Upper Tribunal
(Immigration and Asylum Chamber)

Kishver and others ("limited leave": meaning) Pakistan [2011] UKUT 00410(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination delivered orally**
On 29 July 2011	**at hearing. Sent out on**
	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge Southern

Between

SULTANA KISHVER

F KASZI

FAISAL BASHIR

HASHIR KAZI

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z Malik , instructed by Malik Law Chambers Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

"Limited leave" under s. 10(i)(a) of the Immigration and Asylum Act 1999 includes leave under s. 3C of the Immigration Act 1971.

DETERMINATION AND REASONS

1.
This appellant Sultana Kishver ("the appellant") is a national of Pakistan. She came to the United Kingdom with her husband on 12 September 2004. They had leave to enter as visitors. Her leave was due to expire on 1 March 2005. In January 2005 applications or purported applications for leave to remain were made by the appellant and her husband. Her husband's application was refused under the rules. The appellant submitted a further application on 11 March 2005 having received no response to her application of 24 January. The appellant's application was refused but that refusal has

subsequently been withdrawn. The substantive refusal on which these proceedings have been based was dated 19 March 2009; it refuses further leave and indicates that there is no right of appeal against that decision. Undaunted, the appellant put in a notice of appeal. That was received by the Tribunal on 2 April 2009 and on 12 June 2009 Immigration Judge R A Britton heard the appellant's purported appeal. He dismissed it in a determination sent out on 6 June 2009.

2.
An application for a reconsideration order was on application granted on 27 July 2009 and the matter came before the Tribunal as the Asylum and Immigration Tribunal but as presently constituted by the then Deputy President and Senior Immigration Judge Southern on 8 October 2009. This is the second subsequent hearing. The difficulty raised by this appeal falls under two heads. The first question is whether the appellant had or has ever had a right of appeal to the Asylum and Immigration Tribunal or any Tribunal. The second question arises from the Secretary of State's treatment of her application.

3.
So far as the first question is concerned, it is clear from the history as we have set it out that the matter was dealt with by the AIT as one in which there was a right of appeal. Before us today, although it is fair to say that the documents had been sent in earlier and apparently not put before us, Ms Isherwood raises the question whether there was ever a valid right of appeal. She bases her argument on the fact, and it is a fact, that in the application of 24 January 2005 the appellant used the wrong form. There was a form prescribed for the application which she made and it is accepted on her behalf by Mr Malik that the appellant used the wrong form. At the time the regime for in-country applications for leave to remain was in the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2003; those regulations prescribed forms for a number of purposes, including the purpose for which the appellant sought leave.

4.
Regulations 11 and 12 of those regulations are headed "Prescribed Procedures". In reg 11 "the following procedures are hereby prescribed in relation to an application for which a form is prescribed in any of regulations 3-9 above" (Regulations 3-9 above are the regulations which prescribe the forms).

" (a) The form shall be signed and dated by the applicant…

(b) The application should be accompanied by such documents and photographs as specified in the form.

(c) The application shall be, [I summarise] sent."

Regulation 12 is, so far as material, as follows:

"12 (1) A failure to comply with any of the requirements of Regulation 11(a) or (b) above to any extent will only invalidate an application if:

(a)
the applicant does not provide, when making the application, an explanation for the failure which the Secretary of State considers to be satisfactory,

(b)
the Secretary of State notifies the applicant, or the person who appears to the Secretary of state to represent the applicant, of the failure within 21 days of the date on which the application is made, and

(c)
the applicant does not comply with the requirements within a reasonable time and in any event within 21 days of being notified by the Secretary of State of the failure”

5.
Those Regulations make it clear that it was open to the Secretary of State to treat an invalid application as one which was valid, because invalidity would only arise if the Secretary of State notified the failure. Ms Isherwood’s submission was that reg. 12 applies only when the prescribed form has been used. We do not accept that submission. In our judgement, reg. 11 relates to all matters relating to the application. The words are “the following procedures are hereby prescribed in relation to an application for which a form is prescribed” and the first requirement is that the form, that is to say the prescribed form, shall be signed and so on. It appears to us that reg. 12 clearly covers failures to use the correct form and that the non-use of the correct form could therefore properly, under the Regulations, be condoned by the Secretary of State in an appropriate case.

