



**In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review**

In the matter of an application for Judicial Review

The King on the application of
Mohammed Athikul Islam Khan

Applicant

and

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Kamara

HAVING considered all documents lodged and having heard Mr A Miah of counsel, instructed by Kalam Solicitors, for the applicant and Mr P Erdunast of counsel, instructed by GLD, for the respondent at the final hearing on 24 July 2024,

IT IS ORDERED that:

1. The application for judicial review is dismissed.
2. The Applicant shall pay the Respondent's reasonable costs, to be assessed if not agreed.
3. Permission to appeal is refused.

Signed: T Kamara

Upper Tribunal Judge Kamara

Dated: 17 September 2024

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date):
19/09/2024

Solicitors:
Ref No.
Home Office Ref:

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 point 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 sent (Civil Procedure Rules Practice Direction 52D 3.3).



Case No: JR-2023-LON-001779

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

JUDGMENT DATE

Before:

THE HON. MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE KAMARA

Between:

THE KING
on the application of
MOHAMMED ATHIKUL ISLAM KHAN

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr A Miah

(instructed by Kalam Solicitors), for the applicant

Mr P Erdunast

(instructed by the Government Legal Department) for the respondent

Hearing date: 24 July 2024

J U D G M E N T

Judge Kamara:

1. By way of an application for judicial review filed on 16 August 2023, the applicant challenges the decision of the respondent dated 17 May 2023 refusing his application for leave to remain under Appendix Skilled Worker of the Immigration Rules ('the Rules') as well as the decision of 19 June 2023, maintaining that decision on administrative review.

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2. The applicant first entered the United Kingdom on 17 June 2021 having been issued with entry clearance to study at CEG UFP Limited. That leave expired on 17 February 2022. On 30 November 2021, CEG UFP notified the respondent that the applicant had not paid his fees and had withdrawn from the intended course. Consideration was given by the respondent to curtailing the applicant's leave but no action was taken to do so.
3. The respondent says that there was no contact from the applicant until 28 February 2022 when the applicant telephoned the Home Office to book an appointment to make a claim for asylum. That telephone call was entered on the CID database on 7 March 2022. The applicant's solicitors say that the first telephone contact was made on 7 February 2022. On 16 June 2022, an employee of the Home Office telephoned the applicant's former solicitors to book an appointment for him to attend the Croydon Asylum Intake Unit ('AIU') on 27 June 2022.
4. On 27 June 2022 the applicant attended the AIU and made an asylum claim in person. On the same occasion the applicant was served with documents informing him that he was an overstayer who was liable for detention and removal from the United Kingdom. He was detained until bail was granted on 11 July 2022.
5. On 19 January 2023, the applicant sought permission to remain in the United Kingdom as a Health and Care Skilled worker under Appendix Skilled Worker of the Rules.
6. In the decision of 17 May 2023, the respondent explains that the sole reason for the refusal of the applicant's claim is that he is in breach of immigration laws because he has overstayed in the United Kingdom since 17 February 2022, following the expiry of his leave to enter as a student. That meant, according to the respondent, that the applicant was unable to meet the requirements of paragraph SW2.2 of the Rules.
7. The original grounds of challenge are twofold. Firstly, it is contended that the respondent made an error of law and fact in deciding that the applicant was an overstayer at the time he made his Skilled Worker application. The second ground suggests that were the respondent to say that an asylum claim was incapable of extending section 3C leave, this would amount to discriminatory treatment.
8. The second ground appears to have fallen away at the renewal application stage. In any event, the respondent's Detailed Grounds of Defence dated 22 May 2024 explicitly records that the respondent accepts that an application for asylum can constitute an application for the purposes of section 3C(1) of the 1971 Act.
9. Permission to proceed with this application was granted by Upper Tribunal Judge Blundell on 4 March 2024 with reference to the first ground alone. The grant of permission includes the following commentary:

(The applicant) maintains that the telephone call on 7 February 2022 was sufficient to amount to a claim for asylum, as a result of which s3C applied and he was not an overstayer when the decision under challenge was made.

