SECTION 3C LEAVE

A note on section 3C leave, covering what it is, when it applies and how it ends or can be cancelled.

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SCOPE OF THIS NOTE

This note provides information on section 3C leave. It sets out what section 3C leave is, when it applies, the conditions of leave when it applies and the circumstances in which it does not operate to extend leave. It also addresses when section 3C leave ends, how it can be cancelled and the consequences of such cancellation.

WHAT IS SECTION 3C LEAVE?

Section 3C of the Immigration Act 1971 acts to extend a person's leave to enter or remain, where there is a pending application to vary a person's leave (meaning an application for limited or indefinite leave to remain in the UK). It operates to protect migrants who make "in-time" applications from becoming overstayers while they are awaiting decisions on those applications, or any subsequent in-time administrative review or in-country appeal which follows the decision.

"Section 3C leave" is a common term used by the Home Office and practitioners, but it is a misnomer. The Home Office will never issue a grant of "section 3C leave". It is merely a continuation of a former grant of leave. It is better to think of it as (for example, Tier 2) leave, extended by virtue of section 3C.

WHEN SECTION 3C APPLIES

Triggering section 3C

Section 3C will be triggered if and only if all the following conditions are met:

- A person currently has limited leave to enter or remain in the UK.
- That person makes an application to the Secretary of State for the Home Department to vary that leave.
- Their application for leave to remain is made on or before the date their leave is due to expire.
- On the date after their leave was due to expire, the application for leave to remain had not been withdrawn or decided.

Therefore, they must make a valid application before their leave to enter or remain expires, and a decision on their application must not be made until after their existing leave expires. Section 3C will then act to extend their existing leave until the application is decided.

Section 3C can only be triggered by an application for variation of leave (section 3C(1)). However, it is possible to vary that application by making a further valid application for leave to remain, while leave is extended by section 3C and while the initial application is still pending (*section 3C(5)*). This is helpful if the applicant's circumstances change while their initial application is outstanding. They can then vary it to meet the requirements of another category. A common example of this is where due to the length of time an application has been pending, the applicant now meets the requirements for a settlement application on the basis of ten years' continuous lawful residence in the UK.

The Home Office guidance on *Applications for leave to remain: validation, variation and withdrawal* (Validation, Variation and Withdrawal Guidance) confirms that:

> An applicant can vary the purpose of an application at any time before a decision on the application is made. Any application submitted where a previous application has not yet been decided is a variation of that previous application. An applicant can only have one application outstanding at any one time. (*Page 16.*)

Paragraph 34F of the Immigration Rules confirms that any valid variation of a pending leave to remain application will be decided in accordance with the Immigration Rules at the date the variation application is made.

If section 3C is not triggered by a valid application for leave to remain, then regardless of whether a person brings an appeal or administrative review they will not have their leave extended by section 3C.

Continuing section 3C

Once section 3C is triggered, it continues to be engaged where either:

- An in-country in-time appeal can be brought and is pending (within the meaning of *section 104* of the Nationality, Immigration and Asylum Act 2002), meaning it has been lodged and has not been withdrawn, abandoned, or finally determined by the First-tier Tribunal, Upper Tribunal or Court of Appeal.
- An administrative review could be sought, is pending, and has not been determined.

EXAMPLES WHERE SECTION 3C APPLIES

Example 1: in-time extension application

Rachael is a Tier 2 (General) migrant with leave to enter expiring on 1 June 2020. She wishes to extend her Tier 2 (General) leave to continue her employment with the Rosen Association. She must make a Tier 2 (General) application on or before 1 June 2020. If Rachael makes it on or after 2 June 2020, she never transitions to "section 3C leave". If Rachael makes it on or before 1 June 2020 there are several possible outcomes.

Outcome 1

Rachael and the Rosen Association had plenty of time to prepare Rachael's Tier 2 (General) extension application and she applied on 10 April 2020, using the standard service. Rachael's Tier 2 (General) application was granted before her leave was due to expire, on 1 May 2020. Rachael never needed to rely on *section 3C* and never transitioned to it as her leave did not expire with her application pending. This is the safest possible option for Rachael.

Outcome 2

Rachael was only able to apply shortly before her leave was due to expire on Friday 29 May 2020. She used the "super priority service" and received a decision by the next working day, Monday 1 June 2020. Rachael's application was refused. She did not have enough time to make a further application on 1 June 2020 supported by a new certificate of sponsorship from the Rosen Association. Therefore, Rachael's Tier 2 (General) leave expired on 1 June 2020 with no pending application and so her leave was not extended by virtue of section 3C. On 2 June 2020, Rachael is an overstayer in the UK, and subject to the hostile environment measures. Seeking an administrative review or judicial review of the refusal decision will not extend her leave. To have avoided this "section 3C trap" (see *The ""section 3C trap"": applications decided before leave expires*), Rachael should either have urgently made any application on 1 June 2020, or she should have used the standard service when she applied on 29 May 2020 (as it is unlikely her application would have been decided in such a short period of time and would therefore still be pending on 1 June 2020).

Outcome 3

Rachael applies for her extension on 1 May 2020 using the standard service and is successfully granted her leave as a Tier 2 (General) migrant on 10 June 2020. While her application was pending between 2 June 2020 and the grant of her new leave, Rachael's Tier 2 (General) leave was extended by virtue of section 3C. During that time Rachael was subject to the same conditions on her leave (see *Conditions of leave where section 3C applies*).

Outcome 4

Rachael applies for her extension on 1 May 2020, using the standard service. As in Outcome 3, her leave is extended by section 3C while her application is pending. However, she is refused on 10 June 2020. Within 14 days of receiving the decision, she can bring an administrative review.

