



Neutral Citation Number: [2021] EWCA Civ 1480

C2/2020/1206

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM**  
**CHAMBER)**  
**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**  
**JR/6956/2017**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/10/2021

**Before:**

**LORD JUSTICE MOYLAN**  
**LADY JUSTICE ANDREWS**  
and  
**LORD JUSTICE LEWIS**

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**Between:**

<b>THE QUEEN (on the application of X and others)</b>	<b><u>Appellants</u></b>
<b>- and -</b>	
<b>THE SECRETARY OF STATE FOR THE HOME DEPARTMENT</b>	<b><u>Respondent</u></b>

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**Ramby de Mello and Farhan Asghar** (instructed by **Asghar and Co Solicitors**) for the  
**Appellants**  
**Zane Malik Q.C.** (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date: 6 October 2021  
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**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 at 9.30am on 14th October 2021.*

## **Lord Justice Lewis:**

### INTRODUCTION

1. This appeal concerns the question of whether the Secretary of State for the Home Department has an implied power to defer consideration of an application for leave to remain in the United Kingdom pending the outcome of criminal investigations and, if so, whether she exercised that power lawfully.
2. In brief, the first appellant was granted leave to enter and remain in the United Kingdom until 23 April 2017 as a Tier 1 (Entrepreneur) Migrant. The other appellants were given leave to enter as his dependants. In 2016, a criminal investigation into the first appellant and 12 others began as they were suspected of involvement in a conspiracy involving tax frauds. In April 2017, the first appellant applied to extend his Tier 1 (Entrepreneur) Migrant leave to remain and the other appellants applied to extend their leave as dependants. The respondent decided to defer, or delay, making a decision on those applications until the outcome of the criminal investigation.
3. The appellants contend that the respondent has no implied power to defer consideration of the application pending the outcome of the criminal investigation. They further contend that the decision to defer involved imposing a requirement which the appellants had to fulfil – namely that the first appellant had not been charged with a criminal offence – in order to qualify for leave and that requirement has not been included in rules laid before Parliament as required by section 3(2) of the Immigration Act 1971 (“the Act”). Finally, they contend that the decision to defer was unlawful and irrational.

### THE LEGAL FRAMEWORK

4. The Act sets out the basic framework governing entry into and stay in the United Kingdom. General principles are set out in section 1 of the Act. Those persons with a right of abode (essentially British citizens and certain Commonwealth citizens: see section 2 of the Act) are entitled to live in and come and go to the United Kingdom. Others require permission to do so. The relevant general principles are set out in section 1 of the Act in the following terms:

“1.— General principles.

(1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

(2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).

.....

(4) The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom.”

5. Section 3 of the Act makes general provision for regulation and control of immigration. It provides that a person who is not a British citizen shall not enter or remain in the United Kingdom unless given leave to do so. Section 3(2) of the Act requires the Secretary of State to lay before Parliament a statement of the rules, or any changes in the rules, as to the practice to be followed for regulating entry into and stay in the United Kingdom. The material provisions are in the following terms:

“3.— General provisions for regulation and control.

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

.....

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty

days beginning with the date of the resolution (but exclusive as aforesaid).”

6. Section 3C of the Act, inserted in 2002, deals with the situation where an application for variation of leave (for example, to extend the period for which leave to remain is given) is made but the application is not decided before the leave expires. In those circumstances, the existing leave is extended until the application is decided, or any appeal or administrative review could be sought or is pending. If a person leaves the United Kingdom, that leave lapses: see section 3C(3) of the Act.
7. Section 4 of the Act deals with the administration of control and provides, so far as material, that:

“4— Administration of control.

(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions) [ or to cancel any leave under section 3C(3A)]<sup>1</sup>, shall be exercised by the Secretary of State.....”

8. Immigration Rules (“the Rules”) and changes to those Rules have been laid before Parliament from time to time prescribing in detail the criteria which applicants for leave to enter or remain in the United Kingdom must satisfy. For present purposes, the material provisions are paragraphs 245DD, dealing with leave to remain as a Tier 1 (Entrepreneur) Migrant and the general grounds governing when leave may be refused. Paragraph 245DD provides, so far as material, as follows:

**“245DD Requirements for leave to remain**

To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

**Requirements(a)** The applicant must not fall for refusal under the general grounds for refusal, except that paragraph 322(10) shall not apply, and must not be an illegal entrant.

