IAC-FH-LW-V4

IN THE UPPER TRIBUNAL

JR/7887/2018

Field House,
Breams Buildings
London
EC4A 1WR

18 July 2019

THE QUEEN
(ON THE APPLICATION OF)
MD SAFIUL ALAM TOPADAR

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

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Mr M Biggs, instructed by Hubers Law Solicitors appeared on behalf of the Applicant.

Mr W Hansen, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE ALLEN:

1. The applicant challenges the Secretary of State's decision of 27 September 2018 refusing to grant him leave to remain under Tier 2, a decision which was upheld on administrative review on 31 October 2018. The applicant also seeks a declaration that his current status is that of a person with section 3C leave.

2. Permission to apply for judicial review was granted at an oral hearing by Lang J on 7 March 2019.

3. There are two grounds of challenge. The first of these concerns the nature of administrative review and its relationship with section 3C of the Immigration Act 1971. The second issue is a point on procedural fairness.

Chronology

4. The relevant facts and dates in this case are as follows. The applicant was granted leave to enter the United Kingdom as a Tier 4 (General) Student on 19 November 2009. He was granted further subsequent periods of leave up to 6 July 2016. On 6 July 2016 he made an application in time for FLR(O). On 22 August 2016 he applied for leave to remain as a Tier 2 (General) Migrant. On 24 August 2016 he submitted a letter to the Home Office varying his FLR(O) application to a Tier 2 (General) application.

5. On 7 August 2018 a request was made by the respondent for further information from the applicant's sponsor. The deadline for a response to that letter expired on 14 September 2018 without a response.

6. On 27 September 2018 the applicant was refused leave to remain as a Tier 2 (General) Migrant with a right to administrative

review. He applied for administrative review on 8 October 2018.

7. On 18 October 2018 the applicant sent a letter to the Home Office requesting leave to remain on the basis of Article 8. The administrative review was concluded on 31 October 2018, maintaining the decision of 27 September.

8. The essential argument of the applicant is that the letter of 18 October amounted to a variation of an outstanding application for further leave to remain and hence the respondent erred by failing to appreciate that the administrative review had become otiose as it had been taken over by the variation of the application for leave to remain which resulted in the decision of 27 September 2018. As a consequence it is argued that that application remains outstanding and that the applicant has leave to remain by virtue of section 3C of the Immigration Act 1971. It is in particular argued that the application of 18 October 2018 was a human rights claim which amounted to a variation of a pending application for further leave to remain for the purposes of section 3C(4) and (5) of the Immigration Act 1971.

9. As regards the second ground, it is argued that the decision was procedurally unfair because the Secretary of State acted unfairly and exercised a discretion under paragraph 77J of Appendix A of the Immigration Rules unlawfully in not extending the time granted to the sponsor to provide the further documents requested in the letter of 7 August 2018 and in not giving the applicant notice that a request of information had been sent to the sponsor, not notifying him of the timeframe that had been identified for a response and failing to inform him of the possible result if this was not responded to. In addition it is argued that the applicant

should have been informed in advance of the decision of 27 September 2018 that the request had not been complied with.

Submissions

10. In his written and oral submissions Mr Biggs argued that the letter of 18 October 2018 amounted to a variation of a pending application for further leave to remain for the purposes of section 3C(4) and (5) of the Immigration Act 1971. He noted what had been said in JH (Zimbabwe) [2009] EWCA Civ 78 including the point made at the end of paragraph 35 that: "once a decision has been made, no variation to the application is possible since there is nothing left to vary". He argued that that was not an obstacle in the instant case.

11. With regard to the nature of administrative review, Mr Biggs argued that the power to decide or refuse an application for administrative review is provided by sections 3A-3B and 4 of the 1971 Act. On that basis the administrative review process is simply an extension of the decision-making application process available when an application for leave or further leave has been made. He argued that as a consequence until the administrative review process is concluded the application for leave which underlines it remains outstanding, albeit that an initial, necessarily inchoate decision to refuse that application has been taken. Unlike the situation in JH, which was decided before the abolition of appeal rights in the 2014 Act and the introduction of the administrative review process, when an application for administrative review is pending there must necessarily be something left to vary for the purposes of section 3C(5) of the 1971 Act.

12. He supported his argument by reference to paragraph 2.2 of Appendix AR of the Immigration Rules which provides that on administrative review the presumptive refusal of the application for leave under consideration can be "withdrawn"

or, where the initial decision is upheld, the basis of that decision can be modified by providing further or fresh reasons for the decision. Paragraph 34N(2) of the Immigration Rules provides also that where the decision is upheld but for new reasons there is a further right to administrative review.

13. Mr Biggs argued that those features of the administrative review process strongly indicated that while an administrative review was pending so too was the underlying application for leave. If this were not so, he argued, it was impossible to understand how the administrative reviewer could remake the review decision in the applicant's favour or maintain the refusal but for new and potentially fundamentally different reasons. He argued that this confirmed that administrative review was simply an extension of the underlying application process.