The same principles apply even if Rachael were switching routes, for example, from Tier 2 (General) migrant to become a dependant of her partner, or to be an "Innovator". Additionally, if her leave has been curtailed (for example, if her sponsor's licence has been revoked, if she has been made redundant, or if she has resigned) then the above applies, but the relevant date to make an application on or by would be the date her curtailed leave is due to expire.

Example 2: in-time administrative review

If a person makes an in-time request for an administrative review, section 3C will operate to extend their leave, providing it had already been triggered by the application for leave to remain. Their leave will be extended by *section 3C(2)(d)* of the Immigration Act 1971:

- During the period an administrative review can be made (ignoring the possibility for it to be made out-of-time).
- While a further application for administrative review can be made (following an administrative decision which does not succeed, and the eligible decision remains in force but with different or additional reasons to those specified in the decision under review).
- Until the administrative review is rejected as invalid.
- Until the application for administrative review is withdrawn.
- Until the notice of outcome is served that the review succeeded and the eligible decision is withdrawn; or does not succeed and the eligible decision remains in force and all of the reasons given for the decision are maintained; or that the review does not succeed and the eligible decision remains in force but one or more of the reasons given for the decision are withdrawn (*AR 2.2(a)-(c), Immigration Rules)*.

(*AR 2.9, Immigration Rules.*)

Continuing with Rachael from *Outcome 4*: her leave was extended by virtue of section 3C as her in-time application was decided after her Tier 2 (General) leave expired. She received a negative decision on 10 June 2020.

Rachael now has 14 calendar days from receipt of that decision to bring an in-country request for an administrative review (*paragraph 34R, Immigration Rules*). The first day of the period is 11 June 2020, the day after which she receives the decision.

Section 3C(2)(d) of the Immigration Act 1971 will continue to extend her leave during these 14 days when a review could be sought. If Rachael does not seek an administrative review within the relevant time limit, her leave ends on the 14th day from receipt of the decision. 24 June 2020 is the last day she could have made an in-time administrative review application.

If a person is in detention in the UK under the Immigration Acts, they have just seven calendar days to seek an administrative review (*paragraph 34R(1)(b), Immigration Rules*).

What if Rachael had a compelling reason, and the Home Office accepts her out of time application for administrative review on 25 June 2020? It does not matter. Her leave will not be extended by section 3C.

Rachael applies in-time for an administrative review on 20 June 2020.

While the administrative review is pending, her leave will continue to be extended by section 3C. *AR 2.10* of the Immigration Rules defines the circumstances within which an administrative review is not pending. This includes where a fresh application is made:

> In this case the day prior to the day on which the fresh application is submitted is the last day on which administrative review is pending (*AR 2.10(b)*).

Therefore, if Rachael submits an application on 25 June 2020, while her administrative review is pending, the application brings the administrative review and any leave extended by section 3C to an end on the day before the application is submitted (24 June 2020). She cannot vary her application as it has already been decided.

If, however, her administrative review is successful, and the Home Office withdraws its decision, her application is again pending before the Home Office. Throughout any period of reconsideration, her leave continues to be extended by section 3C. During this period, Rachael may vary her original application if she so wishes by submitting a further valid fresh application.

However, assume Rachael's administrative review is unsuccessful. By a decision served on 15 July 2020, the Home Office maintains its refusal decision of 10 June 2020 (see *Appendix SN* for presumptions regarding service).

Rachael's Tier 2 (General) leave, which had been extended by section 3C, expires on 15 July 2020. From then onwards she is an overstayer subject to the hostile environment measures. However, this is not the end of the road for Rachael. Rachael should ask her Tier 2 Sponsor, the Rosen Association, to assign her a new certificate of sponsorship, and she could make a fresh Tier 2 (General) application relying on the exception for overstayers in paragraph 39E of the Immigration Rules to show that she meets paragraph *245HD(p)* of the Immigration Rules.

The provision in paragraph 245HD(p) that "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" is contained in the leave to remain rules for most immigration categories.

Therefore, if Rachael holds another form of leave, other than Tier 2 (General), she should still be able to benefit from the exception in paragraph 39E. However, it is worth checking the Immigration Rules carefully and explicitly stating in any cover letter to the application that she seeks to rely on *paragraph 39E* to meet the relevant provision.

Example 3: appeals

In-country appeal

Where leave has been extended by section 3C by an application for leave to remain, it will continue to be extended until the appeal has been finally determined, withdrawn or abandoned.

The Rosen Association has also recently employed Rick, who is here as the partner of a British citizen. Rick's leave to remain pursuant to Appendix FM expired on 3 March 2020. He made an in-time application to extend this leave on 1 February 2020, which was refused on 10 June 2020.

Out-of-country appeal

If Rick's application was certified as clearly unfounded and did not give rise to an in-country right of appeal, then Rick became an overstayer on 10 June 2020 and section 3C is not engaged. It is possible, however, for Rick to challenge the certificate by way of judicial review (see *Judicial review proceedings*).

Appealing to the First-tier Tribunal

If Rick's application was refused with an in-country right of appeal, his leave is automatically extended for the 14 days after the decision is sent to him (*rule 19, Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604)*), during which he can bring an appeal under *section 82(1)* of the Nationality, Immigration and Asylum Act 2002 against that decision.

Rick cannot make an application during these 14 days and continue to have his leave extended by section 3C, as there is no longer an application to vary; the application has already been decided.

If Rick does not lodge an in-time appeal, his leave ends 14 days after the refusal decision was sent to him. Even if the First-tier Tribunal accepts to hear the appeal that was lodged out of time, section 3C will not act to extend his leave.

What if the Home Office tries to withdraw the refusal while the appeal is pending (often it attempts to do so on the day of the hearing)? If the decision is withdrawn, then the appellant's leave will continue to be extended by virtue of section 3C while a decision is awaited. It is possible for the outstanding application to be varied before a decision is made (under section 3C(5)). There is significant case law and guidance on when the First-tier Tribunal should treat an appeal as withdrawn under *rule 17(2)* when the respondent withdraws the underlying decision, which is beyond the scope of this note.

