Neutral Citation Number: [2021] EWCA Civ 1308

Case Nos: C4/2019/2154, C2/2019/1454
and C2/2019/2801

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**
**(ADMINISTRATIVE COURT)**
**AND FROM THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 August 2021

**Before:**

**LORD JUSTICE PHILLIPS**
**LORD JUSTICE STUART-SMITH**
and
**SIR STEPHEN RICHARDS**

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**Between:**

**THE QUEEN (ON THE APPLICATON OF OLUFUNKE ADENIKE AKINOLA)** — **Appellant**

**- and -**

**UPPER TRIBUNAL** — **Respondent**

**- and -**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT** — **Interested Party**

**THE QUEEN (ON THE APPLICATION OF (1) ADNAN ABBAS (2) MOHAMMAD SARWAR ALAM)** — **Appellants**

**- and –**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT** — **Respondent**

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**Arfan Khan** (instructed by **Dylan Conrad Kreole**) for **Ms Akinola**
**Russell Wilcox** and **Anas Khan** (instructed by **Thompson & Co**) for **Mr Abbas**
**Benjamin Hawkin** (instructed by **Paul John & Co**) for **Mr Alam**
**Lisa Giovanetti QC** and **Ben Keith** (instructed by the **Government Legal Service**) for the **Secretary of State**
The Upper Tribunal did not appear and was not represented

Hearing dates: 13-14 July 2021
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# Approved Judgment

**Sir Stephen Richards:**

1. The Court has before it three applications for permission to appeal which have been listed together for a "rolled-up" hearing with appeals to follow if permission is granted. The central issues in all three cases concern the interpretation and effect of section 3C of the Immigration Act 1971 as amended ("the 1971 Act"), which provides for the extension of immigration leave in certain defined circumstances. They relate in particular to the position under section 3C where an application has been made for variation of existing leave, the application has been refused by a decision of the Secretary of State, and subsequently (i) there is an out-of-time appeal for which an extension of time is granted, or (ii) the Secretary of State withdraws and/or reconsiders the decision. The issues arise in the context of applications under paragraph 276B of the Immigration Rules for indefinite leave to remain on the ground of long residence. In each case the question whether leave was extended by the operation of section 3C is relevant to whether the applicant had accumulated the required "10 years continuous lawful residence in the United Kingdom".

2. This judgment is structured as follows: (1) the legislative framework; (2) the facts of the individual cases; (3) a discussion of the main legal issues; (4) specific consideration of each of the individual cases in the light of that discussion, dealing at the same time with any separate points specific to the case; and (5) a summary of conclusions.

## The legislative framework

*Section 3C*

3. We were provided with various materials on the background to and history of section 3C, including the position under section 14 of the 1971 Act as considered by the House of Lords in *Suthendran v Immigration Appeal Tribunal* [1977] AC 359, and the introduction of the Immigration (Variation of Leave) Order 1976 to protect the rights of an applicant who had submitted an application for an extension of leave to remain before the expiry of their existing leave but whose application could not be decided until after their existing leave had expired. That regime was replaced by the Immigration and Asylum Act 1999, section 3 of which inserted a new section 3C into the 1971 Act.

4. Section 3C itself has been subject to some amendment over the years but the core provisions have remained the same. They read as follows:

> "**3C Continuation of leave pending variation decision**
>
> (1) This section applies if –
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and
>
> (c) the leave expires without the application for variation having been decided.

> (2) The leave is extended by virtue of this section during any period when –
>
> > (a) the application for variation is neither decided nor withdrawn,
> >
> > (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or
> >
> > (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).
>
> (3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.
>
> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
>
> (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).
>
> (6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section ….”

5. That wording is taken from the version in force from 31 August 2006 to 19 October 2014 (which covers the first period relevant to the three cases before us). In the version in force between 20 October 2014 and 30 November 2016 there was inserted a new sub-section (2)(d), whereby the leave is also extended by virtue of the section during any period when “an administrative review of the decision on the application for variation (i) could be sought or (ii) is pending”. An “administrative review” is defined in a new sub-section (7) and is a specific procedure which was not engaged on the facts of the present cases. In the version in force between 1 December 2016 and 30 January 2020 (which covers the last period relevant to the present cases), the only further change was the insertion of a sub-section (3A) whereby leave extended by virtue of section 3C may be cancelled if the applicant fails to comply with a condition attached to the leave or used deception in seeking leave to remain. Again, that provision is not engaged on the facts of the present cases.

6. Section 3C(1)(c) and (2)(a) refer to an application being “decided”. In *R (Topadar) v Secretary of State for the Home Department* [2020] EWCA Civ 1525, [2021] 1 WLR 2307, at [44], Lewis LJ (with whom the other members of the court agreed) held that “it is clear that an application seeking to vary an existing leave is decided within the meaning of section 3C(2)(a) of the 1971 Act when the application is refused” by the Secretary of State and that a subsequent administrative review operates as a review of the refusal decision, not as an extension of the decision-making process. Further,

regulation 2 of the Immigration (Continuation of Leave) (Notices) Regulations 2006 provides that for the purposes of section 3C an application for variation of leave is decided when notice of the decision has been given in accordance with regulations made under section 105 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"); or where no such notice is required, when notice of the decision has been given in accordance with section 4(1) of the 1971 Act.

7. Section 3C(2)(c) refers to the time when an appeal is "pending" within the meaning of section 104 of the 2002 Act. Section 104(1) provides that an appeal under s.82 of that Act is pending "during the period – (a) beginning when it is instituted, and (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99)". Section 104(2) makes further provision as to when an appeal is "finally determined" for the purposes of section 104(1), but the section does not give any guidance as to when an appeal is "instituted". Rule 19(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provides that an appellant "must start proceedings by providing a notice of appeal to the Tribunal"; and rule 19(2) provides that if the person is in the UK "the notice of appeal must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought". Rule 20 concerns the position where a notice of appeal is provided outside the time limit in rule 19. Whether an out-of-time appeal for which an extension of time is granted is "instituted" when the notice of appeal is filed or when the extension of time is granted is another of the issues raised in the present applications.

*Paragraph 276B of the Immigration Rules*

8. Paragraph 276B of the Immigration Rules reads, so far as material:

> "The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> …
>
> (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –
>
> > (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or
> >
> > (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

9. The interpretation and effect of paragraph 276B were the subject of detailed consideration in *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357, [2020] 4 WLR 154. In summary, and so far as relevant here, it was held by

the majority (Underhill and Dingemans LJJ) that the requirements in sub-paragraphs (i) to (v) are intended to be free-standing and self-contained; nonetheless, the provision for disregarding previous periods of overstaying in the second sentence of sub-paragraph (v) ("Any previous period of overstaying …") is misplaced and is to be understood as applying when calculating whether an applicant has accumulated 10 years continuous lawful residence for the purposes of sub-paragraph (i)(a); but it only applies where there are gaps in lawful residence which are "book-ended" by leave, i.e. to any period of overstaying which is both preceded and followed by a period of leave.

*The Secretary of State's guidance*

10. The submissions before us have referred to various documents published by the Secretary of State for the guidance of Home Office staff, though it is axiomatic and is common ground that such guidance cannot affect the construction of section 3C. The documents in question have all undergone repeated revisions in reaction to legislative changes and developments in the case-law. The versions to which particular reference has been made are:

    i) "*Leave extended by section 3C (and leave extended by section 3D in transitional cases)*", version 10.0, published on 18 January 2021 ("the section 3C guidance"). This document sets out the Secretary of State's explanation of when leave is extended by section 3C and how section 3C leave comes to an end.

    ii) "*Withdrawing decisions*", version 3.0, published on 6 February 2020 ("the withdrawals guidance"). This gives Home Office presenting officers advice as to when, in the context of tribunal appeals, it would be appropriate to withdraw a decision or concede a case that is being appealed.

    iii) "*Reconsiderations*", version 10.0, published on 30 July 2018 ("the reconsiderations guidance"). This tells caseworkers what to do when an applicant believes a decision is incorrect and asks for it to be reconsidered.

    I will refer as necessary to particular passages in those documents when considering the issues in the case.

## The facts

11. It is helpful to set out the facts of the individual cases at this stage to provide the context for a discussion of the main issues, though it will be necessary to revert to the individual circumstances when examining how the conclusions reached on the main issues bear upon the situation of each applicant and when considering additional points specific to each.

