



Neutral Citation Number: [2021] EWCA Civ 1038

Case No: C4/2019/2480

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
MS MARGARET OBI, SITTING AS A JUDGE OF THE HIGH COURT
CO/3044/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2021

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE MALES
and
LORD JUSTICE LEWIS

Between:

THE QUEEN (on the application of AK and others)	<u>Applicants</u>
- and -	
THE ENTRY CLEARANCE OFFICE (ISLAMABAD)	<u>Respondents</u>
THE SECRETARY OF STATE FOR THE HOME	
DEPARTMENT	

Tim Buley QC and David Ball (instructed by **Duncan Lewis**) for the **applicants**.
Samantha Broadfoot QC and Carine Patry (instructed by **Government Legal Department**)
for the **respondents**

Hearing date: 1 July 2021

Permission is given for this judgment to be cited in legal proceedings in court.

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 9th July 2021.

Lord Justice Lewis:

INTRODUCTION

1. This is an application for permission to appeal against a decision of Ms Obi, sitting as a judge of the High Court (“the judge”), refusing an application to extend time for the bringing of a claim for judicial review.
2. In summary, the 11 applicants are nationals of Afghanistan. Their eldest sister came to the United Kingdom in March 2012 and was granted asylum in June 2012. The 11 applicants sought entry to the United Kingdom in June 2012 on the basis that they had been the subject of a de facto adoption by their sister in Afghanistan. That application was refused as the applicants did not satisfy the requirements of the relevant Immigration Rules. Ultimately, on 12 December 2017 the 11 applicants were granted discretionary leave to enter the United Kingdom for 33 months. That leave was granted outside the Immigration Rules on the basis that refusal of leave to enter would involve a breach of the right to respect for family life guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).
3. On 25 July 2018, the 11 applicants filed a claim for judicial review challenging what was said to be a decision of 26 April 2018, and the continuing unlawful application of the Immigration Rules. At an oral hearing, the judge decided that the effective decision in this case was that of 12 December 2017 so that the claim was brought out of time. She refused to grant the application to extend time for bringing the claim.
4. The 11 applicants contend that the judge was wrong to refuse to extend time for bringing the claim. They contend that this Court should extend time, grant permission to apply for judicial review and either hear the substantive claim itself or remit the matter to the Administrative Court. The respondent contends that the judge was entitled to reach the decision that she did.

THE LEGAL FRAMEWORK

5. Paragraph 352D of the Immigration Rules provides that children whose parents have been granted refugee status in the United Kingdom may be granted leave to enter to join or remain with their parents. Paragraph 352D provides

352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:

- (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
- (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and

- (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
- (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

6. Prior to 31 March 2003, “parent” was defined in paragraph 6 of the Immigration Rules to include an adoptive parent but only where the child was adopted in accordance with a decision taken by a competent administrative authority or court in a country whose adoption orders were recognised by the United Kingdom.
7. On 31 March 2003, changes to the Immigration Rules came into force which amended the definition of “parent” to include the parent of a child who was the subject of a de facto adoption. The amendments provided a definition of de facto adoption. The material provisions of paragraph 6 provide that parent includes:
 - “(c) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or a court in a country whose adoption orders are recognised by the UK or where a child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A.....”
8. Paragraph 309A of the Immigration Rules provides that:

“Adopted children

309A. For the purposes of adoption under paragraphs 310-316C a de facto adoption shall be regarded as having taken place if:

- (a) at the time immediately preceding the making of the application for entry clearance under these Rules the adoptive parent or parents have been living abroad (in applications involving two parents both must have lived abroad together) for at least a period of time equal to the first period mentioned in sub-paragraph (b)(i) and must have cared for the child for at least a period of time equal to the second period material in that sub-paragraph; and
 - (b) during their time abroad, the adoptive parent or parents have:
 - (i) lived together for a minimum period of 18 months, of which the 12 months immediately preceding the application for entry clearance must have been spent living together with the child; and
 - (ii) have assumed the role of the child’s parents, since the beginning of the 18 month period, so that there has been a genuine transfer of parental responsibility.”
9. The definition is convoluted but, essentially, for a de facto adoption to have taken place, the following requirements need to be satisfied. The adoptive parent (or parents):
 - a) must have lived abroad for a minimum period of 18 months immediately preceding the application by the child for entry clearance;

- b) must have been living with the child for a period of 12 months immediately preceding the application by the child for entry clearance;
 - c) must have assumed the role of the child's parents, since the beginning of the 18 month period, so that there has been a genuine transfer of parental responsibility.
10. The applicants criticise aspects of this definition. In particular, they criticise the requirement that the adoptive parent must have lived with the child in the 12 months immediately preceding the making of an application for entry clearance. They point to the fact that this definition could never be satisfied in the case of a refugee as that person would have fled the country to seek asylum elsewhere. It would inevitably have taken time to be recognised as a refugee in the state to which the person fled and before any application for entry clearance could be made on behalf of the child. That person could not, therefore, have been living with the child in the period "immediately preceding" the making of the application for entry clearance. By parity of reasoning, similar criticisms could be made of the requirement that the adoptive parent must have lived in the country for an 18 month period "immediately preceding the making of the application for entry clearance".