14. Mr Biggs referred also to paragraph 34X(4) of the Immigration Rules which states that an application for administrative review which has not been determined will be treated as withdrawn if the applicant makes an application for entry clearance, leave to enter or leave to remain. He argued that when this was read together with paragraphs 34BB(1) and (2), it was consistent with the argument that it was possible to vary an application for leave to remain while an administrative review of the decision presumptively deciding that application was pending and that indeed in respect of an application for administrative review which had triggered an extension of leave by section 3C(2)(d), Rule 34X(4) could only work on this basis. He argued that it must follow that the words "an application for entry clearance, leave to enter or leave to remain" in paragraph 34X(4) must, by Rule 34BB(2), be read to mean "a variation of an application …". Mr Biggs argued that paragraph 34X(4) when read with paragraph 34BB(2) could not work if by section 3C(2)(d) and (4) an application

made while an administrative review was pending was invalid. There would in that situation be no "application" to trigger the withdrawal of the application for administrative review because the "application" was invalid ab initio. It would not be appropriate to read the word "application" as including "invalid application". A nullity would have the effect of ending the extension of leave under section 3C and involved depriving a migrant of the benefit of administrative review.

15. With regard to the arguments made by Mr Hansen in reliance upon paragraphs AR2.10(b) and AR2.6 of Appendix AR, it was argued that paragraph AR2.6 was irrelevant since the result of the applicant's argument was that the administrative review had been overtaken as a result of the variation of the continuing application which occurred while the administrative review was pending. The administrative review should therefore be treated as having been withdrawn and the varied application should have been decided in lieu of the administrative review.

16. As regards paragraph AR2.10(b), this would not apply, as it referred to a "fresh application" rather than a "variation" of a pending application which was in fact the case. The retrospective effect of AR2.10(b) could not make an application for leave to remain which was at the time it was made invalid by section 3C(4) valid, as the retrospective operation of an Immigration Rule could not render valid what was made invalid ab initio in primary legislation. It was argued that as the Immigration Rules were currently expressed the only way a fresh application could be effective would be if it was properly understood as a variation of a pending application for further leave to remain as was the position in the instant case.

17. It was further argued that the letter of 18 October was indeed a valid variation. Mr Biggs referred to paragraphs 37 to 39 of JH (Zimbabwe) in which the Court of Appeal adopted a broad concept of "variation" of an application for leave to remain for the purposes of section 3C. This, it was argued, was consistent with the approach of the Court of Appeal in Balajigari [2019] EWCA Civ 673 where the Court of Appeal had accepted that a human rights claim could be advanced as part of an application for further leave under the points-based system without any particular formality. It was argued that as a consequence of the above contentions the respondent should have made or should in due course make a decision on the varied application of the human rights claim advanced in support of it and this would give rise to a right of appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002.

18. As regards the procedural fairness ground, Mr Biggs argued that even bearing in mind the highly prescriptive nature of the points-based system, a discretion was conferred on the respondent by paragraph 77J of Appendix A to HC 395, but this was not a case, unlike EK (Ivory Coast) [2014] EWCA Civ 1517 where the unfairness resulted from erroneous actions by a sponsor for whom the respondent was not responsible. It was not a case where substantive fairness was being argued, only procedural unfairness. The respondent in the circumstances of the case was obliged to give notice to the applicant that a request for information had been sent to the sponsor, should have notified him of the timeframe that had been identified for a response and should have told him of the possible result if this was not responded to and should also notified the applicant in advance of the decision of 27 September that the request had not been complied with.

19. In his submissions on the section 3C ground, Mr Hansen argued that the principles in JH (Zimbabwe) had to be applied to the statutory scheme as varied by the addition of the administrative review provisions to the Immigration Act 1971 and Appendix AR to the Immigration Rules.

20. It was clear from section 3C(2)(d), that section 3C leave is extended whilst an administrative review of the decision under challenge was pending, but that question had to be determined in accordance with the Immigration Rules and in particular AR2.9 and 2.10. It was argued that the applicant's administrative review ceased to be pending and his section 3C leave ended when notice of the outcome of the administrative review was duly given on 31 October 2018. Even if the "application" of 18 October 2018 was a valid application for further leave, it did not have the effect contended for of extending his 3C leave. On the contrary, in accordance with AR2.10(b) it would mean that his 3C leave ended even earlier, on 17 October 2018.

21. The main point however, Mr Hansen argued, was that following from a proper application of section 3C as explained in JH (Zimbabwe), following the decision of 27 September 2018 there was "nothing left to vary" as expressed in JH (Zimbabwe).