Upper Tribunal and onwards appeals

If Rick's appeal is unsuccessful before the First-tier Tribunal, his leave will also be extended by virtue of section 3C while any in-time appeal is pending to appeal to or before the Upper Tribunal.

Rick will need to apply to the First-tier Tribunal for permission to appeal to the Upper Tribunal no later than 14 days after the day on which he is sent the written reasons for the decision (*rule 33, Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014*).

If that application is unsuccessful, Rick must seek permission from the Upper Tribunal, the time limit is within 14 days after the date on which notice of the First-tier Tribunal's refusal of permission was sent to Rick (*rule 21, Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)*).

If permission is granted, Rick's leave is extended during any appeal before the Upper Tribunal.

If Rick wished to then apply for permission to appeal from the Upper Tribunal to the Court of Appeal from within the UK, the time limit would be 12 working days (*rule 44, Tribunal Procedure (Upper Tribunal) Rules 2008*). An appeal to the Court of Appeal is finally determined once that court gives judgment, regardless of whether any appeal is made to the Supreme Court. This is because section 104 of the Nationality, Immigration and Asylum Act 2002 defines when an appeal under section 82(1) is finally determined, and includes while an application for permission to appeal under *section 11* or *13* of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination, or has been granted and is awaiting determination, or is remitted under section 12 or 14 of that Act and is awaiting determination. These provisions of the Tribunals, Courts and Enforcement Act 2007 do not cover appeals to the Supreme Court.

Therefore, during onwards rights of appeal to the Upper Tribunal or Court of Appeal, section 3C will extend Rick's leave during the periods when permission to appeal could be sought, and where an in-time appeal is pending. At each step, Rick would need to ensure that he had appealed in-time. Following an Upper Tribunal hearing, it is possible that the case could be remitted to the First-tier Tribunal to be heard afresh. In these circumstances, if Rick had made all applications and appealed in-time, throughout the fresh hearing before the First-tier Tribunal his leave will continue to be extended by virtue of section 3C.

If the Upper Tribunal refused to grant Rick permission to appeal the First-tier Tribunal decision, the way to challenge that decision is through judicial review proceedings under *CPR 54.7A*, called a Cart JR after *R (Cart) v Upper Tribunal [2011] UKSC 28*. It must be brought in the High Court within 16 days of the Upper Tribunal's decision was sent, a much shorter timeframe than the ordinary judicial review deadline of three months. Section 3C does not extend leave during judicial review proceedings (see *Judicial review proceedings*).

Finally determined in-time appeal

If Rick's in-time appeal has been finally heard and decided, with no permission to onward appeal being sought, or permission being finally refused (without the possibility of renewing the application to a different court or tribunal) then it is finally determined.

If Rick's in-time appeal is allowed by the First-tier Tribunal, and assuming the Upper Tribunal upheld the First-tier's decision on appeal, and no further permission to appeal is sought, the Secretary of State's original refusal is set aside and the Secretary of State has to remake the decision. Ordinarily, the judicial determination is implemented and some form of leave to remain is granted.

Rick's position is that his leave continues to be extended by section 3C between the appeal being allowed and a new decision being made by the Secretary of State.

Before any new decision is made on the original application, which is again considered pending, it is possible for the application to be varied by a fresh valid application pursuant to section 3C(5).

Example 4: varying the application for leave to remain

Rachael has already transitioned to section 3C, as her prior leave expired when her Tier 2 (General) application was outstanding. No decision is made on Rachael's Tier 2 (General) application for some months. By then, Rachael realises that she has spent ten years in the UK continuously and lawfully. She meets the criteria for

settlement on the basis of long residence and makes a valid application before the Tier 2 (General) application is decided.

The long residence application (under *paragraph 276B* of the Immigration Rules) is automatically considered a variation of the Tier 2 (General) application and will amend it. The date of the application for the purposes of the Immigration Rules is the date the Tier 2 (General) application was submitted.

Rachael should not be out of pocket (or not for long) by making this long residence application. The Home Office's guidance, *Leave extended by section 3C (and leave extended by section 3D in transitional cases*) (Section 3C Guidance), confirms that "where there is a difference in the fee between the initial variation application and the amended application any additional fee must be paid". . In the Guidance, an "initial variation application" refers to the initial application for leave to remain, and the "amended application" refers to what in practice is commonly termed a "variation application". In practice with the online application system, this may mean that Rachael will need to pay the new application fee (and, if required, the Immigration Health Surcharge) and request a refund of the prior fees.

Example 5: dependants' applications

If a main applicant (such as a Tier 4 (General) migrant) has a dependant partner, when the Tier 4 migrant makes an in-time valid application for leave to remain (such as for Tier 2 (General) leave to remain), but before their application is decided they make a further application on the basis of long residence, their partner can also make a variation application under Appendix FM, asking for it to be decided after a decision has been made on the long residence application.

The Validation, Variation and Withdrawal Guidance confirms that if a dependant is part of the original application (for example, Tier 2) that is later varied, and they could not be included in the variation application (for example, the settlement application above), if they have not submitted an application in their own right, then the Home Office will write to dependants. The Home Office will confirm that the original application has been varied, that they are not included in the variation application, that their original application has fallen away and that they should now make a separate application.'

Example 6: leaving the UK with extant leave

The Validation, Variation, Withdrawal Guidance states that if an applicant has extant leave (for example, Tier 4 (General)), and makes an in-time application for further leave (for example, Tier 2), but then leaves the UK with extant leave (Tier 4 leave) which expires when they are outside the UK, they will transition onto section 3C leave. They will not have transitioned onto section 3C while they were in the UK.

