IN THE UPPER TRIBUNAL

R (on the application of Ahmed) v Secretary of State for the Home Department (3C leave – whether "granted") [2017] UKUT 00489 (IAC)

F ield House

London

Heard on: 30 October 2017

Between

THE QUEEN (on the application of)

NAHID AHMED

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Before

UPPER TRIBUNAL JUDGE SOUTHERN

For the Applicant: Mr R. Pennington-Benton, instructed by Connaughts Solicitors

For the Respondent: Mr Z. Malik, instructed by the Government Legal Department

APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

Where a person who is present with leave as a Tier 4 student makes an application for further leave in the same capacity during the currency of that leave, his leave, although extended by statutory effect of s3C, is an extension of that same leave and so it continues to be leave granted to him as a Tier 4 Student. Therefore, for the purposes of paragraph 245ZX(ha) of the Immigration Rules, any period during which leave to remain is extended by operation of s3C does count towards the five-year limit for grant of leave for study at or above degree level.

1.
This application for judicial review raises a narrow but according to counsel for both parties, important, issue of construction of a not infrequently encountered provision of the Immigration Rules.

2.
Paragraph 245ZX(ha) of the Immigration Rules provides in respect of an application for further leave to remain as a student, subject to certain exceptions that do not apply in this case:

“If the course is at degree level or above, the grant of leave to remain the applicant is seeking must not lead to the applicant having been granted more than 5 years in the UK as a Tier 4 (General) Migrant, or as a student, to study at degree level or above unless:

…”

3.
The question that arises to be addressed is whether, when calculating that period of 5 years, any period during which a previous grant of leave as a Tier 4 student has been extended by operation of s3C Immigration Act 1971 is to be included as a period he has leave as a student or whether it is to be disregarded.

4.
The importance of this is illustrated by the circumstances of this particular applicant. Although the parties are not in precise agreement as to the dates of his various periods of leave and study, it is not necessary to calculate precisely those periods of leave or extended leave. That is because it is agreed between the parties that if the period of 3C leave is to count towards the period of leave granted for study at or above degree level then the application made by the applicant for a further period of 12 months to study at the Global Banking School was correctly refused but if, as a matter of law, leave extended by s3C does not count, even though the applicant was studying during part of that period of leave extended by s3C the very course that he sought further leave to pursue, then the decision to refuse was unlawful and must be quashed.

5.
The chronology of relevant events may be summarised as follows:

a.
The applicant, who is a citizen of Bangladesh, arrived in the United Kingdom with entry clearance as a Tier 4 student and was admitted with leave to remain between 20 January 2011 until 30 April 2014. While present with this leave he was enrolled on a course at degree level at London Metrocity College between 29 March 2011 and 28 November 2013.

b.
Having completed that course, but still having leave granted to pursue it, he made an application for further leave to pursue a one-year degree level course at the University of Sunderland (at their campus in London E14).

c.
That application was refused, but the applicant lodged an appeal and enrolled with the University of Sunderland and completed that course between 28 April 2014 and 20 January 2015, as a result of which he was awarded a BSc in International Tourism and Hospitality Management.

d.
Although his appeal against refusal of leave was successful, being allowed on 27 August 2015, by then he had already completed the course that was subject of the appeal against refusal to grant leave to remain. Despite this, as his appeal had been allowed, the respondent granted the remainder of the leave initially sought, so that on 11 January 2016 the applicant was granted a further 4 months of leave until 11 May 2016.

e.

Before the expiry of that short period of leave he submitted a further application for leave to remain as a student, once again at or above degree level, this time to pursue a 1-year long course at the Global School of Banking (although, as we shall see, in fact the course lasted 10 months) and he has been granted permission to bring a judicial review of a decision of the respondent, made on 8 June 2016, to refuse that application and against a decision of 13 July 2016 to maintain that refusal on administrative review.

6.
It can be seen from this brief summary that by the time the applicant made this latest application for an additional years' leave as a student he had had the benefit of three periods of leave:

a.
The original grant of leave 20.1.2011-30.4.2014, a period of 39 months;

b.
A period of 3C leave 1.5.2014-11.01.2016, a period of 20 months;

c.
The grant of leave following his successful appeal 11.1.2016-11.05.2016, a period of 4 months.