*Akinola: facts*

12. There is a considerable degree of uncertainty about some of the factual detail in Ms Akinola's case, but the following appears to be common ground.

13. She entered the UK on 26 January 2007 with entry clearance as a student until 31 December 2008. Her leave was subsequently extended to 31 October 2013.

14. On 24 August 2013, prior to the expiry of her existing leave, she applied for a further extension of that leave. The application was refused by a decision of 18 September 2013, still at a time prior to the expiry of her existing leave.

15. Ms Akinola sought to challenge the refusal decision by way of judicial review. That led to a reconsideration but on 25 June 2014 the Secretary of State maintained the decision. A further challenge by way of judicial review was resolved on 20 July 2015 by the Secretary of State agreeing once more to reconsider the decision. Ms Akinola then applied, on 6 August 2015, to vary her original application to include a human rights claim. The Secretary of State's reconsideration of the application, including consideration of the human rights claim, led to a further refusal decision, dated 15 September 2015. Time for appealing that decision expired on 29 September 2015 without an appeal being instituted.

16. On 5 October 2015 a notice of appeal was filed out of time at the First-tier Tribunal ("the FTT"). At a preliminary hearing on 7 December 2015 the FTT granted an extension of time for appealing. At a hearing of the appeal on 25 January 2017, one day before the tenth anniversary of Ms Akinola's entry into the UK, the appeal was withdrawn so that she could make an application for indefinite leave to remain on the basis of long residence.

17. On 7 February 2017 she made her first application for indefinite leave to remain on the basis of long residence. The application was rejected as invalid. Permission to challenge that decision by way of judicial review was refused.

18. On 26 January 2018 she made a further application for indefinite leave to remain on the basis of long residence. On 21 November 2018 the application was refused, on the ground that she could not meet the requirements of paragraph 276B(i)(a) and (v) of the Immigration Rules. An appeal against the decision was dismissed by the FTT on 13 February 2019. Permission to appeal to the Upper Tribunal ("the UT") was refused by the UT on 5 June 2019.

19. Ms Akinola then sought to challenge by way of judicial review that decision of the UT refusing permission to appeal. Permission to apply for judicial review was refused by the Administrative Court on 5 August 2019. An application to the Court of Appeal for permission to appeal was filed out of time on 27 August 2019, with a request for an extension of time. Orders linking this with other cases, ordering the present rolled-up hearing and granting permission to amend the grounds of appeal were subsequently made but the question of extension of time has been left open, together with the question of permission to appeal.

*Abbas: facts*

20. Mr Abbas's present solicitors have been unable to obtain copies of past immigration papers from his previous solicitors, with the result that the factual history in his case has some evidential gaps and uncertainties. On the material before the court, the position is as follow.

21. Mr Abbas entered the UK on 7 March 2009 with entry clearance as a student until 9 July 2012. That period of leave was subsequently extended on various bases up to 27 May 2017.

22. On 27 May 2017, the last day of his existing leave, he applied for indefinite leave to remain on the basis of long residence and private life. The application was refused on 22 November 2017 and certified under section 94 of the 2002 Act as clearly unfounded, with the consequence that there was no in-country right of appeal. An attempted in-country appeal to the FTT was struck out for lack of jurisdiction.

23. On 15 February 2018 Mr Abbas's then solicitors sent a pre-action protocol letter intimating a claim for judicial review of the refusal decision of 22 November 2017. No copy of that letter is available but the consideration given to it on behalf of the Secretary of State is shown by a series of internal emails dated 26 February 2018 and recorded in departmental case record sheets. The caseworker to whom the letter had been allocated indicated a wish to maintain the decision but sought views on the representations raised in the letter that the Secretary of State had failed to take into account that the applicant had a wife and young child. The reaction of a senior caseworker was that the representations raised a good point, with a recommendation "that we withdraw the certificate and look to reconsider the case on a non-prejudiced basis". Although a further email talked in terms of withdrawing the decision of 22 November 2018 and reconsidering it in light of the issues raised, what appears to be the final email in the chain stated that "we have agreed to consider our decision of 22 Nov 2017. I am happy with the decision to refuse [indefinite leave to remain], we just need to address the applicant's wife and child etc within your refusal letter", and asked for a reconsideration. The Secretary of State's actual response to the pre-action protocol letter was sent the following day, on 27 February, and stated, so far as material:

> "You have asked for the following relief:
>
> - For the SSHD to reconsider her decision dated 22 November 2017 and grant your client with leave to remain.
>
> - Alternatively, for the SSHD to withdraw her decision dated 22 November 2017 and provide an in-country right of appeal to your client.
>
> …
>
> Following consideration of the points raised in your letter before claim, enquiries were made with the relevant casework department.
>
> The SSHD has reviewed the decision dated 22 November 2017 and will now proceed to reconsider the matter to address the issues raised in your Pre Action Protocol letter."

24. On the following day, 28 February 2018, Mr Abbas was sent the result of the reconsideration, namely a further decision refusing his application of 27 May 2017 and certifying the claim under section 94 of the 2002 Act. The decision referred to the fact that "following further representations in the form of a Pre-Action Protocol it was agreed to consider the decision of 22 November 2017". To a large extent it repeated the content of the original decision but it added to the reasoning in relation to Mr Abbas's wife and child. The certification under section 94 was in identical terms to those of the original decision.

25. Mr Abbas claims that in the meantime, on 23 February 2018, he had submitted a new application for leave to remain which by paragraph 34BB of the Immigration Rules took effect as a variation of his original application of 27 May 2017; and he says that this variation was not taken into account in the reconsideration and that the decision of 28 February 2018, in purporting to determine the unvaried application, was given in error. The Secretary of State's position is that it was not open to Mr Abbas to vary the application of 27 May 2017, on which a decision had already been made on 22 November 2017, and that in any event the Secretary of State has no record of receiving such a variation application. Furthermore, on 19 February 2018 Mr Abbas had issued a claim for judicial review of the refusal decision of 22 November 2017; that claim was served on the Secretary of State on 26 February 2018; and permission to apply for judicial review was refused on 9 July 2018. Although allowance must be made for Mr Abbas's inability to obtain papers from his previous solicitors, I think it impossible to proceed on the basis that he made a variation application on 23 February 2018, given in particular that there is no documentary evidence whatsoever to show that such an application was made and there is no evidence of any challenge to, or complaint about, the decision of 28 February 2018 on the basis that it had failed to deal with such an application.

26. On 25 July 2018 Mr Abbas made a further application for leave but this was rejected on 9 January 2019 as invalid.

27. Mr Abbas claims that on 29 November 2018 he made a further application by way of variation of his application of 23 February 2018. The Secretary of State has no record of receiving such an application and again there is no documentary evidence to support its existence.

28. On 5 March 2019 Mr Abbas made an application for indefinite leave to remain on the basis of long residence, an application which he says again took effect as a variation of his application of 23 February 2018. This was refused by the Secretary of State on 7 March 2019, essentially on the ground that Mr Abbas's leave had not been extended by the operation of section 3C beyond the date of the decision of 22 November 2017 and he did not meet the requirement of 10 years continuous lawful residence in the UK. Following receipt of a pre-action protocol letter the Secretary of State agreed to reconsider that decision and was provided with further evidence. This led to a reconsideration decision dated 9 July 2019 to the same effect as the decision of 7 March 2019.

29. Mr Abbas then brought a claim for judicial review of the decision of 9 July 2019. Permission to apply for judicial review was refused by the UT. The UT also refused permission to appeal against its decision. Mr Abbas then applied to the Court of Appeal for permission to appeal. That is the application now before us in accordance with the case management directions already mentioned.

*Alam: facts*

30. The factual history in Mr Alam's case is as follows.

31. He entered the UK on 8 August 2008 with entry clearance as a student to 31 December 2011. A subsequent application for leave to remain as a Tier 2 General Migrant resulted in that period of leave being extended to 13 September 2015. The period was then

curtailed, however, to expire on 2 August 2014, because his sponsor ceased to hold a Tier 2 licence.

32. On 2 August 2014, the last day of his curtailed leave, he applied for leave to remain outside the Immigration Rules on compassionate grounds. That application was refused on 15 October 2014 with a right of appeal. The Secretary of State's position is that the refusal decision was served on Mr Alam's then solicitors on 17 October 2014, on which basis time for lodging an appeal expired on 31 October 2014. The solicitors state, however, that they did not receive the decision until 25 March 2015, when it was re-sent to them in the circumstances described below. Mr Alam likewise says that he did not receive the decision until it was re-sent in March 2015.

