DA (Section 3C – meaning and effect) Ghana [2007] UKAIT 00043

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House

Date of Hearing: 28 November 2006

Date of Promulgation: 25 April 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Allen

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Ahmed, of Aamir Zane Solicitors
For the Respondent: Mr Avery, Home Office Presenting Officer

(1) The prohibition on new applications in s3C(4) of the 1971 Act must be given its proper force. It is not open to the Secretary of State to treat an entirely new application as merely a variation of an existing one. (2) Once an application has been decided it is not capable of being varied. (3) Once a decision is the subject of a pending appeal, any variation is a matter for the grounds of appeal, not a variation under s3C(5). (4) The effect of s3C(4) is that there can be only one application that is the subject of an appeal to the Tribunal. Any matters on which the appellant relies to substantiate a claim under the Immigration Rules need to be argued in that appeal. The determination of the appeal must be regarded as having decided the issues arising from the application and any variations of it.

DETERMINATION AND REASONS

The facts

1. The appellant is a citizen of Ghana. He appealed to an Immigration Judge against the decision of the respondent on 21 June 2006 to give directions for his removal as an overstayer, having refused his application for leave to remain as the unmarried partner of the sponsor

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and having decided that his removal would not breach his rights under the European Convention on Human Rights. The Immigration Judge dismissed the appeal. The appellant sought and obtained an Order for Reconsideration. Thus the matter comes before us.

2. The appellant's immigration history is somewhat complex, but is not in any doubt. Before the Immigration Judge it was largely confirmed by documents produced by the respondent, and the only issue of fact outstanding was settled by the Immigration Judge's determination in the appellant's favour. We may therefore set it out as follows.

3 July 2001	Appellant entered United Kingdom and was granted leave to enter as a student. On application further leave was granted, the last period of leave expiring on 30 June 2004
16 May 2004	The appellant applied for leave to remain in the United Kingdom as the unmarried partner of the sponsor.
15 June 2004	The appellant withdrew his application for leave to remain as an unmarried partner, recognising that he did not meet the requirements of the Immigration Rules, but asserting that he wished to take a full part in the upbringing of their expected child.
18 June 2004	The appellant applied for leave to remain in the UK as a student.
30 June 2004	The date of expiry of the appellant's leave to remain as a student.
1 July 2004	The appellant's application for leave to remain as a student was refused on the ground that both his application for leave to remain as an unmarried partner and the terms of his withdrawal of that application suggested that he had no intention to leave the United Kingdom at the end of his studies.
5 July 2004	The appellant applied again for leave to remain in the United Kingdom as the unmarried partner of the sponsor ("*the second application*").
3 December 2004	An Adjudicator dismissed the appellant's appeal against the decision of 1 July 2004 refusing him leave to remain as a student. The determination was based not only on the reason given by the

	Secretary of State in the Notice of Refusal (see above) but also on the ground that there was before the Adjudicator no evidence of the appellant's financial circumstances. The Adjudicator made no reference in his determination to the appellant's intentions or application as an unmarried partner: the determination does not appear to consider that aspect of the appellant's case. The appellant did not seek permission to appeal against the Adjudicator's determination.
7 January 2005	The appellant submitted an application for leave to remain as the unmarried partner of the sponsor ("*the third application*").
25 January 2005	The third application was returned to the appellant because he had not submitted the documents required or enclosed the appropriate fee.
28 January 2005	The appellant re-submitted the third application, within the time allowed by the Secretary of State for doing so.
15 June 2006	The third application was refused. The letter of refusal made it clear that one ground for the refusal was that the appellant has not had "any leave to enter or remain in the United Kingdom since the 30/06/04", and therefore cannot meet the requirements of paragraph 295D(i) and (iv) of the Statement of Changes in Immigration Rules, HC 395, and that, in addition, as sufficient financial evidence had not been submitted, the appellant had not demonstrated that he was able to meet the requirements of paragraph 295D(ix). Having accordingly treated the application as an application outside the Rules on the grounds that the appellant's removal would breach his human rights, the Secretary of State refused the application and made a decision to remove the appellant by way of directions given under s10 of the 1999 Act. The appellant appealed, in time, on grounds which are in entirely general terms, save for an assertion that the second application "is still pending with the respondent for further consideration".

