also advanced for the first time at the hearing, runs as follows:

    i) The judgment in Chowdhury is authority for the proposition that "*anything which comes in*" after a decision has been made will amount to a variation of the grounds of appeal to the FtT/UT (as the case may be).

    ii) Alternatively, the respondent accepted in the letter dated 20 September 2013 that the applicant could apply to the UT to amend his grounds of appeal in his appeal (IA/03700/2013). The respondent accepted in the letter dated 20 September 2013 that the applicant had an outstanding appeal as at 20 September 2013. Accordingly, the respondent accepted that the applicant could apply to the UT for variation of his grounds of appeal, notwithstanding that the application of 8 August 2013 post-dated the promulgation of the UT's determination.

    iii) Accordingly, the applicant's s.3C leave continued until the UT has decided his application to vary his grounds of appeal in IA/03700/2013.

    Ms Kansal did not address me on the question whether the UT was *functus officio* once it had dismissed the appellant's appeal in IA/03700/2013.

17. I reject Ms Kansal's submission that all of her grounds were in her skeleton argument. Grounds 4 to 8 were not in the original grounds that were considered by the UT when permission was granted. Of these, only ground 4 was raised in the skeleton argument. Accordingly, an application for permission to amend the grounds to include grounds 4 to 8 should have been made. The only application for permission to amend the grounds concerned grounds 5 and 6.

18. In relation to ground 5, I asked Ms Kansal at the commencement of the hearing whether she was aware that, in Secretary of State for the Home Department v Raju & others [2013] EWCA Civ 754 (a copy of which I provided to her), the Court of Appeal overturned the UT's determination in Khatel and others. Although she confirmed that she did not rely upon ground 5 (having apologised for not mentioning Raju in the "*Additional Grounds on behalf of the claimant"),* she nevertheless submitted that para 23 of the judgment in Raju left open the

possibility of arguing that an application is continuing albeit not on the basis of the UT's determination in Khatel.

19. As to the relief sought, section 6 of the claim form and para 32 of the original grounds refer to the following:

    i) an order quashing the decision.

    ii) a mandatory order requiring the respondent to reconsider the decision in the light of all the circumstances.

    iii) a declaration that the respondent acted unfairly.

    iv) costs.

    v) further or other relief.

20. However, Ms Kansal informed me at the hearing that the applicant seeks variation of the application made to the respondent on 14 November 2012 or variation of the grounds of appeal to the UT in appeal number IA/03700/2013.

Assessment

21. The leading authority on the proper construction of s.3C is JH (Zimbabwe) v Secretary of State for the Home Department [2009] EWCA Civ 78. The version of s.3C considered by the Court of Appeal in JH (Zimbabwe) was the version in force from 2 April 2003 until 30 August 2006. This version was the same as the version set out at my para 5 above, except as follows:

    i) s.3C(2)(b) and (c) in force from 2 April 2003 until 30 August 2006 did not have the words shown in bold in my para 5 above. These words were added by s.11(2) and (3) of the Immigration, Asylum and Nationality Act 2006 with effect from 31 August 2006, subject to certain transitional provisions specified in IS 2006/2226 art. 4(3) which are not relevant in this claim; and

    ii) s.3C(6) in force from 2 April 2003 until 30 August 2006 read as follows:

        "(6) In this section a reference to an application being decided is a reference to notice of the decision being given in accordance with regulations under section 105 of that Act (notice of immigration decision)."

22. These differences are not material in this claim for the following reasons: In relation to s.3C(2)(b) and (c), the respondent has not suggested that the applicant left the United Kingdom at any material time. In relation to s.3C(6), Ms Kansal did not suggest that the applicant's application of 14 November 2012 had not been decided within the meaning of s.3C(6). Ground 5 which argued that the applicant's application was a continuing application relied upon the UT's determination in Khatel. Ms Kansal did not suggest that the application had not been "decided" pursuant to the regulations made under s.3C(6).