.....”

9. There then follows a list of a further 28 requirements (contained in paragraph 245DD(b) to (s)) that an applicant must meet. By way of example, some require the applicant to have certain attributes such as access to specified amounts of money for investment or business activity. Others require that the respondent is satisfied that the applicant genuinely intends to establish, take over or become a director of one or more businesses.
10. Paragraph 245DD(a) provides that a person must not fall for refusal under the general grounds for refusal which are contained in Part 9 of the Rules. For present purposes, the material provision is paragraph 322(5) which, under the heading “Grounds on which leave to remain and variations of leave to enter or remain should normally be refused”, states the following:

“(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including criminal convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security”.

11. Paragraph 323(1) of the Rules provides that a person’s leave to enter or remain may be curtailed on any of the grounds set out in paragraph 322(2)-325(A) of the Rules.
12. For completeness, I note that paragraph 322(1C) of the Rules provides that leave to remain is to be refused where the person has been convicted of an offence for which he has been sentenced to imprisonment for 4 years or more, or sentenced to imprisonment for between 1 and 4 years and less than 15 years has passed since the end of the sentence, or sentenced to imprisonment for less than 12 months and less than 7 years has passed since the end of the sentence, or has received a non-custodial sentence within the 24 months prior to the date when the application was made.

## THE FACTUAL BACKGROUND

### *The Appellants and their Application for Leave*

13. The appellants are all nationals of Yemen. The first appellant is the husband of the second appellant and they are the parents of the other appellants.
14. The first appellant entered the United Kingdom on 25 February 2014 with an entry clearance as a Tier 1 (Entrepreneur) Migrant with leave to remain until 23 April 2017. On about 18 April 2017, he applied for an extension of his leave to remain as a Tier 1 Entrepreneur pursuant to paragraph 245D of the Rules. The other appellants applied for an extension of their leave on the basis that they are dependants of the first appellant. Those applications have not yet been determined by the respondent. It is the deferral of the taking of the final decision on those applications which is the subject matter of this appeal.

### *The Criminal Investigation*

15. In 2016, prior to the making of these applications, a criminal investigation had begun into a number of individuals, including the first appellant, who are suspected of conspiring to facilitate a multimillion pound fraud involving alleged misuse of various tax regimes. In July 2016, approximately 40 search warrants were executed and a number of individuals, including the first appellant, were arrested.
16. The first appellant was arrested on suspicion of three offences, namely fraudulent evasion of income tax contrary to section 106A of the Taxes Management Act 1970, conspiracy to cheat the public revenue contrary to section 1 of the Criminal Law Act 1977, and money laundering contrary to the Proceeds of Crime Act 2002. He was released on bail. The conditions of bail were varied on 11 December 2016 to preclude the first appellant from applying for new travel documents and required the surrender of his existing passport to Her Majesty’s Commissioners for Revenue and Customs (“HMRC”) and for HMRC to retain that passport.
17. The first appellant has not yet been charged with having committed any offence. He denies involvement in any wrongdoing.

18. The evidence indicates that the investigation involves consideration of considerable material. Over 700 items were seized during the search, mainly consisting of lever arch files, and a further 100 items of evidence were seized. Orders have been obtained for the production of information from over 100 bank accounts. The legality of the warrants and the retention of seized material were the subject of legal proceedings. They appear to have been concluded in January 2019. HMRC conceded that the warrants were unlawful as they did not particularise the names of the suspects, but HMRC were allowed to retain the majority of the seized items and were then able to consider their evidential value. The latest information available at the time of the Upper Tribunal hearing of the claim in January 2020 was that information would be submitted to the Crown Prosecution Service in stages during 2020. We were told that the original timetable could not be met because of restrictions imposed due to the coronavirus pandemic. We were further told that the bail return date for the first appellant had been varied to 29 January 2022 and that the earliest possible date for a decision to be reached by the Crown Prosecution Service on whether to charge the appellant is January 2022.