3. The Immigration Judge considered the points put by the appellant: there was no representative of the respondent before him. So far as concerns

the question whether the appellant had leave at the time he made his third application, the Immigration Judge considered s3C of the Immigration Act 1971, and a passage from Macdonald's Immigration Law and Practice, Sixth Edition, paragraph 4.13. He concluded that the appellant could have varied his application for leave to remain as a student by adding grounds relating to his intentions as the unmarried partner of the sponsor, but that:

> "It is quite clear to me that he had no real intention to rely on his student application at the time that he submitted his second application for leave to remain as an unmarried partner. The whole basis of this application was, I find, to secure for himself long-term settlement in the UK. … I am satisfied that the appellant had no … intention to vary his application which he submitted on 18 June 2004 when he submitted a completely different type of application on 5 July 2004."

4. He accordingly found that the second application did not cause s3C to extend the appellant's leave to remain in the United Kingdom. It followed from that that the third application was submitted at a time when the appellant had no extant leave.

5. The Immigration Judge went on to consider the other ground upon which the respondent had refused the application insofar as it depended on the Immigration Rules. His process for doing so is not altogether clear, because he included in his determination what are apparently two standard paragraphs setting out the duties of an Immigration Judge, of which the first, which was of some importance in determining the appellant's compliance with the financial requirements of the Rules, appears to ignore the provisions of s85(4) of the 2002 Act. He therefore did not take into account any evidence post-dating the decision, but found that at the date of the decision the appellant "would have had the finance available to meet the requirements of paragraph 295D(ix)".

6. So far as concerns the human rights grounds, the Immigration Judge noted that there was no material before him to show that the sponsor could not settle with the appellant and their child in Ghana: the evidence merely established that the appellant preferred to remain in the United Kingdom. Alternatively, the appellant could go to Ghana and apply for entry clearance from abroad. The Immigration Judge therefore found that the appellant's removal from the United Kingdom would not breach his rights under Article 8.

Section 3C and its history

7. Section 3C of the Immigration Act 1971 was inserted by the 1999 Act and amended by the 2002 Act. Following the amendments it was in the following terms from 1 April 2003:

> "**3C. Continuation of leave pending variation decision**
> (**1**) This section applies if -

(a) a person 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, Immigration and Asylum Act 2002 could be brought 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 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) 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).

(Further changes were made with effect from 31 August 2006 by s11 of the Immigration, Nationality and Asylum Act 2006. They have no effect on this appeal or on the matters we discuss here.)

8. A note on the history of those provisions is necessary. In Suthendran v IAT [1977] AC 359, [1977] Imm AR 155 and R v IAT ex parte Subramaniam [1977] QB 190, [1976] Imm AR 155, the House of Lords and the Court of Appeal respectively decided that on the true construction of the legislation (at that time s14 of the Immigration Act 1971) there was a right of appeal against a refusal to vary or extend leave only if the applicant had leave at the date of the decision and at the date of any subsequent Notice of Appeal. These decisions, no doubt correct, were undoubtedly inconvenient. It meant that a delay between an application and the decision on it would deprive the applicant of a right of appeal if his leave expired before the decision was made. The legislative response was the Immigration (Variation of Leave) Order 1976 (SI 1976/1572), which had the effect that if a person applied, during the currency of existing leave, for a variation or extension of leave, his leave was extended until 28 days after the decision on the application. Thus he had leave both at the time of the decision and at the time of any notice of appeal.

9. Both s14 and the Variation of Leave Order were replaced by provisions in the Nationality, Immigration and Asylum Act 1999. The appeals

provisions of that Act no longer required there to be leave at the time of the Notice of Appeal, and the requirement that a person have leave at the date of the application is now sometimes (but not always) a part of the relevant paragraph of the Immigration Rules although it is far from clear that it does not remain a statutory requirement.

10. The 1999 Act also inserted a new s3C into the 1971 Act. Unlike the present version, which we have set out above, s3C as it was in force from 2 October 2000 until 1 April 2003 did not extend leave during the course of an appeal: it extended the applicant's leave only up to the date of the decision and the period after the decision during which any in time Notice of Appeal against it could be given. The section had at subss(3) and (4) provisions to precisely the same effect as those now contained in subss(4) and (5).

11. The position during the currency of an appeal was governed by paragraph 17 of Schedule 4 to the Act, which provided that while an appeal against a refusal to vary leave was pending, "the leave to which the appeal relates and any conditions subject to which it was granted continue to have effect", but that an application for variation of leave to enter or remain could not be made during the period by which leave was extended by that paragraph. Thus the provisions for a response to change of circumstances were somewhat different. An *application* made during what we may call "s3C leave" was always prohibited. But during the period of extension provided by s3C itself a current application could be *varied*; whereas there was no provision for variation during the extension provided by paragraph 17 of Schedule 4. That remained the position until s3C was replaced on 1 April 2003. The new provisions, which we have set out above, retain the provisions prohibiting application but allow variation in subss(4) and (5); but, on their face, those provisions apply without distinction to all the period of s3C leave specified by the three paragraphs of subs(2).