23. Accordingly, the judgment in JH (Zimbabwe) is directly applicable. The leading judgement in JH (Zimbabwe) was given by Richards LJ who said as follows, at paras 35 and 36:

    "35. The key to the matter is an understanding of how s.3C operates. I have set the section out at para 10 above. The section applies, by subs.(1), where an application for variation of an existing leave is made before that leave expires (and provided that there has been no decision on that application before the leave expires). In that event there is, by subs.(2), a statutory extension of the original leave until (a) the application is decided or withdrawn, or

(b), if the application has been decided and there is a right of appeal against that decision, the time for appealing has expired, or (c), if an appeal has been brought, that appeal is pending: I paraphrase the statutory language, but that seems to me to be the effect of it. During the period of the statutory extension of the original leave, by subs.(4) no further application for variation of that leave can be made. Thus, there can be only one application for variation of the original leave, and there can be only one decision (and, where applicable, one appeal). The possibility of a series of further applications leading to an indefinite extension of the original leave is excluded. However, by subs.(5) it is possible to vary the one permitted application. If it is varied, any decision (and any further appeal) will relate to the application as varied. **But once a decision has been made, no variation to the application is possible since there is nothing left to vary.**

36. Once the operation of s.3C is understood, the concern of the tribunal in *DA Ghana* [[2007] UKAIT 00043] about nullifying the prohibition in subs.(4) if a second application is treated as a variation of the first can be seen to lose its force. **A second application can be treated as a variation of the first only up to the point when the Secretary of States makes a decision on the application.** There is nothing surprising about subs.(4) having only a limited impact during that period, given that it is qualified by subs.(5) which expressly permits a variation of the first application. Thereafter, however, subs.(4) is effective to prevent any further application which might otherwise have been made right up to the time when an appeal in relation to the first was no longer pending, and to prevent a succession of such applications. Far from being nullified, it retains an important function in avoiding abuse of the system.''

(my emphasis)

24. I consider that the reasoning in paras 35 and 36 is plain. It requires no explanation. At paras 36-40, Richards LJ said that a later application is capable of being treated as a variation of the first application even if it is for a different purpose and on a different form. It is clear from paras 43-46, that the question whether a second "*application*" is an application as such or a variation of an earlier application is a question of fact, notwithstanding that the second "*application*" is not expressly put forward as a variation of the first. What is plain beyond any doubt is that once the Secretary of State has decided the original application, it cannot be varied by a later application because there is nothing left to vary once a decision has been made.

25. A purported "application" for leave or variation of leave, made after a decision has been made on an earlier application, may operate (if it is made during the period of an appeal) as an amendment of the grounds of appeal, if that is permitted by the FtT or the UT (as the case may be). In AS (Afghanistan) and NV (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 1076, there were two claimants. Both had made applications for leave after the Secretary of State had refused their original applications and they had appealed. It is clear from paras 49 and 50 of the judgment that the Court of Appeal considered that the claimants were not permitted to make applications for variation of their leave because of s.3C(4) of the 1971 Act and the judgment in JH (Zimbabwe). The Court of Appeal upheld the decisions of the Asylum and Immigration Tribunal refusing to accept such applications as amendments of the grounds of appeal in the two appeals. The reasoning of the Court of Appeal, which is explained at paras 49 and 50, is not relevant in the instant case.

26. JH (Zimbabwe) was followed by the UT in Qureshi (Tier 4 – effect of variation – App C) Pakistan [2011] UKUT 00412 (IAC). The UT made the point that there is no restriction on the number of occasions on which applications for variation of the original application can be made provided notice of variation is given prior to the respondent's decision as thereafter there would be no application pending. Accordingly, Ms Kansal is incorrect to say that there can only be one variation of the original application. The only restriction is that the application to vary the original application must be made before a decision has been made.

27. Ms Kansal said that she was aware of JH (Zimbabwe). She submitted that JH (Zimbabwe) was considered in Chowdhury and that Chowdhury was authority for the propositions relied upon in relation to grounds 4 and 8.

28. In my view, Ms Kansal has completely misunderstood Chowdhury. Whilst I agree that Chowdhury does apply JH (Zimbabwe), it is *not* authority for any of the propositions she advanced, for the reasons given below. Second, Chowdhury was a permission decision. In addition, it was a decision of the Administrative Court whereas JH (Zimbabwe) was a decision of the Court of Appeal. Thus, even if Ms Kansal is correct in her understanding of Chowdhury (which is not the case), I am bound by JH (Zimbabwe).

