

**Upper Tribunal
Immigration and Asylum Chamber**

JR/4906/2018

Field House,
Breems Buildings
London
EC4A 1WR

Heard on: 3 February 2020

BEFORE

UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of Md Shahidul Islam)

Applicant

v

Secretary of State for the Home Department

Respondent

Mr P Turner, *Counsel*, on behalf of the Applicant
Mr J Anderson, *Counsel*, on behalf of the Respondent.

**APPLICATION FOR JUDICIAL REVIEW
JUDGMENT**

- (1) These are a written record of the oral reasons given for the judgment at the hearing.

The application

- (2) The applicant initially applied on 18 July 2018 for judicial review of a

pre-action protocol response from the respondent dated 4 July 2018. That letter re-affirmed an earlier response dated 2 May 2018, in which the respondent provided reasons for not having reached a decision on the applicant's application on 7 October 2016 for indefinite leave to remain. The challenge, therefore, is on the basis of a delay to make a decision, rather than to challenge a decision itself. The applicant sought:

- a. an order recognising his entitlement to indefinite leave to remain on the basis of long residence;
- b. an award of damages for loss of income in the period in which the respondent had delayed making a decision on his application, because he had been forced to quit a previous job following his leave to remain expiring in 2016; and
- c. damages for breach of his human rights, on the basis that the respondent had unlawfully adopted a blanket policy to delay consideration of applications for indefinite leave to remain, where applicants had previously used immigration advisers, in earlier, unconnected visa applications, called "Immigration4u", which were then subject of criminal investigations. The applicant was an innocent party; no allegations had been made against him personally; and the criminal investigations had since concluded.

Grant of permission

- (3) Following a lengthy litigation history, which it is unnecessary to repeat in full, Upper Tribunal Judge Norton-Taylor granted the applicant's application for reinstatement of his initial review challenge (proceedings had been previously compromised because of an agreement by the respondent to issue a fresh decision by 31 May 2019, absent 'special circumstances'), on the basis that the respondent had yet to reach a decision. Judge Norton-Taylor also granted permission to bring judicial review proceedings, noting in particular the respondent's continuing delay in making any decision; the absence of any firm timeframe doing so; and at least arguable prejudice to the applicant, resulting from the current state of affairs. He confirmed that the original grounds of challenge did not need to be amended and the grant of permission related to all of those grounds.

Background facts

- (4) The background facts are undisputed, unless otherwise indicated. For ease of reference, I have adopted the factual background set out in the respondent's detailed grounds of defence but in doing so have also considered that the applicant's grounds of challenge; written skeleton argument; and witness statement; together with annexed documents.

- 2) The applicant is a Bangladeshi national, who lawfully entered the UK on a student visa on 27 September 2006. He subsequently successfully extended his leave to remain in the UK, with a grant of leave until 19 November 2012. It was at this stage that he made an in-time application for further leave to remain as a Tier 1 (entrepreneur) migrant using immigration advisers called "Immigration4u," which have since been the subject of a criminal investigation under "Operation Meeker"; prosecution; and convictions of a number of its officers/employees in relation to large-scale attempts to fraudulently obtain entrepreneur visas. There is no allegation at this stage that the applicant was complicit in this fraud. Criminal sentencing of 'Immigration4u' representatives has since been the subject of widespread public reporting in September 2019. It is also worth noting that the respondent had previously informed the Upper Tribunal on 30 January 2019 that the criminal convictions flowing from Operation Meeker, as opposed to sentencing, had been resolved by that date.
- 3) On 14 March 2014, the applicant applied to vary his application for leave to that of a Tier 4 student, without the assistance of "Immigration4u." The respondent refused that application in a decision dated 23 June 2015 but provided him with an in-country right of appeal. He exercised that right and his appeal was dismissed by a First-tier Tribunal in a decision dated 20 August 2016, a copy of which is not been provided to me, but to which neither party referred me. The applicant applied for permission to appeal that decision on 30 September 2016, but he then withdrew his appeal.
- 4) The applicant's leave to remain, as extended by section 3C of the Immigration Act 1971, ended on 30 September 2016. The consequence is that he has been an overstayer since that date and has been unable to work. Nevertheless, within the relevant "grace period" permitted by the respondent, pre-dating the introduction of paragraph 39E of the Immigration Rules, the applicant applied on 7 October 2016 for indefinite leave to remain. He did so using a same-day application process. The respondent did not make a decision on the same day and the applicant had repeatedly chased for a decision since that date.
- 5) The applicant has issued pre-action protocol letters on 14 November 2016; 25 April 2017; and 19 April 2018. Permission was initially refused on the papers by Upper Tribunal Judge Perkins on the papers on 21 November 2018. He did so on the basis that the delay in the respondent's decision was explained (namely the applicant's use of a firm of immigration advisers whose conduct had caused concern) and whilst that was not of itself to the applicant's discredit, it was an answer to the allegation of a public law error in failing to consider the application.