6.
The position in this appeal is that although the notice of decision of March 2009 made clear the Secretary of State’s view that the application of January 2005 was not a valid application, the Secretary of State’s position has been at a number of stages during this appeal that there was a valid appeal . That could only be the case if the application of 24 January 2005 was a valid application, because otherwise the appellant’s leave would have expired by the time she made her only valid application and she would have had no right of appeal against his refusal.

7.
Ms Isherwood’s submissions today were made on the basis that she sought to withdraw a concession which she acknowledged had been made in litigation, to the effect that there was a right of appeal. However we do not think that that is an appropriate way of putting the application which she made. Rights of appeal arise or do not arise by statute. In the present circumstances, although the right of appeal exists only if there was a valid application in January 2005, it was for the Secretary of State to decide, if appropriate, that the application made on that date was a valid application. If it was a valid application then there was a right of appeal in respect of his refusal. If it was not, there was not. It was not open to the Secretary of State to “concede” the right of appeal. What the Secretary of State has done at various stages in this litigation is to treat the application as a valid application. That was itself a valid executive decision by the Secretary of State or an officer of hers and we think it would be entirely inappropriate for that decision now to be reversed.

8.
We therefore decide that it is not open to the Secretary of State to withdraw the decision, effectively made long ago, that the application of 21 January 2005 was a valid application.

9.
What follows from that is that as it was made during existing leave, it extended that leave by virtue of s. 3C of the Immigration Act 1971, and the second application, on 11 March 2005 was a variation of it. It remained undecided in effect until 19 March 2009 when a notice of decision was sent out. As we have indicated, that notice of decision said that there was no right of appeal, but in so far as the decision of 19 March 2009 was a response to the application of 24 January 2005 as varied, there was indeed a right of appeal. It follows from that that the notice of decision was not a valid notice of decision because it did not comply with the Immigration (Notices) Regulations 2003. Mr Malik

however, emphasises that he seeks to proceed with the appeal; he waives the requirement of notice of rights of appeal, as he is entitled to do.

10.
The conclusion is that there is and was a valid appeal against the decision of 19 March 2009 and that appeal is, following the abolition of the Asylum and Immigration Tribunal, now before this Tribunal.

11.
The second question relates, as we have indicated, to the way in which the application was in the end decided by the Secretary of State. The appellant's application was an application for further leave. She had had leave as a visitor and now sought to remain on another basis. The notice of decision indicated that as leave was being refused she should make arrangements to depart from the United Kingdom and that if she did not do so she might be removed. It is also of course accepted however, that her removal would require a further decision. The appellant has sought to demonstrate that in those circumstances it was wrong for the Secretary of State to decide only to refuse her further leave: the Secretary of State should also have considered whether she ought to be removed and should have made a removal decision, or something equivalent to a removal decision at the same time as refusing her leave.

12.
That submission, made in this case and in a number of other cases, has caused a considerable amount of difficulty. In TE (Eritrea) v SSHD [2009] EWCA Civ 174, the same argument was raised and in the course of submissions, Counsel for the Secretary of State conceded that in the circumstances of that case, the Secretary of State would consider whether to make a decision to remove the claimant under s10, applying the considerations set out in para 395C of the Statement of Changes in Immigration Rules HC 395. That concession, on its face raised a number of further difficulties and there has been subsequent litigation in the Court of Appeal, most recently Mirza v SSHD [2011] EWCA Civ 159; [2011] Imm AR 484 and Daley-Murdock v SSHD [2011] EWCA Civ 161; [2011] Imm AR 500.

13.
The result of those two decisions taken in tandem is broadly speaking as follows: A person who is refused leave to remain at a time when that person has no outstanding leave is not entitled to require the Secretary of State to make any other immigration decision in order to ease that person's immigration status. The argument in that case is that the person was already committing an offence by overstaying at the time the application for further leave was made; and therefore there is no additional disadvantage by requiring the person to leave forthwith: there is no risk of committing a new immigration offence by staying. If, on the other hand, a person makes an application during existing leave, the effect of Mirza is that the Secretary of State should make in tandem the removal decision.