29. In Chowdhury, the claimant had applied in June 2011, during the currency of his leave to remain as a Tier 4 (General) student, for leave as a Tier 1 (Post-Study Work) Migrant. His application was refused on 15 July 2011. He appealed to the FtT. The FtT dismissed his appeal on 9 September 2011. He was granted permission to appeal to the UT. His appeal was heard before the UT on 3 February 2012. The UT reserved its decision. On 28 March 2012, the claimant obtained his BA graduate qualification. On 5 April 2012, the claimant applied for leave, relying upon his BA graduate qualification. On 6 April 2012, the Tier 1 (Post-Study Work) category was withdrawn. On 24 May 2012, the UT dismissed the claimant's appeal. On 29 September 2012, the Secretary of State decided that the claimant's application of 5 April 2012 was void as it was prohibited by s.3C(4) of the 1971 Act because it was an application for variation of an existing leave to remain made whilst an appeal was pending.

30. Before the Deputy Judge, the claimant argued that the application of 5 April 2012 was not a fresh application to vary his leave to remain but was instead a variation of the original application dated 21 June 2011. He contended that the effect of his service of that variation on the Secretary of State was "*to return the application*" in its varied form to be determined by the Secretary of State with the decisions of the Secretary of State, the FtT and the UT having no continuing effect and that his varied application was therefore yet to be decided by the Secretary of State (para 10 of Chowdhury).

31. At paras 23-24, the Deputy Judge decided that the application of 5 April 2012 was not a fresh application for leave to remain but an attempt to vary the application of June 2011. The Deputy Judge then went on to say as follows, at paras 25-28:

> *''(4) Should the document have been submitted to the SSHD or to the Upper Tribunal?*
>
> 25 Section 3C(5) provides that section 3C(4) "does not prevent an application for variation of the application for variation of leave". Thus, what is permitted does not have to be an application to vary, a unilateral act of varying the application is permitted. However, there is no definition of what constitutes an effective variation of the application. In particular, once the SSHD has made a decision, can the original application be varied whilst an appeal against that decision is pending and, if it can, should the variation document be notified to the appeal tribunal that is to hear the appeal or to the SSHD that has already disposed of it?
>
> 26 It would be surprising if the application could not be varied following a decision of the SSHD even though an applicant's leave to remain continues to be extended since, if that was the case, the applicant would have lost the right to vary the application pending the hearing of the appeal but would regain it if the appeal was successful. Moreover, the wording of subsection (5) that states that the variation of the application is not prevented by the extension of leave under subsection (2) suggests that whenever leave is extended under subsection (2) , a variation of the original application is permitted. However, if that variation takes place in the period after an SSHD decision has been issued but before the appeal against that decision has been determined, the terms of the variation may only be considered and applied by the FtT, or in a second appeal by the UT, if such is permitted by the appropriate tribunal, if necessary following a successful application for permission to amend or to rely on the variation.

> 27 However, that conclusion does not identify what constitutes a variation. Supposing the variation had been written out in a document which was clearly one prepared by the applicant but from oversight the document was never issued or posted to anyone and remained in a drawer in the applicant's desk and no mention was made of the variation until it was too late to affect the decision. It would be strange if, nonetheless, the original application had been varied by that unpublished document. In this case, the SSHD had, in issuing a decision rejecting and dismissing Mr Chowdhury's application, concluded its involvement in that application and had no further entitlement to change, alter or withdraw the decision albeit that it could consider a further application which applied to vary the decision just taken. It follows that, for the document to be treated as a variation of the original application, its contents must be made known to the decision-maker directly affected by the variation. Mr Chowdhury informed the UKBA in his letter dated 8 October 2012 that "I made a fresh application to the UKBA on 5 April 2012 and since that day I received nothing in regards to the application." That shows that he intended the document to be acted upon by the UKBA and that its contents were not a variation for the purposes of section 3C since the only body then able to give effect to the variation, namely the Upper Tribunal, neither saw the document nor was intended to see the document.
>
> 28 I conclude that the document dated 5 April 2012 did not vary the original application."

32. Ms Kansal relied upon the final sentence of para 25 and the whole of para 26. She submitted that the final sentence of para 26 shows that the UT in Chowdhury had power to consider the claimant's application of 5 April 2012 as a variation of the original application of June 2011.