33. On 7 January 2015 Mr Alam applied for leave to remain as a Tier 2 Migrant. That application was refused on 6 February 2015 without a right of appeal. The refusal decision referred to the previous decision dated 15 October 2014. Mr Alam's solicitors then wrote to the Secretary State, stating that they had not received the decision of 15 October 2014 and requesting that it be re-sent. That is how it came to be received by the solicitors and Mr Alam on 25 March 2015.

34. Following receipt of the re-sent decision of 15 October 2014, Mr Alam on 27 March 2015 filed a notice of appeal out of time against that decision, with a request for an extension of time. On 28 April 2015 the FTT extended time for appealing. It may reasonably be inferred that in exercising its discretion to extend time the FTT accepted Mr Alam's explanation as to the delayed receipt of the decision.

35. The appeal itself was dismissed by the FTT on 24 February 2016. The UT subsequently allowed an appeal against the FTT's decision and remitted the case to the FTT for re-hearing. On 17 January 2017, following the rehearing, the appeal was again dismissed by the FTT. Permission to appeal to the UT was refused by the FTT on 2 August 2017 and by the UT on 27 September 2017. That marked the final determination of the appeal and was the point at which the appeal ceased to be pending within the meaning of section 104 of the 2002 Act.

36. Thereafter, on 11 October 2017, Mr Alam made a further application for leave to remain, on the basis of private life. On 15 February 2018 he varied it to an application for leave to remain on the basis of exceptional circumstances. On 5 July 2018 he varied it again to an application for indefinite leave to remain on the basis of long residence.

37. By a decision dated 12 November 2018 the Secretary of State refused the further application as so varied. The decision proceeded on the basis that Mr Alam's last period of leave expired on 15 October 2014, that he had remained in the UK unlawfully since then, and that as a result he did not meet the requirements of paragraph 276B(i)(a) and (v). It rejected his case on private life and exceptional circumstances. It also found that the application did not meet the test for a fresh claim under paragraph 353 of the Immigration Rules and that Mr Alam therefore had no further right of appeal.

38. Mr Alam applied for judicial review of the decision of 12 November 2018. Permission to apply for judicial review was refused by the UT, which also refused permission to appeal against its decision. Mr Alam then applied to the Court of Appeal for permission to appeal. That is the application now before us in accordance with the case management directions already mentioned.

## General discussion of the main issues

39. The main issues raised in the light of those factual histories are the effect under section 3C of (i) an appeal out of time for which an extension of time is granted, and (ii) a withdrawal and/or reconsideration of a refusal decision. Before I turn to the issues themselves, however, I propose to consider a number of general points concerning the section.

40. First, it is common ground that the purpose of section 3C is to protect the immigration status of those with existing leave who have applied for a variation of that leave and are awaiting a decision of the Secretary of State or are exercising appeal rights in respect of a decision. Without an extension of leave in such circumstances, an applicant would be in the UK unlawfully as an overstayer on the expiry of their original leave. The disadvantages to which overstayers are exposed were summarised by Lord Kerr in *Pathan v Secretary of State for the Home Department* [2020] UKSC 41, [2020] 1 WLR 4506, at [115]-[117], including the following:

> "115. There are two types of effect of becoming an overstayer: immediate and long-term. If one is knowingly an overstayer, one automatically commits an offence under section 24(1)(b) of the 1971 Act and becomes liable to imprisonment for a term of up to six months or a fine. Overstaying also tips a person into the Home Office's 'hostile environment'. Since July 2016 it has been illegal for an overstayer to be in employment. That prohibition remains in place even after an overstayer has applied for a visa extension. It persists until (and if) they are granted leave to remain. Overstayers may find it difficult to rent accommodation and may be prevented from driving.
>
> 116. Long term consequences may be even more serious …."

To similar effect is this summary by Lord Wilson, at [210]-[211], of the consequences for Mr Pathan of becoming an overstayer:

> "210. … The consequences were that, while he remained in the UK, he (a) committed a criminal offence, punishable with imprisonment; (b) became liable to detention pending forcible removal; (c) committed a criminal offence if he continued to work …; (d) ceased to be entitled to state benefits; (e) became disqualified from occupying rented accommodation; (f) became subject to NHS charging provisions; (g) became subject to the freezing of funds in his bank account; (h) became subject to revocation of his driving licence; and (i) in the various circumstances identified … above, became subject to a ban on later re-entry into the UK.
>
> 211. It follows that, when on 7 July 2016 Mr Pathan became an overstayer, legal disabilities at once precluded his continued pursuit of normal life in the UK ..."

41. In so far as it protects an applicant's immigration status and prevents the applicant becoming an overstayer, section 3C also has a potentially important part to play in the accumulation of the 10 years continuous lawful residence in the UK which is a requirement for the grant of indefinite leave to remain under paragraph 276B of the Immigration Rules. Whilst I do not think that that can be said to be a purpose of the section, it is plainly an important aspect of it and provides the context for each of the cases now before us.

42. Section 3C is also framed with a view to avoiding abuse of the protection it provides. Thus, in holding that an application made contrary to section 3C(4) did not operate to extend leave under section 3C(2), the court in *R (Basir) v Secretary of State for the Home Department* [2018] EWCA Civ 2612, [2019] 1 WLR 3057 observed that the purpose of section 3C(4) "is to prevent abuse of the system by the making of successive applications and to ensure that there is only one application to vary leave at any one time" (at [26] per Nicola Davies LJ, with whom the other members of the court agreed). The facts of the present cases might nonetheless be thought to illustrate the existence of a real potential for abuse in the form of successive variations of the original variation application itself, as permitted by section 3C(5).

43. A further general point concerns the structure of section 3C. It envisages three distinct stages during which the section may operate to extend leave: (a) up to the point where the application for variation is decided by the Secretary of State or withdrawn by the applicant; (b) the period during which an in-country appeal against the Secretary of State's decision could be brought (ignoring any possibility of an appeal out of time with permission); and (c) where an in-country appeal is brought, the period during which that appeal is pending. As I understood his submissions, Mr Khan sought to argue on behalf of Ms Akinola that an application is not "decided" within the meaning of section 3C(1)(c) and (2)(a) until any judicial review challenge to, or appeal against, the Secretary of State's decision has come to an end. That argument cuts through the structure of section 3C and is in my view plainly wrong. The language of section 3C(2)(b) ("an appeal under section 82(1) of the [2002 Act] … against the decision on the application for variation") makes clear that the "decision" so referred to is that of the Secretary of State, and the earlier references to the application for variation being "decided" are plainly to be read accordingly. This conclusion accords with the view expressed in *R (Topadar) v Secretary of State for the Home Department* and with the basis of regulation 2 of the Immigration (Continuation of Leave) (Notices) Regulations 2006, as referred to at [6] above.

44. I turn to consider the issues relating to an appeal out of time and to withdrawal and/or reconsideration of a decision.

*Appeal out of time*

45. Formerly it was widely understood that where leave was extended under section 3C, the extension had to be "seamless", in that once it had come to an end it could not revive. Thus, if leave was extended by virtue of section 3C(2)(b) during the period when an appeal could be brought against a decision but an appeal was not brought within that period, the extended leave came to an end on the expiry of the period and could not be revived by a subsequent appeal out of time even if an extension of time was granted and there was then a pending appeal within the meaning of section 104 of the 2002 Act.