Thus, the total period he had been present in the United Kingdom on the basis of being a Tier 4 student was 63 months, if the period of 3C leave is included as leave as a Tier 4 Student. Had the period of further leave he sought for the purpose of the course at Global Banking School been granted, that would have amounted to 75 months, plainly more than the maximum period allowed for study at or above degree level of 5 years. Put another way, as did Mr Malik in his submissions, even if one included the period during which the applicant held leave extended by s3C only that part of it that he was actually studying at University of Sunderland, that being 10 months, he would still have spent more than 5 years in the United Kingdom as a Tier 4 Student, studying courses at degree level or above.

7.
For that reason, the application was refused.

8.
In seeking Administrative Review, the applicant argued that the period during which he was present pursuant to leave extended by statutory effect of s3C Immigration Act 1971 between 25 March 2014, when he made an application for further leave to remain, and 11 January 2016 when leave was granted following a successful appeal, should not count for the purposes of applying the provisions of 245ZX(ha).

9.
This was not accepted by the respondent. In maintaining the refusal, the respondent referred to the Tier 4 Policy Guidance published in April 2016 (with emphasis as added by the respondent):

Calculating periods of leave counting towards time limits

106. To calculate the maximum amount of time that you have spent studying at a specified level, we will consider how much leave you have already received to study courses as a Tier 4 (General) migrant or a Student, and add the length of leave that you will receive if your current application is granted.

…

109. We will also count any previous periods of leave you have held under Tier 4 (General) and /or the Student route, where you have subsequently left the UK. This period will be counted from the date the leave began until the date it expired. If you extend your Tier 4 / Student leave, or received an period of continuing leave in accordance with section 3c of the Immigration Act 1971, this will be included. If your leave was curtailed, we will take the date the curtailed leave expired.

Applying this policy guidance, the position before the respondent was clear. The period of 3C leave was to count for the purposes of 245ZX(ha) which meant, as a matter of simple arithmetic, the application was one that could not succeed. The respondent considered representations made in the application for Administrative review founded upon R (Alvi) v SSHD [2012] UKSC 33, but said only that:

“However, the policy guidance we use is published and approved by the Home Office, we do not believe this case law is relevant to your substantiate (sic) your claims nor do we believe that the policy guidance has been misapplied in your case.”

10.
Mr Pennington-Benton, on behalf of the applicant, had set out in his skeleton argument two strands of challenge to the refusal to grant leave. The second of those was a submission founded upon “conspicuous unfairness in an individual case”. Realistically, and as had been anticipated by the judge who granted permission to bring this application for judicial review, he did not pursue that argument as a separate issue in his oral submissions, although it still informs the arguments he does pursue. He was plainly right not to do so. This applicant has suffered no unfairness, having been able to continue his studies notwithstanding the impugned decision. And, as we shall see, that was possible because the legal framework in play is designed precisely to accommodate such an outcome so that studies do not necessarily have to be put on hold while the applicant awaits a decision on an application to pursue them or to appeal against a decision to refuse his application.

11.
Mr Pennington-Benton urges caution in reliance upon the facts of this particular case because, he submits, it is relatively unusual for an applicant for further leave as a student to embark upon his next course of study before his application for further leave is determined. Although he referred to judicial comment concerning difficulties encountered by students in such circumstances, no evidence was offered to support that submission and, as is pointed out by Mr Malik for the respondent, and as discussed below, that submission sits uncomfortably both with the framework in place designed specifically to accommodate that occurring and with the fact that this particular applicant was able to proceed to pursue and complete his course, even though his application for leave to do so had been refused and he remained present on leave extended by s3C while he pursued an appeal.

12.
Distilled to its essence, Mr Pennington-Benton’s submission is that there is a distinction to be drawn between leave granted by the respondent to an applicant for leave to remain as a Tier 4 Migrant and leave extended by statutory effect because an applicant has made an in-time application that has not been determined or because he continues to pursue a right of appeal against an adverse decision. He argues that s3C leave arises by statutory effect and so is not leave “granted” by the respondent.

13.
He submits that where a period of 3C leave is lengthy, this can have the result that a significant part of the 5-year maximum period for study at or above degree level will be taken up and this would give rise to a level of unfairness that cannot be taken to have been intended by the rule maker. He seeks

also to draw a distinction between the original period of leave granted, which is that which, in his submission, para 245ZX(ha) refers to, which is the leave granted by the SSHD, and the period of leave extended by the statutory effect of s3C, which is not, he says, leave "granted by the SSHD". He relies, in particular, upon the final statement to be found in para 245ZX(ha):

"For the avoidance of doubt, the calculation of whether the applicant has exceeded the time limit will be based on what was previously granted by way of period of leave and level of course rather than (if different) periods and courses actually studied."