22. Administrative review was no more than the review of an eligible decision to decide whether the decision was wrong due to a case working error, and the scope for introducing new evidence was very limited. The whole scheme of Appendix AR was inconsistent with the applicant's submissions. The fact that he retained a right of administrative review and that his 3C leave was extended while it remained pending did not mean that he had a right under section 3C(5) to vary further the decided application. The mischief of the possibility of a series of further applications leading to the indefinite

extension of the original leave as adumbrated in JH (Zimbabwe) would be facilitated. The relevant Home Office Guidance Version 8.0 of 6 March 2017 made it clear that a person on section 3C leave could not amend their application after it had been decided, pending any appeal or administrative review. This was in accordance with Appendix AR paragraph 2.10. Reference was also made to the other point in the Guidance that the administrative review could not be used to apply for leave on another basis and this was in accordance with paragraph AR2.6 of Appendix AR. Nor under the Guidance could an applicant use an application for administrative review of an eligible decision to apply for leave on another basis, for example to claim that they should be granted leave under a different tier of the points-based system. A human rights or protection claim made in an administrative review application would not be considered.

23. As regards the procedural fairness ground, it was argued that there was no unfairness. The Secretary of State's letter to the sponsor of 7 August 2018 was signed for as received on 10 August 2018 and the sponsor had been given 25 business days, much more the minimum of ten business days referred to in the Rules, in which to reply. The letter to the sponsor made it clear that the application might be refused if the information was not provided. There was no obligation to make separate contact with the applicant and warn him. The Secretary of State was entitled to expect that there would be regular contact between the applicant and his sponsor in relation to the application. The response when it finally came, dated 11 October 2018, referred to additional documents covering varied areas of the business as a result of which there was a need for more time to prepare and send them back, but there had been no request for more time until long after the decision

had been made. As a consequence, it was argued, the claim on procedural fairness was not made out.

The Law

Immigration Act 1971

24. "**3C 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.

…

(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".

"RELEVANT PASSAGES OF APPENDIX A

Attributes for Tier 2 (General) Migrants

76. An applicant applying for entry or leave to remain as a Tier 2 (General) Migrant must score 50 points for attributes.

76A. Available points for entry clearance or leave to remain are shown in Table 11A.

76B. Notes to accompany Table 11A appear below the table.

Table 11A

Certificate of Sponsorship	**Points**	**Appropriate Salary**	**Points**
Job offer passes Resident Labour Market Test	30	Appropriate salary	20

Resident Labour Market Test exemption applies	30		
Continuing to work in the same occupation for the same Sponsor	30		

Notes

Certificate of Sponsorship

77. Points may only be scored for one entry in the Certificate of Sponsorship column.

…

77H. No points will be awarded for a Certificate of Sponsorship if the Entry Clearance Officer or the Secretary of State has reasonable grounds to believe, notwithstanding that the applicant has provided the evidence required under the relevant provisions of Appendix A, that:

(a) the job as recorded by the Certificate of Sponsorship Checking Service is not a genuine vacancy,

(b) the applicant is not appropriately qualified or registered to do the job in question (or will not be, by the time they begin the job), or

(c) the stated requirements of the job as recorded by the Certificate of Sponsorship Checking Service and in any advertisements for the job are inappropriate for the job on offer and / or have

been tailored to exclude resident workers from being recruited.

…

77J. To support the assessment in paragraph 77H(a)-(c), the Entry Clearance Officer or the Secretary of State may request additional information and evidence from the applicant or the Sponsor, and refuse the application if the information or evidence is not provided. Any requested documents must be received by the Entry Clearance Officer or the Secretary of State at the address specified in the request within 10 business days of the date the request is sent."

"**Multiple Applications**

34BB. (1) An applicant may only have one outstanding application for leave to remain at a time.

(2) If an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application.

(3) Where more than one application for leave to remain is submitted on the same day then subject to sub-paragraph (4), each application will be invalid and will not be considered.

(4) The Secretary of State may give the applicant a single opportunity to withdraw all but one of the applications within 10 working days of the date on which the notification was sent. If all but one of the applications are not withdrawn by the

specified date each application will be invalid and will not be considered.

(5) Notice of invalidity will be given in writing and served in accordance with Appendix SN of the Rules."

"**Notice of an eligible decision**

34L. (1) Unless sub-paragraph (2) applies, written notice must be given to a person of any eligible decision. The notice given must:

(a) include or be accompanied by a statement of reasons for the decision to which it relates, and

(b) include information on how to apply for an administrative review and the time limit for making an application.

(2) Sub-paragraph (1) does not apply where the eligible decision is a grant of leave to remain.

Making an application

34M. An application for administrative review must be made in accordance with the requirements set out in paragraphs 34N to 34S. If it is not it will be invalid and will not be considered.

34N. (1) Unless sub-paragraph (2) or (2A) applies only one valid application for administrative review may be made in respect of an eligible decision.

(2) A further application for administrative review in respect of an eligible decision as set out in Appendix AR may be made where the outcome of

the administrative review is as set out in paragraph AR2.2(d) of Appendix AR of these Rules.