46. That understanding was changed by the decision of the UT in *R (Ramshini) v Secretary of State for the Home Department* dated 31 July 2019 (JR/2156/2019). Counsel for the Secretary of State in that case argued in support of the position as then widely understood. UT Judge Lane held otherwise, stating:

> "9. [Counsel for the Secretary of State's] submissions rely heavily upon the respondent's own policy Leave Extended by Section 3C, Version 9.0. This reiterates several times the principle that section 3C leave cannot be resurrected once leave to remain has ceased. That has always been my own view and, indeed, appears to have been that of the applicant's representatives going into this hearing …. I was, however, not directed to any authority which supports that contention although I acknowledge that the use of the word 'extended' would appear, in its ordinary sense, to indicate that leave must be in existence in order that it may be extended or continued. Moreover, the section does not refer at all to the creation of fresh leave.
>
> 10. Having said that, the first use of the word 'extended' in sub-paragraph (2) follows on from the words in (1)(c): '.. the *leave expires* without the application for variation having been decided'. The section does not (as it could have done) speak in terms of leave continuing as if it had not expired. The entire weight of construction which the respondent gives the section rests on the word 'extended'. It is not, in my opinion, distorting the meaning of 'extended' to suggest that leave may be 'extended' following a hiatus during which it may have lapsed. Certainly, the section does not exclude that construction. Moreover, the parties agree that the applicant's circumstances fall within (2)(c). It is clear from the structure of the section that the sub-paragraphs of section 3C(2) are disjunctive. Irrespective of the provisions of the other sub-paragraphs, the applicant's leave, therefore, would, by a simple reading of the words of sub-section (2)(c), be extended during any period when an appeal under Section 82(1) of the 2002 Act, brought while he was in the United Kingdom, was pending within the meaning of section 104 of that Act. On its face, the section makes no reference to continuous periods of leave; indeed, it refers only to '*any* period' …. Section 104 provides that an appeal is pending during the period beginning when it is instituted and ending when it is finally determined, withdrawn or abandoned. There is no definition of the expression 'instituted' as Davis J observed in *Erdogan* [2004] EWHC 541 (Admin). Sweeney J found (and I respectfully agree) that an appeal is 'instituted' at the point when the First-tier Tribunal grants permission to appeal out of time. That proposition was confirmed by the Court of Appeal on appeal (see *Erdogan* [2004] EWCA Civ 1087 at [15])."

47. The Secretary of State now accepts the approach in *Ramshini* and has changed her section 3C guidance to reflect it in the current version 10.0. Accordingly Ms Giovanetti

QC, on behalf of the Secretary of State, accepted before us that an appeal out of time for which an extension of time is granted does cause leave to revive by virtue of section 3C(2)(c) but submitted that it does so only with future effect from the date when the extension of time is granted. On the other hand Mr Khan and Mr Hawkin, for Ms Akinola and Mr Alam respectively, took the approach in *Ramshini* one step further, submitting that when section 3C(2)(c) is engaged by an appeal out of time for which an extension of time is granted, it extends the section 3C leave with retroactive effect so as to make that leave continuous from the end of the period in section 3C(2)(b) when it otherwise expired. As a subsidiary challenge to the analysis in *Ramshini*, Mr Khan argued further that where an extension is granted for an appeal out of time, the appeal is instituted when the notice of appeal is filed, not when the extension of time is granted, and that it is therefore pending for the purposes of section 3C(2)(c) from the time when the notice of appeal is filed.

48. It is therefore common ground that an out-of-time appeal for which an extension of time is granted engages section 3C(2)(c) as a pending appeal and results in a revival of the section 3C leave. The principal question in dispute is whether that leave revives only with future effect or does so with retroactive effect so as to run continuously from the time when it otherwise expired at the end of the period in section 3C(2)(b). I have found that a difficult question. There are substantial pointers in each of the two directions canvassed in argument before us, but also in the direction of the position as widely understood prior to *Ramshini*.

49. At first sight the language of section 3C suggests continuity of leave throughout the various stages or periods in section 3C(2)(a), (b) and (c) in so far as those provisions are engaged. The first condition for the section to apply is that a person who has limited leave to enter or remain in the UK applies for variation of the leave (section 3C(1)(a)). If that and the other conditions of section 3C(1) are met, the opening words of section 3C(2) provide that "the leave" – i.e. that original leave – is "extended" by virtue of the section during any period when section 3C(2)(a), (b) or (c) is engaged. Thus the provision operates on the face of it to extend the original leave, not to confer a fresh grant of leave; and it is straining language to say that the original leave is extended if there is a break in its continuity. The UT in *Ramshini* made the point that the condition in section 3C(1)(c) for an extension under section 3C(2) is that the original leave "expires" without the application for variation having been decided, and that the section does not speak in terms of leave continuing as if it had not expired. Nonetheless the language of extension suggests that the original leave continues without a gap from the point when it otherwise expires. A further pointer towards continuity is the heading to section 3C itself, "Continuation of leave pending variation decision", albeit a section heading carries limited weight.

50. The linguistic considerations do not, however, end there. Another important aspect of the opening words of section 3C(2) is that the leave is extended "during any period when" paragraph (a), (b) or (c) applies. In most cases that wording fits happily with the idea of continuity of leave. Paragraph (a) will apply while a decision is awaited. If a decision is made without an in-country right of appeal, paragraphs (b) and (c) will not be engaged at all. If a decision is made with an in-country right of appeal, paragraph (b) will apply with immediate effect and for so long as an appeal can be brought in time; and if an appeal is brought in time, paragraph (c) will apply thereafter with immediate effect and for so long as the appeal is pending. A difficulty arises, however, where

there is an appeal out of time, leading to a gap between the period covered by paragraph (b) and the period covered by paragraph (c). If the phrase "during any period when" is given its natural meaning, it applies to the period covered by paragraph (b) and to the period covered by paragraph (c) but it does not apply to the gap between them. That would suggest that, if an out-of-time appeal does engage section 3C(2)(c) and causes the revival of section 3C leave, it does so only with future effect and not retroactively from the end of the period covered by paragraph (b) – a result that cannot be reconciled with the idea of continuity suggested by an "extension" of the original leave. Thus, there is a real tension between different elements in the opening words of section 3C(2) itself.

51. The difficulty discussed in the previous paragraph would not arise if the position as widely understood prior to *Ramshini* were correct. On that approach, paragraph (c) would be read as applying only to an appeal brought in time and there would be no gap between the periods in paragraph (b) and (c); whereas an out-of-time appeal would not attract *any* further leave under section 3C, leaving no linguistic tension to be resolved. The bracketed closing words of section 3C(2)(b), "ignoring any possibility of an appeal out of time with permission", could be taken to support that approach if they were read not only as limiting the period covered by paragraph (b) but also as indicating more generally that an appeal out of time with permission is to be ignored. But those words do not have to be read in that way. A perfectly sensible construction is that they apply within paragraph (b) alone, by excluding the *possibility* of an appeal out of time with permission when determining the period covered by that paragraph, but that they do not tell one what happens when there is an *actual* appeal out of time with permission: an actual appeal, whether brought in time or brought out of time with permission, is covered by paragraph (c) so long as the appeal is pending. That must be the construction on which the common ground on the present issue is premised.

52. I turn from linguistic to purposive considerations. To read section 3C(2)(c) as extending leave with retroactive effect, so as to produce continuity of extended leave, in the case of an out-of-time appeal for which an extension of time is granted would accord with the purpose of protecting the position of those who are exercising appeal rights in respect of a decision by the Secretary of State: in particular, protection from the potentially serious consequences of being an overstayer. Where time is extended by the tribunal so as to permit an applicant to bring an appeal out of time, the applicant is exercising appeal rights in the same way as a person who brings an appeal in time; and for the protection conferred by section 3C to be fully effective, the section should operate to extend leave continuously in each case. We were told, moreover, that the FTT and UT adopt the same approach to extensions of time as is applied to relief from sanctions under the Civil Procedure Rules, in accordance with the principles laid down in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 and *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1663, [2015] 1 WLR 2472; and see the UT decision in *R (Onowu) v First-tier Tribunal (Immigration and Asylum Chamber)* [2016] UKUT 00185 (IAC). So the tribunal will look as appropriate at the significance of the delay, at whether there is good reason for it, and at all the circumstances of the case. In a case where the tribunal decides that an extension of time for appealing is justified, there is no obvious reason why the applicant should be in a worse position as regards the continuation of leave under section 3C than a person who brought an appeal in time. The case of Mr Alam, whose appeal was brought many months out of time because of delayed receipt of the Secretary of State's decision,

highlights the potential unfairness of holding that leave under section 3C revives only with future effect from the date when the appeal is instituted. It may be, however, that Mr Alam's case is an extreme one and that in the generality of cases where an extension of time is granted for an out-of-time appeal the gap between the end of the period in section 3C(2)(b) and the time when section 3C(2)(c) is engaged is a relatively short one, with a correspondingly short period during which, on the Secretary of State's case, the applicant is an overstayer.

