Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **IA/25943/2012**

THE IMMIGRATION ACTS

At **Birmingham & Field House** Decision signed: **18.03.2015**

on **08.12.2014 & 03.02.2015** sent out: **23.03.2015**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

YI CAO

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Shaheen Haji* (on 8 December) and *Rashid Ahmed* (on 3 February) – both counsel instructed by Aughton Ainsworth, Manchester
For the respondent: Mr Neville Smart (on 8 December) and Mr Sebastian Kandola (on 3 February)

DETERMINATION AND REASONS

1. This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Hariqbal Sangha), sitting at Birmingham on 22 January 2013, to allow a long residence appeal by a

citizen of China, born 9 October 1983. The case has since been to the Court of Appeal, and back again, by way of a consent order; but there is no need to go into all of that for the moment. The permission judge also granted permission to appeal out of time, for reasons he gave.

2. The original challenge to the judge's decision was not on the basis relied on by Mr Smart case before me, as set out in his written submissions, prepared on 21 June 2013 for a previous Upper Tribunal hearing. The point taken is that the appellant had only s. 3C embarkation leave, following the refusal of a previous student application, but before its dismissal on appeal, at the time he made his present long residence application. This is not relied on by way of asserting that his s. 3C leave did not count towards the necessary period of residence; but that it didn't give him the necessary status to make an application, which could be treated as if it were an application for a variation of his previous one.

3. This case is based on *JH (Zimbabwe)* [2009] EWCA Civ 78, and in particular the following passage from the judgment of Richards LJ, effectively the only reasoned one, and worth setting out in full, as Mr Smart did in his submissions.

> 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.
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> 36. Once the operation of s.3C is understood, the concern of the tribunal in *DA Ghana* 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.

4. What happened in this case was as follows:

06.10.2011	appellant's student application refused
21.04.2012	appellant makes long residence application
22.05.2012	dismissal of his student appeal (by Judge Malcolm Parkes) becomes final, on finding false documents used in his student application
30.10.2012	removal decision
11.02.2013	Judge Sangha allows long residence appeal
18.07.2013	deputy Upper Tribunal Judge Satvinder Juss re-makes decision and dismisses appeal
27.08.2013	Upper Tribunal Judge Hugh Macleman refuses permission to appeal
05.12.2013	Sir Stanley Burnton refuses permission to appeal
19.09.2014	consent order sealed in Court of Appeal, 'remitting' appeal to Upper Tribunal

5. It might well be wondered, considering that permission to appeal had been refused, first over a year before by a judge of this Tribunal; and then nearly nine months before by a judge of the Court of Appeal, why the Treasury Solicitors should have consented to such a course. I am not here to read minds; but I have to do whatever it was that the consent order, taken with the statement of reasons attached, said I must.

6. The statement of reasons itself was not particularly illuminating: parties who file, or consent to the filing of such documents, should remember that Lords Justices asked to sign consent orders cannot possibly be expected to read and consider all the material themselves. It is the parties' responsibility to make sure that the terms, preferably set out in the consent order itself, but if not, then in the statement of reasons, should make it quite clear exactly what it is that the Upper Tribunal has been asked to re-decide.

7. That was certainly not done in this case: the closest the statement of reasons came to that aim was to refer to the terms of Judge Macleman's refusal of permission: "Judge Sangha should perhaps not have allowed the appeal, on the findings reached, "under the Immigration Rules", but on the basis only that the decision under appeal was not in accordance with the law". That was a perfectly clear basis for Judge Macleman's decision, where he refused permission, as in due course did Sir Stanley Burnton, on the ground that the appellant had no real case on the merits; but very much less satisfactory as a foundation for this Tribunal re-deciding, if possible, what the real position on its merits might be.

LONG RESIDENCE

8. I have to do the best I can with that task. Judge Sangha was faced with an appeal by a man who had had leave to remain as a student from 2002, but with significant gaps, including one of 88 days in 2009 – 10, till 30 August 2011. On that day he applied for further leave to remain as a student, but was refused on 6 October. It followed (see *JH* (Zimbabwe)) that he had not the necessary status, as a person with s. 3C embarkation leave only, for his long residence application on 21 April 2012 to be considered as a variation of his student application.

9. Only if that application should have been considered at that point would this appellant have been entitled to be treated, subject to the necessary continuity of residence, as a person with ten years' lawful stay under the 'old Rules', in force before 9 July 2012; or to have any realistic prospect of getting indefinite leave to remain on that basis [ie paragraph 276B (i) (a)] under the transitional provisions set out at paragraph 7 of *Edgehill & another* [2014] EWCA Civ 402. Those provisions require a valid application made before 9 July, which this was not. It follows that the appellant was equally not entitled to the benefit of paragraph 276B (ii), dealing with public interest reasons for someone to be allowed indefinite leave to remain.

10. It must equally follow that the question, raised at some length in the appellant's grounds of appeal to the Court of Appeal, about whether the Home Office should have considered whether to use their discretion to disregard the gaps in the continuity of his lawful residence, was entirely irrelevant, because he had no legitimate expectation when he made his application on 21 April 2012 that it would be considered under the 'ten-year rule' at all. Nor did any of the points made there or in the appellant's skeleton argument before me about his position under 276B (ii) help him, for the same reason.