THE FACTS

11. There has been no substantive hearing of this claim in the Administrative Court and no judgment identifying the relevant facts. As this is an application for permission to appeal, this Court has had limited evidence provided to it and is not in a position to find facts. The factual description below is taken either from the documents where particular facts are not in dispute or from the findings of fact made by the First-tier Tribunal which considered an appeal by the applicants in 2013. Those factual findings have not been challenged and, indeed, at the most recent hearing in the Upper Tribunal in June 2017, it is recorded that the applicants and respondent were content that the Upper Tribunal should consider the evidential findings made by the First-Tier Tribunal.

The Applicants and their Sister

12. The 11 applicants are all nationals of Afghanistan. The oldest was born in 1995 and the youngest was born in 2005. Their eldest sister, Ms K, was born in 1981. Ms K worked for US Aid in Afghanistan between August 2008 and November 2008. Ms K and her husband then moved to Germany where Ms K had a scholarship to complete a Master's Degree in Public Policy.
13. The applicants' father had psychiatric problems which worsened in October 2010. That resulted in the mother leaving the family home. It appears that Ms K returned to Afghanistan at some time in about November 2010. The First-tier Tribunal noted that Ms K had obtained a court order, in about December 2010, by which she was appointed the applicants' legal guardian. Ms K completed her Master's Degree during a number of visits to Germany and cared for the applicants.
14. At some stage, she began working in Kabul as the Gender Adviser to the High Peace Process. Following threats, however, Ms K was forced to flee Afghanistan and arrived in the United Kingdom in March 2012. She applied for asylum. That claim was

accepted in June 2012 and Ms K was, we were told, given leave to remain for 5 years. We were told that in due course she became entitled to apply for indefinite leave to remain, and, ultimately to apply for British citizenship and is now a British citizen.

15. On 28 June 2012, the applicants applied for entry clearance under paragraph 352D of the Immigration Rules in order to enable them to come to the United Kingdom to join their sister. On 7 November 2012, those applications were refused. We have been provided with a copy of one of the decisions and we were told that the other 10 were in materially similar terms. The decision noted that the applicant wished to join her sister in the UK and it was claimed that the sister had adopted the applicant in Afghanistan in December 2010. The decision noted that Afghanistan was not a party to the Hague Convention dealing with adoptions. The decision summarised the evidence before the entry clearance officer. It recorded that the entry clearance office was not satisfied that the applicant was a child of a parent who was currently a refugee. Consequently, the application was refused as the entry clearance office was not satisfied that the applicant met the requirements of the relevant paragraph of the Immigration Rules.
16. Ms K's husband also applied for entry clearance. His application was granted. He stayed in Afghanistan, however, to look after the 11 applicants.

The Appeals

17. The applicants appealed to the First-tier Tribunal. There were, in effect, two strands to the appeal. The first issue was whether the 11 applicants had been the subject of a de facto adoption by their sister, Ms K, in Afghanistan (in which case, they would be eligible to enter the United Kingdom under paragraph 352D of the Immigration Rules as the de facto adopted children of a refugee). Secondly, if the applicants were not eligible under the Immigration Rules, would refusal of leave to enter amount to an unlawful interference with their, or their sister's, right to respect for family life under Article 8 of the Convention so that they should be granted leave to enter outside the Rules?
18. The First-tier Tribunal found that the sister had taken responsibility for her siblings in November 2010 and fled Afghanistan in March 2012. It considered, however, that the applicants had not established that Ms K had spent a period of 18 months living in Afghanistan during which period she had assumed the role of a parent. Secondly, while there was family life between the applicants and their sister, the tribunal found that, on the evidence before it, Ms K was not in loco parentis and the relationship between her and her siblings was not akin to that between a parent and dependant children. In reaching that conclusion, the tribunal reviewed the evidence including the evidence of contact after Ms K came to the United Kingdom in March 2012. It concluded in paragraph 23 that:

“I find that the Sponsor and her husband are effectively the sole legal guardians of the Appellants and that their relationship is likely to go beyond what is normal for siblings but I find that they have failed to prove that the relationship has reached a stage at which the relationship is equivalent to a de facto adoption or one in which the Sponsor and her husband ought to be treated as parents to the Appellants.”