53. Ms Giovanetti submitted that anomalies and gaps in protection will inevitably arise but that they can be dealt with where appropriate by an exercise of discretion by the Secretary of State. An example is provided by a passage in the section 3C guidance dealing with the withdrawal of a decision. The guidance proceeds on the basis that where a decision by the Secretary of State has brought section 3C leave to an end, the subsequent withdrawal of the decision will cause leave to revive but only from the point of withdrawal, so that the applicant will have been without section 3C leave in the interim. In a passage quoted in full later in this judgment, when I come to consider the topic of withdrawals, the guidance indicates that the applicant should not be disadvantaged by the break in their leave but should be treated as having been lawfully in the UK for the purposes of deciding their immigration applications. Whilst it would be possible to apply a similar approach in respect of a break in leave between the end of the period in section 3C(2)(b) and the point at which an out-of-time appeal engaged section 3C(2)(c), the Secretary of State's discretion does not appear to have been exercised in that way yet; and reliance on discretion would in any event be less satisfactory for applicants than if the effect of engaging section 3C(2)(c) were to extend their leave without such a break. But I accept that the Secretary of State's discretion is *capable* of being exercised so as to mitigate the disadvantages of a gap in leave under section 3C.

54. It is also necessary to face up to the conceptual and practical difficulties of treating section 3C leave as reviving with retroactive effect in the case of an out-of-time appeal for which an extension of time is granted. Where the period in section 3C(2)(b) during which an appeal could be brought comes to an end without an in-time appeal, the immediate consequence will be that leave ceases to be extended under section 3C and the applicant becomes an overstayer. That will continue to be the position unless and until an extension is granted for an appeal out of time so as to bring the case within section 3C(2)(c). If, however, the case is then brought within section 3C(2)(c) and leave is thereby extended with retroactive effect from the point where it previously came to an end, it will result in a complete reversal of the legal state of affairs during the interim period. Instead of being an overstayer, with all the consequences of that status (criminal liability, liability to detention pending removal, prohibition on employment, etc.), the applicant's presence in the UK during the interim period will have been rendered lawful; and things lawfully done in relation to the applicant as an overstayer during the interim period, such as detention or termination of employment, will have been rendered unlawful. The applicant's relationship with the state and with third parties may be affected. To put it another way, on one and the same date the applicant will have been present in the UK unlawfully, by the effect of section 3C(2)(b), and lawfully, by the effect of section 3C(2)(c). Ms Giovanetti described such consequences as bizarre and submitted that if Parliament had intended such a result one would expect clear words to that effect.

55. That is a powerful argument. It is true that the retroactive reversal of a prevailing legal state of affairs can happen when a decision by the Secretary of State is subsequently quashed by the court on judicial review. If the decision carried no right of appeal and brought section 3C leave to an end, the immediate result of the decision will have been to make the applicant an overstayer and subject to the legal incidents of overstaying. All that, however, will be reversed upon the making of a quashing order: it will be as if the Secretary of State's decision had never been made and the applicant had had leave under section 3C(2)(a) throughout because the application for variation had not, after all, been decided. But I acknowledge that that is a very particular situation, in which the issue of a quashing order depends on the exercise of discretion by the court and the effect of the order is to cut the original decision out of the picture. It is very different from the position contended for by the applicants here, in which the statute automatically produces two contradictory states of affairs, by bringing section 3C leave to an end on the expiry of the period in section 3C(2)(b) but then conferring section 3C leave from the same point once an out-of-time appeal engages section 3C(2)(c).

56. I think it possible in principle for a legislative provision to produce such a result, as was implicitly recognised by Ms Giovanetti in her argument that if Parliament had intended that result here one would expect clear words to that effect. But I accept that clear words would indeed be required to produce it. As already explained, the language of section 3C is far from clear and there is on the contrary a real linguistic tension within the section. Purposive considerations favour the applicants' approach to the section but in my judgment they are not strong enough to carry the day. I feel driven reluctantly to the conclusion that the approach taken by the Secretary of State is the correct one, even though it results in a gap in the protection afforded by section 3C to applicants who appeal out of time, however good their reasons may be for the delay. This conclusion also produces an equivalence of approach between out-of-time appeals and withdrawals, considered below, in that in both situations it is possible for section 3C leave to lapse but then to revive with future effect, leaving a gap in continuity. I would hope that the Secretary of State would feel able to exercise her discretion to mitigate the disadvantages of the gap in relation to out-of-time appeals in the same way as she has done in relation to withdrawn decisions.

57. In conclusion on this issue, I should indicate that although the position as widely understood prior to *Ramshini*, whereby section 3C leave cannot revive once it has been lost (so that section 3C(2)(c) cannot apply at all to an appeal out of time), has a certain attraction in terms of purely linguistic considerations and does not create any problems of retroactivity, it would result in a much greater loss of protection for applicants and is a construction I would lean against for that reason. It does not have sufficient attraction overall to cause me to challenge the common ground in this case that section 3C(2)(c) can apply to an out-of-time appeal for which an extension of time is granted.

*At what point in time does an out-of-time appeal engage section 3C(2)(c)?*

58. Section 3C(2)(c) applies when an appeal against the Secretary of State's decision, brought while the appellant is in the UK, "is pending (within the meaning of section 104 of [the 2002 Act])". Section 104(1) provides that an appeal is pending "during the period – (a) beginning when it is instituted …". If the effect of an out-of-time appeal engaging section 3C(2)(c) were to extend leave retroactively from the end of the period in section 3C(2)(b), nothing would turn on when precisely such an appeal is instituted. If, however, I am correct that the effect of an out-of-time appeal engaging section

3C(2)(c) is to cause leave to revive only with future effect from the time when the appeal is instituted, the question of when such an appeal is instituted assumes a potential importance. It could, in particular, affect whether an applicant has accumulated 10 years continuous lawful residence in the UK: short periods of overstaying may fall to be disregarded under the terms of paragraph 276B of the Immigration Rules as interpreted in *Hoque v Secretary of State for the Home Department* (see [9] above), so that the length of the gap between leave coming to an end under section 3C(2)(b) and the revival of leave under section 3C(2)(c) could make a difference to the calculation. It is right to note that it would not make any difference in practice to any of the three cases before us. But since the issue has been canvassed in argument before us and is closely related to the wider issue just considered, I propose to deal with it.

59. The UT in *Ramshini*, citing *R (Erdogan) v Secretary of State for the Home Department* [2004] EWCA Civ 1087, held that an appeal is instituted at the point when the FTT grants permission to appeal out of time, i.e. when the FTT decides to extend time for appealing. The Secretary of State has again accepted that position. Mr Khan submitted, however, that the decision in *Erdogan* is distinguishable and that on proper analysis an out-of-time appeal is instituted when the notice of appeal is filed, even though the existence of a valid appeal from that date will depend on the later grant of an extension of time.

60. As mentioned at [7] above, section 104 of the 2002 Act itself gives no guidance as to when an appeal is instituted, and one needs to look for that purpose at rules 19 and 20 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Rule 19 provides in material part:

> "**19. Notice of appeal**
>
> (1) An appellant must start proceedings by providing a notice of appeal to the Tribunal.
>
> (2) If the person is in the United Kingdom, the notice of appeal must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought."

Rule 20 deals specifically with a late notice of appeal. It reads:

> "**20. Late notice of appeal**
>
> (1) Where a notice of appeal is provided outside the time limit in rule 19, including any extension of time directed under rule 4(3)(a) (power to extend time), the notice of appeal must include an application for such an extension of time and the reason why the notice of appeal was not provided in time.
>
> (2) If, upon receipt of a notice of appeal, the notice appears to the Tribunal to have been provided outside the time limit but does not include an application for an extension of time, the Tribunal must (unless it extends time of its own initiative) notify the person in writing that it proposes to treat the notice of appeal as being out of time.

> (3) Where the Tribunal gives notification under paragraph (2), the person may by written notice to the Tribunal contend that –
>
> (a) the notice of appeal was given in time; or
>
> (b) time for providing the notice of appeal should be extended,
>
> and, if so, that person may provide the Tribunal with written evidence in support of that contention.
>
> (4) The Tribunal must decide any issue under this rule as to whether a notice of appeal was given in time, or whether to extend the time for appealing, as a preliminary issue, and may do so without a hearing.
>
> (5) Where the Tribunal makes a decision under this rule it must provide to the parties written notice of its decision, including its reasons."