11. The argument raised before the judge for the appellant by his then counsel (not Miss Haji) rested on a misconception as to the effect of *JH* (Zimbabwe) on the position of someone with s. 3C embarkation leave only. It was plainly an error of law on the part of the judge to allow the appeal on that basis, and that part of his decision cannot stand.

12. The judge also allowed the appeal under article 8, without doing any more than referring back to the reasons he had given for allowing it under the Rules. If those had been sustainable, then there would have been nothing much wrong with that, except that it would have been quite unnecessary to refer to article 8 at all. However, the judge's Rules reasons were wrong, on the basis already explained, and his article 8 decision needs to be re-made.

ARTICLE 8

13. That leaves for consideration the proportionality decision to be reached on the balancing exercise between the public interest in the enforcement of immigration law, and the appellant's own right to private and family life, carried out in terms of the general jurisprudence on article 8 (see *MM & others* [2014] EWCA Civ 985). The question was whether or not the result of that exercise showed 'exceptional' or 'compelling' reasons for allowing the appeal under article 8. The parties were told that, if there were any further submissions about that, then I should be prepared to consider them at a short further hearing at Field House on 3 February.

14. On 3 February Mr Kandola referred to

(a) notice of a further decision, served on 13 October 2013, to remove the appellant as an illegal entrant; and

(b) s. 117B of the Immigration and Asylum Act 1999, added by s. 19 of the Immigration Act 2014.

These were of course new points; but, in re-making the article 8 decision, I have to consider the facts and the law as they now stand.

15. On (a), Mr Kandola's submissions were made on the basis of the version of s. 10 of the Immigration and Asylum Act 1999 available in court (Phelan 11th Ed.). This[1] was also the version cited by Helen Mountfield QC in her judgment in *Shahbaz Ali* [2014] EWHC 3967 (Admin) [hearing 5 and 6 November 2014]; but she was dealing with the legality of decisions served on 11 August 2014, before the relevant part of the Immigration Act 2014 was brought into force in October. I on the other hand am dealing with the merits of this appellant's article 8 case, as they stand on the facts and law now.

16. S. 10 (8) as it stood before last October provided that a removal decision under the provisions then in force should invalidate, not only any period of leave affected by the breach of conditions or deception which had led to the decision to remove, but any leave previously given to the person to be removed. It may be that Parliament came to consider that provision unnecessarily draconian; but, for whatever reason, the only equivalent, in the present version of s. 10, is s. 10 (6), which applies only to family members of the person to be removed: s. 10 (8) deals with another point entirely.

17. It follows that Mr Kandola's argument on s. 10 (8) of the Immigration and Asylum Act 1999 must fail; and with it, as will shortly be seen, part of his argument on s. 117B of the Nationality, Immigration and Asylum Act 2002. He might have argued, if it had been clear that the former 10 (8) had been replaced by the Immigration Act 2014, that it nevertheless invalidated, once for all and at the date when the decision to remove the appellant was served on him, any previous leave he had had. I should not have been in the least sympathetic to such an argument, however, since an elementary

[1] See appendix

sense of justice suggests, that, just as the appellant has to take the rough side of the 2014 Act, so he is entitled to the smooth[2].

18. That part of Mr Kandola's argument was based on s. 117B (4), which provides for little weight to be given to private life established at a time when the person concerned had been here unlawfully; so it could not succeed in this case, without s. 10 (8) operating to invalidate all the periods of leave the applicant had had to date. Mr Kandola's alternative submission was based on s. 117B (5): "Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

19. This point requires consideration of the meaning of 'precarious': it is not defined in the Nationality, Immigration and Asylum Act 2002, nor in any other statute of which the parties were aware. Used in a very loose sense in ordinary life, it is a common English word, whose meaning must be a question of fact: often, for example, it has the sense of someone having a precarious hold on life, or on a rock-face (which may come to the same thing, if he is unlucky).

20. On the other hand, in legal language 'precarious' is a term of art, probably best known as referring to the maxim '*Nec vi, nec clam, nec precario*', about the necessary qualities of adverse possession of land, if it is to found a claim by prescription. There it means 'by permission'. I put these alternatives to the parties, who were unable to offer any further aid to construction.

21. Mr Kandola did think there might be one of the Immigration Directorates' Instructions [IDIs] dealing with the point, though he was unable to refer me to it in court. On principle, I should be very reluctant to take the definition of a word in a statute from that used internally by one party to litigation arising under it. However, I had given an opportunity for further submissions, and indicated that I should not be unwilling to look at the IDI in question, if it could be found.