Grounds

- 6) The applicant challenges the respondent's reply on 4 July 2018 to his pre-action protocol letter. He has referred to the fact of his engagement with a Bangladeshi proposed partner on 6 March 2015 whom he has been unable to visit, and whose applications for marriage visit visas have been refused on 13 March 2016 and 19 September 2017.

Ground one – general delay

- 7) The respondent's delay because of Operation Meeker is unlawful on public law grounds. His 2012 application involving Immigration4U was superseded by a subsequent 2014 application without their involvement, and which in any event has been refused and so cannot be relevant to the application for indefinite leave to remain. The fact that the respondent and a First-tier Tribunal were able to reach decisions on his Tier 4 student application without delay undermined any justification for a delay of a decision in respect of the ILR application. There is no time scale in which any confidence can be placed about when the delay in the ILR consideration will end. The respondent can cancel the applicant's ILR if there are any subsequent concerns about the applicant. The delay has caused real impact of the applicant because of his inability to work and the damage to his career. No sufficient explanation for the continuing delay has been provided.

Ground two – articles 6 and 8 ECHR

- 8) The applicant's inability to work has had as an impact on his rights to a private life under article 8 ECHR, and his inability to be visited by his fiancée, which he asserts is been linked to Operation Meeker.
- 9) The applicant has been subjected to a form of penalty because of the criminal investigation and therefore qualifies for protection under article 6 because his circumstances as a "suspect" have been substantially affected (see: Deweert v Belgium, 6903/75, [42] and [46]; and Eckle v Germany 8130/78, [73]). In terms of any civil proceedings, the applicant has not been informed of the nature and cause of any accusation against him and he has not had a fair and effective opportunity to challenge the interference with article 8 rights.

Ground three – procedural fairness and absence of reasons

- 10) The respondent's application of an indeterminate blanket policy

deprives the applicant of notice, by way of a supposed justification for the continuing decision to put consideration of his ILR application.

Ground four – fetter of discretion

- 11) The application of a blanket policy as a result of Operation Meeker amounts to an unlawful fetter by the respondent on her discretion to decide the applicant's ILR application.

The basis of the respondent's resistance to the orders sought

Ground one - delay

- 12) The applicant does not meet the very high threshold, namely that a delay must be regarded as manifestly unreasonable or that he has suffered a particular detriment as a result of the respondent's actions, which the respondent has failed to alleviate (see R (FH) v SSHD [2007] EWHC 1571 (Admin) and SSHD v Said [2018] EWCA Civ 627. Far longer periods of delay have been regarded as lawful. The assertion that the involvement of 'Immigration4u' was immaterial because it related to an earlier application could not be sustained as if there had been any wrongdoing it would still be material to the ILR application. Subsequent post-grant cancellation by the respondent was entirely inappropriate as respondent needed to consider all circumstances in reaching a decision on ILR and if she failed to do so, she could be justly criticised. The applicant's loss of salary because of an inability work was because he was an overstayer who had lost a previous First-tier Tribunal appeal. The fact that he had chose to remain in UK notwithstanding that decision was the cause of any loss.

Ground two

Article 8

- 13) The applicant has not made a human rights claim but instead has applied for ILR. No authority has been identified for the proposition that the delay in making an application for ILR engages article 8. Even if it did, it was plainly proportionate. The applicant's inability to work was as a consequence of his previous failed application for leave to remain and his inability to see his family was because of his decision to remain in the UK. Statutory appeals against the respondent's refusals of his fiancée's visit visa applications should made separately.

Article 6

- 14) There is no criminal investigation into the applicant. Article 6, in relation to safeguards on criminal procedures, is therefore irrelevant.

The respondent's consideration of an immigration visa is not a determination of the applicant's civil rights or obligations, which might engage article 6. Article 6 does not require the respondent, in the course of reaching a visa decision, to disclose the nature and cause of any accusation against him, as the applicant alleges.

Ground three

- 15) The respondent has provided an explanation for why the applicant's application has been put on hold. The respondent has attempted to reach settlement in respect of the timeframe in which to review the applicant's application.

Ground four

- 16) The respondent has not fettered her discretion and is entitled to take decisions in accordance with the generality of applications in which Immigration4u may have been involved, particularly in light of the guidance formulated in the wake of the Court of Appeal's decision in Balajigari v SSHD [2019] EWCA Civ 673, i.e. the possible adoption of a "minded to refuse" process.

Discussion and conclusions

Ground one

- 17) I do not accept Mr Turner's submission that the authority of R (FH) v SSHD is limited in its application or can be distinguished from the present application, on the basis that it dealt with so-called 'legacy cases,' where those applicants had already had previous claims considered and rejected. I accept that the explanation for, and effect of, delay has to be considered on a case-by-case basis, but nevertheless the test is a high one and there does have to be a delay that is manifestly unreasonable; or an individual must have suffered some particular prejudice. I specifically reject Mr Turner's proposition that anything outside what he described as the standard response time for an application for indefinite leave to remain of between eight weeks to six months is manifestly unreasonable. The respondent's published timeframes for responses, or 'customer service standards' are carefully caveated to refer to straightforward applications, allowing for departure from those standard timeframes.
- 18) I concluded that the delay of just under three and a half years in the applicant's case was not so manifestly unreasonable, noting that the respondent had provided explanations on more than one occasion for the delay, namely the reference initially to Operation Meeker; and then

in light of Balajigari. As Operation Meeker progressed, the respondent provided further updates, from the initial reference to it in 9 May 2017; followed by correspondence dated 2 May 2018 at [177] of the applicant's bundle, to the applicant being a possible party of interest, because of his previous use of 'Immigration4U'.

- 19) As the respondent's letter of May 2018 went on to discuss, while the police investigation was in relation to Immigration4U rather than in relation to the applicant directly, the eventual decision to bring prosecutions was made in March 2018. The criminal trial was scheduled to be finished by the end of August 2018 and until those proceedings were concluded the respondent was unable to conclude the applicant's application. The letter went on to set out the respondent's concerns, which I do not repeat, but suffice it to say, does provide an explanation for the need for a continuing delay.
- 20) The respondent later wrote to the applicant on 30 May 2019, a copy of which was at page [111] of the applicant's bundle. The respondent stated that following a nine-month trial at Southwark Crown Court, five defendants were found guilty of conspiracy to defraud the respondent by making false Tier 1 applications and that the applications submitted by Immigration4U used fraudulent details. The respondent stated that the applicant's application was amongst those submitted by Immigration4U during the relevant period, which was why he was a party of interest and his application had been put on hold. The respondent stated that although criminal proceedings had now been concluded it was not yet possible to progress the applicant's case.
- 21) Following the conclusion of criminal proceedings, the respondent indicated that she was reviewing all outstanding Operation Meeker applications, to consider the impact that the trial had those applications in light of the trial judge's findings in respect of the applications involving shell corporations; fraudulent documents; and information submitted by the convicted representatives of Immigration4U on behalf of their clients. Given the broad scope of the criminal proceedings and the number of pending cases, the respondent indicated that this exercise had taken longer than anticipated. The respondent went on to confirm that she was now developing case handling instructions, which in turn had been impacted by the Court of Appeal's decision in Balajigari.
- 22) The respondent referred, in the same letter of May 2019, to an earlier adjournment of the judicial review application by Upper Tribunal Rintoul on 30 January 2019 (see page [107] of the applicant's bundle). The adjournment was made on the basis that it appeared that the

criminal convictions flowing from Operation Meeker had been resolved and that the applicant's case had been allocated to a caseworker section within the respondent and that it was anticipated, as at 30 January 2019, that there would be a decision within three to six months. In the circumstances, Judge Rintoul was satisfied that it would be appropriate to stay the proceedings for three months in the hope that they could be resolved by consent.

- 23) Mr Turner suggested that Judge Rintoul's adjournment decision; the reference to convictions under Operation Meeker having been resolved; and the applicant's case having been allocated to a caseworker section; meant that the applicant had been exonerated from any wrongdoing and it followed that the link between Operation Meeker and any subsequent delay was an entirely irrational one.
- 24) I do not accept that proposition. While there is no allegation against the applicant at this stage and the criminal prosecutions have ended, that does not mean, as the respondent has subsequently made clear, that the applicant's use of Immigration4U is irrelevant to his ILR application. As the respondent stated in the letter of May 2019, she has needed to consider the criminal findings of large-scale fraud, even if, in the applicant's case, she does so by reference to a different evidential standard and has considered whether, and how, to adopt a "minded to refuse" process. I regard the link between Operation Meeker and the delay in the respondent's decision on the applicant's ILR application as rational and explicable.
- 25) I further reject an oral submission made by Mr Turner for the first time today that the reference to Balajigari was a contrived one, in other words, not an additional procedure added in good faith to protect the applicant, but instead, a contrived process, instigated to justify the delay and defeat the judicial review application. I accept Mr Anderson's submission that first, that it not a ground of review that has previously been made and that second, that is an extremely serious allegation which, contrary to Mr Turner's submission, cannot reasonably be inferred from the chronology of events, which I have considered in detail.
- 26) Instead, I accept Mr Anderson's submission that the delay has to be seen in the context of the sentencing judge had described as fraud "*on an industrial scale*" by the applicant's then immigration advisers involving a large number of applicants; and as the respondent confirmed in correspondence, was explicable because of the factual complexities of that fraud even (including the use of shell companies) even for those who were not the subject of criminal convictions. It was neither necessary nor did it follow that because of the delay in the

timeframe that the adoption of a minded to refuse process was contrived.

- 27) Moreover, I reject Mr Turner's submission that the adoption of a "minded to refuse" process outside the cohort of cases involving discrepancies in tax declarations, as per Balajigari, could be impugned on public law grounds. The respondent had referred to Balajigari in the May 2019 letter and while that has caused a further delay in reaching a decision on the applicant's ILR application, I do not accept that Mr Turner's further submission, that the respondent could grant ILR and then retract it, while uncertain of all relevant facts and possible explanations, was an alternative that the respondent can be criticised for not following. In this context, Mr Anderson has indicated that a draft "minded to refuse" letter has been drafted and is awaiting final approval, before being sent to the applicant shortly.
- 28) In the circumstances, I reject the part of the first ground that the delay has been manifestly unreasonable; or that the "minded to refuse" process is contrived to justify an element of the delay.
- 29) I have considered the second aspect of R (FH) v SSHD and in particular whether the applicant has suffered a particular detriment by virtue of the delay.
- 30) There are two areas in which the applicant has asserted that he has suffered particular detriment. First, he has not been able to work since 2016 when his "3C" leave expired. Second, he has not been able to visit his fiancée in Bangladesh and her applications for visit visas to marry him have been expressly refused by reference to his immigration status, albeit for additional reasons such as the lack of funds by which the applicant could support his fiancée.
- 31) In relation to the applicant's ability to work, I asked Mr Turner whether the applicant had ever applied for permission to work while his ILR application was being considered. Mr Turner confirmed that he had not, despite the option of doing so being canvassed in Balajigari. He said that there was no published policy indicating that people could do so and that there was every indication that it would have been turned down.
- 32) I do not accept Mr Turner's submissions as a satisfactory answer to the question of whether the prejudice of not being able to work could have been avoided by the applicant pro-actively seeking permission to work. The applicant has been legally advised throughout the period of delay; the well-known authority of Balajigari expressly canvassed the possibility of working prior to ILR applications being resolved; and it

is no answer to suggest that an application for permission to work would have been turned down, when such an application for permission has never been made. There was an alternative potential remedy open to the applicant to mitigate the impact of delay, which he has not pursued.

- 33) This in turn impacts on the respondent's refusal of his fiancée's application for leave to enter and marry him. Whilst I accept that the respondent's decision referred expressly to the applicant's immigration status, they also referred to concern about his financial means to support his fiancée. Mr Turner accepted in his written skeleton argument that if the applicant's ability to work had been resolved, there was a strong possibility that the applicant's fiancée would have been granted entry clearance. The applicant's failure to seek permission to work therefore impacted directly on his fiancée's entry clearance being refused.
- 34) The applicant failed to pursue alternative ways of mitigating the impact of delay in relation to his fiancée in a second aspect. It remained open to the couple to progress a statutory appeal against the refusal of entry clearance in the First-tier Tribunal. I reject Mr Turner's submission that it is an answer to that lack of challenge, to say that a statutory appeal would have failed, when no such appeal has been made.
- 35) In conclusion on ground one, I am satisfied that this is not a case where the delay in question is manifestly unreasonable, noting the complexity of the matters before the respondent. The respondent has, albeit with delays, explained the reasons for doing so and explained, when there was a consent order which had provided for a decision absent 'exceptional circumstances', those circumstances. I also do not regard the delay as being the cause of particular detriments to the appellant, where there were alternative options for him to pursue, without needing to leave the UK and abandon his ILR application.

Ground 2: Articles 6 and 8

- 36) These grounds are tied heavily to ground one. In respect of Article 6, Mr Turner, without making any formal concession, explained that he had not drafted the original grounds and had no answer to Mr Anderson's submission that Article 6 was not applicable to a determination of an immigration visa - see R (MK (Iran)) v SSHD [2010] EWCA Civ 115. The undisputed proposition is that the applicant's ILR application is not a civil right which engages Article 6. There are no criminal proceedings against the applicant. I reject the challenge under Article 6.

- 37) In respect of Article 8, the respondent's Acknowledgement of Service and grounds of defence point out that the applicant makes no reference to any authority for the proposition that his rights under Article 8 are engaged. Indeed, it has been left to the respondent to identify one possible case, BAC. v Greece, ECHR application number 11981/2015. Mr Turner responded by indicating that he had not settled the original pleadings and relied on the delay as impacting on the applicant's family and private life.
- 38) I accept Mr Anderson's submission that BAC v Greece can be distinguished on its facts from the applicant's case. In BAC, the Greek statutory body had concluded that the claimant, seeking protection, had suffered adverse treatment and the Greek procedural rules required that in those circumstances, protection status should be confirmed within 24 hours. The Greek government had failed to do so 12 years' later. I distinguish that case on two grounds. First, the length of the delay in that case is inexplicable in contrast to the applicant's case. Second, in the case of BAC, the second decision, in respect of which there was such a delay, was merely to confirm the consequences of the first decision, which was not the case in the applicant's application. The applicant's challenge was on the assumption that his ILR application would succeed, when it was far from clear that that assumption was a realistic one.
- 39) I therefore reject the challenge under Article 8.