10. Following the grant of permission, the respondent filed a witness statement dated 18 April 2024 from Nazish Bhatti, a Senior Executive Officer of the Home Office. That correspondence sets out a chronology of the applicant's immigration history and explains the process of seeking asylum for those whose leave is about to expire.

The law

11. The relevant parts of Section 3C Immigration Act 1971, state:

“Continuation of leave pending variation decision

(1) This section applies if—

- (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
- (b) the application for variation is made before the leave expires, and
- (c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when —

- (a) the application for variation is neither decided nor withdrawn,

12. Section 113(1) of the Nationality, Immigration and Asylum Act 2002 (“NIAA 2002”) read as follows as at February 2022:

“asylum claim” means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

13. In respect of the process to make an asylum claim the relevant Rules in place when the applicant says he made his claim on 7 February 2022, are as follows:

327. Under the Rules, an asylum applicant is a person who, in person and at a designated place of asylum claim, either; (a) makes a request to be recognised as a refugee under the Refugee Convention on the basis that it would be contrary to the United Kingdom's obligations under the Refugee Convention for them to be removed from or required to leave the United Kingdom, or (b) otherwise makes a request for international protection. "Application for asylum" shall be construed accordingly.

327A. [...]

327B. A designated place of asylum claim is: (i) an asylum intake unit; (ii) an immigration removal centre; (iii) a port or airport; (iv) a location to which the person has been directed by the Secretary of State to make a claim for asylum; or (v) any other location where an officer authorised to accept an asylum application is present and capable of receiving the claim.

14. We have also been ably assisted by the focused submissions of both representatives at the substantive hearing as well as by their succinct skeleton arguments.

Discussion

15. The first matter to be assessed is the date when the applicant contacted the respondent to request an appointment. The applicant states that this occurred on 7 February 2022 prior to his leave to remain expiring whereas the respondent says that this took place on 28 February 2022, eleven days after the applicant's leave expired.
16. Mr Miah accepted that if this point was decided against the applicant, the second issue, that is whether the telephone call could constitute an asylum claim, would fall away. We declined to decide this matter in isolation and invited submissions on the application as a whole. He invited us to accept that the letter from Syed Shaheen & Partners dated 23 January 2023 was clear evidence of when the telephone call was made to book an asylum appointment for the applicant.
17. For his part, Mr Erdunast clarified the position because in the Acknowledgement of Service, the respondent sought to make a positive case that the telephone call in question took place on 7 March 2022 as opposed to 7 February 2022. He had conceded the 7 March 2022 claim for the purpose of the permission hearing owing to the statement on the CID Case Record Sheet that the 'application/raised date on CID reflects the date that this data was entered on CID and NOT the date the person called the appointment line.' Otherwise, Mr Erdunast argued that the applicant had not discharged the burden of proof which was upon him to establish that the call seeking an asylum appointment took place on 7 February 2022.
18. The witness statement of Ms Bhatti refers to her having reviewed all Home Office systems, as well as documents contained in Home Office files, records and information provided by Home Office colleagues in relation to the applicant's 'contact with the Croydon Intake Unit in-country appointment booking line and subsequent registration' of his asylum claim. Ms Bhatti sets out a complete chronology in relation to the applicant's immigration history, the relevant parts of which are reproduced here.
 10. On 17/02/2022 the Applicant's Student Visa expired and no further applications have been submitted.
 11. On 18/02/2022 the Home Office records note "probable overstayer" due to Visa Expiry.
 12. On 28/02/2022 the Applicant contacted the in-country appointment booking line to book an appointment to claim asylum (Home Office reference number "102978" was given to the Applicant).
 13. On 07/03/2022 the Home Office systems are updated to note the incoming call on 28/02/2022, which was not aligned to the incoming call date as previously shared with the court/Applicant.

14. On 16/06/2022 the Home Office staff member called back the Applicant to book appointment; date of appointment given 27/06/2022.
15. On 27/06/2022 the Applicant attends the Croydon Intake Unit and registers asylum claim in person at the designated Intake Unit in Croydon
19. By contrast the letter from Syed Shaheen & Partners is addressed directly to the applicant and informs him that the firm 'contacted home office first on 7/2/2022 to book an asylum appointment and home office took your mobile number...'
20. The letter from the former solicitors mentions that the firm 'further contacted the home office on 28/2/22 when they issued the above asylum reference number...' The reference number referred to is stated to be 102978.
21. On this preliminary point, we prefer the evidence of the respondent as set out in the statement of Ms Bhatti, and which refers to the steps taken to ascertain the facts in this case and is rich in detail. By contrast, the letter from the applicant's former solicitor was signed on 23 January 2023, nearly a year after the claimed events of 7 February 2022 and is unaccompanied by contemporaneous evidence nor details as to the claimed date of the call such as an attendance note or call log. Furthermore, the solicitor's letter is signed in the name of the firm despite at least four solicitors being named on the headed notepaper. While we are prepared to accept that a telephone call may have been made on the applicant's behalf on 7 February 2022, there is no evidence to support the claim that this call was made to the correct number at the Home Office which was required to secure an appointment to claim asylum.
22. The applicant's statement of truth dated 14 August 2023 does not assist greatly as it merely states that after he instructed Syed Shaheen & Partners on 7 February 2022, they 'promptly reached out' to the Home Office and registered his claim. By contrast, the details provided in the solicitors' letter in relation to the telephone call on 28 February 2022 are consistent with the respondent's records and resulted in a reference number and an appointment at the AIU. It is notable that Ms Bhatti found no reference to a telephone call being made on 7 February 2022 when undertaking a review of the Home Office records.
23. As we have concluded that the first contact on the applicant's behalf was made on 28 February 2022, it follows that the applicant failed to make an application for asylum before his leave expired on 17 February 2022. Accordingly, his leave was not extended under section 3C of the 1971 Act. Furthermore, as the applicant's leave had not been extended and he had become an overstayer in the United Kingdom from 17 February 2022 he was thereafter in breach of immigration laws and could not meet SW2.2 of the Rules.
24. We indicated at the hearing that we would nonetheless proceed to consider the applicant's contention that a telephone call made on his behalf to request an appointment constituted an application for asylum.

25. Mr Miah's overarching point was that the applicant made a valid application for asylum via telephone which was conditional upon him attending the appointment which had been arranged at the AIU. As the applicant had done so, he contended, that this action retrospectively validated the application from the outset. In making this submission, he prayed in aid the analysis of Lord Brown in *Mahad* [2009] UKSC 16 at [10]:

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.

26. Expanding on this theme, Mr Miah, referring to *Mirza* [2016] UKSC 63 at [33], argues that the applicant's circumstances could be distinguished. At this juncture we note that *Mirza* concerned either the payment of a fee at the time of the application or provision of biometrics subsequent to the application, which if not provided invalidated the application. The point Mr Miah emphasised was that in *Mirza* there was a failure to comply with certain steps which rendered the applications invalid, whereas in the applicant's case there was no such failure as the applicant had attended the screening interview. He contended that the applicant's attendance completed the requirement to attend in person and made his claim subsequently valid from the date of the telephone call. Had the applicant failed to attend, it could have invalidated the application and *Mirza* would then be applicable.
27. The difficulty with this argument is that the asylum claim is made, according to statute, Rules and legal authority when an applicant attends their screening interview. We find that the facts cannot be distinguished from *Mirza* and that the applicant's case is analogous to the fee scenario in that the fee has to be paid at the start of the process. With an asylum application, the claim is made at one time which is close to the fee-type scenario in *Mirza*. In that scenario, if the fee is paid subsequent to the application, it does not retrospectively validate the application, as that application was invalid from the outset, as found at [36] of *Mirza*.
28. With reference to *Pathan* [2020] UKSC 41 at [115], Mr Miah emphasised the serious legal consequences to the applicant of overstaying his leave, the point being made that he has become someone potentially engaging in criminality. We accept that this is the case and that these circumstances have also resulted in the refusal of the applicant's Skilled Worker application as well as restrictions on work and accommodation. Yet this without more does not suffice to displace the meaning of the Rules.
29. Reliance was placed by Mr Miah on an extract from version 11 of the Asylum Screening guidance published on 18 April 2024. In particular, where it states;

'individuals who sought to register an asylum claim before the commencement of the act but were provided with an appointment to attend a designated place to register their asylum application on or after 28 June will be considered to have

'made an asylum claim' before the commencement date in respect of how the asylum policies amended by the act will apply to them. For example, version 10 of assessing credibility and assessing refugee status will apply for those that 'made an asylum claim' before the 28 June 2022 and version 11 to those that made a claim after the 27 June 2022. However, if the individual does not attend their appointment, but later wishes to register a claim for asylum on or after commencement, they will not be considered to have 'made an asylum claim' unless (a) there were circumstances beyond their control that made it impossible for them to attend the appointment scheduled for them, (b) they contacted the Home Office as soon as reasonably practicable to warn / explain of the said circumstances..'

30. The first observation we make is that this guidance was not in place at the time of the telephone call made on the applicant's behalf on 28 February 2022.

31. Secondly, the version of the guidance which was in place, (version 6 of 31 December 2020), replicates paragraph 327 of the Rules in that it states that an asylum application is to be made in person at a place designated to accept asylum claims. Furthermore, the guidance relied upon by Mr Miah does not relate to general provisions going to the meaning of section 113 of the 2002 Act but to commencement, transitional and savings provisions in relation to the Nationality and Borders Act 2022 (NABA) which are inapplicable in this case because the first provisions in NABA came into force on 28 June 2022, the day after the applicant attended the AIU for his interview. We would add that The Nationality and Borders Act 2022 (Commencement No. 1, Transitional and Savings Provisions) Regulations 2022, at Schedule 2, paragraph 4, for which we are grateful to Mr Erdunast who provided it during the hearing, states that the said Act does not apply to claims made before 'the appointed day', that is 28 June 2022.

32. Mr Miah relied upon Version 11.0 of the guidance published for Home Office staff on 18 April 2024 regarding the Nationality and Borders Act 2022 at page 86 where it is said:

When an appointment is made to attend the Asylum Intake Unit (AIU), it must be recorded as an appointment. It is not to be recorded as an asylum claim, as all asylum claims are required to be made in person. The appointment will, however, act as a barrier to removal until the date of the AIU scheduled appointment has passed.

33. The aforementioned extract is consistent with section 113 of the 2002 Act as well as paragraph 327 of the Rules and does not assist the applicant's case.

34. Mr Miah argued that the fact that a telephone call indicating a desire to claim asylum was a barrier to removal indicated that the telephone call must be an application. That argument is undermined by the first sentence of the above extract which explicitly states that the appointment is not to be recorded as an asylum claim. We further note from *R (Troitino) v National Crime Agency* [2017] EWHC 931 (Admin) at [36] that

a letter setting out a brief outline of what the claimant in that case would say on appeal was found not to be an asylum claim as defined by section 113 of the 2002 Act.

35. Mr Miah submitted that support for his contention that the telephone call amounted to the start of an asylum claim which was validated by attendance at an interview could be found in *AAA v Secretary of State for the Home Department (Rwanda)* [2022] EWHC 3230 (Admin) (19 December 2022) 3 at paragraph 31 where the asylum process was described thus:

‘Each Claimant made an asylum claim. Shortly after the claim was made (usually within a day or so), each Claimant attended an asylum screening interview. Every asylum claimant attends such an interview. The purpose of the interview is to obtain basic information...’