(2A) A further application for administrative review in respect of an eligible decision under Appendix AR (EU) may be made where a decision is withdrawn and a new decision made in accordance with paragraph AR(EU)2.2. of Appendix AR (EU).

(3) An application for administrative review of an eligible decision under Appendix AR may not be made if the applicant has previously signed an administrative review waiver form in respect of the eligible decision, in accordance with paragraph AR2.10 of Appendix AR of these Rules.

(4) If, after receiving notice of the eligible decision, an application for entry clearance, leave to enter or leave to remain is made during the time within which an application for administrative review under Appendix AR may be brought within paragraph 34R (including any possibility of an administrative review out-of-time under paragraph 34R(3)), an application for administrative review of the eligible decision may not be made under Appendix AR.

34O. (1) Where the eligible decision under Appendix AR is either a decision on an application for leave to remain or a decision to cancel leave to enter or remain which is in force on a person's arrival at the UK, the application for administrative review must be made in accordance with paragraph 34U or paragraph 34V.

(2) Where the eligible decision under Appendix AR is a refusal of an application for entry clearance, the application for administrative review must be made in accordance with paragraph 34VA.

(3) Where the eligible decision has been made under Appendix EU, the application for administrative review must be made in accordance with paragraph 34U.

34P. The application must be made in relation to an eligible decision.

34Q. An application under Appendix AR must be made:

(a) when the administrative review is in relation to an eligible decision on an in country application, as defined in paragraph AR3.2 of Appendix AR, while the applicant is in the UK;

(b) when the administrative review is in relation to an eligible decision made on arrival at the United Kingdom, as defined in paragraph AR4.2 of Appendix AR, while the applicant is in the UK, unless the eligible decision is made in the Control Zone (as defined in Appendix AR of these Rules), in which case administrative review may not be applied for and will not be considered until after the applicant has left or been removed from the Control Zone;

(c) when the administrative review is in relation to an eligible decision on an application for entry clearance, as defined in paragraph AR5.2 of Appendix AR, while the applicant is outside the UK.

34QA. An application under Appendix AR (EU) of these Rules may be made from either inside or outside the UK.

34R. (1) An application under Appendix AR must be made:

(a) where the applicant is in the UK and not detained, no more than 14 calendar days after receipt by the applicant of the notice of the eligible decision;

(b) where the applicant is in detention in the UK under the Immigration Acts, no more than 7 calendar days after receipt by the applicant of the notice of the eligible decision;

(c) where the applicant is overseas, no more than 28 calendar days after receipt by the applicant of the notice of the eligible decision; or

(d) where the eligible decision is a grant of leave to remain, no more than 14 calendar days after receipt by the applicant of the biometric immigration document which states the length and conditions of leave granted.

34R. (1A) An application under Appendix AR (EU) must be made no more than 28 days after receipt by the applicant of the notice of the eligible decision.

(2) An application which is permitted under paragraph 34N(2) or 34N(2A) of these Rules must be made within the relevant time limit stated in paragraph 34R(1) as if it was an initial application, and the notice of the outcome of the previous administrative review will be treated as the notice of the eligible decision.

(3) But the application may be accepted out of time if the Secretary of State is satisfied that it would be unjust not to waive the time limit and that the application was made as soon as reasonably practicable.

(4) DELETED

(5) For provision about when an application is made see paragraph 34W.

34S. An applicant may only include an application on behalf of a dependant of the applicant if that dependant:

(a) was a dependant on the application which resulted in the eligible decision; or

(b) was previously granted leave to enter or remain as a dependant of the applicant and that leave is being cancelled at the same time as that of the applicant

Notice of invalidity

34T. A notice of invalidity will be given in writing and served in accordance with Appendix SN of these Rules.

…

Withdrawal of applications

34X. (1) An application which may only be brought from within the UK and has not been determined will be treated as withdrawn if the applicant requests the return of their passport for the purpose of travel outside the UK.

(2) An application which may only be brought from within the UK and which has not been determined will be treated as withdrawn if the applicant leaves the UK.

(3) The application for administrative review may be withdrawn by the applicant. A request to withdraw an application must be made in writing to the Home Office at the address provided for that purpose on the visas and immigration pages of the gov.uk website. The application will be treated as withdrawn on the date on which the request is received.

(4) An application for administrative review which has not been determined will be treated as withdrawn if the applicant makes an application for entry clearance, leave to enter or leave to remain.

(5) Sub-paragraphs (1) and (2) above do not apply to an application for administrative review made under Appendix AR (EU)."

"**Immigration Rules Appendix AR: administrative review**

Administrative Review

Introduction

Administrative review is available where an eligible decision has been made. Decisions eligible for administrative review are listed in paragraphs AR3.2, AR4.2 or AR5.2 of this Appendix.

Administrative review will consider whether an eligible decision is wrong because of a case working error and, if

it is considered to be wrong, the decision will be withdrawn or amended as set out in paragraph AR2.2 of this Appendix.

Rules about how to make a valid application for administrative review are set out at paragraphs 34M to 34Y of these Rules.

