IN THE UPPER TRIBUNAL

JUDGMENT GIVEN FOLLOWING HEARING

JR/ 2254/2019

Field House
Breams Buildings
London
EC4A 1WR

Heard on: 3 February 2020

THE QUEEN
(ON THE APPLICATION OF)
WAQAR ALI

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE CRAIG

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Mr R Ahmed and Mr Z Raza, both of Counsel, instructed by Marks & Marks Solicitors, appeared on behalf of the applicant.

Mr Z Malik, of Counsel, instructed by the Government Legal Department, appeared on behalf of the respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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JUDGE CRAIG:

1. As will appear below, the issue which I now have to decide is a narrow one. The interpretation of the rules on which my decision turns has only limited, if any, relevance for future cases as the rule upon the interpretation of which this decision turns has now been changed.

2. The decision under challenge is a decision of the respondent made on 28 January 2019, which was maintained on administrative review on 6 March 2019. By this decision, the respondent refused the applicant's application for leave to remain as a Tier 1 (Entrepreneur) Migrant. This application will be referred to below as “the third application”. The sole ground of refusal was under paragraph 245DD(g) of the Rules, with reference to paragraph 39E, the basis of decision being that the applicant, who had been present without leave since October 2016 was accordingly in breach of the Immigration Rules as at the date of application. The application was made under the points–based system and it is common ground that had the application not been refused for this reason the applicant would have been awarded sufficient points, that is the application would have been granted.

3. The background facts are not in issue. The applicant is a national of Pakistan who was born on 17 February 1983. He entered the UK lawfully in January 2010 with entry clearance as a student and leave was extended in this capacity until 2 February 2012.

4. Following an in–time application, on 8 March 2013 the applicant was granted further leave to remain as a Tier 1 (Post–Study) Migrant which leave was valid until 8 March 2015.

5. While in the UK lawfully, on 27 February 2015 the applicant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant

("the first application"). This application was refused on 8 May 2015 but the applicant was entitled to an in-country right of appeal which he exercised. However, his appeal was dismissed by the First—tier Tribunal on 23 March 2016 and he was subsequently refused permission to appeal to the Upper Tribunal both by the First—tier Tribunal, on 22 August 2016 and then on renewal by the Upper Tribunal on 14 October 2016. Until the refusal of his application for permission to appeal to the Upper Tribunal was rejected by the Upper Tribunal, the applicant had continued to be present lawfully pursuant to the provisions of Section 3C of the Immigration Act 1971 (“3C leave"). However, again it is common ground that on the refusal of permission by the Upper Tribunal on 14 October 2016, the applicant was appeal rights exhausted and he no longer had 3C leave. Technically, after that date, the applicant remained in the UK in breach of the immigration laws.

6. On 9 November 2016, that is within 28 days of the applicant having become appeal rights exhausted in respect of the first application, the applicant applied again for leave to remain as a Tier 1 (Entrepreneur) Migrant ("the second application"). This application was refused by the respondent on 4 January 2017 and that refusal again was upheld on administrative review on 18 February 2017. There is some confusion within the papers as to whether the date of decision was 16 or 18 February 2017, because the decision letter is dated 16 February 2017 and not 18 February 2017. However, it appears to be common ground that the decision was actually made on 18 February, this being the date set cut in the respondent's reply to the Pre—Action Protocol Letter in respect of these proceedings as the date on which the applicant's administrative review application regarding the second application had been considered and the decision maintained,

it being stated within brackets that that decision letter had been dated 16 February 2017. In the initial decision letter of 6 March 2019 refusing the third application, it is stated in terms that "it is accepted that your current application [discussed below] submitted on 4 March 2017 was made within fourteen days from your last refusal dated 16 February 2017".

7. At no stage during the course of this application, either in writing or at the hearing before me, has the respondent attempted to argue that the date of decision had in fact been the date which appears on the administrative review decision, 16 February 2017, rather than the date asserted on behalf of the applicant, which is 18 February. This date is important, for the reasons which will be apparent below, but this decision is made on the understanding, as agreed between the parties, that the decision on administrative review upholding the respondent's decision refusing the second application, had been made on 18 February and not 16 February 2017.