Similarly, a person who leaves the UK with extant leave can vary their continuing leave from outside of the UK. *Paragraph 33A* of the Immigration Rules requires it to be in the "form and manner as permitted for the giving of leave to enter". However, the same rule confirms that "the Secretary of State is not obliged to consider an application for variation of leave to enter or remain from a person outside the United Kingdom". Nevertheless, the Validation, Variation, Withdrawal Guidance states that "if the applicant leaves the UK with extant leave, makes an application to extend that leave from abroad before their leave expires, they transition onto section 3C leave and will have 3C leave indefinitely if we do not decide the application."

CONDITIONS OF LEAVE WHERE SECTION 3C APPLIES

Where a person's leave has been extended by virtue of *section 3C*, they remain under the same conditions, unless these are varied by the Secretary of State.

This is generally straightforward, but certain conditions are restrictive.

Example 1: Tier 2 migrant

Rachael's Tier 2 sponsor, the Rosen Association, have had their sponsor licence revoked. Rachael's leave was curtailed to 60 days. Before the expiry of those 60 days, she made a change of employment application which was not decided before her curtailed leave expired. Section 3C is engaged and her Tier 2 (General) leave has been extended with the same conditions.

Rachael as a Tier 2 (General) migrant is restricted to no employment except "working for the sponsor in the employment that the Certificate of Sponsorship Checking Service records that the migrant is being sponsored to do, subject to any notification of a change to the details of that employment" (for example, *paragraph 245HE(d)(iii)(1)* of the Immigration Rules). She cannot do this as the Rosen Association do not have a licence.

She is permitted to undertake 20 hours per week of supplementary employment (outside of the normal working hours for which her prior certificate of sponsorship was assigned) in the same profession as her previous certificate of sponsorship (*paragraph 245HE(d)(iii)(2), Immigration Rules*). Unfortunately, this is not permitted for Rachael as the Tier 2 and 5 guidance confirms that to undertake supplementary employment, "you must continue to work for your sponsor in the job recorded on your Certificate of Sponsorship" (*GOV.UK: Sponsor a Tier 2 or 5 worker: guidance for employers*). If Rachael's application is pending for a significant period of time, throughout this period, she will be unable to work or earn. She is also not permitted to have recourse to public funds. This may place Rachael in a difficult financial position.

Example 2: Tier 4 student

Similarly, Tier 4 students are not permitted recourse to public funds and have limitations on the employment they can take. Students who have followed a full-time course of degree level study, sponsored by a higher education provider with a track record of compliance; or sponsored by an overseas higher education institution to undertake a short-term study abroad programme in the UK, ordinarily have a condition of employment during term time of no more than 20 hours per week, and employment (of any duration) during vacations.

The *Tier 4 of the Points-Based System: Policy Guidance* (Tier 4 Guidance) confirms that "You may work full-time after your course has ended, provided your conditions of stay permit work during term time and you have leave to stay in the UK. The period at the end of the course is considered vacation time, in addition to the period before your course starts. Therefore, if you are permitted to work, you can work full-time during these periods before your course starts and when it ends." Ordinarily, therefore, a Tier 4 student that has fully completed their course, where their leave has been extended by section 3C, will be permitted to work full-time. If they have stopped studying before completing their course, they will be in breach of their conditions if they are working. In any case, Tier 4 migrants are not permitted to fill full-time permanent vacancies. This leaves the possibility of full-time fixed-term contracts.

Additionally, there are restrictions on self-employment and engaging in other business activity (see, for example, *paragraph 245ZW(c)(iii)(8)* of the Immigration Rules), and limitations on other study they can undertake (see, for example, paragraph 245ZW(c)(iv)).

WHEN DOES SECTION 3C NOT EXTEND LEAVE?

Section 3C will not extend leave where:

- An invalid application is made.
- An application is made after the migrant's current leave has expired.
- An application is made under the EEA Regulations (Immigration (European Economic Area) Regulations 2006, 2016 or 2018).

Invalid applications

Section 3C is not triggered by an invalid application. This is confirmed in the *Section 3C Guidance.*

This principle was also confirmed in *Mirza and others v Secretary of State for the Home Department [2016] UKSC 63*. As appreciated by Lord Carnwath in his judgment in that case, the danger is that at the point of making an application, although an applicant has acted in good faith and believes the application to be valid, it may be invalid.

Therefore, if either Rachael or Rick had made an invalid application, their leave would not be extended by virtue of section 3C.

Under *section 50* of the Immigration, Asylum and Nationality Act 2006, the Secretary of State has powers to prescribe the consequences of procedural failure. *Regulation 16* of the Immigration and Nationality (Fees) Regulations 2018 (*SI 2018/330*) stipulates that the consequences of failing to pay the specified fee for an application means the Secretary of State may reject the application as invalid or request the person to pay the outstanding amount (within ten working days). Applications for which the correct fee is not paid are invalid from the outset (*Mirza*).

Section 5 of the *UK Borders Act 2007* similarly gives the Secretary of State the power to require an applicant to provide their biometric information. The consequences for failing to provide biometric information that may be taken are that the person's application for leave to remain can be treated as invalid (*regulation 23, Immigration (Biometric Registration) Regulations 2008*, as amended by *regulation 19, Immigration (Biometric Registration) (Amendment) Regulations 2015*). In *Mirza*, the Supreme Court held that the natural reading of these provisions is that the Secretary of State has the power to treat the application as invalid, invalidating the application from the time of the decision, but not before.

To be a valid application, it must comply with *paragraph 34* of the Immigration Rules, which includes:

- Being made on an application form which is specified for the immigration category under which the applicant is applying on the date on which the application is made.
- All mandatory sections of the application form must be completed.
- Any application fee is paid in full in accordance with the process set out in the form.
- Any requisite Immigration Health Surcharge fee is paid in accordance with the relevant process on the GOV.UK website.
- The requisite proof of identity is provided or an exception in *paragraph 34(5)(c)* of the Immigration Rules applies.
- If the applicant is under the age of 18, parental or legal guardian written consent is provided.
- If the application is made on a paper application form (few, if any, exist now), it is sent by pre-paid post or courier to the address on the application form.
- An applicant complies with the application process on GOV.UK and in the invitation to enrol biometrics which is provided as part of the application process in relation to making an appointment to provide biometrics, and providing any evidence requested by the Secretary of State in support of their application.