Definitions

AR1.1 For the purpose of this Appendix the following definitions apply:

Applicant	**the individual applying for administrative review**
Case working error	an error in decision-making listed in paragraph AR2.11
Control Zone	has the meaning given collectively by Schedule 1 to the (International Arrangements) Order 1993, Schedule 1 to the Channel Tunnel (Miscellaneous Provisions) Order 1994 and regulation 2 of the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003. In these Rules it also includes a "supplementary control zone" as defined by Schedule 1 to the Channel Tunnel (International Arrangements) Order 1993.
Valid application	an application for administrative review made in accordance with paragraphs 34M to 34Y of these Rules
Pending	as defined in paragraph AR2.9

Applicant	**the individual applying for administrative review**
Reviewer	the Home Office case worker, Immigration Officer or Entry Clearance Manager conducting the administrative review.
Original decision maker	the Home Office case worker, Immigration Officer or Entry Clearance Officer who made the eligible decision.

General Principles

What is administrative review?

AR2.1 Administrative review is the review of an eligible decision to decide whether the decision is wrong due to a case working error.

Outcome of administrative review

AR2.2 The outcome of an administrative review will be:

(a) Administrative review succeeds and the eligible decision is withdrawn; or

(b) Administrative review does not succeed and the eligible decision remains in force and all of the reasons given for the decision are maintained; or

(c) Administrative review does not succeed and the eligible decision remains in force but one or more of the reasons given for the decision are withdrawn; or

(d) Administrative review does not succeed and the eligible decision remains in force but with

different or additional reasons to those specified in the decision under review.

What will be considered on administrative review?

AR2.3 The eligible decision will be reviewed to establish whether there is a case working error, either as identified in the application for administrative review, or identified by the Reviewer in the course of conducting the administrative review.

AR2.4 The Reviewer will not consider any evidence that was not before the original decision maker except where:

(a) evidence that was not before the original decision maker is submitted to demonstrate that a case working error as defined in paragraph AR2.11 (a), (b) or (c) has been made; or

(b) the evidence is submitted to demonstrate that the refusal of an application under paragraph 322(2) of these Rules was a case working error and the applicant has not previously been served with a decision to:

(i) refuse an application for entry clearance, leave to enter or leave to remain;

(ii) revoke entry clearance, leave to enter or leave to remain;

(iii) cancel leave to enter or leave to remain;

(iv) curtail leave to enter or leave to remain; or

(v) remove a person from the UK, with the effect of invalidating leave to enter or leave to remain,

which relied on the same findings of facts.

AR2.5 If the applicant has identified a case working error as defined in paragraph AR2.11 (a), (b) or (c), the Reviewer may contact the applicant or his representative in writing, and request relevant evidence. The requested evidence must be received at the address specified in the request within 7 working days of the date of the request.

AR2.6 The Reviewer will not consider whether the applicant is entitled to leave to remain on some other basis and nothing in these rules shall be taken to mean that the applicant may make an application for leave or vary an existing application for leave, or make a protection or human rights claim, by seeking administrative review.

Applying for administrative review

AR2.7 The rules setting out the process to be followed for making an application for administrative review are at 34M to 34Y of these Rules.

Effect of Pending administrative review on liability for removal

AR2.8 Where administrative review is pending the Home Office will not seek to remove the applicant from the United Kingdom.

When is administrative review pending?

AR2.9 Administrative review is pending for the purposes of paragraph AR2.8 of this Appendix and sections 3C(2)(d) and 3D(2)(c) of the Immigration Act 1971:

(a) While an application for administrative review can be made in accordance with 34M to 34Y of these Rules, ignoring any possibility of an administrative review out-of-time under paragraph 34R(3);

(b) While a further application for administrative review can be made in accordance with paragraph 34M(2) of these Rules following a notice of outcome at AR2.2(d) served in accordance with Appendix SN of these Rules;

(c) When an application for administrative review has been made until:

(i) the application for administrative review is rejected as invalid because it does not meet the requirements of paragraph 34N to 34S of these Rules;

(ii) the application for administrative review is withdrawn in accordance with paragraph 34X; or

(iii) the notice of outcome at AR2.2(a), (b) or (c) is served in accordance with Appendix SN of these Rules.

AR2.10 Administrative review is not pending when:

(a) an administrative review waiver form has been signed by an individual in respect of whom an

eligible decision has been made. An administrative review waiver form is a form where the person can declare that although they can make an application in accordance with paragraphs 34M to 34Y of these Rules, they will not do so;

(b) administrative review has previously been pending and the individual in respect of whom the eligible decision has been made submits a fresh application for entry clearance, leave to enter or leave to remain. In this case the day prior to the day on which the fresh application is submitted is the last day on which administrative review is pending.

What is a case working error?