<u>The Immigration Directorates' Instructions</u>

12. The drafting of s3C is not particularly opaque, and it might well be thought to be a relatively easy task to distinguish between a new application and a variation of an existing application, and to reach a view about what is the period of time during which an application can be varied. All these matters are, however, thrown into considerable doubt by the publication of Immigration Directorate's Instructions. The Instructions we were shown by the appellant are dated December 2003, and Mr Avery did not suggest that they were not current at the date of the hearing of this appeal. (In fact subsequent research has shown that the relevant paragraphs (they are in s5 of Chapter 1 of the IDIs) were substantially re-written in September 2006. We are glad that that is so, but it is the December 2003 version that was the published position of the Home Office when the important events for the purposes of this appeal took place.) That version contains two matters of instruction to

caseworkers that are, to say the least, very surprising. The first is that a new application can be treated as a variation of the original application, even if the new application is completely different. A change from a student application to a spouse application is given as a specific example. The second is that this position (that is to say that an application can be varied by its replacement by a completely different application) continues for the whole of the period of s3C leave.

13. So far as concerns the first of those directions, we have the gravest doubts whether it can be lawful. An application for variation or extension of leave is not made in purely general terms. It is made for a specific purpose under the Immigration Rules, and, following provisions also introduced under the 1999 Act and subsequently amended, has to be made in and on a specific form, and every application has to be accompanied by documentation appropriate to the specific application being made. Further, to take the example mentioned in the instructions themselves, an application for a variation of leave in order to remain as a student is an application for leave which is different in quality from an application for leave to remain as a spouse. A student's leave is dependent on following a respectable course successfully, and the leave has conditions relating to the course and restricting other work. A spouse's leave is linked to the marriage and has no conditions restricting work. To describe an application for student leave as being merely "varied" by being replaced by an application for leave as a spouse distorts the meaning of the word "variation" in subs(5); and, more crucially, it essentially nullifies the prohibition in subs(4). If an application can be varied in that way, it is difficult to see that any new application is in fact prohibited at all. That is why we say that the provisions of the IDIs to that effect are of very doubtful legality. The Secretary of State is entitled to grant leave to those who do not meet the requirements of statute or the Immigration Rules; but he is not entitled to tell applicants that he will not apply the law.

14. So far as concerns the second remarkable feature of the IDIs which we have identified – that is, that the possibility of variation, as so largely interpreted, exists for the whole of the period of 3C leave – the explanation clear although disgraceful is to be found in the terms of the December 2003 IDIs themselves. It is clear that, although by December 2003 the version of s3C introduced by the 2002 Act had been in force for nine months, and although by September 2006 it had been in force for three and a half years, the version of the relevant part of the IDIs giving the Secretary of State's instructions to his officers between those dates took no account of the new provisions of s3C at all. The reviser in December 2003 confines himself to the law as it was before April 2003. Thus, he begins by explaining how s3C was inserted by the 1999 Act, he gives the effect of s3C by reference only to the 1999 Act, and he summarises the one-stop provisions of the 1999 Act, which he describes at paragraph 7 as "new". He details the provisions of paragraph 17 of Schedule 4 to that Act, and some of his other comments can apply only

to the 1999 Act's s3C, for example the reference in paragraph 5 to "the final ten working days of leave under s3C". In this context it is rather surprising to find a reference to the 2002 Act at paragraph 4.1, but that sole reference relates to a different point.

15. It is thus clear that all the remarks made in that version of the IDIs about "leave extended by s3C" apply, in the draftsman's mind, only to the period specified by the original version of s3C: that is, the period between the application and the last date for giving Notice of Appeal against a decision on it. Although the remarks are expressed in entirely general terms, and at the time when this version was in force, could no doubt be expected to extend to the whole of the period under s3C leave under the present version of that section, they are entirely misleading. Indeed, on his remarks on paragraph 17 of Schedule 4 to the 1999 Act he makes it clear, during an appeal, there can be no application for variation of leave. Any application that is made should, he directs, be treated as "out of time" unless it falls for consideration on an appeal under the one-stop provisions of the 1999 Act: that is to say, broadly speaking, if it relates to asylum or human rights.