If an applicant fails to do one or more of the above, the Secretary of State may (and in practice, often does) notify the applicant and give them one opportunity to correct the error or omission, within a specific timeframe. The Section 3C Guidance indicates that if the fee has been paid (even if the wrong fee), a person is given ten business days to respond to the request. If the requisite information is received, and the application is accepted as valid,

then the application should be treated as valid from the date it was first made. Therefore, if an application was made in-time, but validated at a later date, section 3C will act from the date the applicant's extant leave expires, even if the correct fee was not received until after that date.

If the information required to make the application is not received, there will be no valid application, and the application will be invalid from the date it was made, and never give rise to an extension of leave under section 3C.

In practice, the final bullet point on the above list is the most complicated when making a variation application. It is not clear from the Home Office's guidance whether the Home Office expects a biometric appointment to be booked and attended for each variation application.

Often applicants, such as Rachael in Outcome 2, will have a short timeframe after receiving a negative decision when they still have extant leave to make a fresh application before their leave expires (to benefit from section 3C). Depending on the circumstances, they may not be able to make their application. Rachael, in the example above, may not have been able to obtain a certificate of sponsorship from her sponsor in such a short timeframe, or to seek legal advice. It is permissible to vary an application through a further application (under section 3C(5)). Rachael in Outcome 2 could then put in a holding application (such as a human rights application) on 1 June 2020, which will still be pending when her leave expires. She is then protected by section 3C. On 14 June 2020, when she receives her new certificate of sponsorship, she could make a further Tier 2 (General) application.

The only question about validity is whether Rachael would need to have attended a biometric appointment for her 1 June 2020 human rights application to be considered valid. Incorporating *Mirza*, the Section 3C Guidance confirms that, "where the application becomes invalid because of a failure to provide biometrics, the Supreme Court clarified that section 3C leave came to an end at the point the Home Office serves a notice of invalidity." Therefore, it is arguable that the first application will be considered valid, and can be varied provided no notice of invalidity has been served on the applicant.

However, if Rachael does enrol her biometrics for the human rights application, she will need to be aware that as soon she enrols her biometrics, the Home Office could process her application and make a decision on it. If certified clearly unfounded, section 3C's applicability comes to an end for her. She will need to ensure she submits her variation application before any decision is made on her human rights application to continue to benefit from section 3C. An application cannot be varied once a decision has been made on it. If Rachael waits for her human rights application to be refused, even if she receives a right of appeal, she cannot make a fresh Tier 2 (General) application while her appeal is pending (*section 3C(4)*). To make a fresh application (other than a protection or human rights claim), she would have to withdraw her appeal, which would bring her section 3C leave to an end.

Out-of-time applications

Section 3C will not be triggered where an application for further leave is submitted after that person's leave has expired. Where there is no leave, section 3C is clearly unable to extend it.

Even if *paragraph 39E* of the Immigration Rules applies, such that the application is accepted out of time, this does not mean that the period during which that application was pending was covered by section 3C.

Rick's leave as a partner expired on 3 March 2020. If he applied to extend his leave on 4 March 2020, or any day after that date, regardless of whether he is successful, his leave will not have been extended by virtue of section 3C during the period of his application.

Even if Rick can bring an in-country appeal against any refusal, section 3C was never engaged and will not act to extend his leave.

Intervening periods of overstaying

If a person is trying to accumulate ten years of continuous lawful residence to be eligible for settlement under *paragraph 276B* of the Immigration Rules, any prior period of overstaying may be relevant.

To the dismay of many practitioners, R *(Masum Ahmed) v Secretary of State for the Home Department [2019] EWCA Civ 1070* is still good law. In that case it was held that although previous periods of overstaying may be excepted (where paragraph 39E applied, or before 24 November 2016 where the application was made within 28 days), the application of the 14-day or 28-day grace period did not convert these periods into lawful leave to remain. The Home Office's *Long Residence Guidance* is currently more generous than the Court of Appeal in *Masum Ahmed* in accepting that gaps of overstaying where applications were made no more than 28 days out of time pre-24 November 2016, or 14 days after that date if paragraph 39E applies, should not break the lawfulness of the continuous residence. However, it would always be open to the Home Office to amend its guidance in line with the Court of Appeal's recommendation in *Masum Ahmed*.

EEA applications

Section 3C will not extend leave where an application is made for an EEA Residence Card under the EEA Regulations, as such an application does not meet the first requirement of section 3C(1). It is not an application for variation of leave. Rather, it is an application for confirmation that the applicant is exercising rights under the EEA Regulations.

On the contrary, an application under the EU Settlement Scheme pursuant to *Appendix EU* is an application for pre-settled status (limited leave to enter or remain) or settled status (indefinite leave to remain). Therefore, an in-time valid application under that Appendix could engage section 3C.

The "section 3C trap": applications decided before leave expires

Some applicants fall into the trap of thinking section 3C applies to them, when it does not. They have done everything correctly. They have made an in-time valid application for leave to remain, either well before their current leave to enter or remain expires, or they have used a priority or super priority service to receive a quicker decision. Often these are the most careful applicants. They wanted to ensure they had received their new grant of leave before their prior grant had expired. However, while they still hold extant leave, they instead receive a refusal decision on their application.