AR2.11 For the purposes of these Rules, a case working error is:

(a) Where the original decision maker's decision to:

(i) refuse an application on the basis of paragraph 320(7A), 320(7B), 322(1A) or 322(2) of these Rules; or

(ii) cancel leave to enter or remain which is in force under paragraph 321A(2) of these Rules; or

(iii) cancel leave to enter or remain which is in force under paragraph V9.4 of Appendix V of these Rules; or

(iv) refuse an application of the type specified in paragraph AR3.2(d) of these Rules on grounds of deception,

was incorrect;

(b) Where the original decision maker’s decision to refuse an application on the basis that the date of application was beyond any time limit in these Rules was incorrect;

(c) Where the original decision maker’s decision not to request specified documents under paragraph 245AA of these Rules was incorrect;

(d) Where the original decision maker otherwise applied the Immigration Rules incorrectly; or

(e) Where the original decision maker failed to apply the Secretary of State’s relevant published policy and guidance in relation to the application.

AR2.12 Additionally, where the eligible decision is one specified in paragraph AR3.2, a case working error is also where there has been an error in calculating the correct period or conditions of immigration leave either held or to be granted.

Administrative Review in the UK

Decisions eligible for administrative review in the United Kingdom

AR3.1 Administrative review is only available where an eligible decision has been made.

AR3.2 An eligible decision is:

(a) A decision on an application where the application was made on or after 20th October 2014 for leave to remain as:

(i) a Tier 4 Migrant under the Points Based System; or

(ii) the partner of a Tier 4 Migrant under paragraph 319C of the Immigration Rules; or

(iii) the child of a Tier 4 Migrant under paragraph 319H of the Immigration Rules.

(b) A decision on an application where the application was made on or after 2nd March 2015 for leave to remain, as:

(i) a Tier 1, 2 or 5 Migrant under the Points Based System; or

(ii) the partner of a Tier 1, 2 or 5 Migrant under paragraphs 319C or 319E of the Immigration Rules; or

(iii) the child of a Tier 1, 2 or 5 Migrant under paragraphs 319H or 319J of the Immigration Rules.

(c) A decision made on or after 6th April 2015 on an application for leave to remain made under these Rules unless it is an application as a visitor, or where an application or human rights claim is made under:

(i) Paragraph 276B (long residence);

(ii) Paragraphs 276ADE(1) or 276DE (private life);

(iii) Paragraphs 276U and 276AA (partner or child of a member of HM Forces);

(iv) Paragraphs 276AD and 276AG (partner or child of a member of HM Forces) where the sponsor is a foreign or Commonwealth member of HM Forces and has at least 4 years' reckonable service in HM Forces at the date of application;

(v) Part 8 of these Rules (family members) where the sponsor is present and settled in the UK (unless the application is made under paragraphs 319AA to 319J of these Rules, or under paragraph 284, 287, 295D or 295G where the sponsor was granted settlement as a Points Based System Migrant) or has refugee or humanitarian protection status in the UK;

(vi) Part 11 of these Rules (asylum);

(vii) Part 4 or Part 7 of Appendix Armed Forces (partner or child of a member of HM Forces) where the sponsor is a British Citizen or has at least 4 years' reckonable service in HM Forces at the date of application;

(viii) Appendix FM (family members), but not where an application is made under

section BPILR (bereavement) or section DVILR (domestic violence),

in which case the appropriate remedy is an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 rather than an application for administrative review.

(d) A decision made on or after 6th April 2015 on an application for leave to remain made by a Turkish national or their family member pursuant to the UK's obligations under Article 41 of the Additional Protocol to the European Community Association Agreement (ECAA) with Turkey, and under Article 6(1) of Decision 1/80 of the Association Council established by that agreement.

AR3.3 An eligible decision in paragraph AR3.2 is either a decision to refuse an application for leave to remain or a decision to grant leave to remain where a review is requested of the period or conditions of leave granted."

Discussion

25. It is relevant to begin with what was said by Richards LJ at paragraph 35 of JH (Zimbabwe). He said:

"35. The key to the matter is an understanding of how section 3C operates. I have set the section out at para 10 above. The section applies, by sub-section (1), where an application for variation of an existing leave is made before that leave expires (and provided that there has been no decision on that application before the leave expires). In that event there is, by sub-section (2), a statutory extension

of the original leave until (a) the application is decided or withdrawn, or (b), if the application has been decided and there is a right of appeal against that decision, the time for appealing has expired, or (c), if an appeal has been brought, that appeal is pending: I paraphrase the statutory language, but that seems to me to be the effect of it. During the period of the statutory extension of the original leave, by sub-section(4) no further application for variation of that leave can be made. Thus, there can be only one application for variation of the original leave, and there can be only one decision (and, where applicable, one appeal). The possibility of a series of further applications leading to an indefinite extension of the original leave is excluded. However, by sub-section (5) it is possible to vary the one permitted application. If it is varied, any decision (and any further appeal) will relate to the application as varied. But once a decision has been made, no variation to the application is possible since there is nothing left to vary."