*The Decision to Defer a Decision on the April 2017 Applications*

19. The respondent decided to defer reaching a decision on the applications for an extension of the appellants' leave to remain pending the outcome of the criminal investigation. As the Upper Tribunal noted, the precise circumstances in which this decision was notified to the appellants is unclear but there were communications which led the first appellant to believe that no decision would be made on the applications until the criminal investigation was completed or, at least, had been progressed in some way. That understanding is reflected in a pre-action protocol letter dated 31 July 2017 and sent by the first appellant's solicitors in which they said that those representing the first appellant had been in communication with Home Office officials "who have confirmed that a decision on the application will not be made until the conclusion of investigations by HMRC in relation to potential money laundering/tax offences".
20. There is a witness statement dated 9 January 2020 from Mr Alexander Budden who is a higher executive officer technical specialist with the respondent. He states that the applications for leave to remain have been "on hold" since they were made as the first appellant is a member of a group of individuals who are subject to criminal investigation by HMRC. He summarised the nature of the investigation. He states at paragraph 8 of his statement that:

"8. The Home Office is not prejudging the outcome of the investigation by HMRC. The criminal investigation is of very significant magnitude and its nature is such that it is not considered appropriate to make a decision on the Applicant's application at this stage. It is not an efficient use of public funds for the Home Officer to review the significant amount of evidence and information that is currently being considered by HMRC and CPS to decide, at this stage, whether it is desirable for the Applicant to be given leave to remain. In the particular circumstances of this case, it is considered appropriate to wait for the outcome of the criminal investigation before deciding whether to exercise discretion to grant the Applicant leave to remain."

*The Claim for Judicial Review*

21. By a claim form dated 16 August 2017, the appellants contended that the decision to defer making a decision pending the outcome of the criminal investigation was unlawful. They applied for a mandatory order that the respondent make a decision on their applications to extend their leave to remain in the UK to be served on them no later than 4 p.m. on Monday 11 September 2017.
22. The respondent served an acknowledgement of service and summary grounds for resisting the claim. It stated that the delay was not unreasonable or unlawful as the first appellant was subject to an impending prosecution. It referred to guidance indicating that if a person has a prosecution pending for an offence the application must be put on hold. It is accepted that the summary grounds were wrong to say that the first appellant was subject to a pending prosecution (no decision on whether to charge has been made and no prosecution has been pending at any material time).
23. The application for permission to apply for judicial review was referred to an oral hearing. Permission was refused. The appellants appealed against that refusal to the Court of Appeal. Permission to appeal was granted and, eventually, by a consent order sealed on 10 October 2019, the appeal was allowed, permission to apply for judicial review was granted and the matter remitted to the Upper Tribunal for a hearing of the claim for judicial review.
24. Amended grounds of judicial review dated 27 November 2019 were filed by the appellants. Detailed grounds of defence were filed by the respondent on 8 January 2020. The detailed grounds contended that the respondent had an implied power to defer decisions on the applications for leave to remain and the respondent was entitled to decide that it was not appropriate at this stage to make a decision, given the magnitude and nature of the investigation, and that it would not be an efficient use of funds for the respondent to review the significant amount of evidence and information being considered by HMRC.

*The Decision of the Upper Tribunal*

25. Following an oral hearing of the claim in January 2021, the Upper Tribunal dismissed the claim. It held that there was no express power to delay, or defer, making a decision on an application for leave to remain. That conclusion is not challenged. However, the Upper Tribunal held that there was an implied power for the respondent to delay making a decision on the appellants' applications for leave to remain. That power had to be exercised in accordance with the established principles of public law governing the exercise of discretionary powers and, in particular, the requirement to act rationally. The Upper Tribunal concluded that the respondent had acted rationally. It considered that the criminal investigation was highly complex in nature and that significant resources had already been devoted to the criminal investigation. The Upper Tribunal recognised the merit in the appellants' argument that HMRC (and possibly the CPS) could share information with the respondent to enable her to reach a decision on the applications in the light of the information currently available. The Upper Tribunal went on to say:

“Having said that, it is a fact that the criminal investigation is ongoing and it is difficult to see how the respondent could obtain a full picture of the

relevant circumstances at this pre-charging stage. Indeed the inference must be that the HMRC itself does not have a full picture, given that an indication of the charging decision is not likely to be made until August 2020. Even if relevant information were shared by HMRC, it is a rational position for the respondent to adopt that she would have to separately review what would clearly be a voluminous body of evidence in order to arrive at a properly considered decision. It is a highly likely consequence, and clearly a rational one to foresee, that this would absorb resources.”