36. This passage of *AAA* does not assist Mr Miah’s arguments because the claimants in that case were detained and had made their claims at an immigration removal centre (IRC), which is described at paragraph 327B (ii) of the Rules as a designated place.
37. An asylum claim made in an IRC can be distinguished from the facts of the instant case where a telephone call was made outside a designated place. We would add that we derived no assistance from Mr Miah’s reliance on *Akinola* [2021] EWCA Civ 1308 at [64] which concerned an extension of time for appealing which we found did not bear on the circumstances of the instant case.
38. The difficulty with Mr Miah’s argument is further laid bare by what was said in *Singh* [2018] EWCA Civ 1669 at [21]:

The suggestion that a telephone call to an official or a shout in the street could constitute an “application”, whether valid or otherwise, is nonsensical. Mr Biggs acknowledged as much, but the acknowledgement does not strengthen his submission.

39. Section 3C(1) of the 1971 Act requires an application to be made for a variation of leave, prior to the expiry of that leave. As indicated above, the parties agree that an asylum claim is a relevant application. The requirement in s113 of the 2020 Act is clear in that an asylum application must be made in at a place designated by the Secretary of State. Consistent with the legislation, paragraph 327 of the Rules establishes that an asylum claim must be made in person at one of the designated places, which includes an AIU. The Rules were amended by a Statement of Changes dated 10 December 2020 and were therefore in place at the time of the events surrounding the applicant’s asylum claim. The aforementioned provisions are similarly consistent with Article 6(1) of the Asylum Procedures Directive (2005/85/EC).
40. The telephone call was not an application for asylum as it was not made in person at a designated place. No application for asylum was made until 27 June 2022, more than four months after the applicant’s leave expired. It follows that had the telephone call to the appointment line

been made on 7 February 2022, it would not have amounted to a valid application for asylum and the applicant's leave would not have been extended by section 3C of the 1971 Act.

41. We have considered the fairness of the decision in this case. It was argued on the respondent's behalf that applicants who contact the appointment line prior to the expiry of their leave are advised to use the walk-in service to ensure their application is processed on time. Indeed Ms Bhatti's statement makes that point at paragraph 19. We take into consideration Mr Miah's submission that this information is not published in the guidance on the Gov.uk website, contrary to Ms Bhatti's statement.
42. Having taken instructions during the hearing, Mr Erdunast stated that call handlers on the appointment line had a script which included the questions, 'Do you have valid leave to remain in the UK?; what is the expiry date?; Do you have a passport?' He submitted that his instructions were that if a visa was due to expire before an appointment, the caller was advised to walk-in to the asylum intake unit.
43. Mr Miah did not challenge this evidence. Indeed, in the applicant's case no such advice would be provided because his leave had already expired at the time of the call to the appointment line.
44. We conclude that it cannot be said that attendance at the interview retrospectively validated the earlier declaration that the applicant wished to apply for asylum, as communicated in the telephone call of 28 February 2022.
45. Following the hearing, an unsolicited letter was received from the GLD dated 24 July 2024 making the following points.

Further to today's hearing, I refer to paragraph 20 of Ms Bhatti's witness statement, where she states that, due to the Covid-19 restrictions, the Home Office was unable to book asylum appointments and only offered a walk in service for vulnerable customers.

I confirm, for the avoidance of doubt, that a walk-in service was also open for those who had leave expiring.

I further confirm, for the avoidance of doubt, that my client invites the Applicant's representatives to make any submissions consequential on this clarification that they consider appropriate.

46. The contents of this GLD letter had no impact on the decision on this judicial review application given that the applicant was not affected by covid-19 restrictions and it was not argued at the hearing that the walk-in service was unavailable for those whose leave was expiring at the time the applicant's leave was due to expire. The response sent by Kalam Solicitors on 24 July 2024 contains no submissions on the points made by the respondent but impermissibly requests disclosure of documents. Neither letter was of any assistance to the Upper Tribunal.

47. This application is refused.

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