16. Before us, both parties argued that the provisions of the IDIs meant that a completely new set of circumstances advanced by the appellant even at a very late stage of an appeal counted as a "variation" of the application and had to be dealt with at the appeal hearing. We are satisfied that that is a misunderstanding of misleading IDIs. The true position is as set out in the present version of the IDIs, revised in September 2006 but not known to Mr Avery, which have at paragraph 3.2 the following wording which we regard, with respect, as clearly correct:

> "However s3C makes a clear distinction between the decision on the application and the appeal against that decision. *Once an application has been decided it ceases to be an application and there is no longer any application to vary under s3C(5).* So any new information will fall to be dealt with during the course of the appeal rather than as a variation of the original application." (emphasis added)

17. Thus, despite the fact that s3C makes no distinction between the period of leave relating to the making of the decision and the period of leave relating to a pending appeal, there is still a distinction. Section 3C(5) ceases to have any force when the decision is made, because the application is merged in the decision and is no longer capable of being varied. Any variation thereafter will be of the grounds of any appeal, which can be varied, but only with the leave of the Tribunal under Rule 14 of the Tribunal's Procedure Rules, and only within the limits appropriate to such variation.

18. Once this distinction is understood to have survived, certain provisions even of the misleading earlier version of the IDIs become rather easier to understand. In particular, there is a suggestion in them that, on receipt

of a new (that is to say varied) application, the original decision could and possibly should be revoked and replaced with a decision reflecting the variation in the application and the new facts relied on. Obviously, such a provision, if understood to extend to the whole of the period of s3C leave, as both parties before us said that it should be, imports a capacity in the appellant to bring proceedings to a halt by dramatically varying his claim at a late stage – perhaps even before the Court of Appeal. But that is not what is meant. The provisions for revoking a decision and replacing it with a new one are understood as applying only to the period of s3C leave as it would have been under the 1999 Act. They therefore allow the decision to be reconsidered if the new material comes in within the time for appealing against the decision – perhaps even in a Notice of Appeal. That is an indulgence, because by then the application has ceased to be capable of variation, but it is no doubt a sensible provision. Once the time for appealing has expired, however, new facts and new arguments become a matter for the Tribunal if there is an appeal, but, if there is no appeal, will merely furnish the basis for an application made otherwise than during a period of existing leave.

19. We have described the possibility of variation in the short period immediately after the decision as an indulgence, and that is what it is. It seems to us that, even if the possibility of variation under s3C(5) is limited to the time before and immediately after the decision is made, the wide interpretation of the word, which still features in the IDIs, presents the same problems of lawfulness as we have identified earlier. Parliament could have enacted a provision that any new application received during a particular period might (or must) be treated as a variation of the original application, but it did not do that. It prohibited new applications. Any interpretation, whether judicial or executive, must respect that prohibition and give effect to it.

Application to the present case

20. In the present case we are concerned with whether the third application was made validly at a time when the appellant had existing leave. The appellant's argument is as follows: (1) His application for variation of leave in order to enable him to remain as a student was made in time and therefore generated leave under s3C from 30 June, when his existing leave expired. (2) That leave continued to the date of decision, during the further period when an appeal could be brought, and (as he appealed) during the further period when the appeal was pending. (3) He therefore had leave under s3C when the second application was made. (4) The second application was therefore to be treated as a variation of the student application. (5) Whether or not the student application was withdrawn, any decision needed to reflect the new material contained in the variation. (6) Section 3C leave therefore continued until a decision on the unmarried partner elements of the application as varied. (7) No such decision had been made when the third application was submitted. (8) Therefore the appellant had s3C

leave when the third application was submitted. (9) Therefore that application should be regarded as a further variation of the original student application, made in time, whilst the appellant had current s3C leave.

21. Thus the question whether the third application was in time depends on whether the second application could be and was a variation of the student application. The appellant argued that it could be and it was. Mr Avery took a similar view, on the basis of the IDIs, but submitted that the appellant's argument failed for another reason, to which we shall return shortly. The Immigration Judge thought that second application could have been a variation of the student application but, on the facts, was not. Our view is that it was not, because it could not be. There are two reasons. The first, as we have already indicated, is that in our view an application for leave to remain as an unmarried partner cannot be regarded as a "variation" of an application for leave to remain as a student, within the meaning of s3C(5). It is in application for leave for a different purpose, for a different period and under different conditions; and, under the provisions of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2003 (SI 2003/1712) it had to be made on a different form and accompanied, as the form required, by different documents. If the distinction between "variation" and "application" in s3C means anything (and it must, because of the prohibition on applications as distinct from variations) then what the appellant did on 5 July 2004 was not, and was not capable of being, a variation of his application for leave to remain as a student.

