Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05753/2016
IA/01626/2016

THE IMMIGRATION ACTS

Heard at Field House
On 7 November 2017

Decision & Reasons Promulgated
On 28 November 2017

Before

MR JUSTICE DINGEMANS SITTING AS AN UPPER TRIBUNAL JUDGE
DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR IMTIAZ AHMED (FIRST APPELLANT)
MRS ASIA FATIMA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Chohan, Counsel, instructed by S Z Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, who are nationals of India, have permission to challenge the decision of Judge Seelhoff of the First-tier Tribunal (FtT) sent on 7 August 2017 dismissing their appeals. They are husband and wife. They have three children aged 4, 2 and 6 months. They had lodged appeals in respect of two decisions of the Secretary of State: one dated 17 February 2016 refusing the first appellant indefinite leave to

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remain (ILR); the other dated 11 March 2016 refusing both the first appellant and the second appellant leave to remain under the Tier 1 Entrepreneur scheme.

2. The appellants' immigration history in brief is as follows. On 14 February 2006 the first appellant was granted leave to enter the UK as a student and he was granted an extension in the same capacity until 28 February 2010. On 12 May 2010 his application for leave to remain as a Tier 4 General Student was refused, but on 7 November 2011 he was granted leave to remain under the Tier 1 Post Study Migrant scheme until 7 November 2013. On 6 November 2013, the day before his leave expired, he submitted a Tier 1 Entrepreneur application. When the first appellant applied for ILR in February 2016, and was refused on the same day, his Tier 1 Entrepreneur application was still outstanding. A decision on the latter was eventually made on 11 March 2016.

The Decision of 17 February 2016 Refusing the First Appellant ILR

3. The reasons the respondent gave for refusing the first appellant's application for ILR were that he had not accrued ten years' continuous lawful residence, as required by paragraph 276A of the Immigration Rules by virtue of a break in continuity of some five months and 29 days. It was acknowledged he had lawful residence from 12 March 2006 until 4 October 2010 (when he became appeal rights exhausted in respect of the decision refusing his Tier 4 (General) Student application on 23 March 2010). He did not make a subsequent application until 2 April 2011. The decision letter also stated that the first appellant was not able to meet the requirements of Appendix FM either as a partner or a parent, or on the basis of private life under paragraph 276ADE. The refusal letter concluded by stating that since the first appellant had not outlined any exceptional circumstances, his application did not fall for a grant of leave outside the Rules.

4. The first appellant's grounds of appeal contended that the decision was an unjustifiable interference with his Article 8 rights as no consideration had been given to his established private and family life in the UK and the reasons/obstacles preventing him and his family from returning to Pakistan and that it had not taken account of the best interests of the children.

The Decision of 11 March 2016 Refusing the Tier 1 (Entrepreneur) Application

5. The reasons given by the respondent for refusing the combined application made by the two appellants under the Tier 1 (Entrepreneur) scheme were various but can be summarised as being that the first appellant had not shown that his business proposal was a genuine one.

6. The appellants' grounds of appeal against this decision were that the decision was not in accordance with the Immigration Rules and was incompatible with their Article 8 rights and that discretion should have been exercised differently. The appeal letter requested that their appeal against this decision be linked with that against the refusal of ILR.

The Judge's Decision

7. Having taken oral evidence from the two appellants and heard the submissions of the parties, the judge addressed the refusal decision of February 2016 and reminded himself that he only had jurisdiction to allow appeals on human rights grounds. As regards the issue of the break in the continuity of the first appellant's residence, he concluded that:

   (i) the appellant had been treated unfairly in 2010 as the respondent had failed to apply evidential flexibility to his application;

   (ii) if he were to be considering the application under the Rules "I would probably make a finding that the Appellant ought to have been treated as if he fell within the terms of the Respondent's policy on long residence applications which was being operated at the time";

   (iii) as he only had jurisdiction to allow appeals on human rights grounds, it was relevant that the lawful residence relied on from 6 November 2013 until 17 February 2016 was "derived from [section] 3C leave [Section 3C of the Immigration Act 1971 ("the 1971 Act")] secured by an application as an entrepreneur which it must be said was of very dubious merit" (paragraph 41);