14.
As we have indicated in the course of argument this morning and as we think Mr Malik at any rate is prepared to acknowledge, there is some difficulty in showing how the removal decision could be made under the provisions of s. 10 of the Immigration and Asylum Act 1999. That is because s. 10, which is the authority for any removal decision which would have been made in this case applies if a person has outstayed their leave. The wording of s. 10 (1)(a) is as follows:-

"A person who is not a British citizen may be removed from the United Kingdom in accordance with directions given by an Immigration Officer if

(a)
having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;”

15.
The problem is that in this case, as in Mirza’s case, the operation of s. 3C of the Immigration Act 1971, which extends existing leave during the currency of any appeal, means that the person is not a person who has remained beyond the time limited by the leave. At the time of any appeal he is still not an overstayer. Precisely how the Secretary of State is lawfully to make a decision under s. 10 deciding to remove a person who is not subject to removal has not yet been explained, so far as we understand it, by the Court of Appeal or by anybody else. Mr Malik submits that the meaning of “limited leave” in s. 10(1)(a) is restricted to the original leave granted and not to leave under s. 3C, but that is a very difficult submission to accept for at least two reasons.

16.
The first is that s. 3 of the Immigration Act 1971 sets out the dichotomy of leave being either limited or indefinite, and provides that only limited leave may have conditions. It follows that whatever the condition, if leave is not indefinite, it is limited and so “limited leave” in s. 10 means leave which is subject to any conditions at all. It therefore does not follow that because s. 3C leave may be of an indeterminate period, it is not limited leave.

17.
Secondly, and perhaps more importantly, the restriction on removal of a person under the 2002 Act is restricted under ss 77 and 78 of that Act to cases where either there is a claim for asylum pending or where there is an appeal pending. If Mr Malik is right that “limited leave” in s. 10 applies only to the original grant of leave and not to its extension by s. 3C, it would follow that a person who, in time, has made a valid application for further leave, would be liable to be removed, as soon as his original leave ran out. That liability would continue thereafter for the whole period of the Secretary of State’s determination of his application and the following days during which if he had been refused, he had a right of appeal. Only when a notice of appeal was actually lodged would the protection from removal under s. 78 apply. That simply cannot be right. Sections 77 and 78, and the reformulation of s. 3C were a replacement of the old Immigration (Variation of Leave) Order 1976 which was specifically intended to prevent the removal of a person who had made in time an application for further leave. It is clear that those provisions taken together are intended to prevent precisely the situation which would arise if Mr Malik’s submission about the meaning of s. 10 of the 1999 Act were to be accepted.

18.
In those circumstances, we are unwilling to go as far as Mr Malik would ask us to and require the Secretary of State to make a decision under s. 10 in the present case. It does not appear to us that in the present case the Secretary of State can lawfully make a decision under s. 10. The appellant has leave and is not subject to removal under s. 10.

19.
A change in the law has been introduced by s. 47 of the Immigration, Asylum and Nationality Act 2006 which came into force on 1 April 2008. That section provides power for the Secretary of State to make decisions of the sort suggested whilst s. 3C leave is running. The section is now in force, although it was not in force at the time when the decision under appeal in the present case was made. It is not for us to indicate at this stage what effect that change in the law ought to have on this appeal. Nor are we prepared to direct, as Mr Malik suggests that we should direct, that the appellant be granted leave.

What we do do is make a decision equivalent to that which we are told was the outcome of the litigation in Mirza. [1] That is to say, we decide that the Immigration Judge erred in law by failing to conclude that, in the circumstances of the case, the decision of the Secretary of State on the 19 March 2009 was not in accordance with the law, for failure to consider also the question of removal. We make no direction.

20.
Mr Malik also asked us to consider a point under Article 8 of the European Convention on Human Rights. The argument under Article 8 before the Immigration Judge was that the appellant's removal would breach Article 8. Bearing in mind that no removal decision had been issued, that ground was, we think, unlikely to succeed. In view of the decision we have made, that is to say that no lawful decision has been made at all, it cannot possibly succeed. No other issue in relation to human rights has been raised in the course of the reconsideration and appeal to the Upper Tribunal, and, as we indicated in the course of the argument, in an appeal which has been on foot for so long it would not be appropriate to look, at this late stage, at an entirely different issue which can be of only marginal relevance, bearing in mind that the Secretary of State now will have to remake all relevant decisions in this case.

21.
For the reasons we have given, this appeal is allowed.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

---

[1] We have since been reminded that this was a decision that ultimately turned on judicial review rather than on appeal.