Rule 4(3)(a), to which reference is made in rule 20(1), is part of the FTT's general case management powers and provides that the tribunal may "extend or shorten the time for complying with any rule, practice direction or direction".

61. Thus, by rule 19(1), proceedings are to be started by providing a notice of appeal to the tribunal (to which I will refer as the filing of the notice of appeal). The time limit for an in-country notice of appeal is given by rule 19(2) but that time limit may be extended by the tribunal either in advance, pursuant to rule 4(3)(a), or subsequently, pursuant to rule 20. Where no such extension of time is granted, there will be no valid appeal and the notice of appeal will be ineffective. But where an extension of time is granted, it seems to me that it will be granted up to the date when the notice of appeal was filed; and in considering whether to grant such an extension, the tribunal will focus on the reasons for delay up to that date. Any further lapse of time between the date when the notice of appeal was filed and the date when the application for an extension of time is decided will depend upon the tribunal's own workload, resources and priorities and will generally be irrelevant to the decision. In the circumstances I take the view that when an extension of time is granted, it renders the notice of appeal effective from the date when it was filed, so that the appeal proceedings are instituted at that date rather than at the date when the decision to extend time is made or written notice of it is provided to the parties.

62. *R (Erdogan) v Secretary of State for the Home Department* was concerned with an earlier and different legislative regime. The context was the withdrawal of asylum support on the expiry of the time limit for an appeal to the Immigration Appeal Tribunal from an adjudicator's dismissal of an appeal against refusal of an asylum claim. Entitlement to support depended *inter alia* on whether there was still a pending appeal. Rule 15(1) of the Immigration and Asylum Appeals (Procedure) Rules 2003 provided that "An appeal from the determination of an adjudicator may only be made with the permission of the Tribunal upon an application made in accordance with these Rules". Rule 16 provided how and when an application was to be made. In particular, rule 16(1) provided that "An application notice for permission to appeal must be filed" within specified time limits which varied according to the nature of the case; and rule

16(2) provided that "The Tribunal may extend the time limits in paragraph (1) if it is satisfied that by reason of special circumstances it would be unjust not to do so". Accordingly, as observed by Newman J at [10] of his judgment, with which the other members of the court agreed: "It follows that, unless and until the tribunal has extended time, there is no appeal within the meaning of the rules because the limits in paragraph 1 will not have been met". The judgment went on to consider the position under section 104 of the 2002 Act, which again was in materially different terms from the version of the section in force at times relevant to the present cases: in particular, section 104(2) provided that an appeal was not finally determined "while a further appeal … (b) may be brought (ignoring the possibility of an appeal out of time with permission)". In a rather densely reasoned passage, Newman J said this:

> "15. As a matter of general approach to time limits in connection with an appeal, it seems to me that, since an application for permission to appeal within a statutory time limit exists as a statutory right, it has a character which an application made out of time does not. The existence of a discretionary power to extend time upon application being made gives rise to a procedural right which is inchoate in character. However, in this instance, the result is, in my judgment, driven by the terms of section 104. Further, section 104(2)(b) includes within the meaning of a pending appeal the situation where an appeal has not been instituted, but the period when an appeal 'may be brought' is still running. It is not simply the institution of an appeal which creates a pending appeal; it is the currency of the time limit. The words in brackets, "ignoring the possibility of an appeal out of time with permission", point to such an application being different in kind. The rules, in my judgment, make the position clear. Rule 16(2) in terms provides that if permission to appeal out of time is granted, then the appeal will be in accordance with paragraph 1 of rule 16. Once that occurs, there will be a pending appeal within section 104.
>
> 16. The judge relied upon the word 'instituted' and observed that it was not defined in the legislation. With respect, the word 'instituted', in connection with an appeal means proceedings which commence an appeal, not an application ancillary to those proceedings. Further, rules 15 and 16 show how an appeal is to be instituted."

63. Given the different wording of the primary legislation and the rules in force at the time, and the extent to which Newman J's reasoning was based on such wording, the judgment in *Erdogan* case appears to me to be distinguishable and to provide no real assistance in determining when an appeal out of time is instituted in accordance with the legislative regime that governs the present cases. In distinguishing *Erdogan* on a different issue in *R (Secretary of State for the Home Department) v Immigration Appeal Tribunal* [2004] EWHC 3161 (Admin), Collins J noted at [44] that "the Rules did not at that stage provide for an appeal to exist in circumstances where there was an application to the Tribunal out of time".

64. Accordingly, the UT in *Ramshini* was in my judgment wrong to rely on *Erdogan* on this issue and wrong to reach the conclusion it did on the issue. In my judgment, for the reasons given above, where an extension of time is granted for an appeal out of time, the date when the appeal is instituted and becomes a pending appeal within section 3C(2)(c) is the date when the notice of appeal was filed, not the date when the extension of time was granted. That involves the acceptance of an element of retroactivity, in that where the grant of an extension of time post-dates the filing of the notice of appeal it causes leave to revive from the earlier date when the notice of appeal was filed. In this case, however, it seems to me to be the clear result of the relevant legislative provisions.

*Withdrawal/reconsideration*

65. As already mentioned when considering out-of-time appeals, where a decision by the Secretary of State refusing an application for variation of leave is subsequently quashed by the court in proceedings for judicial review, the quashed decision has no legal effect for the purposes of section 3C, so that the application for variation will not have been "decided" until a fresh decision is taken on the application, and leave will continue to be extended under section 3C(2)(a) in the meantime. So much is common ground. But Dr Wilcox, on behalf of Mr Abbas, submitted that the effect of the Secretary of State's *withdrawal* of a decision, at least where it is withdrawn because of a recognition that it is defective, is functionally equivalent to the quashing of a decision by the court and has the like consequence that the application for variation will not have been decided until a fresh decision is taken on the application, and leave will continue to be extended under section 3C(2)(a) in the meantime. I did not understand him to argue that the mere reconsideration of a decision has the same consequence, but it appeared to be part of his case that it may be implicit from a decision taken on reconsideration that the original decision has been withdrawn and replaced by the fresh decision, with the same consequence for the continuation of leave until the date of the fresh decision.

66. The Secretary of State's position is more nuanced. A decision can be withdrawn for a range of reasons. The withdrawals guidance (at page 5) gives examples of circumstances where a decision may be withdrawn in the context of tribunal appeals: where there is a clear caseworking error which means that the decision is fatally flawed; where there has been a clear change in circumstances such as a change in country conditions or a change in policy; or where there is new evidence available, which when assessed on the appropriate standard as genuine leads to the conclusion that the decision to refuse is no longer sustainable and a grant of leave or status, subject to security and other checks, is now appropriate. But it is submitted that, whatever the context and whatever the reason for withdrawal, the consequence for leave under section 3C is the same. The withdrawal of a decision does not involve an acceptance that the decision was a nullity or deprive the decision of legal effect from the time it was made, as would be the case if the decision were quashed by the court. The decision ceases to have effect only from the date when it is withdrawn. Applying that to section 3C, the Secretary of State's approach reflects that adopted in relation to out-of-time appeals in the light of *Ramshini*. The position taken is that withdrawal does not operate retroactively to reverse the previous effect of the decision but it may cause leave under section 3C to revive for the future as from the date of withdrawal, because at that point a decision on the variation application becomes outstanding again. Discretion will, however, be exercised so that the gap in section 3C leave does not cause the person to be disadvantaged in relation to immigration applications.

67. The Secretary of State's approach is reflected more fully in the section 3C guidance (at page 7), under the heading "Withdrawn decisions":

> "Where a decision is withdrawn by the Secretary of State and the person has section 3C leave because of a pending appeal or administrative review, their section 3C leave will continue but will revert to leave under section 3C(2)(a) instead of section 3C(2)(b) as a decision on the original application will be outstanding.
>
> Where a decision has been taken which has brought 3C leave to an end, and that decision is subsequently withdrawn the 3C leave will be resurrected from the point the decision is withdrawn.
>
> [Withdrawing a decision has no effect on section 3C leave if the person did not have 3C leave at the time the decision was withdrawn.]
>
> This is a change from the previous policy position and reflects a change in caselaw. There will still have been a break in the 3C leave from the point the decision bringing 3C leave to an end was served until it was withdrawn. For example, if the decision that brought 3C leave to an end was served on the 10 August and was not withdrawn until the 25 August, from the 10 August to the 24 August the person will have been without leave. However, where a decision is withdrawn and there is an application for leave outstanding, or a new application is made after a decision has been withdrawn, the person should not be disadvantaged by the break in their leave in having that application considered. This means you should treat the person as having been lawfully in the UK for the purposes of deciding the immigration application."