22. Further, he could not vary his application on 5 July 2004 because it had already been decided. He had ceased to have a pending application to vary. Although the Secretary of State might have decided, in the circumstances, to revoke his original decision, leaving the application outstanding, and then to treat it as varied (by some new material capable of amounting to a variation), he had no obligation to do so, and there was no legitimate expectation that he would do so.

23. It follows that, so far as this appeal is concerned, the only application lawfully and effectively made during the existence of current leave was the student application. The appellant's only s3C leave expired at the end of the time that was available to him to appeal against the Adjudicator's determination (of the appeal against the decision on the student application) in December 2004. The third application was made outside that time and so was not made during the currency of existing leave.

24. The Immigration Judge could not but have reached that conclusion if he had applied what in our view was the correct interpretation of the law. His error is accordingly entirely immaterial.

25. Mr Avery attacks the appellant's submissions on another ground entirely. He argues as follows. (1) If the second application was effective at all it was as a variation of the application for leave to remain as a student. (2) The decision on that application was adverse to the appellant and he appealed against it. (3) Because of the provisions of s3C(4), there could be no other application with which the Adjudicator was concerned in December 2004. (4) The appellant did not advance any grounds for leave to remain as an unmarried partner before the Adjudicator, and he did not seek to appeal against the Adjudicator's determination on the ground that the Adjudicator had failed to take such matters into account. (5) All proceedings arising out of the only application that the appellant could lawfully have made were therefore terminated in December 2004, and the alleged variation of the application is subsumed in the Adjudicator's determination of the appeal against the immigration decision.

26. The appellant's only answer to that argument was to refer, in somewhat vague terms, to conversations with IND officials who, it was said, had had, at about the time the Adjudicator dealt with the matter, accepted that the appellant had an application outstanding.

27. We are confident that Mr Avery's argument is right. The appellant could not have an application outstanding at that time: he could make only one application and, as he knew, it had been decided and he was appealing against the decision. Section 3C(4) has the clear result that an Adjudicator or (now) this Tribunal can be concerned with only one application – whatever its terms, varied or not, may be – and therefore with one decision on an application. However many times an applicant may vary or attempt to vary his application, he is entitled to only one decision. It follows that, so far as any particular period of s3C leave is concerned, there can be only one appeal. In the present case the appeal was determined by the Adjudicator in December 2004, and the appellant's s3C leave expired with the time allowed for applying for permission to appeal to the Immigration Appeal Tribunal. The second application, and everything belonging to it, was either prohibited by s3C(4) or, if a variation, has to be regarded as dealt with by the Adjudicator, and the appellant's s3C leave expired within the time allowed for seeking permission to appeal to the Immigration Appeal Tribunal. At the time the third application was made the appellant had no current leave.

28. For that reason also, therefore, the Immigration Judge's error of law was not material.

29. The second matter dealt with by the Immigration Judge was the question of finance, and whether the appellant could comply with the requirements of paragraph 295D(ix). As we have already indicated, he appears to have erred in his approach to the evidence. This issue would only arise, however, if the appellant had had current leave at the time of

the third application. As he did not, the Immigration Judge's error of law is again immaterial.

30. There remains the issue of human rights. We may say only that we see no reason to differ in substance from what the Immigration Judge said. The appellant and his partner have always known that the appellant's position was precarious and they must be assumed to have engaged in their relationship on the basis that the appellant might have to return to Ghana. The only material before the Immigration Judge relating to the question was the appellant's assertion that his partner would not want to live, with their child, in Ghana, and the clear impression he gave that he preferred to remain in the United Kingdom. There was no further evidence before us. There is no provision in the Immigration Rules allowing the appellant to stay in the United Kingdom. There is nothing to suggest that it would not be reasonable to expect him and his family to live in Ghana. Even if that were not reasonably practicable, there is nothing at all to suggest that the appellant's human rights or those of anybody else would be breached by requiring him to return to Ghana and to make an application from abroad in the normal manner. For these reasons we agree with the Immigration Judge that the appellant's removal would not breach any Convention right of his.

31. For the foregoing reasons we order that the Immigration Judge's determination, dismissing this appeal, shall stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: