



Heard at Field House  
On 27 June 2019

R (on the application of Bajracharya) v Secretary of State for the Home Department (para. 34 – variation – validity) [2019] UKUT 00417 (IAC)

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

The Queen on the application of  
**MR BAJRACHARYA**

**Applicant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Before the Hon. Mrs Justice Thornton (sitting as a Judge of the  
Upper Tribunal)**

**Application for judicial review: substantive decision**

**Representation:**

For the Appellant: Dr Russell Wilcox, Counsel instructed by Chancery Solicitors

For the Respondent: Ms Katie Ayres, Counsel instructed by Government Legal Department

*(1) Paragraph 34 [A-F] of the Immigration Rules is to be construed by the application of the ordinary principles of statutory construction, which start from the natural meaning of the words in their context.*

*(2) Paragraph 34 requires applicants to make an application for leave to remain in accordance with the provisions of 34.*

*(3) If a second application is submitted when the first application is outstanding, the second application will be treated as a variation of the first application [34BB(2)].*

*(4) If the variation does not comply with the requirements in paragraph 34 “the variation will be invalid and will not be considered” (paragraph 34E). Invalidity does not extend to the original application.*

## **Decision: the application for judicial review is granted**

### **Introduction**

1. The Applicant, Mr Bajracharya, challenges the Respondent’s decision dated 20 August 2018, by which the Respondent rejected his application for indefinite leave to remain in the United Kingdom as invalid for failure to supply biometric information and stated that the Applicant had become an overstayer liable to removal from the UK (“the Decision”).
2. The backdrop to the Decision was three successive applications for leave to remain by the Applicant. He had applied for further leave to remain on human rights grounds in November 2017. He made a subsequent application in March 2018 on family and private life grounds. His third application, which gave rise to the Decision was an application for indefinite leave to remain, made in May 2018.
3. The Applicant accepts that the Secretary of State was entitled to reject his May 2018 application for indefinite leave to remain because he failed to provide the necessary biometric information. However, on behalf of the Applicant, Dr Wilcox contends that in then treating the Applicant as an overstayer, the Respondent misconstrued paragraph 34E of the Immigration Rules. Correctly construed, paragraph 34E required the Respondent to treat the third application as an invalid variation of his previous (second) application which was valid and therefore required determination.
4. The Respondent contends that paragraph 34 must be interpreted in light of Lord Carnwath’s analysis in the Supreme Court decision of Mirza v Secretary of State for the Home Department [2016] UKSC 63 and the Court of Appeal’s decision in R (Singh) v Secretary of State for the Home Department [2018] EWCA Civ 1669. Accordingly the third application was valid on submission and a ‘valid variation of a leave to remain application’, pursuant to paragraph 34F of the rules, thereby effectively subsuming the previous application. Under paragraph 34F the ‘valid variation’ fell to be determined in accordance with the Immigration Rules and it failed for want of the necessary biometric information.

5. Permission was granted by the Upper Tribunal to judicially review the Decision on the following basis:

*“... We grant permission on ground 2 as expanded upon in the hearing. That concerns the inclusion in the Decision of a section 10 notice, informing the applicant that he was an overstayer and could be removed. The argument is pleaded .... as follows. The Applicant says he did not receive the curtailment notice sent on 17 July 2017. He says that this was sent his partners email address and the relationship had by then broken down. He does not mention the curtailment notice in the grounds he says he was unaware of it until he received the Respondent’s AOS. He says the curtailment was therefore ineffective and his leave continued to 15 November 2017. On 13 November 2017, he applied for further leave. The Applicant accepts that this application was varied by a second application on 15 March 2018. He points to evidence that he enrolled his biometrics in relation to that application on 8 May 2018. He says therefore that this second application was valid. He submits that the subsequent application to vary made on 4 May 2018 which was declared invalid by the Decision did not render invalid the 15 March 2018 application because having regard to rules 39 and 39E, only a valid application can operate to vary an earlier application. Accordingly he says that this application remains pending...*

*...it is arguable that his leave would continue by the valid application on 15 March 2018 which, if he is right on his variation argument would then mean that he had leave as of the date of the Decision and thereafter further leave when the application was again varied on 2 September 2018....” (Upper Tribunal Judge Smith)*

(reference above to paragraph 39 is assumed to be reference to paragraph 34 of the Immigration Rules)

6. Accordingly the issue that arises before this Tribunal is the proper construction of paragraphs 34 of the Immigration Rules and the implications of the analysis in Mirza v SSHD [2016] and Singh v SSHD [2018].

### **Factual Background and Chronology**

7. The Applicant is a national of Nepal born on 27 October 1984. He entered the United Kingdom on 10 October 2009 with leave to enter as

a Tier 4 (Gen) student dependent partner, valid from 1 October 2009 until 21 May 2011. The Applicant then made several subsequent applications for further leave on the basis of his relationship with his spouse which tracked the changing basis upon which she was granted extension to her stay. The last of these applications afforded the Applicant leave to remain, valid until 15 November 2017.

8. It appears that the Secretary of State attempted to send notice to the Applicant on 17 July 2017 curtailing his leave to remain so as to expire on 15 September 2017. The Applicant contends that he only became aware of the curtailment notice after the issue of these proceedings and the notice was not properly served. This issue was excluded by Upper Tribunal Judge Smith as falling for determination in this application and accordingly I do not consider the point further.

9. On 13 November 2017, the Applicant applied for further leave to remain on human rights grounds. It is common ground that this application satisfied the requirements of paragraph 34 of the Immigration Rules and was validly made. On 15 November 2017, his leave expired. It is also common ground that the Applicant made a subsequent application, on 15 March 2018, for leave to remain, this time on grounds of family and private life. On 04 May 2018 the Applicant made a third application - this time for indefinite leave to remain outside the Immigration Rules. The necessary biometric information was provided for the second application (family and private life) on 08 May 2018. Biometric information was not however provided in relation to the third application (indefinite leave to remain) despite the Respondent writing to the Applicant on 12 June 2018 requesting his biometrics within 15 working days:

*“Even if you have had your biometrics taken for a previous application you still need to do it again for this application, to enable the Home Office to confirm your identity”.*

10. On 12 July 2018, the Respondent sent the Applicant a second letter requesting his biometrics within 10 working days or a reasonable explanation for why this could not be done:

*“If you fail to enrol within 10 working days and do not contact us with a valid reason your application may be rejected as invalid”.*

11. On 20 August 2018 the Respondent rejected the Applicant’s applications for leave to remain as invalid:

*“You have attempted to make an application for leave to remain in the United Kingdom. We wrote to you on 12 June 2018 and requested that you enrol your biometrics initially within 15 working days. We wrote you again on 12 July 2018 and provided you with a further 10 working days. As we have not received any correspondence from you and we can see that you have still not enrolled your biometrics within*

*the stipulated timeframe, we have rejected your application. We are therefore returning your application and documents received from you."*

12. The letter went on to state:

*"Persons who require but no longer have leave to enter or remain are liable to removal from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 (as amended by the Immigration Act 2014.)*

*You may be detained or placed on reporting conditions."*

13. On 2 September 2018 the Applicant made an application for indefinite leave to remain outside the Immigration Rules based on his private life in the UK, compassionate grounds and his fear of persecution on his return to Nepal.

### **The Submissions of the parties**

14. On behalf of the Applicant Dr Wilcox accepted that the application of 4 May 2018 for indefinite leave to remain was rendered invalid by the Applicant's failure to provide the necessary biometric information. However he submitted that the previous application for leave to remain on grounds of family and private life remained valid, the biometric information having been provided on 08 May 2018. It is apparent, he said, from the statutory regime; the rules and the Respondent's guidance that there is a clear distinction between an application for leave to remain and the variation of any such application. More specifically the natural reading of paragraph 34E is that any defects in an attempt to vary an application do not infect the underlying application. Lord Carnwath's analysis in Mirza v Secretary of State for the Home Department [2016] UKSC 63 is not apt when applied to variations.

15. On behalf of the Secretary of State, Ms Ayres submitted that, as per the analysis of Lord Carnwath in Mirza, the Applicant's application for indefinite leave to remain was valid on submission on 04 May 2018 because it complied with the requirements of paragraph 34 of the Immigration Rules. Paragraph 34BB of the Rules provides that there can only be one outstanding application for leave to remain. Accordingly the valid variation effectively subsumed the previous application and fell to be determined under paragraph 34F (as a valid variation). As the Applicant had failed to provide the necessary biometric information his application failed. There was by this point no previous application in existence for him to fall back on.

### **The Legal framework**

16. Section 3C of the Immigration Act 1971 provides for the continuation of leave pending a decision on an application to vary the leave:

*“Continuation of leave pending variation decision*

- (1) *This section applies if –*
- (a) *a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,*
  - (b) *the application for variation is made before the leave expires, and*
  - (c) *the leave expires without the application having been decided.*
- (2) *The leave is extended by virtue of this section during any period –*
- (a) *the application for variation is neither decided nor withdrawn,*
- ...
- (4) *A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.*
- (5) *But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).”*

17. Section 50 of the Immigration Nationality and Asylum Act 2006 enabled the Secretary of State to lay down in the immigration rules requirements for the procedure for applications, including the use of specified forms, and to make provision for the consequences of failure to apply.

18. The version of paragraph 34 in force between 06 April 2018 to 05 July 2018 when the Applicant’s application was decided provides, so far as relevant to the issues arising, as follows:

*“How to make a valid application for leave to remain in the UK*

*34. An application for leave to remain must be made in accordance with sub-paragraphs (1) to (10) below.*

...

*(3) Where the applicant is required to pay a fee, this fee must be paid in full in accordance with the process set out in the application form.*

...

*(10) Where the applicant is required to provide their biometric information, this must be provided in accordance with the process set out*

*in the biometric enrolment letter and any subsequent warning letter issued in accordance with the Code of Practice about the sanctions for non-compliance with the biometric registration regulations.*

*34A. Subject to paragraph 34B, where an application for leave to remain does not meet the requirements of paragraph 34, it is invalid and will not be considered.*

#### *Multiple Applications*

*34BB (1) An applicant may only have one outstanding application for leave to remain at a time.*

*(2) If an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application.*

...

#### *Variation of Applications or Claims for Leave to Remain*

*34E. If a person wishes to vary the purpose of an application for leave to remain in the United Kingdom, the variation must comply with the requirements of paragraph 34 (as they apply at the date the variation is made) as if the variation were a new application. If it does not, subject to paragraph 34B, the variation will be invalid and will not be considered.*

*34F. Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made."*

19. The power to require biometric information is derived from regulations made under section 5 of the UK Borders Act. The Immigration (Biometric Registration) Regulations 2008 (2008/3048) provide that a person subject to immigration control "*must apply for the issue of a biometric immigration document*" where certain conditions were satisfied (Regulation 3).
20. Regulation 23 provides that on failure to comply, the Secretary of State "*may*" take any of the actions specified in paragraph (2):

*"(2) The actions specified are to -  
(a) refuse an application for biometric immigration document;*

*(b) treat the person's application for leave to remain as invalid..."*

*(c) refuse the person's application for leave to remain; and*

*(d) cancel or vary leave to enter or remain."*

21. Home Office Guidance on 'Application for leave to remain; validation, variation and withdrawal' states at [153-178]:

***"Varying an application for leave to remain***

*An applicant can vary the purpose of an application at any time before a decision on the application is served. 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....*

*Deemed date of service of a decision is as follows, if served:*

- by post, 2 days after the date the letter is posted*
- by email, on the date the email is sent*
- in person, on the date it is served*

*If the applicant wishes to vary the purpose of their application, they must complete the specified form and meet all the requirements of paragraph 34 of the Immigration Rules for the variation to be valid.*

*...*

*A valid variation of purpose will look like a new application. You must check CID to see if an earlier application exists which has not yet been decided. This will tell you whether the new application is a variation of an existing application or a fresh application. If it is a fresh application you must consider whether it can be made. Guidance on applications made while a person is on section 3C can be found in the [3C guidance](#).*

*...*

***Date of application: application to vary***

*Where an application is varied, the application date remains the date of the original application. This is relevant to whether an applicant has, or will have, 3C leave....*



*However, for PBS applications, where a variation application is made in accordance with paragraph 34E, then, for the purposes of assessment against the rules, the date on which the variation is made should be treated as the date of the application.”*

22. In R (Mirza, Iqbal and Ehsan) v Secretary of State for the Home Department [2016] UKSC 63 (at [179-193]), the Supreme Court considered how section 3C of the Immigration Act 1971 applies where an application to vary the period of leave was made in time but was procedurally defective for some reason. Lord Carnwath distinguished the cases of Mirza and Iqbal (non-payment of fees) from that of Ehsan (failure to provide biometrics). The failure to provide biometric information could not be treated as retrospectively invalidating an application from the outset. It would invalidate the application from the time of the failure to submit biometric information and not before, thus meaning the application was valid at the outset.

*“36. ....there is a potentially important difference. The obligation to pay the fee arises at the time of the application. There is no conceptual difficulty in providing that an application unaccompanied by a fee is invalid from the outset. The requirement to apply for biometric information arises only at a later stage, on receipt of a notice from the Secretary of State. Thus in Ms Ehsan’s case the application was made in December 2011, but it was not until the following February that she was required to make an appointment. Even then it was accepted that there might be a reasonable explanation justifying further delay.*

*37. It is difficult to see any reason why a failure at that stage should be treated as retrospectively invalidating the application from the outset, and so nullifying the previous extension under section 3C of her leave to remain. There appears to be nothing in section 7 of the 2007 Act to support such retrospective effect.*

*.....*

*In any event there is no reason to read it as having retrospective effect. The natural reading, which is consistent with the statutory purpose, is to give power to invalidate the application as from the time of the decision, but not before.”*

23. In R (Singh) v The Secretary of State for the Home Department [2018] EWCA Civ 1669 (at [194 - 206]) Lord Justice Irwin adopted Lord Carnwath’s analysis in relation to the provision of a passport:

*“26. Just as in the case of Ms Ehsan, this Appellant made an application in proper form. There was nothing further he was obliged to do at that point. I fail to grasp how that was not a valid application at that time. The subsequent failure to provide documentation properly led to the application becoming “invalidated”, but I can see no basis on which it could properly be invalidated retrospectively from the beginning, so that there never was a valid application. That is clearly to be distinguished from a case where the necessary steps for a valid application at the outset (such as payment of the relevant fee) had never been taken. If that is correct, then there was indeed a valid application on 22 October 2014, and time ran accordingly”.*

## **Discussion**

24. Paragraph 34 [A-F] of the Immigration Rules is to be construed by the application of the ordinary principles of statutory construction, which start from the natural meaning of the words in their context (Lord Carnwath in Mirza v SSHD at [33]).
25. It seems to me that the natural meaning of paragraph 34, as it was at the relevant time, is as follows:
  - a. Paragraph 34 requires applicants to make an application for leave to remain in accordance with the provisions of [34]. The relevant fee must be paid in full [34(3)]. Biometric information must be provided in accordance with the process to be set out in a biometric enrolment letter from the Respondent [34(10)].
  - b. If an application does not meet the requirements of paragraph 34 it will be invalid and will not be considered [34A].
  - c. An applicant cannot have more than one application outstanding at a time [34BB(1)].
  - d. If a second application is submitted when the first application is outstanding, the second application will be treated as a variation of the first application [34BB(2)].
  - e. A variation must comply with the requirements of 34, as if it were a new application [34E]. If the variation does not comply with paragraph 34, then (subject to 34B) the variation will be invalid and will not be considered [34E].
  - f. Any ‘valid variation’ of a leave to remain application will be decided in accordance with the rules [34F].
26. The wording in 34 (application) and 34E (variation of an application) is different. An application ‘must be made in accordance with’ the requirements of paragraph 34. A variation of an application ‘must comply’ with the requirements of paragraph 34. Paragraph 34 includes the requirement for biometric information which is forward looking. Compliance cannot take place, it seems to me, until the applicant receives the biometric enrolment letter from the Respondent

and follows the process set out in the letter. That does not however make the application invalid at this juncture given the requirement to comply has yet to be triggered by the receipt of the enrolment letter so as to set the biometric clock starts ticking. The variation is in a state of pending compliance. Once the Respondent sends the biometric letter the clock starts ticking and the application will become invalid if the applicant does not submit the data within the requisite timescale.

27. To support her interpretation that the May 2018 application for indefinite leave was valid from the outset, Ms Ayres' relied on Lord Carnwath's obiter analysis in Mirza, where his Lordship considered that the failure to provide biometric information could not be treated as retrospectively invalidating an application from the outset. He considered the appropriate position was that a failure to provide the information would invalidate the application from the time of the failure to submit biometric information and not before, meaning therefore that the application was valid at the outset.

28. However, Lord Carnwath was considering an application for leave to remain under section 3C. He was not considering the variation of any such application. My assessment of the natural meaning of paragraph 34 is founded on the words of paragraph 34E which provides that "the variation must comply with the requirements of paragraph 34" (emphasis added).

29. Moreover, it is important to look at the version of the rules that Lord Carnwath was considering in his analysis. Counsel did not have a copy of the relevant version at the hearing. After the hearing I was provided with a copy of the version of paragraph 34 in force as at the date of the determination of Ms Ehsan's claim in 23 December 2011. In the version supplied by Ms Ayres the requirement to supply biometric information is not one of the conditions listed as necessary for a valid application under paragraph 34. At the time of Lord Carnwath's analysis the requirement to supply the biometric information was derived from the Biometric Regulations and not from paragraph 34 of the Immigration Rules. This then may be the context for Lord Carnwath's distinction between the requirement for a fee and the requirement for the biometric information:

*"..... The obligation to pay the fee arises at the time of the application. There is no conceptual difficulty in providing that an application unaccompanied by a fee is invalid from the outset. The requirement to apply for biometric information arises only at a later stage, on receipt of a notice from the Secretary of State.*

30. The case of Singh v SSHD [2018] EWCA Civ 1669 concerned an application for leave to remain. The applicant failed to supply a passport within the requisite timescale and his application was rejected as invalid. He challenged the decision on the basis that the decision to treat the application as invalid was an error because he

has supplied the passport, albeit it late. Irwin LJ applied Lord Carnwath's analysis to the provision of passport photos. He analysed the position as follows:

*"Just as in the case of Ms Ehsan, this Appellant made an application in the proper form. There was nothing further he was obliged to do at that point. I fail to grasp how that was not a valid application at that time. The subsequent failure to provide documentation properly led to the application becoming 'invalidated' but I can see no basis on which it could properly be invalidated retrospectively from the beginning so that there was never a valid application" [26]*

31. I accept that a requirement to supply a passport within 15 days is a forward looking obligation, as are the biometric requirements in this case. However, the version of the Rules in force at the time of Irwin LJ's analysis differs from the version applied to the Applicant in this case. Nor, as I understand, was Irwin LJ considering a variation to an application, as here. The judgment does not therefore refer to the equivalent paragraph to 34E in this case (variations). As noted above, my analysis of paragraph 34 is based on the wording of the paragraph in force at the time the application in this case was determined.
32. As she accepted, properly in my view, Ms Ayres' interpretation required her to collapse the distinction between an application for leave to remain and an variation of that application. It is apparent from the wording of section 3C(4) & (5) Immigration Act that there the statutory regime makes a conceptual distinction between the two:

*(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.*

*(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a)."*
33. From a plain reading of paragraph 34E I do not see how the distinction can be collapsed in the way Ms Ayres sought to do, given the wording of paragraph 34E. If the variation does not comply with the requirements in paragraph 34 *"the variation will be invalid and will not be considered"* (paragraph 34E). Invalidity does not extend to the original application.
34. Accordingly, I am of the view that the analysis of Lord Carnwath in Iqbal and the decision in Singh can be distinguished.
35. Ms Ayres contended that Dr Wilcox's interpretation would cause administrative difficulties and confusion. I am not convinced the administrative difficulties are so great. The timetable for compliance with the requirement of biometric information is within the control of the Respondent. Moreover the default position is clear. Unless and

until the variation complies with the requisite requirements, the original application remains the application eligible for determination.

### **Conclusion**

36. For the reasons given above, the application for judicial review succeeds.
37. The Secretary of State's decision of 20 August 2018 was based on an erroneous construction of paragraph 34 of the Immigration Rules in force at the relevant time.
38. The Applicant's variation of his application for leave to remain was invalid once he failed to supply the necessary biometric information within the requisite timescale. However his second application had complied with requirements. It was therefore valid and eligible for determination by the Secretary of State.

### **Order**

39. I therefore make an Order quashing the Secretary of State for the Home Department's decision dated 20 August 2018.

### **Permission to appeal to the Court of Appeal**

1. I refuse permission to appeal to the Court of Appeal because the case does not raise an important point of principle or practise there is no other compelling reason for the Court of Appeal to hear it.

### **Costs**

2. The Secretary of State shall pay the Applicant reasonable costs of this judicial review application, to be subject to be subject to detailed assessment if not agreed.

Signed: \_\_\_\_\_



**The Hon. Mrs Justice Thornton**

Dated: **29/10/2019**