Ground three – procedural fairness and absence of reasons

- 40) The applicant's challenge to the absence of reasons for the delay and lack of details of allegations against him is covered in the analysis of ground one. The respondent has provided detailed reasons for the delay and the complexity of the issues which impact on the applicant's application. The applicant's challenge that he should be provided with further reasons is not consistent with his challenge to the respondent's adoption of a "minded to refuse" process. The remainder of this challenge amounts, in reality, to a challenge to the delay, which I have already rejected.

Ground four – fetter of discretion

- 41) Once again, the challenge is, in reality, one in relation to delay. The applicant challenges the delay in the respondent reaching a decision and in not reaching a decision straightaway whilst she considered not only the complex facts arising as a result of the Immigration4U prosecution but also the implementation of a Balajigari-style process

for the applicant. As I have indicated, I do not accept that the adoption of a “minded to refuse” process can be impugned on public law grounds nor can the delay be impugned, for reasons I have already given.

Summary of conclusions

- 42) The applicant’s rights under Articles 6 and 8 of the ECHR have not been breached. The delay cannot be impugned on public law grounds and the applicant has failed to pursue alternative remedies to mitigate the impact of the delay on him. The application for judicial review is refused on all grounds.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **10 February 2019**



**Upper Tribunal
Immigration and Asylum Chamber
Judicial Review Decision Notice**

The Queen (on the application of Md Shahidul Islam)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Keith

Having considered all documents lodged and having heard Mr P Turner, Counsel, instructed by J Stifford Solicitors, on behalf of the applicant and Mr J Anderson, Counsel, instructed by the Government Legal Department on behalf of the respondent at a hearing at Field House, London on 3 February 2020

It is ordered that

- (1) The judicial review application is dismissed in accordance with the judgment attached.
- (2) I order, therefore, that the judicial review application be dismissed.

Permission to appeal to the Court of Appeal

- (3) The applicant has sought permission to appeal to the Court of Appeal, in oral submissions, the gist of which are as follows:
 - a. (1) that I had erred in concluding that the delay in the respondent reaching a decision was explicable because of the complexity of issues being considered by the respondent, when the respondent had adduced no evidence on that point. Contrary to that assertion, the judgment refers to correspondence from the respondent dated 30 May 2019, constituting evidence, at page [111] of the applicant's bundle,

which dealt with the complexity of those matters, as including shell companies, and fraudulent documents and information submitted by the convicted representatives on behalf of their clients. I do not regard the judgment as disclosing any arguable error of law.

- b. (2) I had erred in concluding that the Court of Appeal decision in Balajigari v SSHD [2019] EWCA Civ 673, was authority for the proposition that those awaiting an ILR decision had the right to work. Contrary to that assertion, the judgment did not state that the applicant had the right to work, but instead, he had had the option of applying for permission to do so, which he had failed to pursue. I do not regard that as disclosing an arguable error of law.
- c. (3) I was setting a 'dangerous precedent' in concluding that the adoption of a "minded to refuse" process, without its inclusion in a published policy, was not unlawful. Contrary to that assertion, the judgment does not decide that a "minded to refuse" process must be adopted, but that in complex factual scenarios, the adoption of a "minded to refuse" process, on a case-by-case basis, may not be impugned on public law grounds. That aspect of the judgment discloses no arguable error of law.
- d. (4) I had erred in linking the delay in the respondent reaching her decision to 'Operation Meeker.' The judgment considered this at length at paragraph [19] to [24]. The assertion of an arguable error of law amounts, in reality, to a disagreement with the conclusions in the judgment.

(4) I therefore refuse permission to appeal to the Court of Appeal for the same reasons that I have refused the orders sought for judicial review.

Costs

(5) I did not accept Mr Turner's submission that the respondent would not have been at the stage of being about to reach a decision on ILR, unless she had been prompted to do so by the threat and progression of judicial review. For the reasons given in the judgment attached, the applicant's challenge to the respondent's delay in reaching a decision has failed and it has been open to the applicant to seek alternative means of mitigating the impact of the delay on him. In the circumstances, as his application has failed, on the merits, on all grounds, I order that the applicant shall pay the respondent's reasonable costs, to be assessed, if not agreed.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **10 February 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an applicant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).