19. The First-tier Tribunal then considered whether refusal of leave would involve a breach of Article 8 of the Convention. It concluded that Ms K's husband had a visa and could enter the United Kingdom. He had not done so as a matter of choice as he had stayed to care for the applicants. The tribunal therefore concluded that the interference with his family life was limited. It further concluded that the decision to refuse leave was a proportionate interference with the applicants' right to respect for their family life.
20. Permission to appeal that decision was refused. Ultimately, however, permission to apply for judicial review of that refusal of permission to appeal was granted by Holman J. In his reasons, Holman J. noted that there were two issues in the case: firstly whether the applicants could apply for leave on the basis of the Immigration Rules (and Holman J. noted that they could not) and secondly, whether refusal of leave was compatible with Article 8 of the Convention. Holman J. considered that it was arguable that the First-tier Tribunal had conflated these two matters when dealing with the second issue and granted permission to apply for judicial review. The refusal of permission to appeal was ultimately set aside. The applicants were given permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal and the matter returned to the Upper Tribunal for consideration.
21. The Upper Tribunal, however, also found that refusal of leave was a proportionate interference with the applicants' and their sister's Article 8 rights. Following an appeal to the Court of Appeal (which was conceded by the respondent), the matter came back before the Upper Tribunal in June 2017. The Upper Tribunal considered that the First-tier Tribunal had failed to consider all the relevant circumstances. It held that, given the facts as found by that tribunal, the decision of the entry clearance officer to refuse entry clearance did amount to an interference with the rights guaranteed by Article 8(1) and was not proportionate. The Upper Tribunal therefore allowed the appeal against the First-tier Tribunal's decision and indicated that it expected the entry clearance officer to deal with the matter expeditiously.

The Grant of Leave

22. By the time the Upper Tribunal decision was promulgated on 29 June 2017, five years had passed since the applicants had first applied for entry clearance in 2012. They were children (or in some cases now adults) who had spent a large part of their childhood in Afghanistan separated from their sister and being looked after by their brother-in-law. Despite the circumstances and despite, one might think, the urgency of the situation, the respondent did not immediately address the question of whether the applicants should now be granted leave to enter the United Kingdom.
23. On 29 September 2017, solicitors for the applicants sent a pre-action protocol letter to the respondent. It noted that there was still an outstanding application for entry clearance which needed to be addressed. It referred to the decision of the Upper Tribunal, noting that the respondent was not appealing the decision. It referred to the delay in dealing with the matter and requested that the applicants be given entry clearance. It did not suggest, however, that the applicants were entitled to leave to enter as de facto adopted children of their sister or that the provisions of the Immigration Rules which prevented them from obtaining such leave were unlawful. The entry clearance officer responded on 11 October 2017 saying that no decision had yet been taken.

24. On 12 December 2017, the respondent finally granted entry clearance by means of a stamp in each of the applicants' passport. The entry clearance, effectively, granted leave to enter and remain in the United Kingdom for 33 months. The 11 applicants arrived in the United Kingdom on 17 January 2018.
25. There is no clear documentary record of the reasoning underlying the decision to grant leave to enter limited to 33 months. However, a letter of 26 April 2018, and the witness statement of Alex Cramer, an entry clearance manager working for the United Kingdom Visa Immigration section in Abu Dhabi, confirm that leave was granted outside the Immigration Rules by the referred case work unit (not the entry clearance manager). The relevant policy guidance confirms that where appeals have been granted on human rights grounds, as the requirements of the Immigration Rules have not been met, decisions are to be taken by the referred casework unit. The guidance indicates that discretionary leave should be granted for 33 months and subject to a condition that there be no recourse to public funds. The overwhelming inference, therefore, is that discretionary leave was granted outside the rules, following the successful appeal on Article 8 grounds. That was why the matter was dealt with by the referred casework unit. That is why leave was for 33 months. It reflects the circumstances leading up to the grant of leave. The referred casework unit was not asked to, and was not considering the position of de facto adoption under the Immigration Rules. That had been dealt with as long ago as 2012 and 2013.

The Claim for Judicial Review

26. On 15 February 2018, solicitors for the applicants sent a pre-action protocol letter to the respondent. The letter began by explaining that the claim would relate to the failure to grant the applicants indefinite leave to remain following the successful appeal in June 2017 and the grant of limited leave to remain outside the Immigration Rules. It stated that the purpose of the letter was to "avoid litigation" by giving the respondent the opportunity to rectify the failure in not granting indefinite leave to remain. The letter said that there were two matters in dispute, namely (1) that paragraph 309A of the Immigration Rules setting out the scope of de facto adoptions was unlawful and (2) the decision to grant 33 months leave rather than indefinite leave was unlawful. It set out reasons why it was considered that paragraph 309A was unlawful. It then set out reasons why, in light of that unlawful rule, the decision to limit leave to remain to 33 months was itself unlawful and involved alleged breaches of Article 8 and 14 of the Convention.
27. On 1 March 2018, the entry clearance office in Islamabad replied. Having identified the two matters in dispute, the letter said:

"With apologies for the delay, I can confirm that this office seeking guidance from the relevant UKVI department on your claim and in particular the endorsement on the proposed applicants' visas of 33 months limited leave. As soon as we have the required information we will be in touch with our client as appropriate.

I hope this information address the points raised in your Pre-Action Protocol and negates the need for you to pursue the matter to judicial review".

28. Nothing further was heard from the respondent. On 23 April 2018 a further pre-action letter was sent on behalf of the applicants. On 26 April 2018, the entry clearance officer in Islamabad replied on behalf of the respondent. The material part of the letter says this:

“The claim is that:

- 1) The Immigration Rules at Paragraph 309A setting out the scope of de facto adoptions are unlawful
- 2) The Secretary of State’s decision to issue the proposed applicants with 33 months limited leave as opposed to indefinite leave is unlawful

An interim PAP response was sent on 1 March 2018. The relevant UKVI department has confirmed that leave was correctly issued 33 months limited leave as opposed to indefinite leave. The entry clearance was for [leave outside the rules] and not family re-union and the appeal was allowed on [human rights] grounds only.

I hope this information addresses the points raised in your Pre Action Protocol letter and negates the need for you to pursue the matter to Judicial Review.”

29. A claim was filed on behalf of the 11 applicants on 25 July 2018. As indicated, the claim form identified the decision to be judicially reviewed as the “decision to refuse to reconsider the grant of leave issued to the claimant (+ ongoing unlawful application of Immigration Rules)”. The date of the decision was said to be the 26 April 2018. The statement of facts and grounds states at paragraph 38 that the challenge is two-fold, namely, a claim that the Immigration Rules were unlawful and secondly that the entry clearance officer’s decision to grant 33 months’ leave only was unlawful. The grounds contend that paragraph 309A is unlawful in so far as it requires that the 18 months of the prospective adoptive parent living in the country be “immediately preceding the application for entry clearance”. That was said to be unreasonable because there would be an inevitable hiatus between the date when the prospective adoptive parent had been recognised as a refugee and the date when he or she had had to flee the country. The grounds further contend that the Immigration Rules were a disproportionate interference with the right to family life under Article 8 of the Convention, or involved unlawful discrimination contrary to Article 14. The grounds of the challenge to the decision granting 33 months’ leave recognised that the applicants did not qualify under the Immigration Rules as persons who had been subject to a de facto adoption as defined in the Rules but contended that it was unlawful not to give them the same leave on the same conditions as their sister.
30. In its acknowledgment of service, the respondent took the point that the real decision under challenge was the entry clearance officer’s decision of 12 December 2017 granting limited leave, not the letter of 26 April 2018. That letter was not a decision but a response to the pre-action protocol letter. The claim therefore had to be brought promptly and within three months of the date when the grounds of challenge first arose, i.e. on the 12 December 2017. The claim had been brought out of time as it was brought on 25 July 2018, more than 7 months after the decision.

31. By an order sent to the parties on 27 November 2018, Mr Mott Q.C. sitting as a judge in the High Court, adjourned the application to an oral hearing. In his observations, he observed that the challenge was to the decision in December 2017 but the claim form was filed on 25 July 2018. He noted that there was no application to extend time and no explanation for the delay. He observed that the claim form relied, “rather disingenuously” as the deputy High Court judge put it, on the letter of 26 April 2018 which was no more than a reply to the pre-action protocol letter.
32. On 19 September 2019 (some eight and a half months later) the applicants applied for an extension of time to bring their claim for judicial review. The application was accompanied by a witness statement of a solicitor, Mr Cheng. He explained that in light of the respondent’s representation that guidance was being sought, taken together with the Legal Aid Agency’s decision to refuse legal aid as the respondent had said it wanted more time to respond, the applicants’ representatives “considered that any subsequent decision relating to the grant of leave would amount to a fresh decision” and would therefore “be subject to new time limits”. Mr Cheng explained that the reference to the date of the decision under challenge as being the 26 April 2018 was not meant as a disingenuous attempt to mislead the court.

The Decision of the Judge

33. The oral hearing of the application for permission, and for an extension of time, took place on 26 September 2019. The judge said this:

“4 With regards to the issue of delay, it is important to note that a claim for judicial review must be filed promptly and, in any event, no later than three months after the grounds for making the claim first arose. The substantive decision in this case was made on 12 December 2017. The claimants were aware of the decision to grant leave and were represented by solicitors throughout. In the circumstances, the claim should have been filed no later than 12 March 2018. It was not, in fact filed until 25 January 2018. Therefore I am satisfied that it was filed out of time.

“5 There is no dispute between the parties that it is well established that reliance on the fact that there has been pre-action correspondence does not extend time. It is also not a good reason for extending the time limit.

6 I am happy to accept that the claimants acted in good faith. Nonetheless that good faith does not provide a good reason for the delay. The letter dated 1 March 2018, in response to the pre-action letter, stated that the author was “*seeking guidance*” on the endorsement. In my judgment, that does not even come close to indicating that the matter was under review. If the claimants’ representative were reassured by those words and conclude that a substantive decision would be issued, they misled themselves. I accept the submission made on behalf of the defendant that, at best, the letter indicated that instructions were being taken in light of the pre-action letter. The letter sent by the defendants on 26 April 2018 was not a substantive decision.

“7 There were then further delays. It has been submitted on behalf of the claimant that this was due to the issues relating to the grant of legal aid. I.e.

with the need to apply and await the grant of legal aid but the application for emergency funding was not made until 28 February 2018. I am afraid, in the absence of a good reason for the delays, I have concluded that it would not be appropriate to extend the deadline as it would be detrimental to good and effective administration.

“8 For this reason alone, I refuse the application”.

34. The judge went on to consider the merits and concluded that she would not have granted permission as the grounds were not arguable.

The Applicants' Application for Permission to Appeal

35. By an appellants' notice dated 4 October 2019 the applicants applied for permission to appeal. That appellants' notice was filed one day out of time and they applied to extend the time. Mr Cheng explained in a witness statement that this was largely due to the fact that the decision had been taken to file on 3 October 2018 (the applicants were still awaiting a decision on legal aid which was not, in fact, made until 4 October 2018). There were however, then unexpected transport difficulties on 3 October 2018 which prevented the solicitors from lodging the appellant's notice on that day. No objection was made to the application. It is clearly right that time should be extended.

36. The grounds of appeal were that the judge was wrong:

- (1) to find that the claim challenging the legality of the Immigration Rules was not arguable;
- (2) to find that the claim was out of time as (a) it was a challenge to the legality of immigration rules seeking a declaration that they were *ultra vires*: that was a measure of delegated legislation with ongoing legal consequences and so was in time; (b) it was in time as a challenge to the respondent's refusal to reconsider in light of a promise to do so; and (c) in any event to refuse to extend time for bringing the claim.

37. By order of 13 January 2021, Hickinbottom LJ adjourned the application into court on a rolled-up basis, that is, for consideration of the application for permission to appeal and, if that was granted, to enable the court, if it considered it appropriate to do so, to grant permission to apply for judicial review and retain the application to be dealt with at the hearing. By order of 21 April 2021, the Joint Council for the Welfare of Immigrants was permitted to intervene by written submissions and evidence limited to one witness statement. They duly did so.

38. As appears from the summary of the grounds of appeal, the challenge to the validity of paragraph 309A of the Immigration Rules was based on the submission that delegated legislation had continuing legal consequences and, consequently, the claim to challenge the legality of the Immigration Rules, brought on 25 July 2021, was in time. Prior to the hearing, the Court drew the parties' attention to decisions of the Court of Appeal dealing with the time limit for bringing claims to challenge the validity of delegated legislation, namely *R (Badmus) v Secretary of State for the Home Department* [2020] 1 WLR 4609, and *R (Delve) v Secretary of State for Work and Pensions* [2021] ICR 236. Those authorities indicate that the submission in

relation to the time limit for challenging the lawfulness of measures such as delegated legislation or the Immigration Rules was misconceived. Time begins to run in respect of a claimant seeking to challenge such a measure when he or she is affected by the measure that is challenged: see *Badmus* at paragraph 77 and *Delve* at paragraphs 126 to 127. That would have raised the issue of when, precisely, the grounds for claiming that paragraph 309A was *ultra vires* arose (which may have been as early as 2012 or 2013 when the applicants applied for leave under that paragraph, or when leave was refused).

39. In the event, Mr Buley QC, and Mr Ball, for the applicants accepted that it was not possible in the light of the authorities to argue that the claim was in time because it was a challenge to measures having a continuing legal effect (ground 2(a) above).
40. It has not been necessary to decide the issue of when, precisely, time began to run in relation to the claim that paragraph 309A of the Immigration Rules was unlawful as we have been able to decide this case on the basis that is most favourable to the applicants, that is that the earliest date on which the grounds of claim first arose was 12 December 2017. In future cases, however, parties must be alive to the decisions of the Court of Appeal relating to the operation of the time limit for bringing claims in relation to measures of general application such as delegated legislation or rules.
41. For convenience, it is appropriate to take the second issue, the question of time limits and the extension of time, first.

DELAY AND THE EXTENSION OF TIME

42. Mr Buley accepted that the judge was correct to find that the substantive decision in the present case was 12 December 2017. He did not seek to maintain the submission that the effective decision was contained in the letter of 26 April 2018 (ground 2(b) of the grounds). He submitted that the judge was wrong, however, not to extend time (ground 2(c) of the grounds). He submitted that there were five factors which the judge failed to have regard to and which, individually or cumulatively, justified an extension of time. These were (1) the correspondence and steps taken in March to April 2018 (2) the overall history of the matter (3) the absence of prejudice to the respondent if an extension of time were granted (4) the significant consequences for the applicants if the extension of time were refused and (5) the public interest in having the lawfulness of paragraph 309A of the Immigration Rules determined.
43. In relation to the correspondence, Mr Buley submitted that the 1 March 2018 letter expressly said it hoped that the willingness to obtain information about the decision of 12 December 2017 negated the need for the applicants to pursue the matter to judicial review. He submitted that that was a relevant factor to the discretion to grant an extension of time as it would be reasonable to wait for the substantive response to the pre-action protocol letter. Further, the solicitor had, in good faith, mistakenly but genuinely read the 1 March 2018 letter as indicating that a further decision would be taken (and the judge accepted that he had acted in good faith). That explained why no steps were taken before 26 April 2018 and why the solicitor believed the time limits applied afresh thereafter. That was a factor relevant to the discretion to extend time.
44. In terms of the overall history, Mr Buley submitted that it took five years for the applicants to obtain leave to enter. Even after they succeeded in their appeal in June