26. To this must be added the provision for administrative review made in amendments to section 3C following the abolition of appeal rights in the Immigration Act 2014. So section 3C(2), under which leave is extended by virtue of this section during any period specified, includes an administrative review of the decision on the application for variation in circumstances where it could be sought or is pending. It is clear from section 3C(7) that the question of whether an administrative review is pending is to be determined in accordance with the Immigration Rules, and the relevant provisions in that regard are AR2.9 and AR2.10 of Appendix AR. It is, I think, uncontroversial that the application for administrative review

was made on 8 October 2018 and was concluded on 31 October 2018, the request for leave to remain on the basis of Article 8, the purported variation, having been made on 18 October. It can be seen from paragraph 34M of HC 395 that an application for administrative review must be made in accordance with the requirements set out in paragraphs 34N to 34S and must be made within fourteen days from receipt of the eligible decision which was the decision under challenge of 27 September 2018. There is no question of a lack of timeliness in this case therefore. The decision under challenge is clearly an eligible decision as defined in AR3.2 of HC 395.

27. A key point here is the application of AR2.10(b). This states that an administrative review is not pending where it has previously been pending and the individual in respect of whom the eligible decision was made submits a fresh application for entry clearance, leave to enter or leave to remain. In such a case the day prior to the day on which that fresh application is submitted is the last day on which administrative review is pending.

28. In response to this, Mr Biggs argues that the letter of 18 October 2018 was not a fresh application but was a variation of the earlier application and as a consequence AR2.10(b) has no purchase on that. Against this, Mr Hansen argues that the "application" of 18 October 2018 was not a valid application for further leave because it did not comply with the requirements of paragraph 34 of HC 395. Paragraph 34 sets out a number of formal requirements that must be satisfied in order for an application for leave to remain to be valid. Mr Biggs argues that though the letter of 18 October was in less than ideal terms it clearly sought leave on the basis of Article 8 and operated as a variation.

29. Mr Hansen also attaches weight to the Guidance on administrative review (Version 8.0) which among other things says that administrative review cannot be used to apply for leave on another basis and the Home Office will not consider any human rights, asylum or EEA grounds that are raised in the application, in accordance with paragraph AR2.6 of Appendix AR.

30. The applicant's argument in response to this is that what was sought is a variation of the original application, not an attempt in the administrative review to apply for leave on another basis. The administrative review application was made in respect of the original decision and then subsequently the variation application was made.

31. It is relevant to note that the letter of 18 October 2018 states that it is an application outside the Rules on the basis of human rights. Unlike the applicant's letter of 24 August 2016 which expressly states that it is a variation application, there is no reference to variation in the letter of 18 October 2018. There is reference to the claimed failure on the part of the respondent to act with fairness vis-à-vis the sponsor and a claim alternatively for leave to remain outside the Rules on the basis of compelling and compassionate circumstances and private life under Article 8. It is also relevant to observe that section 3C(1) refers to a person who has limited leave to enter or remain in the United Kingdom applying for variation of the leave. There is no reference in the letter of 18 October 2018 to a variation of an outstanding application for further leave to remain being sought. That is, perhaps, unsurprising, in light of the fact that the application of 22 August 2016 had been refused in the decision of 27 September 2018. There is also force to Mr Hansen's point that paragraph 34 of HC 395 sets out formal requirements for the making of a valid application for leave to remain in

the United Kingdom, and those requirements, such as the need to apply on an application form which is specified for the immigration category under which the applicant is applying, were not met in this case. Even if Mr Biggs is right to argue that authorities such as Ahsan [2017] EWCA Civ 2009 and Balajigari [2019] EWCA Civ 673 enable the making of a human rights claim without the need to follow the requirements of paragraph 34, there remains for the applicant the difficulty that there is nothing in the letter of 18 October 2018 to suggest that it is anything more than a free-standing application for leave, rather than an attempt to vary an existing application.

32. A further difficulty for the applicant is paragraph 34X(4), which provides that an application for administrative review which has not been determined will be treated as withdrawn if the applicant makes an application for entry clearance, leave to enter or leave to remain. I note Mr Biggs' argument that paragraph 34X(4) has to be read with paragraph 34B(1)-(2), which provides that an applicant may only have one outstanding application for leave to remain at a time, and if an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application. The immediate point to be made is that the previous application for leave to remain had been decided, in the decision of 27 September 2018. Mr Biggs' argument is that an effect of paragraph 34BB(2) is that paragraph 34X(4) must be read as meaning: "a variation of an application …". He argues that, given the terms of section 3C(4) it is only if an application for further leave is, properly analysed, a variation of an outstanding application for further leave that the application could be valid.

33. I see no scope for Mr Biggs' argument that paragraph 34X(4) should be read in the way he suggests. Paragraph 34BB(2) is concerned with the situation where the previous application for leave to remain has not been decided. An application made prior to that decision will be treated as a variation of the undecided application. But in this case there was a decision prior to the application of 18 October 2018, and hence paragraph 34BB(2) does not bite, and there is no warrant for the argument that paragraph 34X(4) should be read in the way suggested.