They may then apply for an administrative review, or lodge an appeal, and their leave may expire with either of those pending. However, they still cannot benefit from section 3C as they have not met the fundamental prerequisite that their application was still pending at the point when their leave expired. Their application was refused before their leave expired. Accordingly, throughout their appeal or administrative review, unknowingly, they will not have been in the UK lawfully.

Under the current appeals regime, there is no necessary connection between section 3C applying and the existence of a right of appeal. For example, an overstayer can make a human rights claim (such as a spouse application) that gives rise to an in-country right of appeal. However, the overstayer will not have the protection of section 3C while that application and subsequent appeal are pending. Whether there is a right of appeal (or right of administrative review for that matter) is dependent on the type of application that was made.

Avoiding the section 3C trap

If a refusal decision is received while an applicant still has extant leave, another application needs to be submitted before that extant leave expires.

In practice, this may be difficult. Rachael from Outcome 2 fell into this trap. She was only able to apply shortly before her leave was due to expire on Friday 29 May 2020. She used the "super priority service" and received a decision by the next working day, Monday 1 June 2020. Rachael's application was refused.

To begin with, Rachael should not have used the super priority service on 29 May 2020. If a person is close to their leave expiring when they wish to apply, they can use the standard service (which has *service standard* of eight weeks) to greatly reduce the risk of having to rush to make an application in a short period of time to benefit from section 3C. If they wish to make the application despite the risks using priority or super priority, they should be warned of the section 3C trap.

However, on 1 June 2020 after receiving the refusal, there is only one way for Rachael to avoid the section 3C trap: to urgently make an application on 1 June 2020. Rachael must fill out an online application form and submit it on 1 June 2020 (as part of the process, this requires her to pay for the application fees and Immigration Health Surcharge ordinarily). For most applications, the date of application is the date on which the application is submitted (*paragraph 34G(3), Immigration Rules*).

What if Rachael could not make a new Tier 2 (General) application as she had used her certificate of sponsorship in her refused application and the Rosen Association could not issue her another one in such a short period of time (such as if they had to request an additional allocation from the Home Office)? In that case, Rachael could put in a "holding application" such as a private life or other human rights application, depending on her circumstances. This could then be varied or amended by Rachael making a further valid Tier 2 (General) application once the requisite supporting documents are available and before her human rights application has been decided. This is permitted by section 3C(5). Often, it is worth explaining the issue in a cover letter to the human rights application, and requesting that it not be decided until the certificate of sponsorship can be issued. In reality, the application will in any case not be decided until biometrics have been submitted. Rachael will have to comply with any deadline for submission of biometric information, however, to ensure that her application is valid.

If Rachael does not submit an application on 1 June 2020, and her Tier 2 (General) leave expires with no pending application, she will be an overstayer as of 2 June 2020. Even if she can and does apply for an administrative review, she will not be covered by section 3C. Moreover, the Home Office aims to reply within 28 days. By the end of the review Rachael may have overstayed for 42 days or more. Therefore, she will no longer be able to benefit from paragraph 39E of the Immigration Rules if she intended to make a fresh application after the administrative review was complete. Similarly, she would not be covered in any further judicial review proceedings.

Judicial review proceedings

Judicial review proceedings will not continue to extend leave by virtue of section 3C.

During the period in which an applicant can apply for permission to bring a judicial review, their leave is not extended. Nor is it extended by a pre-action protocol letter, requests for reconsideration, or by lodging proceedings.

Example 1: following an administrative review

After an unsuccessful administrative review, many applicants continue to wish to challenge the refusal decision. It may be the case that this administrative review was brought in-time following an application that had extended their leave by virtue of section 3C.

However, they will need to be advised that from the moment their administrative review was negatively decided, their leave extended by virtue of section 3C came to an end. Bringing judicial review proceedings, even within the three-month timeframe, will not extend their leave. The only arguable situation in which an applicant could be covered by section 3C throughout a judicial review, following an administrative review refusal, is if the refusal decision was a nullity from the outset, as in Example 2.

Example 2: challenging a clearly unfounded certificate

If a person's application extended their leave by virtue of section 3C, it will also be extended when an in-country appeal could be sought or is pending.

However, some persons who make human rights and protection claims have their applications certified as clearly unfounded (*section 94, Nationality, Immigration and Asylum Act 2002*). The rights of appeal are then non-suspensive, meaning that the claimant can only appeal from outside the UK.

The only way to challenge the decision, which may be necessary to prevent removal without an effective appeal, is to judicially review the certificate. The Upper Tribunal will then determine for itself whether the appeal would be bound to fail.

Consider Pris, who was in the UK as a Tier 4 (General) migrant with leave expiring on 1 February 2020. Before her leave expired, she made in-time human rights and asylum claims on 10 January 2020. These were decided and certified as clearly unfounded on 1 August 2020. Until that point, her leave had been extended by section 3C. Pris is advised that there are grounds to challenge the certificate. On 1 September 2020, her representatives request a reconsideration, to which the Secretary of State does not respond. On 1 October 2020, they write a letter before claim, complying with the *Pre-action Protocol for Judicial Review*. On 15 October 2020, the Secretary of State maintains her decision in her response to the pre-action protocol letter. Pris' representatives apply in-time for permission to apply for judicial review.

Imagine firstly, that following a substantive hearing the Upper Tribunal quashes the certificate and decision.

The Secretary of State's position, per the Section 3C Guidance, is that section 3C cannot be resurrected: "Where the decision is withdrawn after section 3C leave has come to an end withdrawal of the decision does not mean that the person once again has section 3C leave. This is because section 3C leave can arise and exist only where it is a seamless continuation of leave, either extant leave or section 3C leave. Where there is a break in that leave, such that section 3C leave has come to an end, section 3C leave cannot be resurrected".

Arguably, the Secretary of State's position is not correct in law and does not necessarily follow from the statutory text of section 3C of the Immigration Act 1971.

If the Upper Tribunal quashes the decision on judicial review, it is a nullity, and Pris' leave never ceased to be extended by section 3C. This is analogous to the approach of the then House of Lords in *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147* that all public law errors render the decision a nullity from the outset (Lord Reid at page 171B-F). In Pris' case, the unlawful or irrational certification is a nullity (void ab initio) and there is no need for section 3C to be "resurrected".

Alternatively, if after permission is granted following an oral renewal hearing, the Secretary of State may agree in a consent order to withdraw the decision and certificate, reconsider the application and grant Pris leave to remain. Pris' position is slightly different as the Upper Tribunal has not quashed the decision.

It may be important for Pris to have had section 3C leave while the application was being reconsidered if Pris in the future wishes to make a settlement application on the basis of long residence. This period without section 3C extending her leave would be a break in her continuous lawful residence.

In recent years, the Section 3C Guidance has been generous enough not to hold this period, following withdrawal but without leave extended by section 3C, against applicants. It states that "where a person had section 3C leave at the time a decision was made and that decision is withdrawn after section 3C leave has ended, the person should not be disadvantaged by the fact their section 3C leave has ended and cannot be resurrected. This means that the outstanding application should be considered as if the person still had section 3C leave (meaning they should not be refused on grounds they are an overstayer). Where on reconsideration of the withdrawn decision leave is then granted, the break in the person's leave between section 3C leave coming to an end and the grant of new leave should not be held against them in any subsequent application" (*page 7*).

However, bear in mind that the Section 3C Guidance could change. In any case, it could be argued that the withdrawn decision is also a nullity. In *Boddington v British Transport Police [1999] 2 AC 143* the then House of Lords unanimously held that a public law error (an invalid bye-law) making a decision a nullity could be raised in collateral challenges without challenging the validity through judicial review proceedings. This can perhaps be used to argue that even if the decision is withdrawn, rather than quashed in judicial review proceedings, the initial decision and certificate must be treated as a nullity from the outset.

Out-of-time appeals and administrative reviews

If an appeal is made out of time, regardless of whether the tribunal, court or Secretary of State agrees to consider it, it will not extend leave under section 3C.

END OF SECTION 3C LEAVE

Section 3C leave will come to an end if a person:

- Leaves the UK.
- Withdraws their application.
- Fails to appeal.
- Appeals out of time.
- Withdraws their appeal.

Leaving the UK

Section 3C will lapse if the person leaves the UK. This is stipulated by section 3C(3).

For example, Rachael submitted her Tier 2 (General) extension application in-time and her prior leave ended on 1 June 2020. She has now transitioned to section 3C. The Rosen Association wishes for her to attend a robotics conference in India. Rachael cannot travel until a decision is made on her Tier 2 (General) extension application, without bringing an end to her leave that has been extended by section 3C.

It is important to consider what upcoming travel commitments an applicant may have and decide accordingly whether to use standard, priority or super priority services to increase likelihood of a decision within an adequate timeframe.

The temptation to travel used to be lower, as it used to be the case that the Home Office kept an applicant's passport while their application was pending, therefore reducing the likelihood of travel. However, the UK Visa and Citizenship Application Services now ordinarily returns an applicant's passport where the application is made in-time.

If a person who had an in-country right of appeal leaves the UK before their appeal is finally determined, their appeal will be treated as abandoned (*section 92(8), Nationality, Immigration and Asylum Act 2002*). Additionally, section 3C will lapse when the person leaves the UK. In *SR (Algeria) v Secretary of State for the Home Department [2015] EWCA 1375*, the Court of Appeal clarified that the appeal will only be treated as abandoned where an appellant voluntarily leaves, not where an appellant is removed against her will by the Secretary of State (*at paragraph 16*).

Withdrawing an application

If Rachael requests to withdraw her application while it is pending on, for example, 5 June 2020, and after her prior Tier 2 (General) extant leave to remain had expired on 1 June 2020, her leave extended by section 3C will come to an end. If the application she seeks to withdraw was not yet valid under paragraph 34 of the Immigration Rules, according to the Validation, Variation and Withdrawal Guidance, she should be informed of that fact, and that her leave expired on the date her previous grant of leave came to an end (1 June 2020). However, if Rachael's application was valid when she withdrew it on 5 June 2020, then her leave came to an end on 5 June 2020.

However, if Rachael still had extant Tier 2 (General) leave when she withdrew her application (such that she will not yet have engaged section 3C), then she can make a fresh application before her extant leave expires.

The Validation, Variation and Withdrawal Guidance confirms that an applicant can withdraw their application by written request via email or post. The date of withdrawal is the date the Home Office receives the request.

When an applicant makes an application for leave to remain, their proof of identity will be returned to the applicant while their application is being considered, unless the Secretary of State considers it necessary to retain it (*paragraph 34J, Immigration Rules*). This likely refers to the return of the passport during the UKVCAS process.

Where it has been retained and an applicant requests its return for the purpose of travelling outside the common travel area, and provided the application has not been determined, the application will be treated as withdrawn on the day the Home Office receives the withdrawal request.

Also, under *paragraph 34K* of the Immigration Rules, where proof of identity has been returned, the Secretary of State can treat a pending immigration application as withdrawn on the date the applicant leaves the common travel area (the UK, Ireland, and the Crown Dependencies (Isle of Man, the Bailiwick of Jersey and the Bailiwick of Guernsey)).

Withdrawing an appeal

Section 3C will extend leave during the period that an appeal is pending.

A person may wish to withdraw their appeal to make a fresh application. Once a decision is made on an application it cannot be varied. If an application (unless it is a human rights or protection claim) is made while the appeal is pending, it will be void as there is no longer an application to vary (see Validation, Variation, Withdrawal Guidance).

If a protection or human rights claim is made while an appeal is pending, the Home Office can decide this before the pending appeal. If refused with an in-country right of appeal, the appeals can be linked. If not decided before the appeal, the Secretary of State may grant consent for it to be considered at the upcoming appeal hearing.