2017, it still took over five months for the respondent to respond and grant any form of leave. He further submitted that the consequences for the applicants of refusing to grant an extension of time to allow the claim to proceed would be significant. The merits of the claim as it related to paragraph 309A were strong and, if the applicants succeeded, they would be able to contend that the decision to grant 33 months limited leave only had been reached on a wrong basis. Finally, he submitted that there was a strong public interest in determining whether paragraph 309A was unlawful. He relied upon the evidence and submissions of the intervener as demonstrating that the issue was an important one.

45. Ms Broadfoot QC, with Ms Patry, for the respondent submitted that the judge was correct to refuse to extend time. Pre-action correspondence did not extend time and the parties cannot, in any event, agree an extension of time. The applicants' solicitor could not reasonably have relied upon the 1 March 2018 letter in deciding not to issue a claim before the expiry of the longstop, three month period for challenge on 12 March 2018. There was the significant, unexplained delay between 26 April 2018 and 25 July 2018 when the claim was finally filed in the Administrative Court. Further, the applicants did not issue an application to extend time until 19 October 2019 and did not follow the relevant guidance on this issue in the Administrative Court Guide. So far as the consequences for the applicants were concerned, they had had leave to come to the United Kingdom and had lived here for some time. Their applications for an extension of leave had been refused but they were entitled to appeal whilst remaining in the United Kingdom. So far as the merits were concerned, the First-tier Tribunal had indicated that Ms K had not spent the requisite period of 18 months in Afghanistan in any event and was not the de facto adoptive parent and would not satisfy the requirements of paragraph 309A.

Discussion

46. CPR 54.5(1) provides that a claim for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. The time limit cannot be extended by agreement between the parties: see CPR 54.5(2).
47. The court has power to extend time for bringing the claim under CPR 3.1.(2)(a). Ms Broadfoot invited us to adopt the approach to extensions of time for filing an appellant's notice set out in *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472. *Hysaj* concerned an application to extend time for filing an appellant's notice, and the Court of Appeal held that a court had to consider the significance and seriousness of the failure to comply with the relevant rule, the reasons for the failure, and all other circumstances of the case applying the rigorous approach seen in applications for relief from sanctions set out in CPR 3.
48. It is not necessary to consider whether precisely the same approach applies to applications to extend time for bringing a claim for judicial review and we were not addressed in detail on this issue. It is sufficient to note that, in this case, and perhaps more generally, the approach, or considerations, considered relevant in *Hysaj*, are likely to be relevant in any event in considering applications to extend the time for bringing a claim for judicial review. The courts do adopt a rigorous approach to such applications and it is well recognised that there is a public interest in judicial review claims being brought promptly and in any event no later than three months and a failure to do so is seen as a significant and serious failure. The courts will consider

and scrutinise carefully whether there is a good reason for the delay. They do consider other relevant circumstances including whether the claim involves issues of public importance which it is in the public interest to resolve and also any prejudice to other parties of allowing the claim to proceed. In addition, section 31(6) of the Senior Courts Act 1981 specifically provides that where there has been undue delay the court may refuse to grant permission if granting a remedy would be likely to cause substantial hardship or substantially prejudice the rights of any person or be detrimental to good administration.

The date from which the time limit began to run

49. In the present case, the grounds could not have arisen later than 12 December 2017 when the applicants were granted leave. Indeed, the likelihood is that they arose considerably earlier, possibly years earlier, in relation to the claim that paragraph 309A of the Immigration Rules was unlawful. But, for the reasons given above, I will assume that the relevant date is 12 December 2017.
50. In that regard, the judge was correct to find that the substantive decision was 12 December 2017 not the response to the pre-action protocol dated 26 April 2018. It is well-established that a claimant must challenge the decision which in reality determines the legal position. A claimant cannot avoid the application of the time-limits by writing to the defendant and then seeking to characterise a response as a fresh decision. Similarly, a response to a pre-action protocol letter, even one giving further information such as the letter of 26 April 2018, is not the relevant decision and the grounds of claim do not first arise when that response is sent.