26. The Upper Tribunal considered that the decision to delay on the basis of resources was not irrational. It also considered the claimed prejudice caused to the first appellant and the other appellants. As they had applied for leave on about 18 April 2017, that is when their existing leave was still extant, their leave was extended pending the decision on the application (or any review or appeal) by virtue of section 3C of the Act. They were therefore entitled to remain in the United Kingdom but, if they left the United Kingdom, their existing leave would then lapse. In the case of the first appellant, he was not able to leave the United Kingdom under the terms of his bail. The first appellant would, therefore, have been unable to travel overseas to undertake work. The respondent’s delay in dealing with the application was, therefore, not material. The other appellants had leave to remain and any difficulties with institutions, employers or others not recognising that fact needed to be resolved with them. Further, the second appellant had provided a witness statement dated 15 January 2020 setting out, amongst other things, specific examples of prejudice suffered by her or her children (many of these post-dating the decision to defer). The Upper Tribunal recognised that they were unable to travel abroad and that caused upset but not significant prejudice, and did not render the decision to delay irrational. It further recognised that the respondent’s delay had caused anxiety and stress. The Upper Tribunal recognised that a further period of time would elapse before a decision would be made but did not consider that that period, either individually or in combination with the other factors, rendered the decision irrational. It therefore dismissed the claim.

### THE APPEAL

27. The seven appellants appealed the decision of the Upper Tribunal. One, the third appellant, withdrew her appeal on 5 October 2021, the day before the hearing, as she was informed on 4 October 2021 that she had been granted further leave to remain in the United Kingdom on a different basis than that relied upon in the application made in 2017.
28. There are three grounds of appeal:
- (1) There is no implied power to delay making a decision on an application to extend leave to remain whilst an individual is under investigation for alleged offences by HMRC and the judge was wrong to find that there was such a power;
  - (2) The respondent is seeking to impose a requirement which the appellants must satisfy before being granted leave, namely that the first appellant will not be charged by HMRC, and that condition has not been included in Immigration Rules laid before Parliament as required by section 3(2) of the Act; and



- (3) The respondent's decision was based on an incorrect policy and then maintained without any proper guidance and the exercise of the power to delay was unlawful and irrational.

### THE FIRST ISSUE – THE EXISTENCE OF AN IMPLIED POWER

29. Mr De Mello, with Mr Asghar, for the appellants submitted that an applicant for leave to remain is entitled to have that application determined within a reasonable time. Whilst he accepted that the respondent has an implied power to delay taking a decision in certain circumstances, he submitted that that power does not extend to enabling the respondent to defer decision-making pending the outcome of a criminal investigation. He further submitted that that would involve the respondent abdicating responsibility to HMRC or others for taking decisions.
30. Mr Malik submitted that the power to adopt a system of immigration control and to grant or refuse leave to enter or remain necessarily authorises the Secretary of State to have a mechanism for receiving, considering and deciding applications for leave. That includes a power to deal with all incidental matters such as expediting consideration of certain applications or delaying a decision on others in appropriate circumstances. That includes a power to defer a decision pending the outcome of a criminal investigation in appropriate circumstances. The exercise of that power is subject to review on established public law grounds including, in particular whether the decision to defer is irrational. He relied on the decision of the Supreme Court in *R (New London College Ltd) v Secretary of State for the Home Department (Migrants' Rights Network and another intervening)* [2013] 1 WLR 2358.