22. Following the hearing, Mr Kandola e-mailed me and the other side with the following extract from the IDIs:

> **3.6. Overview of the 10-year private life route**
>
> Consistent with the public interest considerations set out in section 19 of the Immigration Act 2014 that provide that little weight should be given to a private life established by a person who is in the UK unlawfully or with precarious immigration status, the private life rules provide a stringent set of requirements to be met by applicants. A person is in the UK unlawfully if he requires leave to enter or remain in the UK but does not have it. For the purposes of this guidance, a person's immigration status is precarious if he is in the UK with limited leave to enter or remain but without settled or permanent

[2] or, more elegantly, to adapt the well-known maxim "*Qui sentit onus, sentire debet et commodum*"

status, or if he has leave obtained fraudulently, or if he has been notified that he is liable to deportation or administrative removal.

23. One reason for my willingness is that 'precarious' is a word which appears quite often in the European jurisprudence on this subject. I assume it, or the local equivalent, is in common use on the Continent in the sense concerned: at least I have not so far seen a case where it is defined. Again, I should still be reluctant to take a definition used in a United Kingdom statute from foreign jurisprudence, though that time may be coming, where European courts are concerned.

24. Mr Kandola went on to argue that someone who, like this appellant, has been here all along, so far as he has had leave at all, on a temporary basis as a student, does indeed have a status which is 'precarious'. The word is used in the sense that, each time his leave runs out, he needs to get it renewed; in ordinary language, to ask for permission to stay. Mr Ahmed, on the other hand, maintained first that, so far as the appellant had had leave, his status was not 'precarious' at all.

25. It is worth looking at the relevant sub-sections together:

> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

26. There is a distinction made there, both in terms of definition and of consequences, between 'precarious' and unlawful status. 'Precarious' clearly means some status more secure than that of a person unlawfully here, but less than that of someone with indefinite leave to remain, or other long-term leave, in a category capable of leading to settlement. The question is whether it includes short-term, such as student leave, which is renewable only on application; or whether it is limited to those here with temporary admission or pending an appeal.

27. I have considered the view taken in the IDIs (see **22**), but reached the conclusion that it is wrong. The meaning of 'precarious' status set out there includes that belonging to some categories of people who are unlawfully here (with leave obtained by fraud), some whose lawful status still stands, but on a knife-edge (those notified of their liability to deportation or removal); and some who are unarguably, if impermanently in this country (without settled or permanent status). It partly overlaps, and partly supplements the separate provision in the Rules for people unlawfully here.

28. On the other hand, if the view is taken that someone with limited leave is neither unlawfully here, nor with 'precarious' status, then the legislative scheme in ss. 117 (4) – (5) of the Immigration Act 2014 becomes clear and rational. The 'precarious' status in question may be reserved for those here on temporary admission, or pending resolution of an asylum or other claim, whose presence is tolerated, rather than allowed as a right. Whether that conclusion makes any difference to the result of this case remains to be seen.

29. Mr Ahmed's next submission, and the only other point of law he was able to make in the appellant's favour, was that, as someone who should have been treated as already here with leave for ten years by the time the 'new Rules' came into force on 9 July 2012), this appellant was entitled to the benefit of the decision in *Edgehill & another* [2014] EWCA Civ 402. However, while the appellant had been here since 16 May 2002, he made the application whose refusal is the subject of this appeal on 21 April 2012, at a time when he had only s. 3C leave, and I have already dealt with and rejected Miss Haji's submissions for him on that point, for reasons given at **8 – 11**, including (at **10**) the point made on the gaps in his residence.

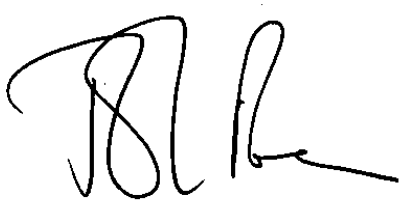
30. Furthermore, this appellant was only here in the first place with short-term student leave, for which he would have had to persuade the Home Office that he intended to leave at the end of his course. He has put forward, not so much an explanation for the false document finding by Judge Parkes, as his own account of taking the ETS test himself, and not by proxy. This is supported by no more, by way of claimed new material, than a letter from the director of studies at his college, identifying him as taking the test by his passport number and date of birth.

31. It has to be said that those details, and if necessary, documents, would have been available to any well-briefed proxy; but what is more, the letter (dated 13 October 2011) was before Judge Parkes, who dealt with it at paragraphs 13 – 22, giving cogent reasons for rejecting the evidence relied on by the appellant. Judge Parkes' decision was never challenged on appeal (again the appellant blames his former representatives), and there is no basis for re-opening his findings now.

32. The only feature of this appellant's case very much in his favour lies in the good works he has done within his own Chinese community. While these of course were praiseworthy in themselves, there was nothing about them to raise any possibility of a finding of exceptional circumstances for allowing his appeal under article 8, taking all the evidence on both sides of the balance into account. Even if the appellant is not to be regarded as someone who established the private life on which he relies while his status here was either unlawful or precarious, that in my view is the only conclusion to be reached.

Home Office appeal allowed: article 8 decision re-made

Appellant's appeal dismissed

(a judge of the Upper Tribunal) 

APPENDIX

(**Immigration and Asylum Act 1999 s. 10**, as previously in force)

(1) 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;

(b) he uses deception in seeking (whether successfully or not) leave to remain;

…

(8) When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him …