33. In my view, this submission is misconceived. JH (Zimbabwe) makes it clear that, once a decision has been made on an application, it cannot be varied and it is therefore not possible for any subsequent application to amount to a variation of the application that has already been decided. The Deputy Judge in Chowdhury was aware of the judgment in JH (Zimbabwe). He referred to it at para 20 and quoted from it at para 21. Ms Kansal relied, in particular, upon the final sentence of para 25 taken together with the first two sentences of para 26. However, it is clear from the final sentence of para 26 that the Deputy Judge considered that any purported variation made after a decision has been made by the Secretary of State but before the appeal has been determined may only be considered and applied by the FtT or the UT, as the case may be; in other words, as a variation of the grounds of appeal. This is reinforced by the final sentence of para 27 from which it is clear that the Deputy Judge considered that the only body that could give effect to such a variation was the UT, as the FtT had determined the appeal. Accordingly, Chowdhury is entirely consistent with JH (Zimbabwe), although I should again stress that, even if it had not been consistent, I would have been bound to apply JH (Zimbabwe). I reject the submission that Chowdhury is authority for the proposition that s.3C permits one variation of an application for leave to remain even if the (purported or attempted) variation is made after the Secretary of State has decided the original application. If Ms Kansal is right, she did not explain why the Deputy Judge concluded, at para 28, that the document dated 5 April 2012 did not vary the original application.

34. This is a complete answer to ground 4.

35. It is also a complete answer to ground 5, which relies upon the determination of the UT in Khatel concerning continuing applications. Furthermore, and as I have already said, the Court of Appeal overturned Khatel in Raju. In addition, I would point out that even the UT in Khatel did not suggest that an application can be a continuing application after the decision on it has been made, which is effectively what Ms Kansal sought to suggest in relying upon Khatel. It is impossible to see how that proposition could properly have been advanced, even leaving aside the judgment in Raju. Finally, I would point out that, in my view, paras 4.a-b of the "*Additional Grounds on behalf of the claimant*" quoted at my para 13 above are incomprehensible.

36. Ground 1 asserts that s.104 of the 2002 Act only applies to s.104(1)(b) and therefore does not apply to s.3C leave. This ground is based on a selective reading of the relevant legislation. Section 104 is relevant in the context of s.3C because it is referred to in s.3C(2)(c), which provides (inter alia) that leave is extended by virtue of s.3C during any period when an appeal is pending within the meaning of s.104 of the 2002 Act. S.104(1) then provides that an appeal is pending during the period beginning when it is instituted and ending when it is *"finally determined, withdrawn or abandoned (or when it lapses under section 99)".* In other words, s.104(1) explains the beginning of the period as well as the end of the period. It is therefore not open to Ms Kansal to simply disregard what s.104 has to say about how the end of the period is to be ascertained and substitute the date of promulgation of the UT's determination as marking the end of the period of the applicant's s.3C leave.

37. Accordingly, and applying s.3C(2) of the 1971 Act and S.104(1) and (2), the applicant's appeal was finally determined by the UT on 14 August 2013 because this was the last day on which he could have made an application for permission to appeal to the Court of Appeal. His s.3C leave therefore ended on 14 August 2013.

38. Leaving grounds 2 and 3 aside for the moment, I shall deal next with ground 6, which is hopeless. I have quoted the respondent's letter dated 20 September 2013 at para 3 above. There is simply nothing in the letter which suggests that the respondent accepted that the application of 8 August 2013 was a valid variation of the application of 14 November 2012. The phrase: "*your client's documentation have been retained on the Home office file as they may be considered as part of your client's existing appeal*" cannot, on any reasonable reading of the respondent's letter, be seen as an acceptance by the respondent that the application of 8 August 2013 was a valid variation of the application of 14 November 2012.

39. Ground 7 is likewise hopeless, for the following reasons:

    i) In effect, Ms Kansal contends that the mere act of including a copy of the application of 8 August 2013 in the applicant's bundle in support of his claim for judicial review of a different decision (i.e. the decision of 20 September 2013) is sufficient to fix the UT with notice of an application for permission to appeal to the Court of Appeal against its determination in a statutory appeal which concerned an entirely different decision. The application of 8 August 2013 was an application to the Secretary of State for leave to remain. It was not even termed as an application for permission to appeal to the Court of Appeal. The application of 8 August 2013 did not even concern a decision; yet Ms Kansal suggests that the UT should have regarded it as a challenge to its decision in a statutory appeal which concerned a different decision. There is simply no reasonable basis for these submissions, even leaving aside the procedural and legislative hurdles in the way, which Ms Kansal did not engage with and to which I shall now turn.

    ii) Ground 7 ignores rule 44(6) of the UT Rules which provides, in effect, that any application for permission to appeal to the Court of Appeal which is made late must include a request for an extension of time and give the reason why the application was not made in time. It also ignores rule 44(7) which provides, in effect, that an application for permission to appeal to the Court of Appeal must identity the decision of the UT to which it relates, the alleged error or errors of law in the decision and state the result that the applicant is seeking. The applicant's application of 8 August 2013 did not comply with any of these procedural requirements. In particular, it was not explained (and had not been explained by the end of the hearing before me) precisely how the application of 8 August 2013 arguably disclosed any point of law in the UT's determination that had already been promulgated and which concerned a different decision made by the Secretary of State.

    iii) Finally, ground 7 completely ignores the words "*ignoring any possibility of an appeal out of time with permission*" in brackets in s.3C(2)(b).