I have placed square brackets around the third paragraph quoted because I find it difficult to reconcile with the rest: at best, it is badly expressed. But the rest of the passage sets out a consistent approach to the effect of withdrawals on section 3C leave.

68. Strictly speaking, it is unnecessary to decide this issue, because it is raised only on behalf of Mr Abbas and, as explained later, I consider that there was on the facts no withdrawal of the original decision in Mr Abbas's case. Again, however, since the issue was fully argued before us and is closely related to the effect under section 3C of an out-of-time appeal, I think it right to express a view on it. In my judgment, the analysis put forward on behalf of the Secretary of State is correct. I do not accept that the withdrawal of a decision, even where the reason for withdrawal is a perceived defect in the decision, is functionally equivalent to the quashing of the decision by the court or has the consequence of causing leave to be extended retroactively under section 3C from the date of the decision. The withdrawal does not reverse the previous legal position but can cause leave to revive under section 3C(2)(a) for the future because, from the date of withdrawal and until a fresh decision is taken, the application for variation can no longer be said to have been decided.

69. The position with regard to *reconsiderations* can be dealt with more quickly. A reconsideration is an internal review of the original decision. The reconsiderations guidance sets out the circumstances in which a formal request for reconsideration can be made and how it is to be dealt with, but reconsiderations can also take place for other reasons such as in response to a pre-action protocol letter or an actual claim for judicial review. Reconsideration can lead in practice to a variety of results, from simply maintaining the original decision to issuing a new decision with additional reasoning but with the same outcome or issuing a new decision with a different outcome. Caseworkers are instructed by the reconsiderations guidance (page 36) that if they reconsider the case and decide that it should have been refused for different reasons they must withdraw the original decision and issue a new decision notice. But I do not read the guidance as meaning that the issue of a new decision notice carries with it a necessary implication that the original decision has been withdrawn. It seems to me that withdrawal of the original decision normally requires a positive step, distinct from the making of a new decision. Moreover, the position is complicated in practice by the fact that a reconsideration may take into account not only the matters considered in the original decision but also additional arguments or evidence put forward subsequently. It happens not infrequently in proceedings for judicial review that a new decision is made to the same effect as the original decision but taking into account matters raised in the claim for judicial review, so that the focus of the judicial review then shifts from the original decision to the new decision. This is not because the original decision has been impliedly withdrawn or has ceased to have legal effect, but because it has become academic. In any event, if there is a withdrawal of the original decision, I have dealt above with the effect of that withdrawal on section 3C leave; but if there is no withdrawal of the original decision, I am satisfied that the making of a new decision on a reconsideration does not change the status of the original decision or its effect on section 3C leave.

## Consideration of the individual cases

70. I turn to consider the individual cases of the three applicants in the light of the general discussion above.

*Akinola*

71. There is a series of reasons why Ms Akinola's claim cannot succeed, each one sufficient to dispose of her claim.

72. First, the Secretary of State's decision of 18 September 2013 refusing Ms Akinola's application for a further extension of her existing leave was made before the expiry of that existing leave on 31 October 2013. It follows that Ms Akinola did not satisfy the condition in section 3C(1)(c) that "the leave expires without the application for variation having been decided", and that section 3C was simply not engaged. That limitation on the scope of the section may seem surprising but is unavoidable on the language of the provision.

73. The position would of course be different if the decision of 18 September 2013 had subsequently been quashed; but the two applications for judicial review that followed did not have that result. The first resulted only in an agreement to reconsider the decision. The second led to a further refusal decision, taking into account an additional human rights claim as well as the original application. Those steps did not affect the

validity or effect of the decision of 18 September 2013. Mr Khan was right not to seek to argue the contrary. I have explained above why the argument he did appear to me to advance, that the original application was not "decided" until any judicial review challenge to, or appeal against, the Secretary of State's decision had come to an end, is untenable.

74. Since section 3C was not engaged at all, it could not operate to extend Ms Akinola's leave beyond its expiry date of 31 October 2013. It follows that she did not have any extended leave under section 3C at the date of the further decision of 15 September 2015 and that there was no basis for any further extension during the period when an appeal could be brought against that decision (section 3C(2)(b)) or during the pendency of the appeal that was brought out of time (section 3C(2)(c)).

75. Further, even if she had had extended leave under section 3C up to and including her appeal against the decision of 29 September 2015, it would have come to an end on her withdrawal of that appeal on 25 January 2017, since there ceased at that time to be a pending appeal. At that point she was still one day short of the tenth anniversary of her entry into the UK. She was in any event already far short of 10 years continuous lawful residence in the UK, but since there is no "near miss" principle even that one day would be sufficient to establish that she had not acquired 10 years of such residence at the date of her application of 26 January 2018 for indefinite leave to remain.

76. Accordingly, the Secretary of State's refusal decision of 21 November 2018 was plainly correct in finding that Ms Akinola could not meet the requirement of paragraph 276B(i)(a) of the Immigration Rules as to 10 years continuous lawful residence; and the FTT was equally plainly correct, in its decision of 13 February 2019, to dismiss Ms Akinola's appeal on that issue. The judicial review challenge to the UT's refusal of permission to appeal against the FTT's decision is unarguable; the Administrative Court was undoubtedly correct to refuse permission to apply for judicial review.

77. A yet further consideration arises out of a respondent's notice for which permission is needed because it was filed late. It raises the argument that Ms Akinola failed to meet the separate requirement in paragraph 276B(v) that an applicant for indefinite leave to remain on the ground of long residence "must not be in the UK in breach of immigration laws": on any view she did not have leave, and was in the UK unlawfully, at the date of the application of 26 January 2018 that was the subject of the Secretary of State's decision of 21 November 2018. If anything turned on it, I would grant permission for the respondent's notice despite its lateness and would uphold the argument that it raises. Ms Akinola's inability to meet the requirement of paragraph 276B(v) was expressly relied on in the decision of 21 November 2018 as a separate factor from her inability to meet the requirement of paragraph 276B(i)(a), and although the point did not feature in the FTT's dismissal of her appeal against that decision, it is in my view a point on which the Secretary of State is entitled to rely as an additional reason why the present judicial review challenge should fail. Since, however, the challenge must fail in any event, it is unnecessary to go into any greater detail on the issue.

78. That brings me finally to Ms Akinola's application for permission to appeal to this court. I would not refuse the relatively short extension of time required, although the Secretary of State takes issue with the adequacy of the explanation given and the reliability of the supporting evidence. I would, however, refuse permission to appeal. An appeal has no prospect of success. As regards the application of the "second appeal"

criteria which apply in substance to this case (following *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663), this judgment does address important points of principle but those points are covered sufficiently by the other two cases before us. Ms Akinola's case is not needed for them and could not get off the ground whichever way they were decided.

*Abbas*

79. On the face of it, Mr Abbas's leave under section 3C ended on 22 November 2017, the date of the original decision by the Secretary of State refusing the variation application of 27 May 2017. That was the point at which the application for variation was decided within section 3C(2)(a); and since there was no in-country right of appeal, section 3C(2)(b) was not capable of being engaged.

80. Section 3C can have operated to extend leave beyond the date of the original decision only if the circumstances of the Secretary of State's agreement to reconsider it in February 2018, and/or the further decision dated 28 February 2018 reached on the reconsideration, had the consequence of depriving the original decision of legal effect so that it did not, after all, "decide" the application for variation for the purposes of section 3C(2)(a). For the reasons given in the general discussion above I take the view that even a withdrawal of the original decision, and *a fortiori* a reconsideration leading to a further decision without a withdrawal of the original decision, would not have had such a consequence; and I have rejected Dr Wilcox's specific argument that a withdrawal in recognition of a defect in the original decision is functionally equivalent to a defective decision being quashed by the court. In any event, however, I am not persuaded that on the facts of Mr Abbas's case the Secretary of State did withdraw or agree to withdraw the original decision. Whilst the possibility of withdrawal was discussed internally, all that was agreed to in the response to Mr Abbas's solicitors was a reconsideration of the original decision. The reconsideration led to a further decision, again both refusing the application and certifying it under section 94 of the 2002 Act. For practical purposes, including any further judicial review challenge, the new decision replaced the original decision, but it did not deprive the original decision of its legal effect, including its effect in bringing Mr Abbas's section 3C leave to an end.

