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**CHAPTER 1
SECTION 5****SECTIONS 3C AND 3D OF THE IMMIGRATION ACT 1971
(AS AMENDED)****1. INTRODUCTION**

It is often not possible to decide an application for an extension of leave until after the period of leave has expired. To prevent applicants from becoming overstayers through no fault of their own, section 118 of the Nationality, Immigration and Asylum Act 2002 introduced an amended section 3C into the Immigration Act 1971. Section 3C automatically extends the leave of a person who has made an application for further leave to remain during a period of extant leave. Technically, the leave is "treated as continuing".

To benefit, a person must have existing leave to enter or remain at the time when their valid application is made. Section 3C then prevents such an applicant becoming an overstayer during the period in which their application for a variation of leave remains undecided and, thereafter, while an appeal against any refusal could be brought or is pending.

To prevent people becoming overstayers while exercising a right of appeal against a decision to curtail or to revoke leave to enter or remain, section 11 of the Immigration, Asylum and Nationality Act 2006 added a section 3D to the Immigration Act 1971. When leave to enter or remain is curtailed or revoked, section 3D extends it while an appeal could be brought or is pending.

2. FIRST APPLICATIONS FOR FURTHER LEAVE TO REMAIN**2.1. Key points**

- Section 3C only applies where an application for extension of stay is made before the expiry of the person's leave and the leave expires before the application for variation has been decided;
- Its effect is to extend the leave and any conditions attached to it while the application is neither decided or withdrawn, while an in-country appeal could be brought, or, while an appeal is pending;
- Section 3C does not apply if an application is refused before substantive leave expires;
- Section 3C does not apply where a person's limited leave has already expired at the time of the application.

3. SECOND AND SUBSEQUENT APPLICATIONS**3.1. Applications lodged during the currency of limited leave**

If two or more applications are made during the currency of substantive leave to enter or remain and are undecided, they should be decided at the same time so that

if 3C is triggered it will expire at the same time for both applications. If section 3C is triggered after multiple applications have been made, and if exceptionally the applications are not decided together, leave will be treated as continuing until the end of the time limit for appealing against the last decision made.

3.2. Applications lodged during leave under sections 3C and 3D

While either section 3C or 3D leave is in force, the applicant is not entitled to make any more applications for variation of leave to enter or remain. So even someone who marries after making an application to remain as a student cannot, while they have leave under section 3C, make a fresh application on the basis of the marriage. On the other hand, it is possible to vary the grounds of an application already made, even by introducing something completely new. A student application can be varied so as to include marriage grounds. If an application is varied before a decision is made, the applicant will be required to complete the necessary prescribed form to vary his application. If an application is varied post decision, it would be open to the applicant to submit further grounds to be considered at appeal. As a result, there may be little difference in practice between a fresh application and a request to vary an existing application. The distinction is made to ensure that all a person's grounds for wishing to remain in the UK result in one decision and thus one appeal. This 'one-stop' principle - one application, one decision, one appeal - is essential to the operation of the appeal process that was introduced in the 1999 Act and has been extended by subsequent Acts.

However section 3C makes a clear distinction between the decision on the application and the appeal against that decision. Once an application has been decided it ceases to be an application and there is no longer any application to vary under section 3C (5). So any new information will fall to be dealt with during the course of the appeal rather than as a variation of the original application.

When section 3D applies leave has been curtailed or revoked. Thus there is no application for the variation of leave and the question of whether an application can be varied or not does not arise.

4. WITHDRAWAL OF APPLICATIONS

4.1. Return of passport for travel before an application has been determined

Where an applicant requests the return of a passport for travel outside the common travel area, the application for variation of leave shall (provided it has not been determined) be treated as withdrawn as soon as the passport has been returned in response to the request (paragraph 34 of HC 395 (as amended by Cm 4851) refers). Section 3C leave will end immediately. There will be no right of appeal against this decision because there will have been no decision to refuse to vary leave.

4.2. Withdrawal of applications (not travelling)

Where an applicant who is not travelling makes a clear, unambiguous request for consideration of the application to be discontinued, section 3C leave will terminate on withdrawal of the application. If such a request is ambiguous, clarification that the application is being withdrawn should be sought. It should be accepted only once a

clear, unambiguous request has been made in writing. Where such notification is given by post, the date of postage is when the application is withdrawn and section 3C leave ends on that date.

4.3. **Subsequent applications**

A second or third amendment to an application made while section 3C leave is running cannot be regarded as a request to withdraw the application as it was initially made, unless this is specifically stated. It should be treated as a variation of that original application (see paragraph 3.2 above). If the applicant makes it absolutely clear that the new grounds are to be considered instead of the grounds put forward initially, then the original grounds need not be considered. In cases of doubt further clarification may be sought, but generally caseworkers should base the final decision on all the grounds put forward.

It should not be assumed that an applicant wishes to withdraw the original grounds simply because they appear incompatible with later grounds. For example, if a person asks for leave to remain as a foreign spouse after an initial application to remain as a visitor, it may well be that the marriage application casts the gravest doubt on the applicant's intention to leave the UK at the end of the visit. Nevertheless, it will be necessary to make a decision on the visit point as well as the marriage grounds.