   (iv) the appellant and his representatives were clearly put on notice of the respondent's intentions to rely on the dubious nature of the Tier 1 Entrepreneur application but failed to address or attempt to rebut this alleged feature of it in the evidence prepared before the appeal; and

   (v) the first appellant's oral evidence to the judge relating to his Tier 1 application, especially as regards what had happened during the period whilst the application was pending, was unsatisfactory. At paragraph 46 the judge stated:

   > "It flows from this finding that I find that 2½ years of the lawful residence that the Appellant relies on was secured in bad faith by making a Tier 1 entrepreneur application based on flawed business plans and relying on funds that were not genuinely available. These findings inform my consideration of section 117B of the Nationality Immigration and Asylum Act 2002 in that I consider that limited weight ought to be attached to those 2½ years as they are properly regarded as very precarious".

8. The judge then addressed the appellants' circumstances in relation to Article 8, both inside the Rules and outside the Rules. He considered that the respondent's decision was a proportionate interference with the appellants' family life. In this regard, he did not accept that there would be significant obstacles to the family's reintegration in India and considered that the children's best interests did not point significantly beyond remaining with their parents. As regards the appellants' private life, he considered that only limited weight could be attached to it in view of the fact that the

first appellant must have known the Section 3C leave secured by the Tier 1 Entrepreneur application was unreliable. The second appellant had only been in the UK for approximately five years and it was accepted that her application for leave as a points-based dependant could not succeed once the husband had applied for ILR on the basis of long residence.

9. At paragraph 54 the judge concluded:

> "In terms of considering the public interest in refusal I note that there is significant public interest in preserving the integrity of the immigration system. Granting indefinite leave to remain in this case would effectively endorse and disregard the fact that a quarter of the ten year's residence was obtained by making an application that was without merit and arguably duplicitous. I considered that it is highly important that the immigration system is not seen to be exploitable in this way".

10. It is to be noted that in the course of assessing the appellants' appeals the judge made a number of observations about the co-existence of appeals against the two decisions (the ten year ILR and Tier 1 Entrepreneur decisions). At paragraph 11 he said that in respect of the first appellant his ten year application "should have had the effect of varying [the first appellant's] Tier 1 Post study work application" but and that in respect of the second appellant "[n]o new application was lodged on behalf of the second appellant leaving her in essence as a PBS dependent with no PBS migrant to depend on". At paragraph 12 he said that the first appellant's appeal was against the ten year ILR refusal decision. At paragraph 14 he said that the only applicable decision in respect of the second appellant was as a dependant of her husband's points-based application; adding at paragraph 20 that "her appeal proceeds solely outside the Rules". At paragraph 42 he stated that "in effect the [Tier 1] decision is null as having been made in respect of an application which has been varied".

<u>The Grounds of Appeal</u>

11. The grounds identified the two issues as being:

"(i) the break in the chain of ten years' continuous leave; and

(ii) "[a]lleged deception in Tier 1 Entrepreneur application".

12. Regarding (i), it was submitted that the extant leave granted to the first appellant by virtue of Section 3C from 6 November 2013 to 17 February 2016 (when he applied for ILR) was guaranteed by Parliament and the Tribunal judge should not have interfered. Article 8 was clearly "engaged" as he had been in the UK since March 2006 and had formed his private and family life in the UK. Regarding (ii), it was advanced that the respondent should have voided the Tier 1 Entrepreneur application as it has been varied by the ILR application of 17 February 2016 pursuant to Section 3C(5) of the Immigration Act 1971. That being the case, the judge's reliance on the Tier 1 refusal decision "was misplaced as that application was voided

under Section 3C(5) and the decision was illegal". In any event, that decision showed insufficient funds; the respondent had not alleged deception.

13. We heard submissions from Mr Chohan and Mr Avery and we would record that we found them helpful. Mr Chohan's largely reiterated points made in the written grounds. He said that whilst he accepted that in the context of an appeal confined to human rights, the judge was entitled to take the decision letter of March 2016 into account, by the same token he should have taken into account that it should not have been made (because the 6 November 2013 application had been voided); that it would not have been before the judge in any event if the respondent had not sat on her hands for two and a half years; and that in seeking to rely on seeming deception the respondent was seeking "a second bite of the cherry through the back door". Except for her delay, there would have been no issue about the quality of the ten year residence. As regards Article 8, he submitted that the judge had not given adequate weight to the appellants' long residence, family life ties and the fact they had never been a burden on the state. Mr Avery submitted that the judge's determination was free of legal error; the judge was entitled to have regard to the quality of the ten years' residence in light of what evidence there was regarding the Tier 1 application.

<u>Our Decision</u>

14. In relation to the judge's rejection of first appellant's appeal against the refusal of ILR made in February 2016, we discern no legal error. Whether or not on a proper understanding of section 3C the respondent's later decision refusing the Tier 1 Entrepreneur application should have been made, the fact of the matter was that it was produced by the respondent as part of the appeal bundle. The appellants were clearly aware that it formed part of the appeal papers and could not have been at all surprised by that as they had themselves requested that their appeal against the ten year ILR and Tier 1 Entrepreneur decisions be heard together. They did not raise any objection to the inclusion of the later refusal decision at the hearing. At the hearing the first appellant was afforded the opportunity to answer questions about the circumstances surrounding his Tier 1 application, its basis in fact and the subsequent developments relevant to it that has taken place during the period when it was still pending. Their representative at the hearing (Mr Slatter) was able to make submissions on its relevance.

15. Mr Chohan says that the judge should have attached little or no weight to the perceived lack of quality in the first appellant's Section 3C leave secured by the application as a Tier 1 entrepreneur because that leave was lawful and there would have been no issue about its quality if the respondent had avoided sitting on her hands. That submission is unsustainable. The first appellant was only able to argue he had achieved ten years' lawful residence (or its equivalent) by reference to the period from March 2006 to March 2016. Two and a half years of that period was comprised by the Section 3C leave. If the respondent had not sat on her hands, he would not have been able to apply on the basis of ten years' residence in the first place. Further, as the appeal was on human rights grounds, it was entirely open to the judge to take into account what the evidence showed regarding the Section 3C

period of leave. The judge's focus in legal terms had to be on the nature and quality of the first appellant's private life including over the period from 6 November 2013 to 17 February 2016. For the appellant's private life argument the length and quality of his period of residence was a highly material matter.

16. Mr Chohan has sought to rely on another point. He argued that even assuming the judge was entitled to have regard to the Tier 1 Entrepreneur refusal decision (and related documentation), he was not entitled to regard that as tainted by deception. Our response to that submission is twofold. First, the judge did not find that the first appellant had used deception; nor had the respondent sought to allege it. Certainly the judge expressed concerns about its reliability and bona fides; but in terms of deception or fraud the furthest the judge went was to state that in his assessment it was "arguably duplicitous". Second, it is simply wrong of the appellant to maintain that the evidence only identified insufficiency of funds (see paragraph 12 of the grounds). The difficulties identified with the first appellant's Tier 1 Entrepreneur application went well beyond insufficiency of funds and encompassed reliance on a venture capital fund that lacked bona fides (Equinox); a lack of credible evidence of market research; a flawed business plan. Each of these shortcomings represented a discrete failure to meet specific requirements of the Rules. Nor were all those shortcomings ones that only became apparent during the period when the application was pending. For example, the refusal letter stated that the first appellant had failed to produce evidence to show he had acquired or formed a business prior to making his Tier 1 application, contrary to paragraph 41-SD of Appendix A.

17. As regards the judge's treatment of the appellants' family life circumstances, the grounds are devoid of merit. There was quite clearly a close engagement by the judge with the pertinent issues that arose, both under the Rules and outside the Rules. The judge made clear findings rejecting the appellants' attempts to downplay their family ties in India. The grounds raise no challenge to those findings, nor to the finding that the family could integrate into Indian society with no significant difficulties. Whilst the grounds do raise the best interests of the child, they wholly fail to identify any error in the judge's specific consideration of these or to the judge's conclusion that they could adapt to life in India with their parents without significant difficulty. Whilst the judge's treatment of the family's Article 8 circumstances is open to the criticism that he did not expressly address all the considerations set out in Section 117B, this observation does not significantly assist the appellants since whilst they both spoke English, the evidence regarding the first appellant's finances did not demonstrate genuine financial independence; and the immigration status of both of them had been precarious at least in the basic sense that neither had settled status. So far as concerns the public interest, the judge's assessment at paragraph 54 that it weighed significantly against the appellants was entirely within the range of reasonable responses.

18. So far as concerns the second appellant's appeal, the judge properly regarded this as largely dependent on the outcome of the first appellant's human rights appeal. Her

period in the UK was noted to be significantly less than the first appellant's in any event: see paragraph 51.

The Issue of the First Appellant's Section 3C Leave

19. During the hearing we raised with the parties whether the appeal hearing before the FtT had proceeded on the correct jurisdictional basis (see paragraph 7(iii) above) as, on one possible construction, the application the first appellant made in February 2016 could not have been a variation of the original application that attracted Section 3C leave as it was made at a time when the first appellant no longer had extant leave, contrary to Section 3C(4). Mr Chohan's response was that the February 2016 application had been properly understood by the judge to be a variation permitted under Section 3C(5) which forms an exception to Section 3C(4). Mr Chohan said that on instruction he had been informed by the first appellant that shortly after he submitted the February 2016 application, the respondent refunded the fee he had paid for his Tier 1 Entrepreneur application. That, he said, reinforced his argument that the respondent had treated the February 2016 application as a variation of the original Tier 1 Entrepeneur application. Mr Avery made no submissions on the issue.

20. Section 3C of the Immigration Act 1971 provides:

> "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,
>
> (b)an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought **[**, while the appellant is in the United Kingdom**]** against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),...
>
> (c)an appeal under that section against that decision, brought while the appellant is in the United Kingdom,**]** is pending (within the meaning of section 104 of that Act).
>
> , or
>
> (d)an administrative review of the decision on the application for variation—
>
> (i)could be sought, or

(ii)is pending.**]**

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

[(3A) Leave extended by virtue of this section may be cancelled if the applicant—

(a)has failed to comply with a condition attached to the leave, or

(b)has used or uses deception in seeking leave to remain (whether successfully or not).**]**

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

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

(6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations—

(a)may make provision by reference to receipt of a notice,

(b)may provide for a notice to be treated as having been received in specified circumstances,

(c)may make different provision for different purposes or circumstances,

(d)shall be made by statutory instrument, and

(e)shall be subject to annulment in pursuance of a resolution of either House of Parliament.**]**

(7) In this section—

- "administrative review" means a review conducted under the immigration rules;
- the question of whether an administrative review is pending is to be determined in accordance with the immigration rules. "

21. Although we were not directed to any authority specifically on the matter, there is a Court of Appeal judgment, **<u>JH</u> (Zimbabwe) [2009] EWCA Civ 78,** in which an application made by JH to vary her still extant leave was made after the time when her original leave had expired. Richards LJ, with Wall LJ and Laws LJ concurring, concluded "that the second application fell to be treated as a variation of the first" (see [46]). This conclusion is part of the ratio of the judgment. Subsequent Court of Appeal judgments on Section 3C, **<u>Iqbal and Others, R (on the application of) v The Secretary of State for the Home Department</u> [2015] EWCA Civ 838** (whose

reasoning was upheld by the Supreme Court in **Mirza**) and **Khan v Secretary of State for the Home Department [2017] EWCA Civ 424**, make no criticism of **JH**.

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22. It is common ground that the point does not affect the outcome of the appeal and as we are bound by the decision of the Court of Appeal in **JH**, we have not addressed it in these circumstances.

23. For the above reasons we conclude:

    The grounds do not disclose an error of law and accordingly the decision of the FtT Judge is upheld.

No anonymity direction is made.

Signed   Date

Dr H H Storey
Judge of the Upper Tribunal