The Factors Said to be Relevant to an Extension of Time

51. I turn then to the five factors that Mr Buley submitted were relevant and which he submitted that the judge failed to consider. The first is the correspondence in March and April 2018. I accept that the parties could not agree to extend the time limits. I do, however, regard the fact that a defendant says he is seeking information and specifically says that he hopes that the claimant can refrain from bringing a claim until that information is provided is a factor relevant to the exercise of the discretion to extend time. It may not be the only factor and there is, also, the wider public interest to consider. The letter of the 1 March 2018 may, therefore, provide a good reason for not taking action and not instituting proceedings during the period from 1 March 2018 until there was the further reply on 26 April 2018. But that ceased to be a good reason for not bringing the claim once the reply had been received and a reasonable, albeit relatively short period to consider the reply, had elapsed. It could not begin to provide a good reason explaining the delay from the end of April 2018 until 25 July 2018. In particular, that letter did not start the time limit in CPR 54.5 running afresh. The solicitor's belief, even reached in good faith as the judge accepted, would not provide a good reason for delaying filing the claim until 25 July 2018. Claims must be brought promptly and in any event, no later than 3 months after the date when the grounds first arose. In circumstances where the original decision was 12 December 2017, solicitors were acting for the applicants throughout, and the letter of 26 April 2018 provided little new information relevant to the grounds of claim (and certainly none that required three months to investigate), these matters are not capable of amounting to a good reason for failing to bring the claim until 25 July 2018.

52. Secondly, I do not consider that the overall history provides a good reason for extending time or is otherwise relevant to the exercise of discretion in this case. It is the case that, unfortunately, it took five years, and lengthy legal proceedings, before the applicants were able to establish that refusal of leave would be incompatible with their and their sister's right to respect for family life under Article 8 of the Convention. Regrettably, the respondent still took over 5 months to deal with the matter after the Upper Tribunal decision in June 2017. During that time, the applicants remained in Afghanistan. The applicants came to the United Kingdom in January 2018. They had solicitors acting for them. They had all the information necessary to bring proceedings, certainly by the end of April 2018. The overall earlier history does not provide a good reason for the failure to bring proceedings particularly in the period between the end of April or early May 2018 and 25 July 2018. The judge was well aware of the earlier history and referred to it in paragraph 3 of her judgment. She was entitled to find that there was no good reason for the delays.
53. Thirdly, the fact that granting an extension of time would cause prejudice to others may be a reason for refusing an extension of time. The absence of prejudice is not of itself a reason for granting an extension of time.
54. Fourthly, Mr Buley relied on the significant consequences to the applicants of a refusal to grant an extension of time. He submitted that the applicants have a strong case that aspects of paragraph 309A are unlawful and that would assist the applicants in contending that the grant of limited leave to remain for 33 months only was also unlawful.
55. The merits of a claim are generally unlikely to be of much relevance in deciding whether it is appropriate to grant an extension of time. As Moore-Bick LJ observed at paragraph 46 of his judgment in *Hysaj* "only where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play" in deciding to grant an extension of time.
56. In the present case, I am very well aware of the circumstances of the applicants and I can see that there is a strong case that aspects of paragraph 309A are unlawful. In particular it is possible to see that there is a case that it is irrational to require that the prospective adoptive parent have lived with the child for the 12 months "immediately preceding the making of an application for entry clearance" (and by parity of reasoning, the fact that the 18 months that the prospective adoptive parent spends living in the relevant country while assuming the care of the child must immediately precede the application for entry clearance).
57. Paragraph 352D of the Immigration Rules provided for a child of a parent who was a refugee to obtain leave to enter if certain conditions were satisfied. Parent, as initially defined, only included children who were adopted pursuant to a decision or order of an authority or court recognised by the United Kingdom. In 2003, however, the Immigration Rules were amended to include children who had been the subject of a de facto adoption by a person. Paragraph 309A defines the circumstances in which a "de facto adoption shall be regarded as having taken place". Imposing a requirement that the 18 months living in the country during which the person assume care of the child and the 12 months living with the child, must be in the period "immediately preceding the making of the application for entry clearance" means that children claiming that they have been the subject of a de facto adoption by a person with

refugee status will be unable to satisfy the requirements of paragraph 309A. The prospective adoptive parents who are refugees will necessarily have fled the country, travelled to the United Kingdom, and time will have been spent applying for refugee status in the United Kingdom. They will not have been living in the country concerned, or living with the child, in the period immediately preceding the making of the application for entry clearance by the child.

58. The reason why, without deciding the issue, that aspects of paragraph 309A may be irrational is this. It appears from the material before us that the definition of parent was amended, at least in part, to enable de facto adopted children of refugees to be able to obtain leave to enter to rejoin the de facto adoptive parent. Yet, the amendments introduced to achieve that result include requirements which mean that children who were intended to benefit from the amended rules cannot do so. Those requirements are arguably irrational and that appears from the terms of the amended Immigration Rules themselves.
59. Indeed, the amended rules have been the subject of criticism by the Supreme Court in *AA (Somalia) v Entry Clearance Officer* [2014] 1 WLR 43, albeit in the context of an appeal dealing with the interpretation of the Rules rather than their validity. Lord Carnwath, with whom the other members of the Supreme Court agreed, observed at paragraph 13 of his judgment that:

“13. I would accept that the requirements of paragraph 309A(b)(i)(ii) seem ill-adapted to the purposes of paragraph 352D. They assume a degree of stability in the home country which is likely to be wholly inappropriate to those like AA seeking refuge from war-torn Somalia, and indeed for most asylum-seekers. Mr Eadie did not argue otherwise, although he suggested some theoretical scenarios in which the requirements might be achievable. As appears from its introduction the definition seems to have been designed principally to deal with ordinary applications to enter by adopted children, covered by the immediately following paragraphs. It finds its way into paragraph 352D by a somewhat circuitous route, which suggests that careful thought may not have been given to its practical implications. If there were any way in which we could legitimately rewrite the rule to produce a fairer result, I could see a persuasive case for doing so. Unfortunately I do not think this possible.”
60. Whilst there is a strong case that aspects of paragraph 309A are irrational in public law terms that, ultimately, is unlikely to assist the applicants in this case. The First-tier Tribunal considered an appeal against the decision of 7 November 2012 that the applicants were not de facto adopted children. First, the tribunal pointed out that the applicants could not demonstrate that their sister, Ms K, had lived in Afghanistan for a period of 18 months prior to her leaving as a refugee during which 18 month period she had assumed the role of the applicants’ parents. She had assumed responsibility in November 2010 and left in March 2012. Secondly, and in many ways more fundamental, the tribunal concluded that Ms K had a family life with her siblings, and she and her husband were effectively the sole legal guardians of the applicants, but that the relationship was not one equivalent to a de facto adoption or one in which Ms K and her husband were to be treated as the parents of the applicant.
61. Assuming that the parts of paragraph 309A which appear to be irrational could be deleted, the applicants would be very unlikely to be able to establish that they were

the subject of a de facto adoption in Afghanistan. If the whole paragraph were deleted, then there would be no rule setting out when there had been a de facto adoption. In the light of the findings of fact by the First-tier Tribunal, it is, to say the least, very unlikely that the respondent would have granted any leave to remain which was different to that appropriate for persons who did not meet the requirements of the Immigration Rules but where refusal of leave would be incompatible with Article 8 of the Convention, that is discretionary leave to remain limited to 33 months in accordance with the guidance.

62. For completeness, the applicants rely on Article 8 and 14 of the Convention. In practice, those claims do not add, for present purposes, to the claim of domestic law irrationality. Those aspects of the claim would primarily be relevant if they showed a strong case that the rules which prevented the applicants from demonstrating that they had been subject to a de facto adoption were unlawful. But that has already been established by reference to domestic law. If, in fact, the applicants could not satisfy the other requirements for establishing that they had been subject to a de facto adoption, reliance on Article 8 or Article 14 would not appear to establish a case, let alone a very strong case, for saying that they must be regarded as persons who had been subject to a de facto adoption. They do not materially add to the merits for the purposes of considering whether to extend time.
63. Consequently, while there is a strong case that aspects of paragraph 309A are unlawful, the merits of the applicants' claim to be treated as having been subject to a de facto adoption, and so eligible for the same leave on the same conditions as their sister, are not shown to be strong.
64. Finally, the applicants rely on the public interest in establishing whether paragraph 309A of the Immigration Rules are lawful. They draw attention to the submissions and evidence of the intervener. I can readily understand why it would be necessary to resolve this issue in a case where it would be relevant to the outcome of the claim for particular claimants. I do not, however, consider that there is a public interest which requires that issue to be resolved now, in this case, where it is unlikely to have any bearing on the outcome.
65. For all those reasons, I do not consider that the applicants have demonstrated that the judge was wrong to refuse to extend the time for bringing the claim for judicial review in this case. The judge was entitled (indeed, in my view correct) to conclude that she ought not to extend time.
66. For those reasons, I would refuse the application for permission to appeal the decision of the judge. The practical consequence of that decision is that the applicants are out of time for bringing their claim for judicial review which was filed on 25 July 2018 and that claim cannot proceed.

Lord Justice Males

67. I agree that permission to appeal should be refused for the reasons given by Lord Justice Lewis.
68. Although we have not heard full argument on the question whether paragraph 309A of the Immigration Rules is unlawful, we do have the benefit of detailed written

submissions and evidence on the point from the Secretary of State which, for my part, I did not find persuasive. There seems to me to be a strong case for saying that it is irrational to acknowledge the concept of de facto adoption while making it impossible in practice for the de facto adopted child of a refugee to satisfy the relevant Rule. That is the effect of the 12 months' requirement in the definition of "de facto adoption". However, the findings of the First-tier Tribunal, reached after hearing evidence from Ms K, mean that even if this requirement were declared unlawful, the applicants would not have been entitled to be treated as Ms K's de facto adopted children as their relationship, however close, was not a relationship of parent and children. The lawfulness of Rule 309A, assuming it remains in its current terms, will therefore have to be tested definitively in another case.

Lord Justice Moylan

69. I agree with both judgments.