5. **WITHDRAWAL OF DECISIONS**

Where leave to remain has been extended by operation of section 3C, a decision to refuse an application for a variation of leave can be formally withdrawn by letter. When an "incorrect" decision has been taken it is possible to withdraw the decision formally and serve a fresh decision, either at the same time or at a later stage. Section 3C leave will continue until the fresh decision is served and a refusal of the application will attract a right of appeal.

Where leave to remain has been extended by operation of section 3D, decisions to curtail or revoke leave to remain can be formally withdrawn. This would mean that the leave which was granted before the decision to curtail or revoke would continue to run.

6. **APPLICANTS' STATUS WHILE SUBJECT TO LEAVE UNDER SECTIONS 3C OR 3D**

Where an applicant's leave has been extended by sections 3C or 3D and the applicant wishes to work or set up in business pending a decision on the application, our advice should be that the section extends the time limit and maintains any conditions attached to the original limited leave.

A person whose previous leave was subject only to a time limit, ie. Code 1, may work or set up in business while the application is under consideration, but should be advised that this does not necessarily mean that an application to remain for such a purpose will be granted.

A person whose leave under sections 3C or 3D expires and who has not been granted leave becomes an overstayer, is no longer subject to any conditions and no longer has any permission to work or run a business. Enforcement action should be considered against the individual if he does not leave the UK.

7. APPLICATIONS MADE AND DECIDED BEFORE LEAVE ENDS

3C leave begins when a person whose limited leave either to enter or remain expires without an application for variation of that leave being decided and it continues while the application for leave has not been decided. Section 3C (1) applies. Therefore if an application is made in time and is refused before the leave ends 3C leave is not triggered. The effect of this will be to prevent the applicant from being able to appeal against the refusal of a variation under section 82. However, if at the same time as the variation application is refused the applicant's leave is curtailed, there would be the right to appeal under section 82 (e). If leave is curtailed, section 3D leave is triggered rather than 3C.

If a variation application is refused within the period of leave and as a result the one stop appeal process is not triggered it will be possible for the applicant to repeat or to make a subsequent application the refusal of which will not be open to certification under section 96.

8. CONTINUATION OF LEAVE WHILE AN APPEAL COULD BE BROUGHT

Under sections 3C(2)(b) and 3D(2)(a) leave is extended while an in-country appeal could be brought against an immigration decision under section 82 of the 2002 Act (see IDI Chapter 12 for a complete list of immigration decisions).

An appeal can be brought until the end of the time limit for appealing against a decision which is 10 working days from receipt of the notice of decision. If the decision is sent by first class post, the decision is deemed to have been received 2 days after it was sent, unless there is proof to the contrary.

If no appeal is brought in time, leave to remain which is extended by 3C or 3D will lapse. If an out of time appeal is accepted by the Tribunal, leave is extended until the appeal is finally determined, withdrawn or abandoned.

9. CONTINUATION OF LEAVE WHILE AN APPEAL IS PENDING

In accordance with sections 3C (2)(c) and 3D(2)(b) leave is extended while an in-country appeal is pending.

An appeal is pending from the time that it is instituted until it is finally determined, withdrawn or abandoned. Section 104 (1) of the 2002 Act applies. An appeal is abandoned if the appellant is granted leave to enter or remain in the UK or if he leaves the UK. Section 104 (4) applies.

An appeal can lapse if the Secretary of State certifies that a decision was taken on grounds of public security (Section 97 of the 2002 Act) or on other grounds of public good (Section 98 of the 2002 Act).

10. ALTERED OR ADDITIONAL GROUNDS OF APPEAL

An appellant may add to, or amend the grounds of the appeal up to the time that it is heard by the Tribunal. This is an essential part of the one stop appeal process. Section 86 (2) (a) of the 2002 Act requires the Tribunal to consider any matter raised as a ground of appeal. (See Appeals Directorate operational guidance on the one stop appeal for detailed advice on the position when further grounds are made during the passage of an appeal.)

11. EXTENDED LEAVE UNDER PREVIOUS LEGISLATION

11.1 Decisions to refuse further leave to remain

Where a decision to refuse further leave to remain was made *before* 2 October 2000, the provisions of The Immigration (Variation of Leave) Order 1976 (VOLO) applied. The purpose of VOLO was to protect the right of appeal under section 14 (1) of the Immigration Act 1971. Under the 1971 Act it was necessary to have leave at the times of application, decision and appeal. VOLO ensured that leave was extended accordingly.

The 1999 Act did not contain the requirement in sections 61 and 69 (2) for leave up to the point of appealing. Therefore Paragraph 17 of Schedule 4 of the 1999 Act provides for leave to have effect while an appeal under section 61 or 69 was pending. A person whose leave was continuing under paragraph 17 was not entitled to apply for a variation of leave.

The 2002 Act further amended Section 3C as described in this instruction.

11.2 Decisions to curtail or revoke leave to remain

Where a decision to curtail or revoke leave to remain was made *before* 31 August 2006 the decision did not take effect while an appeal could be brought or was pending by operation of section 82(3) of the Nationality, Immigration and Asylum Act 2002. This is of similar effect to leave being statutorily extended under section 3D. However, under section 82(3) as a decision did not take effect it was possible for extant leave to expire while an appeal was pending. Also, where a decision did not take effect because of section 82(3), it was possible to make an application to vary leave to remain while an appeal was pending.