First-tier Tribunal

The appellant can give notice of withdrawal of their appeal by providing the Tribunal a written notice of withdrawal of the appeal, or orally at a hearing (*rule 17, Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014*). In either case, reasons must be specified for the withdrawal. The First-tier Tribunal must then notify each party in writing that withdrawal has taken effect under rule 17, and that the tribunal no longer regards proceedings to be pending.

The decision of whether to withdraw is for the appellant, and therefore does not require judicial approval to be effective (*Anwar (rule 17(1): withdrawal of appeal) [2019] UKUT 00125 (IAC)*). The headnote to that case confirms, "If an issue arises as to whether or not an appellant's notice of withdrawal was legally valid, the Tribunal should exercise its case management powers so as to decide the matter. This will normally involve holding a hearing. The judge's task will be to decide on the issue of validity".

An appeal is treated as withdrawn on the day that the appellant requests that the appeal be withdrawn (*Section 3C Guidance, page 12*).

If a person makes their fresh application on the same day the leave is withdrawn the person is still not considered as having section 3C leave for the purposes for that fresh application and will be an overstayer while it is pending.

Upper Tribunal

An appellant may give notice of withdrawal of their case by sending or delivering to the Upper Tribunal a written notice of withdrawal, or withdraw orally at a hearing (*rule 17, Tribunal Procedure (Upper Tribunal) Rules 2008*).

If the appellant is only at the permission to appeal stage, then the effective date of withdrawal is the date the application for permission is withdrawn. The party who has sought permission to appeal does not require the Upper Tribunal's consent to withdraw the application. They can then make an application on the same day as the withdrawal. The person will be treated as if they did not have their leave extended by section 3C on that day (*Section 3C Guidance, page 12*).

If permission to bring the appeal has already been granted, the appellant cannot withdraw their appeal without the Upper Tribunal's consent. The Upper Tribunal will notify each party in writing that withdrawal has taken

effect. Section 3C will act to extend leave until then. The Upper Tribunal's notice will contain the effective date of withdrawal of the appeal.

If the Secretary of State has sought to appeal to the Upper Tribunal against a migrant's successful appeal in the First-tier Tribunal, a migrant cannot give notice under rule 17 of the *Tribunal Procedure (Upper Tribunal) Rules 2008*, as they have no appeal in the Upper Tribunal. If the respondent migrant sent such a notice it would have the effect of leaving the Secretary of State's appeal unopposed (*Ahmed (rule 18; PTA; Family Court materials) Pakistan [2019] UKUT 357 (IAC)*).

CANCELLING SECTION 3C LEAVE

This power of cancellation was commenced on 1 December 2016, when *section 62* of the Immigration Act 2016 amended *section 3C* of the Immigration Act 1971.

Section 3C(3A) stipulates the only two circumstances in which leave extended by virtue of section 3C may be cancelled. They are:

- If the applicant has failed to comply with a condition attached to the leave.
- If the applicant has used or uses deception in seeking leave to remain (whether successfully or not).

Discretionary power

This is a discretionary rather than automatic power, as indicated by the word "may" in section 3C(3A). Therefore, if the applicant falls within one or both of the above circumstances, it is nevertheless worth asking for discretion to be exercised in the applicant's favour. It will be important to raise any mitigating circumstances, the length of the breach if temporary, and compelling circumstances that would follow the applicant being subject to the hostile environment measures particularly where the welfare of a child would be affected. To avoid making a public law error, it is incumbent on the Secretary of State to consider whether to exercise discretion in all the circumstances of the applicant's case.

The intention behind the cancellation power is to treat persons in the same way as a person without section 3C leave, who would have had their leave curtailed. Therefore, the Section 3C Guidance indicates that an approach consistent with the *Curtailment Guidance* should be followed: "if it would be inappropriate to curtail, leave should not be cancelled".

If cancelled, leave extended by section 3C comes to an immediate end. There is no period of curtailment, and therefore, no possibility for further variation.

Consequences of cancellation

The clear consequence of section 3C leave coming to an end is that the person will then be in the UK unlawfully and liable to removal under section 10 of the Immigration and Asylum Act 1999. If they are the main applicant and have family members who are dependants, their family members may also be removed under the same section. Being served with written notice of an intention to remove them invalidates the dependant's extant leave to enter or remain (*section 10(6), Immigration and Asylum Act 1999*).

They will not be able to benefit from the conditions associated with their previous immigration leave, which may include the right to work, study or access public funds.

Pending application

The Secretary of State must first consider the pending application and then decide whether to cancel the section 3C leave. Either of the above circumstances is likely to be relevant to whether the applicant can meet the suitability

requirements or falls under the general grounds for refusal. If the application is to be granted despite the deception, or breach of conditions, the Section 3C Guidance states that section 3C leave should not be cancelled. If the application is refused a separate decision must be made as to whether section 3C leave should also be cancelled. The Section 3C guidance specifically states, "You should not cancel section 3C leave solely because you are refusing an application". The extent to which the deception or breach of conditions was material to the decision to refuse the application is important to the decision whether to cancel. The Section 3C Guidance states, "if you would not have refused the application solely because of the breach of conditions or use of deception then it will not normally be appropriate to cancel section 3C leave". If section 3C leave is also cancelled, then during any administrative review or appeal which may be brought, the applicant's leave will not be extended by virtue of section 3C.

Pending administrative review

The Secretary of State will make a decision on the administrative review. If negative, section 3C leave will come to an end.

Pending appeal

The appeal will not come to an end when section 3C leave is cancelled. In an appeal, there could be adverse effects due to the length of time it may be pending. Again, the extent to which the deception or breach of condition was material to the refusal (or would have been a material consideration) will determine whether section 3C leave should normally be cancelled.