8. Thereafter, on 4 March 2017 (which is within fourteen days of the date on which it is accepted that the respondent had upheld the refusal of the second application on administrative review) the applicant submitted his third application, again being an application for leave to remain as a Tier 1 (Entrepreneur) Migrant. This application was refused by the respondent on 28 January 2019, this application also being upheld on administrative review on 6 March 2019. It is the refusal of this third application which is being challenged within these proceedings.

9. Although permission to bring these proceedings was originally refused on the papers by Upper Tribunal Judge Frances on 18 June 2019, following the renewal of this application to an oral hearing, having heard oral argument at a hearing on 10 September 2019, permission to bring this application was

granted by Upper Tribunal Judge Keith. Judge Keith's decision sets out the issues then being argued with clarity and it is helpful to repeat his reasons within this decision. Judge Keith's reasons were as follows:

> "(1) On 25 April 2019, the applicant issued this challenge to the respondent's decision on 28 January 2019 ("the decision"), in which the respondent refused the applicant's application for a Tier 1 (Entrepreneur) visa, on the basis that he was an overstayer.
>
> (2) The applicant is a Pakistani citizen, who was granted leave to remain as a post—study migrant from 8 March 2013 to 8 March 2015. On 27 February 2015, he applied for to remain as Tier 1 (Entrepreneur) Migrant. This was refused and his appeal was dismissed on 26 March 2016. Permission to appeal was refused and he became appeal-rights exhausted on 14 October 2016. The applicant's leave under Section 3C of the Immigration Act 1971 ended on 14 October 2016. While his second application was made on 9 November 2016, within 28 days of the expiry of his Section 3C leave, this application was refused on 4 January 2017 and maintained on administrative review on 16 February 2017. The applicant made his third application as a Tier 1 (Entrepreneur) Migrant on 4 March 2017, which the respondent rejected in the Decision.
>
> (3) In reaching her decision, the respondent referred to the applicant's immigration history and the fact that his 3C leave had ended on 14 October 2016. The respondent noted that the second application made on 9 November 2016 was not rejected because of his overstaying, by virtue of paragraph 39E of the Immigration Rules, under which an application would

not (then) be refused for overstaying when made within a 28 day "grace" period, but which did not operate to extend leave to remain under Section 3C. The consequence was that when the applicant made his third application on 4 March 2017, it was significantly out-of-time. The respondent therefore rejected the application under paragraph 245DD(g) of the Immigration Rules. The "grace" period did not operate twice.

(4) In the permission application, the applicant asserts that the respondent arguably erred in law in rejecting the applicant's most recent application because of the period of overstaying when it had not been previously rejected in the second application. In addition, the rejection of the applicant's second application, because of the absence of a company appointment report, amounted to an error of law in failing to apply evidential flexibility. In oral submissions before me, Mr Raza focussed on one point - whether the applicant could benefit from the provisions of paragraph 39E on the second occasion, even if "Section 3C leave" were not extended.

(5) Ms Parsons submitted that paragraph 39E(2)(b)(ii) was clear on its face - where someone was only an overstayer for fourteen days, they could seek to be an exception from the consequences of overstaying, which was not the case here.

(6) Mr Raza focussed on the fact that the applicant's second application had been made with the benefit of the predecessor provision to paragraph 39E, so that it was “in–time” or within an exception for the purpose of paragraph 39E (2) He argued that it

followed from the existence of paragraph 39E(2). He argued that it followed from the existence of paragraph 39E(2) that the second period of "grace" was possible.

(7) Neither representative was able to refer me to any authority on the point. The applicant's application had not been rejected on any other ground.

(8) I bear in mind the low threshold in relation to arguability of a permission application. There is an arguable error of law in the respondent refusing to treat the applicant's application as falling within an exception under paragraph 39E on the second occasion, with the consequence that his application was refused on that basis alone.

(9) Permission to proceed with the judicial review is therefore granted."

The Hearing

10. In addition to the pleaded Grounds of Application and Detailed Grounds of Defence, I was also greatly assisted by the skeleton arguments prepared on behalf of both parties, which set out their respective cases concisely and with clarity. I am also grateful to Counsel for both parties for the clear way in which their arguments were advanced orally at the Hearing.