#### *Discussion*

31. First, the Secretary of State has power to do those things expressly authorised by the Act or those things which are ancillary or incidental to the exercise of the functions conferred by the Act. The Act provides that non-British citizens require leave to enter and remain in the United Kingdom. Sections 3 and 4 of the Act confer powers on immigration officers and the Secretary of State to grant or refuse entry to, or leave to remain in, the United Kingdom. Section 3(2) requires the Secretary of State to lay before Parliament a statement of the rules as to the practice to be followed in the administration of the Act for regulating the entry into and stay in the United Kingdom. Those rules will set out the conditions or requirements that applicants must satisfy in order to be eligible for the grant of leave to enter or remain.
32. The function of regulating immigration in this way necessarily involves the Secretary of State having power to establish a system for receiving, considering and deciding on such applications. It includes a power to decide when and how such applications are to be dealt with including a power in appropriate circumstances to defer taking a decision on an application. That power is ancillary or incidental to the exercise of the functions relating to the administration and control of immigration conferred by the Act. The exercise of that power will be subject to review in accordance with the established rules of public law to ensure that the decision is not irrational and does not run counter to the purposes of the Act. A power to defer a decision pending the outcome of a criminal investigation is, therefore, incidental and ancillary to the Secretary of State's functions under the Act. There is no rational basis for interpreting the scope of the power to defer a decision as excluding deferrals pending the outcome

of a criminal investigation. Rather, the question is whether, on the facts of a particular case, the exercise of a power to defer taking a decision on an application (whether pending the outcome of a criminal investigation or some other reason) is a lawful exercise of that power.

33. That interpretation of the Act is consistent with existing authority. The scope of the Secretary of State's implied powers was considered in the *New London College* case. There, the Rules provided for a points-based system whereby an applicant was required, amongst other things, to obtain a certain minimum number of points reflecting certain attributes. An applicant obtained a certain number of points if he or she had a confirmation of acceptance for studies ("CAS") issued by an institution with a sponsorship licence. The Rules did not deal with how an institution obtained such a licence; that was dealt with in guidance. One issue before the Supreme Court was whether there was an implied power to operate a system of sponsorship. Lord Sumption (with whom Lord Clarke, Lord Reed and Lord Hope agreed) held that there was such an implied power. In the last sentence of paragraph 28 and paragraph 29, Lord Sumption said this:

"28.... the statutory power of the Secretary of State to administer the system of immigration control must necessarily extend to a range of ancillary and incidental administrative powers not expressly spelt out in the Act, including the vetting of sponsors.

29. The Immigration Act does not prescribe the method of immigration control to be adopted. It leaves the Secretary of State to do that, subject to her laying before Parliament any rules that she prescribes as to the practice to be followed for regulating entry into and stay in the United Kingdom. Different methods of immigration control may call for more or less elaborate administrative infrastructure. It cannot have been Parliament's intention that the Secretary of State should be limited to those methods of immigration control which required no other administrative measures apart from the regulation of entry into or stay in the United Kingdom. If the Secretary of State is entitled (as she plainly is) to prescribe and lay before Parliament rules for the grant of leave to enter or remain in the United Kingdom which depend upon the migrant having a suitable sponsor, then she must be also be entitled to take administrative measures for identifying sponsors who are and remain suitable, even if these measures do not themselves fall within section 3(2) of the Act. This right is not of course unlimited. The Secretary of State cannot adopt measures for identifying suitable sponsors which are inconsistent with the Act or the Immigration Rules. Without specific statutory authority, she cannot adopt measures which are coercive; or which infringe the legal rights of others (including their rights under the Convention for the Protection of Human Rights and Fundamental Freedoms); or which are irrational or unfair or otherwise conflict with the general constraints on administrative action imposed by public law. However, she has not transgressed any of these limitations by operating a system of approved Tier 4 sponsors. It is not coercive. There are substantial advantages for sponsors in participating, but they are not obliged to do so. The rules contained in the Tier 4 Guidance for determining whether applicants are suitable to be sponsoring institutions, are in reality conditions of participation, and

sponsors seeking the advantages of a licence cannot complain if they are required to adhere to them.”