34. Mr Biggs' further argument is that paragraph 34X(4) can only work in the manner he suggests in cases where section 3C(2)(d) applies, whereby an application for leave to remain has the effect of extending the applicant's leave to remain until that application is determined. This, however, has to be seen in light of, first, the fact that the provisions of section 3C(2)(d) have effect only when an administrative review is pending (or (not this case) could be sought), and AR 2.10(b) makes it clear that administrative review is not pending when it has previously been pending and the individual in respect of whom the eligible decision has been made submits a fresh application for entry clearance. That was the situation in this case, and hence the argument cannot succeed. The administrative review was no longer pending when the further application was made, and hence the difficulties adverted to in paragraphs 23 and 24 of Mr Biggs' skeleton do not arise.

35. Mr Biggs' view depends upon an assumption as to the nature of administrative review. He argues that the administrative review process is simply an extension of the decision-making and application process that applies where an application for leave or further leave has been made, and characterises the decision which is the subject of the administrative review as an "initial, inchoate" decision to refuse the application, and

hence the application for leave in issue remains outstanding until the administrative review process is concluded. That, however, is to ignore the definition of administrative review in AR 2.1: "Administrative Review is the review of an eligible decision to decide whether the decision is wrong due to a case-working error". It is a review of a decision, not a decision in its own right, and the fact that, under AR 2.2 an outcome of an administrative review can be that the eligible decision can be withdrawn or modified, does not alter that character.

36. With regard to Mr Biggs' argument that the Court of Appeal adopted a broad concept of "variation" of a leave to remain application for the purposes of section 3C, though this is true, it is relevant to note that at paragraph 36, the court remarked that a second application can be treated as a variation of the first only up to the point where the Secretary of State makes a decision on the application. And, insofar as weight is placed on what Mr Ockelton said in Sukhwinder Singh (JR/13615/2015: certified as being citable), it has to be remembered that his conclusion that where there has been a valid application for administrative review the original decision cannot be regarded as final was a response to a contention that a challenge to a decision refusing an application for indefinite leave to remain was out of time, as it was more than three months after that decision, but less than three months after the decision on administrative review. For procedural purposes, therefore, time runs from the administrative review outcome maintaining the original decision, but the context is significantly different from that in the instant case, and there remains, as a matter of weight, the definition of administrative review at AR2.1 as the review of an eligible decision. The Immigration Rules draw a clear

distinction between a decision and the administrative review which, as its name implies, is a review only.

37. In conclusion on this issue, therefore, I find that the letter of 18 October 2018 did not operate as a variation of the earlier application, and the administrative review ceased to be pending on 17 October 2018.

38. Mr Biggs suggested at the outset of submissions that if I were with him on the first point there was no need to say much, if anything, on the fairness point. Given my findings above, it is clearly necessary for me to address this issue.

39. On this issue I am entirely in agreement with the points made in Mr Hansen's skeleton argument. It is clear from paragraph 77J that the Secretary of State may request additional information and evidence from the sponsor and may refuse the application if the information or evidence is not provided. The sponsor was given a period of 25 business days, much more than the minimum of ten business days referred to in the Rules, to respond and did not do so within that period. Indeed no response was received until 11 October 2018. Bearing in mind the fact-sensitive nature of fairness in any given case, as set out in EK (Ivory Coast) and the particular constraints of the PBS system, as referred to by Underhill LJ in Mudiyanselage [2018] EWCA Civ 65 at paragraph 56, it is right in my view to conclude that the primary onus was on the applicant to provide all the necessary information and there was no obligation on the Secretary of State to inform the applicant that information had been sought from the sponsor or to remind the sponsor or give the sponsor any other indication other than what was clearly set out in the letter that the consequences of failure to provide evidence and information might lead to the refusal of the application. The claim for

procedural fairness is not made out in this case. As a consequence the claim is dismissed on both bases.

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JR/7887/2018.

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Md Saiful Alam Topadar

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Allen

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr M Biggs, instructed by Hubers Law Solicitors, on behalf of the Applicant and Mr W Hansen, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 18 July 2019.

Decision: the application for judicial review is refused

(1) For the reasons set out in the judgment, I order that the judicial review application be dismissed.

Order

(2) I order, therefore, that the judicial review application be dismissed.

Permission to appeal to the Court of Appeal

(3) I refuse permission to appeal to the Court of Appeal. I have considered the detailed grounds of appeal submitted on behalf of the applicant. I do not consider that they identify an arguable error of law in the decision.

Costs

(4) The applicant does not agree with the draft order for costs put in on behalf of the respondent. I direct that each side files its submissions on costs, the respondent no later than 7 days from the date of this order and the applicant no later than 7 days thereafter.

Signed: ____

Upper Tribunal Judge Allen

Dated:

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

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