40. Ground 8 is also hopeless, for the following reasons:

    i) Chowdhury is not authority for the proposition that "*anything which comes in*" after a decision has been made will amount to a variation of the grounds of appeal to the FtT / UT. Ms Kansal's suggestion that it is authority for this proposition is simply misconceived and based on a misunderstanding.

    ii) The submission that the respondent's letter dated 20 September 2013 accepted that the applicant could apply to the UT to amend his grounds of appeal in his appeal (IA/03700/2013) and that the applicant had an outstanding appeal as at 20 September 2013 fails to appreciate that the issue of whether there was an outstanding appeal before the UT did depend on anything the respondent said in her letter of 20 September 2013. Further, it fails to appreciate the fact that the UT is independent of the parties, including the respondent.

    iii) The submission fails to appreciate the fact that once the UT had dismissed the applicant's appeal in IA/03700/2013 against the decision of 14 January 2013, it was *functus officio*. It had no jurisdiction to even entertain an application for variation of the grounds of appeal.

41. In relation to ground 2, Ms Kansal accepted that, if I was against her on the interpretation of s.3C, then she could not succeed in impugning the lawfulness of s.3C on the ground of fairness, which is raised as part of ground 2 (see para 10.iv) above). In any event, and as I said at the hearing, any such challenge should have been brought elsewhere.

42. Ground 2 also contends that the phrase "*may bring a further appeal on a point of law*" in s.103B(1) of the 2002 Act confers a discretion on the Secretary of State whether to treat an application for leave as a variation of an earlier application based on her assessment as to whether any application for permission to appeal to the Court of Appeal, if brought by the applicant concerned, could meet the second appeal criteria. However, as I said at the hearing and as stated at my para 7 above, s.103 was repealed with effect from 4 April 2005 to coincide with the abolition of the Asylum and Immigration Tribunal. Ms Kansal did not address me on the relevant provision in the Tribunals, Courts and Enforcement Act 2007 (the "TCEA 2007") that replaced s.103.

43. The remainder of ground 2 is devoid of merit, as Ms Kansal seeks to interpret the phrase "*could be made*" in a way which would make it impossible to apply the section in practice and which, in any event, is illogical. I simply cannot see how the phrase "*could be made*" can reasonably be construed as conferring a discretion on the respondent to consider the merits of an application for permission to appeal to the Court of Appeal that an individual could make but which he/she might or might not make, the strength of which may well vary depending on who he/she instructs.

44. Ground 3, which relies upon the applicant's rights under Article 8, is simply untenable, having regard to para 57 of the judgment of the Supreme Court in Patel and others v Secretary of State for the Home Department [2013] UKSC 72.

45. I therefore refuse permission to amend the grounds to include grounds 5 and 6. No application was made for permission to amend the grounds in order to include grounds 4, 7 and 8 but if such an application had been made, I would have refused it, for the reasons given above.

46. Applying s.3C(5) of the 1971 Act as interpreted by the Court of Appeal in JH (Zimbabwe), the applicant's application of 8 August 2013 could not amount to a variation of his application for leave to remain dated 14 November 2012 because the application of 14 November 2012 had already been decided. Applying s.3C(2)(b) of the 1971 Act together with s.104(1) and s.104(2)(a) of the 2002 Act, the applicant's s.3C leave ended on 14 August 2013 because this

was the last date on which he could have made an in-time application for permission to appeal to the Court of Appeal. This means that the applicant's application for leave to remain dated 8 August 2013 was made at a time when he had s.3C leave. Accordingly, the respondent's letter dated 20 September 2013 rejecting the applicant's application of 8 August 2013 as one he was precluded from making under s.3C was not unlawful.

47. For all of the reasons given above, the applicant's challenge to the decision of the respondent of 20 September 2013 on the basis of grounds 1, 2 and 3 is dismissed.

Decision

The claim is dismissed.

Signed Date: 2 April 2015
Upper Tribunal Judge Gill