81. I should deal briefly here with two alternative arguments advanced by Dr Wilcox in relation to the circumstances that led to the February 2018 reconsideration. The first was reliance on the doctrine of "collateral challenge" in seeking to argue that the court should make a finding in the present proceedings that the original decision of 22 November 2017 was flawed by legal error and was invalid. Cases such as *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 (at [70] per Lord Dyson) and *Boddington v British Transport Police* [1999] 2 AC 143 are cited in support of the proposition that a person can rely on a public law error in proceedings other than judicial review; and it is argued that there is no good reason why a challenge of that kind should not be permitted "in the context of public law challenges to subsequent decisions which seek to rely upon an earlier unlawful decision, especially where a challenge to the lawfulness of that earlier decision was compromised on the obvious basis that it could not be sustained" (to quote from Dr Wilcox's skeleton argument). I am extremely doubtful about the appropriateness in principle of entertaining a collateral challenge of that sort in the present proceedings, but I consider it unnecessary to decide the point because in my view the factor that caused the Secretary of State to reconsider the decision of 22 November 2017, namely the

perceived need to address the position of Mr Abbas's wife and child, fell short of establishing that the decision was flawed by legal error and was invalid.

82. The other alternative argument put forward by Dr Wilcox relied on the principle of legitimate expectation articulated in cases such as *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 (in particular per Laws LJ at [68]) and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61, [2009] AC 453 (in particular per Lord Hoffman at [60]). It was submitted that the Secretary of State's reconsideration of the decision of 22 November 2017 (or, as Dr Wilcox characterised it, the withdrawal of that decision) amounted to an unequivocal representation or acceptance that the decision was defective and invalid. In my view the submission is plainly unsustainable. The circumstances surrounding the reconsideration came nowhere near to engaging the principle of legitimate expectation through any such representation or acceptance.

83. It follows from the above that Mr Abbas did not have any extended leave under section 3C after 22 November 2017 and in particular that the reconsideration decision of 28 February 2018 did not affect the position under section 3C. In setting out the facts of the case I have explained why reliance cannot be placed on the claimed variation applications of 23 February 2018 and 29 November 2018. When Mr Abbas made his further application of 5 March 2019 for indefinite leave to remain on the basis of long residence, it was rightly refused (both in the decision of 7 March 2019 and in the reconsideration decision of 9 July 2019) on the ground that his leave had not been extended by the operation of section 3C beyond the date of the decision of 22 November 2017 and he did not meet the requirement of 10 years continuous lawful residence in the UK. Permission to apply for judicial review of the decision of 9 July 2019 was likewise rightly refused by the UT.

84. Nonetheless, since Mr Abbas's one ground of appeal, concerning the effect of withdrawal and/or reconsideration of a decision on leave under section 3C, does raise an issue of some importance, I would grant his application for permission to appeal; but I would dismiss the substantive appeal.

*Alam*

85. The starting point for consideration of Mr Alam's case is his entry into the UK on 8 August 2011 with leave that, as a result of a subsequent extension and then curtailment, lasted until 2 August 2014.

86. His application on the last day of that period, 2 August 2014, for further leave to remain resulted in the extension of the previous leave by virtue of section 3C(2)(a) until the application was decided. The application was decided by the Secretary of State's refusal decision dated 15 October 2014. I have referred above to the evidence that, although the decision was sent in October 2014, it was not received by Mr Alam or his solicitors until a copy was re-sent to them in late March 2015. It has not, however, been argued that the application of 2 August 2014 was on proper analysis decided only when a copy was re-sent in late March 2015 or that the appeal then brought against the decision was brought in time. Mr Alam proceeded at the time, and has proceeded before us, on the basis that the appeal was out of time and that an extension of time was needed; and, as I have said above, the reasonable inference is that in granting the extension of time the FTT accepted his explanation as to delayed receipt of the decision. It follows

that subject to the effect of the appeal out of time Mr Alam's leave had ceased to be extended by virtue of section 3C on 31 October 2014, on the expiry of the period during which an appeal could be brought against the decision of 15 October 2014.

87. The grant of an extension of time resulted in a pending appeal, with the consequence that section 3C(2)(c) became engaged. For reasons given in the general discussion above, however, the consequence of the appeal being out of time was that section 3C leave revived only with future effect from the date when the notice of appeal was filed (27 March 2015), and not with retroactive effect from the date when it had previously ended. It continued from 27 March 2015 until the final determination of the appeal, on 27 September 2017. At that point, however, it came to an end once again.

88. It follows that the further applications for leave to remain that Mr Alam made on 11 October 2017 and, by way of variation, on 15 February 2018 and 5 July 2018 were all made at a time when he had no existing leave and were all incapable of extending his previous leave. Moreover, his period of continuous lawful residence in the UK fell far short of 10 years. Even if I had accepted Mr Hawkin's submission that the out-of-time appeal caused section 3C leave to revive with retroactive effect from 31 October 2014 and that it ran continuously thereafter until 27 September 2017, the period of continuous lawful residence in the UK would still have been under 9 years 2 months. In the circumstances Mr Hawkin was forced to concede that the Secretary of State had been entitled to find, in the decision of 12 November 2018, that Mr Alam did not meet the requirements of paragraph 276B(1)(a) and (v).

89. Mr Hawkin maintained a separate challenge, however, to the finding in the decision of 12 November 2018 that Mr Alam's application did not amount to a fresh claim under paragraph 353 of the Immigration Rules, such as to confer a right of appeal to the FTT. He submitted that the case was substantially different by the time of the decision from that which had previously been considered by the FTT and that it had a realistic prospect of success on an appeal. He submitted in particular that the Secretary of State's consideration of the private life claim and of the overall circumstances of the case was affected by, and the refusal to accept it as a fresh claim was premised on, the erroneous belief that Mr Alam's leave under section 3C had expired at the end of October 2014 so that his period of lawful residence in the UK had been almost 3 years shorter than was in fact the case.

90. In my judgment, the challenge to the refusal to treat Mr Alam's application as a fresh claim is unarguable. The decision of 12 November 2018 set out the test in paragraph 353 of the Immigration Rules, whereby "the submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered", and they "will only be significantly different if the content: (i) had not already been considered; and (ii), taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection". In the application of that test, the submissions were found not to be significantly different from the material previously considered. That is an unsurprising conclusion. The material submitted in support of the application consisted largely of generalities in solicitors' submissions about private life, with very little in the way of specific evidence relating to Mr Alam personally (including the very limited information contained in the long residence application form, his passport, a 'pass' certificate for the "Life in the UK" test and some bank statements). A challenge to a decision that submissions do not amount to a fresh claim can only succeed if it is shown that the Secretary of State's

decision is *Wednesbury* unreasonable: *R (AT (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 413 at [39], citing previous authority. It cannot in my view be said that the decision on the issue in this case was *Wednesbury* unreasonable. For reasons already given I do not accept that there was any mistake in the calculation of the period of continuous lawful residence in the UK; but even if I had accepted that the period of such residence was some three years longer than found in the decision, that would have been insufficient in my judgment to flaw the decision or to create a realistic prospect of success on appeal.

91. Mr Alam's amended grounds of appeal relate to (1) the effect on section 3C leave of an appeal out of time for which an extension of time is granted, (2) the question whether he had 10 years continuous lawful residence in the UK, and (3) the fresh claim issue. I would grant him permission to appeal on ground (1) but would dismiss the substantive appeal on that ground. I would refuse permission to appeal on grounds (2) and (3).

**Conclusion**

92. For the reasons given above:

i) I would refuse Ms Akinola's application for permission to appeal.

ii) I would grant Mr Abbas permission to appeal on his one ground of appeal (relating to the effect of withdrawal/reconsideration on leave under section 3C) but would dismiss the substantive appeal.

iii) I would grant Mr Alam permission to appeal on his first ground of appeal (relating to the effect on section 3C leave of an appeal out of time for which an extension of time is granted) but would dismiss the appeal on that ground. I would refuse him permission to appeal on his other two grounds of appeal.

**Lord Justice Stuart-Smith:**

93. I agree.

**Lord Justice Phillips:**

94. I also agree.