34. Just as the power to identify sponsors is incidental to the power to prescribe rules for the grant of leave to enter and remain, so the power to decide how and when to consider applications for leave is incidental to the power to grant or refuse such applications.
35. Similarly, in *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546, [2007] Imm AR 781, the Court of Appeal had to consider whether a decision to defer categories of applications for asylum in order to meet targets set by the Treasury was lawful. The Court held that there was a power to defer, or delay, taking decisions but the particular exercise of the power in that case was unlawful. Carnwath LJ, as he then was (with whom the other members of the Court agreed) observed at paragraph 51 and 52 that:

“51. The Act does not lay down specific time-limits for the handling of asylum applications. Delay may work in different ways for different groups: advantageous for some, disadvantageous for others. No doubt it is implicit in the statute that applications should be dealt with within “a reasonable time”. That says little in itself. It is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But (as was recognised by the White Paper) in resolving such competing demands fairness and consistency are also vital considerations.

“52. It is clear from Dr Mclean's evidence (as it has been from many cases coming before the courts) that the government was faced with a crisis in 2001, and it needed to take drastic measures to deal with it. Had those measures been based on a principled assessment of the issues and implications, no legal complaint could have been made. However, Dr McLean, fairly and frankly, makes no attempt to justify the decision in that way. On his evidence, the postponement of the old applications was an arbitrary decision, dictated only by the perceived need to meet the targets for dealing with new applications laid down by the agreement with the Treasury. In my view, that was unlawful, and (if it is necessary so to hold) an abuse of power”.

36. Nor does the existence of a power to defer a decision pending the outcome of a criminal investigation involve any unlawful abdication or surrender of decision-making power to that body in a way which runs counter to the Act. The respondent remains responsible for deciding whether to defer taking a decision or whether to take a decision based on the information currently before her. The respondent remains ultimately responsible for determining whether the applicant meets the requirements of the Rules and so should be granted leave to remain. The deferral of a decision on an application for leave to remain pending the outcome of a criminal investigation is a decision by the Secretary of State as to how she proposes to deal with an application. It does not involve abdicating responsibility. That, too, is consistent with authority. In the *New London College* case, one of the arguments was that the system was unlawful as it delegated the decision on a number of matters such as whether the student

applicant had a genuine intention to study to the sponsoring institution. The Supreme Court held that there was no unlawful delegation as:

“19.... leave to enter or remain continues to be the responsibility of immigration officers and the Secretary of State, who retain the last word in each individual case by virtue of the general grounds of refusal.”

37. The Upper Tribunal was correct, therefore, to hold that there was an implied power under the 1971 Act for the respondent to defer, or delay, taking a decision on an application for leave to remain. Such a power is incidental or ancillary to the statutory functions conferred upon the Secretary of State by the Act. The real question in each case is whether the implied power has been exercised lawfully.

### THE SECOND GROUND OF APPEAL

38. Mr de Mello submitted that the respondent was seeking to impose a requirement that the appellants had to meet as a condition of being granted leave to remain, namely that the first appellant had to establish that he would not be charged with a criminal offence. Mr de Mello submitted that such a condition might be seen from the current guidance on grounds for refusal of leave in cases of criminality. That provided that, if a person has a prosecution pending for an offence or is yet to be sentenced, the decision-maker must consider whether to put the application for leave to remain on hold. If, Mr De Mello submitted, that guidance applied where a person was arrested, that would amount to the imposition of a condition on the person which he had to satisfy in order to obtain leave.
39. Mr Malik confirmed that the guidance was not applicable as yet in this case, as it applied when a person has a prosecution pending. It would not apply simply because a person has been arrested. In any event, it was a procedural matter, not a substantive requirement relating to the grant of leave, and was not required to be included within a statement of the rules which had to be laid before Parliament in accordance with section 3(2).