11. The subsidiary arguments referred to by Judge Keith in his decision granting permission to bring this application were not relied on within either the skeleton argument or the oral arguments advanced on behalf of the applicant and in light of the decision I make below, I do not need to refer to them below. I will also not set out verbatim within this judgment the arguments which were advanced, but I have had regard when reaching my decision to everything which was said during the

course of the Hearing and to all the documents contained within the file.

The relevant Rules

12. Paragraph 245DD(g) of the Immigration Rules provides as follows:—

> "(g) The applicant must not be in the UK in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded."

13. This wording applies to applications made on or after 24 November 2016, the Rules having been changed on 3 November 2016. Previously the Rule had read that "Any period of overstaying for a period or 28 days or less will be disregarded".

14. The accompanying explanatory memorandum to HC 667 (which inserted the change to the Rules) states as follows:

> "**Changes to reform the periods within which applications for further leave can be made by overstayers**
>
> 7.45 While applications for further leave to remain for many rules—based applications are expected to be made in time, i.e. before any existing leave expires, any period of overstaying for 28 days or less is not a ground for refusal as far as those applications are concerned. This 28 day period was originally brought in so that people who had made an innocent mistake were not penalised, but retaining it sends a message which is inconsistent with the need to ensure compliance with the United Kingdom's immigration laws.

7.46 The 28–day period is therefore to be abolished. However, an out of time application will not be refused on the basis that the applicant has overstayed where the Secretary of State considers that there is a good reason beyond the control of the applicant or their representative, given in or with the application, why an in time application could not be made provided the application is made within 14 days of the expiry of leave.

7.47 Additionally, for those who have been present on 3C leave (leave extended by Section 3C of the Immigration Act 1971) the 28–day period is to be reduced to 14 days from the expiry of any leave extended by Section 3C. Without this arrangement, the abolition of the 28–day period will mean that any further application made by persons in this position will be out of time.

7.48 For those whose previous application was in–time but decided before their leave expired, or was made out of time but permitted by virtue of the provision outlined in paragraph 7.46, the 28–day period will be reduced to within 14 days of:

- The refusal of the previous application for leave
- The expiry of the time–limit for making an in-time application for administrative review or appeal (where applicable).
- Any administrative review or appeal being concluded, withdrawn or abandoned or lapsing.

This is to ensure that individuals to whom these circumstances apply also have 14 days to make a further application."

15. The new wording (with reference and explanation to what would now be treated as an "in–time" application) accordingly apply to applications made on or after 24 November 2016 which includes the third application (the refusal of which is currently under challenge) but did not apply to the second application, which had been made on 9 November 2016, that is six days after the change had been inserted into the Rules, but some fifteen days before this change came into effect.

16. Paragraph 39E of the Immigration Rules provides as follows:

"**Exceptions for overstayers**

39E. This paragraph applies where:

(1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in–time; **or** [my emphasis]

(2) The application was made:

(a) following the refusal of a previous application for leave which was made in–time; and

(b) within 14 days of:

(i) the refusal of the previous application for leave; or

(ii) the expiry of any leave extended by Section 3C of the Immigration Act 1971; or

(iii) the expiry of the time–limit for making any in–time application for administrative review or appeal (where applicable); or

(iv) any administrative review or appeal being concluded, withdrawn or abandoned or lapsing."

The applicant's case

17. The applicant concedes that at the time he made the third application, he had been in the UK without leave for about sixteen months or so. He also acknowledges that by reason of paragraph 245DD(g) of the Immigration Rules, because he was in breach of the immigration laws at the time he made his application (because he had been without leave for this period) unless paragraph 39E of the Rules applies, his application had to be refused. However, this was the only reason why his application failed, and it is his case that paragraph 39E does apply, because the third application had been made within fourteen days of the administrative review of his second application having been concluded (see 39E(2)(b)(iv)), and that second application was an application which had been made in–time (such that paragraph 39E(2)(a) applied.

18. The reason he says that the second application was made in–time was because at the time that application was made, which was before the change in paragraph 245DD(g), referred to above, came into effect, paragraph 245DD(g) simply provided that any period of overstaying for a period of 28 days or less would be disregarded by the respondent for the purposes of

considering the application. Accordingly, it was submitted, an application made within this specified time period would, on a common sense understanding of the language used within the Rules, be "in—time".

19. The interpretation paragraph within the Rules (paragraph 6) did not define what was meant by “in-time” as used within 39E(2)(a) and although this issue had not been specifically considered by any Court of Record, nonetheless the applicant relied on the guidance given by the previous President of this Tribunal, Mr Justice McCloskey, in *R (on the application of Bhudia) v SSHD* [2016] UKUT 00025, where the President had set out guidance on the construction of the Immigration Rules (referring to previous decisions of the Court of Appeal and House of Lords) as follows:

> “In *Mahad (And Others) v Entry Clearance Officer* [2009] UKSC 16, Lord Brown, collating and summarising the dicta of the Court of Appeal and recalling the words of Lord Hoffmann in *Odelola v SSHD* [2009] 1 WLR 1230, at [4], stated at [10]:
>
> > “Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy …
> >
> > [The intention of the Secretary of State] is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from Immigration Directorate Instructions (IDIs) … issued intermittently to guide immigration

> officers in their application of the Rules … pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act …"

Further guidance is provided by *Iqbal (and Others) v SSHD* [2015] EWCA Civ 169, at [31], which highlighted that the exercise of rewriting any provision of the Rules under the guise of purposive construction is a forbidden one. It was further stated, at [33], that the court:

> "… cannot and should not construe the Secretary of State's rules to mean something different from what, on a fair objective ruling, they actually say."

Finally, we remind ourselves [of] the long established principle of statutory interpretation that the Court will lean against the construction giving rise to an absurdity where the words in question are capable of bearing the suggested alternative meaning."

20. The applicant's submission has the attraction of simplicity. The second application having been made within 28 days of his appeal rights having been exhausted (and his 3C leave having accordingly ceased) that period of overstaying was to be disregarded when the second application was considered. Accordingly, the time in which that application had to be made, under the Rules, was within 28 days of when his leave had ended. The application was accordingly "in-time" because that was the time, provided for within the Rules, in which that application had to be made.

21. The third application, with which this Tribunal is now concerned, is covered by the provisions of paragraph 39E(2) (within that paragraph and alternative to 39E(1)) because It had been made following the refusal of a previous application for leave which had been made in—time (paragraph 39E(2)(a)), being the second application and the third application had

been made within fourteen days of the conclusion of the administrative review in respect of the second application (paragraph 39E(b)(iv)). Accordingly, because paragraph 39E applied, the “current period of overstaying” (which in this case is the period since his appeal rights in respect of the refusal of his first application had been exhausted) was to be disregarded.

22. On behalf of the respondent, Mr Malik maintained the respondent's position, which was that applications for leave were meant to be made at a time when an applicant was in the country lawfully, and although a period of grace might be given in which the respondent would not refuse an application because it had not been made in–time, that was not the same as saying that the application had been in–time. What was to be disregarded was the fact that the application had not been made in-time.

23. Mr Malik referred to the current position, where now it is made clear from the explanatory memorandum (which I have set out above) that so far as applications made on or after 24 November 2016 are concerned "applications are expected to be made in–time, i.e. before any existing leave expires". In other words, although a small period of overstaying, currently fourteen days, will be disregarded, the application is still not made “in–time”. Mr Malik relied on the decision of the House of Lords in *Odelola* (also referred to above) in which it had been held that the Rules to be applied by a Court or Tribunal are the Rules as they are at the time of decision, rather than when an original application was made.

24. The applicant's position with regard to what the Rules, as explained in the memorandum, currently provide is that these were not the Rules at the time the second application was made, and so one has to look at the position as it was then

when considering whether or not the second application had been made "in–time" and that if it had been, the Rules as they currently are assist this applicant, because they provide that “any” current period of overstaying will be disregarded, rather than (as was the position at the time the second application was made) only a period of overstaying for a period of 28 days or less.

Discussion

25. As I have indicated earlier, this is a very narrow point; it turns on whether or not the second application had been, technically, an “in–time” application. I have to decide whether the applicant is correct in asserting that the natural meaning of a provision "disregarding" a period of overstaying (at that time 28 days) when considering whether or not to grant an application for leave to remain is that that application does not have to be made until that period of overstaying has expired, and so an application made within that period on a sensible construction of the language used, is “in–time”. The respondent's alternative submission is that what was provided within the Rules was simply that the fact that the application had not been made in–time was to be disregarded; that did not have the effect of making that application in–time. As I have already indicated, whatever decision I make in this case will have little if any relevance for future applications, because the explanatory memorandum accompanying the Rule change makes it clear that the respondent's present position is that what is now meant by “in –time” is an application made “before any existing leave expires”.

26. In my judgement, the House of Lords decision in *Odelola* does not assist in this case, regarding the construction of the words “in–time” as it relates to the second application,

because it is made clear that the Rule change is only to apply for applications made on or after 24 November 2016, that is to applications made after the second application. While the new Rules undoubtedly apply to the third application, it is necessary for this Tribunal to decide whether or not the second application, that is the application made before the Rule change, had been made in—time, and that turns on what the Rules provided at that time.

27. While I understand the force of Mr Malik's submissions, which were well made and are certainly arguable, looking at the language used within the Rules as they were at the time the second application had been made, it was at that time simply provided that a period of 28 days after the expiration of an applicant's leave would be disregarded by the respondent when consideration was given to that application. There is nothing in the Rules as they were then to suggest that such an application would not be "in—time". If at that date, Counsel had been asked to advise as to the time in which the application for leave had to be made, he or she would quite properly have replied that it was within 28 days of when that applicant's previous leave had expired. In other words, in my judgement, using the language in its natural meaning, any application made within 28 days of the expiration of leave would, for the purposes of the application, be made “in—time”. An in—time application, in my judgement, is an application made within the time limit provided within the Rules far that application to be considered on its merits; that was within 28 days of leave expiring, because that period of overstaying would be disregarded.

28. It follows that when the applicant made his third application, on 4 March 2017, this application was made within fourteen days of the conclusion of the administrative review of the refusal of his second application, which was an application

which had been made "in time" and which application had been concluded (as agreed by both parties) on 18 February 2017. Accordingly, under the present Rules which apply to the third application, paragraph 245DD(g) does not apply because his current period of overstaying will be disregarded under paragraph 39E because 39E(b)(iv) applies, that is to say that the (third) application was made following the refusal of his previous (second) application for leave which had been made in time (being within the time allowed within the Rules for the making of that application) and the third application had been made within fourteen days of the conclusion of the administrative review in respect of that (second) application.

29. It follows that in my judgement the respondent's decision refusing to grant the applicant's third application was unlawful, and that decision must be quashed and I will so order. On the basis of the decision I have made, as the application would otherwise have been granted on the merits, the only lawful decision which the respondent can now make is to grant the application. ~~~~*0*~~~~

Tribunal Ref: JR/2254/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

Notice of Decision

B E T W E E N

THE QUEEN
On the Application of
WAQAR ALI

Applicant

And

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

ORDER

Before Upper Tribunal Judge Craig

Having considered all documents lodged and following oral submissions on 3 February 2020 by Mr R Ahmed and Mr Z Raza, both of Counsel, instructed by Marks & Marks Solicitors, on behalf of the Applicant and Mr Z Malik of Counsel instructed by the Government Legal Department, on behalf of the Respondent

IT IS ORDERED THAT

1. The Applicants claim for Judicial Review be granted.

2. The Respondent's decisions of 28 January 2019, upheld by way of administrative review on 06 March 2019, refusing the Applicant's application for LTR as a Tier 1 (Entrepreneur) Migrant, are quashed.

3. The Respondent shall remake the decision on the Applicant's application for LTR as a Tier 1 (Entrepreneur) Migrant in accordance with the Upper Tribunal's judgment.

Permission to appeal to the Court of Appeal

Permission is refused because an appeal would have no realistic prospect of success

COSTS

The Respondent shall pay the Applicant's costs of, and associated with this claim for Judicial Review, to be subject to detailed assessment if not agreed;

Reasons accompany this decision notice

Signed:

Upper Tribunal Judge Craig

Dated: 10 July 2020

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 17 July 2020

Notification of appeal rights

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

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

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).