Although it seems clear that the purpose of this provision is simply to make clear that the focus is upon the leave granted and not whether the applicant used that period of leave to pursue studies, Mr Pennington Benton submits that the focus is upon the leave previously granted by the SSHD and not the length of any statutory extension of it. He submits that the rule-maker could have focussed on periods of actual study in the United Kingdom rather than the periods of leave granted for the purpose of study, but chose not to. He argues that the intention was a bright line rule, focussed upon periods of leave granted for study rather than periods of actual study which has the advantage of clarity and simplicity.

14.
Mr Pennington-Benton submits also that the approach urged by the SSHD, that s3C leave must be included as leave granted as a Tier 4 student, leads to unfairness because, as he puts it in his skeleton argument, students may

"… fall one side or the other of the 5-year rule, by dint of no more than chance occurrences resulting in them spending more or less periods of time on 3C leave (applications in some cases, but not others, being wrongly refused, differing waiting times for initial decisions…) It is difficult to understand why the rule maker would have intended for this differential and often arbitrary treatment. Much more likely that the rule-maker thought it best (most clear, coherent and outcome-consistent) to simply rely on periods of LTR actually granted…"

Pointing to the observation in R (Syed) v SSHD [2011] EWCA Civ 1059 that the immigration rules "… are to be construed and applied according to their natural and ordinary meaning", Mr Pennington-Benton submits that:

"There can be little doubt that, in ordinary parlance, leave "granted" to an applicant connotes a defined period of leave specifically granted to an individual, for a defined purpose."

15.
Thus, the question of law that is to be addressed in these proceedings is that neatly summarised by Mr Malik at para 11 of his skeleton argument as being whether:

"a) the Secretary of State misconstrued Paragraph 245ZX(ha) of the Immigration Rules in holding that the time spent on leave extended under section 3C of the Immigration Act 1971 ("the 1971 Act") counts towards that the specified five years' period; and

b) the Secretary of State acted unfairly in refusing the Applicant's application."

16.
It is accepted by the respondent that if the period of 3C leave enjoyed by the applicant is disregarded then the period of leave sought by the applicant would not infringe the 5 year rule and, as that was the only reason for refusal, his application was one that fell to be granted.

17.
In submitting that the construction urged by Mr Pennington-Benton is simply not sustainable, Mr Malik has identified a formidable range of arguments to the contrary. He submits that the construction of paragraph 245ZX(ha) proposed by the applicant is not consistent with the natural and ordinary meaning of the vocabulary of that provision, second that it is inconsistent with authority and third that it is inconsistent with the immigration rules read as a whole and the Tier 4 Points Based System framework.

18.
The focus of the rule in question, 245ZX(ha), is the period the applicant has been granted leave "as a Tier 4 (General) Migrant, or as a Student". The question is, therefore, whether during the period leave was extended by s3C he had leave as a Tier 4 Student. In Mr Malik's submission there can be no doubt that he did, and if the intention had been to exclude s3C leave, the rule would have said so. For the construction sought by the applicant, one would have to read into the rule a phrase that was absent from it, that being "excluding a period of s3C leave".

19.
QI (Pakistan) v SSHD [2011] EWCA Civ 614 was concerned with para 245ZX(l) of the Rules, which sets out part of the qualifying criteria for leave as a student:

"The applicant must not be applying for leave to remain for the purpose of studies which would commence more than one month after the applicant's current entry clearance or leave to remain granted under these rules expires."

The Upper Tribunal had dismissed QI's appeal against refusal to grant further leave as a Tier 4 Student, holding that leave extended under s3C does not count for these purposes so that if the applicant's initial grant of leave had ended more than a month before the new course was to commence, then even though his leave had been extended by s3C he could not meet the requirements of paragraph 245ZX(l). The Court of Appeal held that construction to be incorrect and wrong in law. At paragraph 14 per Pill LJ:

"… The natural meaning of the words in the rule is that it will not operate while leave is extended. The leave as extended is not a new or different species of leave; the existing leave is extended."