### *Discussion*

40. In the present case, it is clear and both parties agree that the current guidance applies only when a person has a prosecution pending. It does not apply to the situation applicable here where the first appellant has been arrested and is being investigated but has not been charged and has no prosecution pending. The reference in the current guidance to arrest needs to be read in the context of the guidance as a whole. The guidance states that, where a person has been arrested, a prosecution may be pending where the case has not yet gone to court or the case has not otherwise been concluded. It does not, read fairly and as whole, indicate that the guidance applies to a situation where a person, even though he has been arrested, has not yet been prosecuted. As such, as Mr de Mello accepted, the current guidance does not on its terms apply to this case and would not involve imposing a requirement on these appellants at this stage.
41. More fundamentally, I accept Mr Malik’s submission that a situation where the respondent decided to await the outcome of a criminal investigation, or of a prosecution, would not involve the imposition of a condition which had to be included

in rules laid before Parliament. As Lord Dyson explained at paragraph 94 of his judgment in *R (Alvi) v Secretary of State for the Home Department* [2021] UKSC 33, [2012] 1 WLR 2208, section 3(2) of the Act applies to rules which impose requirements which an applicant must satisfy as a condition of being given leave to enter or remain. Procedural requirements which do not have to be satisfied as a condition of the grant of leave do not fall within the definition of rules which must be laid before Parliament. In the present case, a decision to defer consideration of an application for leave pending the outcome of a criminal investigation does not involve the imposition of a condition which the appellants must satisfy. It is a procedural decision by the respondent as to how she proposes to deal with the application. Similarly, guidance requiring a decision-maker to put an application on hold if the outcome of a pending prosecution would materially affect how the application would be decided would not be a condition which an applicant had to satisfy; it would be guidance on the procedure for the decision-maker to adopt to deal with a decision.

### THE THIRD GROUND – THE LAWFULNESS OF THE DECISION TO DEFER CONSIDERATION OF THE APPLICATION IN THE PRESENT CASE

42. Mr de Mello submitted that the deferral of a decision on the applications for leave to remain in the present case was irrational. The appellants were entitled to a decision within a reasonable time. The detriment and stigma to the appellants, and the difficulties experienced by the appellants (described in the witness statement of the second appellant of 15 January 2020) were foreseeable by the respondent when she decided to defer. Further, it was foreseeable that there would be a lengthy delay and the respondent had not obtained an estimate of the likely time involved from HMRC. In the circumstances, the decision was irrational or had now become so.
43. Mr Malik submitted that, in the context of this case, the decision to defer pending the outcome of the criminal investigation was rational. The respondent had decided that this was a more efficient use of resources and the Upper Tribunal had accepted that argument. No arguments had been put as to why the decision of the Upper Tribunal was wrong.

#### *Discussion*

44. It is helpful first to consider the context in which the deferral was made. First, many months before the applications for leave to remain were made, HMRC had begun an investigation into a suspected organised crime group suspected of involvement in a multimillion pound tax fraud. The appellant was one of 13 people suspected of involvement. Secondly, the documentation in the investigation was substantial and the investigation was complex. Thirdly, all the appellants had existing leave to remain which would be extended by reason of section 3C of the Act until the applications were determined. Thus their legal status in the United Kingdom would remain unchanged. Fourthly, the appellants would be unable to travel outside the United Kingdom as their leave to remain would then lapse: see section 3C(3) of the Act. In the case of the first appellant, however, this had no material effect as the conditions of bail at the time of the decision to defer, and at all subsequent times, prevented him from travelling abroad.
45. Against that background, there is a rational link between the reasons for deferring a decision on the applications for leave and the grounds upon which leave may be

granted or refused. Rule 245DD(1) provides that the application for leave to remain must not fall for refusal under the general grounds. These include the ground in paragraph 322(5) of the Rules, namely the undesirability of permitting the person concerned to remain in the United Kingdom in the light of “his conduct ..., character or associations”. The information emerging in the criminal investigation into an alleged conspiracy to commit fraud or alleged money laundering was, potentially, relevant to the first appellant’s conduct, character or associations. The respondent is entitled to make further enquiries or seek further information if she considers that that information is potentially relevant to the decision to be taken.

46. In that context, the best evidence of the reasons underlying the decision is that of Mr Budden. As he explained, the criminal investigation was of a very significant magnitude and its nature was not such that it was considered appropriate to make a decision on the first appellant’s application for leave to remain at that stage. It was not considered an efficient use of resources to review the significant amount of evidence and information currently being considered by HMRC and it was considered more appropriate to wait for the outcome of the criminal investigation.
47. The Upper Tribunal accepted that the criminal investigation was highly complex and that significant resources had been put into the investigation (see paragraphs 62 and 65 of its decision). It held that a decision based on the efficient use of resources was rational. The Upper Tribunal was entitled to reach that conclusion.
48. Other courses of action could have been taken, as the Upper Tribunal recognised. The respondent could have sought to share information with HMRC to enable her to reach a decision on the application. However, where different courses of action are available, the fact that a decision-maker takes one course rather than another is not of itself irrational. The respondent here took a course of action which the Upper Tribunal considered was a rational one based on a view as to the efficient use of resources. Speaking for myself, I too would regard a decision to await the outcome of the criminal investigation in this case, rather than seeking to reach a decision on partial or no information, or seeking to review information being considered by HMRC before the investigation was completed, as a rational course of action to take in the circumstances.
49. For those reasons, I would dismiss this appeal.

**Lady Justice Andrews:**

50. I agree, but would make a few additional observations in support. Any public body or person responsible for taking decisions, including the Respondent, has an obligation to take account of information that is material to the decision, and therefore necessarily has an ancillary power to carry out such factual investigations as they reasonably consider to be appropriate for the purpose of gathering such information: see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. It follows that there must also be a power to defer taking the decision until the decision-taker is satisfied that they have sufficient information on which to take the decision. The decision to exercise that power is obviously a procedural decision, and is open to challenge on normal public law grounds. Provided that the power is exercised rationally and otherwise lawfully it cannot be impugned. In this case, the Upper Tribunal accepted Mr Budden’s evidence explaining why it

was decided to await the outcome of the criminal investigation, and rightly held that the power had been lawfully exercised.

51. There is no rule that the investigation must be carried out by the decision-maker, as Mr de Mello at one point submitted. If some other body, such as HMRC in this case, is carrying out an investigation that the Respondent rationally considers may yield information about the conduct, character and associations of a person applying for leave to remain, in principle she is entitled to defer consideration of the application until the outcome of the investigation, and await provision of that information. The common sense of that decision would be reinforced if, as in this case, she would waste resources by duplicating an investigation which has already been in progress for several months. By so acting, she is neither delegating responsibility for considering the application to HMRC, nor abrogating her responsibility for evaluating the information and, if she considers it to be material, weighing it in the balance with all other relevant factors when the decision comes to be made.
52. Of course, the power to defer consideration of an application in order to obtain material information must be exercised in a manner that is compatible with the principle that decisions must be taken within a reasonable time. What is a reasonable time will depend on the context, and on the facts and circumstances of the individual case. In the present case, as is clear from the chronology set out by Lewis LJ, the timescale for completing the investigation turned out to be longer than originally anticipated. This was initially due to the time spent in resolving the legal challenge to the validity of the search warrants, and then to the impact of an unforeseen global pandemic (though the latter period of delay occurred after the decision of the Upper Tribunal, and is strictly speaking irrelevant to this appeal).
53. In January 2020, the Upper Tribunal formed the view that a reasonable time had not yet elapsed, but made it clear that if the delay continued, the time might come when a different view could be taken. However, that would have to be the subject of a fresh legal challenge. Whilst I understand the appellants' frustration that an application made in April 2017 is unlikely to be determined before some time in 2022 at the earliest, the function of this Court is limited to reviewing the lawfulness of the decision of the Upper Tribunal, and the view that it took on this matter was one which was reasonably open to it on the information before it.
54. Some comfort can be drawn from the fact that the applicants' immigration status is unaffected because their extant leave to remain has been preserved by section 3C of the Act, and that extended period of leave will count towards their continuous lawful residence. Moreover, should they wish to be able to travel, the appellants other than the first appellant could potentially vary their existing applications and end their complete dependence upon the fate of his application, without jeopardising their section 3C leave, as the third appellant has already successfully done. As Lewis LJ has pointed out, the first appellant is no worse off in terms of being unable to travel, because of the terms and conditions of his bail.
55. For those reasons, in addition to those given by Lewis LJ, I would dismiss this appeal.

### **Lord Justice Moylan**

56. I agree that the appeal should be dismissed for the reasons given by Lewis LJ.