And at paragraph 15, speaking of the effect of s3C:

"…The section expressly provides that leave is extended while consideration of the application for variation is pending."

20.
Mr Pennington-Benton argued that QI was distinguishable on the basis of context. The Court of Appeal was there concerned with expiry of leave and not its extension. Therefore, it does not follow, "linguistically or conceptually" that the view expressed in QI properly informs the construction of paragraph 245ZX(ha). I am unable to accept that submission. The decision of the Court of Appeal in QI establishes clearly and unambiguously that, correctly understood, leave extended by operation of s3C is simply that: an extension of the same leave that was originally granted. It is not something different and simply extends the period during which the applicant has leave to remain as a Tier 4 Student. As an extension of leave, it remains leave granted to the applicant by the respondent.

21.

Further support for this construction is provided by R (Mehmood & Ali) v SSHD [2015] EWCA Civ 744. The issue before the Court of Appeal was whether the phrase “any leave to enter or remain in the United Kingdom previously given to him” in s10(9) Immigration and Asylum Act 1999 includes leave extended by s3C. The submission of the applicant in that case was similar to that advanced here by Mr Pennington-Benton, that as this provision referred specifically to leave “given to him” that was referring only to the leave granted by the SSHD and not the leave extended by statutory effect of s3C. Beatson LJ explained, at paragraph 34, that 3C leave is a continuation of the same leave that existed before the application that had been made which generated the extension of leave:

“… a statutory extension of the same leave that existed before it was made.”

22.
In Mahad v ECO [2009] UKSC 16 Lord Brown, at paragraph 10, approved an earlier observation by Lord Hoffmann that construction:

“… depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy”.

In this context, it is of particular relevance to have regard to the provisions of paragraph 245ZY of the rules, the purpose of which is plainly and specifically to accommodate the position where a student seeks to undertake studies before the outcome of his application for further leave has been determined or his appeal against refusal has been determined. So far as is relevant, paragraph 245ZY provides, with emphasis added:

245ZY. Period and conditions of grant

…

(iv) no study except:

(1)
study at the institution that the Confirmation of Acceptance for studies Checking Service records as the migrant’s Sponsor…

(2)
until such time as a decision is received from the Home Office on an application which is supported by a Confirmation of Acceptance for Studies assigned by a Highly Trusted Sponsor and which is made while the applicant has extant leave, and any appeal or administrative review against that decision has been determined , study at the Highly Trusted Sponsor institution which the Confirmation of Acceptance for Studies Checking Service records as having assigned a Confirmation of Acceptance for Studies to the Tier 4 migrant;

…

As Mr Malik pithily observed in oral submissions, it makes no sense to specifically allow for study in such circumstances and then to ignore it when calculating periods of leave granted for the purpose of study.

23.
Yet further support for the proposition that the legal framework specifically caters for and accommodates periods of study while leave is extended by s3C is provided by the reported decision of

the Upper Tribunal in Patel (revocation of sponsor licence fairness) [2011] UKUT 00211 (IAC) and the decisions of the Court of Appeal in SSHD v Khan [2016] EWCA Civ 137 and R (Raza) v SSHD [2016] EWCA Civ 36 in each of which it was accepted that students could and did continue to study during periods of s3C leave.

24.
Drawing all of this together, in my judgment the position is unambiguously clear. Where a person who is present with leave as a Tier 4 student makes an application for further leave in the same capacity during the currency of that leave, his leave, although extended by statutory effect of s3C, is an extension of that same leave and so it continues to be leave granted to him as a Tier 4 Student. Therefore, for the purposes of paragraph 245ZX(ha) of the Immigration Rules, any period during which leave to remain is extended by operation of s3C does count towards the five-year limit for grant of leave for study at or above degree level. That construction of paragraph 245ZX(ha) is consistent not just with the scheme of the immigration rules, but also with clear authority from the Court of Appeal and the natural and ordinary meaning of the words used.

25.
There has been no unfairness suffered by this applicant. The additional period of leave he sought, if granted, would have meant that he would have been granted more than the 5 years permitted for study at or above degree level. There was never any doubt or ambiguity about that limit on the leave that would be available to the applicant, it being made clear both in the immigration rule itself and in published policy. The policy was not seeking to add to the framework applicable that was absent from the immigration rule. Therefore, the decision under challenge in these proceedings was correct and lawful and the application for judicial review is refused.

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