UTIJR6

JR/ 6956/ 2017

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of X and Others

Applicants

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Norton-Taylor

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Dr S Chelvan and Mr F Asghar, of Counsel, instructed by Asghar and Co Solicitors, on behalf of the applicants and Mr Z Malik, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a hearing at Field House, London on 31 January 2020.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity orders Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the applicants or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision: the application for judicial review is refused

Introduction

1. The applicants are all Yemeni nationals. The first applicant is the husband of the second and the couple are the parents of the third, fourth, fifth, sixth and seventh applicants, the last two being minors. In light of my anonymity direction, I shall refer to the first applicant as “X” throughout this decision.

2. The central challenge put forward by the applicants in this application for judicial review focuses on the respondent's failure to have made a decision on their outstanding applications for further leave to remain in the United Kingdom. In its simplest form, this is a "delay" case, although there are specific issues surrounding this core issue which require specific consideration,

The relevant factual and procedural background

3. X entered the United Kingdom with entry clearance as a Tier 1 (Entrepreneur) Migrant on 25 February 2014, accompanied by the other applicants as his dependents. The leave conferred by the entry clearance ran until 23 April 2017. Prior to entry, the family unit had resided in Saudi Arabia.

4. By an application made on 18 April 2017 (differing dates are stated in the papers, but this has no material bearing on the case), X sought an extension of his leave to remain as a Tier 1 Entrepreneur, pursuant to paragraph 245DD of the Immigration Rules ("the Rules"). The other applicants applied for an extension of their respective leave as his dependents. It is these applications which remain outstanding before the respondent.

5. Prior to the extension applications being made, HMRC began a criminal investigation into alleged multi-million pound tax fraud involving a number of different tax regimes and a large number of companies. X was suspected of involvement and arrested. I shall set out further details about this matter, below.

6. As a result of the criminal investigation, the respondent decided to delay or defer a decision on X's application and those of his dependents. It is somewhat unclear as to how this decision was communicated to X and his legal advisers. Suffice it to say that between April and July 2017 a number of contacts were made which led X to understand that no decision would be made on the pending applications until the criminal investigation had concluded, or at least progressed in some way. This led to a Pre-Action Protocol letter being sent to the respondent on 31 July 2017. A response was received on 7 August 2017. Dissatisfied with this, the application tor judicial review was made on 16 August 2017. Following service of an

Acknowledgement of Service, there was no permission decision 'on the papers': the matter went straight to an oral hearing at which permission was refused by Upper Tribunal Judge Hanson on 28 November 2017. His decision was challenged to the Court of Appeal. Permission to appeal was granted by Henderson LJ on 5 November 2018. By consent, on 10 October 2019, Simler LJ allowed X's appeal and granted permission to bring judicial review proceedings. The matter was remitted to the Upper Tribunal for a substantive hearing.

7. In light of further case management directions issued by Upper 'Tribunal Judge O'Connor, amended grounds of challenge were filed on 27 November 2019 (these were not settled by Dr Chevlan or Mr Asghar). These for the basis of this application for judicial review.

8. Further procedural steps then ensued, including the production of additional evidence, the filing of detailed grounds of defence, and a reply to these.

The criminal investigation

9. The investigation has been ongoing since July 2016. Thirteen individuals were arrested and remain on criminal bail. X is among these. It is suspected that these individuals, being alleged directors, shareholders, and/or signatories to bank accounts for a number of businesses, have conspired to defraud HMRC and launder the proceeds of crime. Specifically, X was arrested on suspicion of the following:

> Fraudulent Evasion of Income Tax contrary to section 106A of the Taxes Management Act 1970;
>
> Conspiracy to Cheat the Public Revenue contrary to section 1 of the Criminal Law Act 1977;
>
> Money laundering contrary to sections 3 to 7, 328, and 329 the Proceeds of Crime Act 2002.

10. The evidence adduced by the respondent indicates that the investigation is ''document heavy", with over 700 exhibits "uplifted" and over 100 media items. The investigation has involved the consideration of over 100 individual bank accounts,

11. As matters currently stand, the bail conditions preclude X from applying for a new travel document, have required the Home Office to surrender his existing passport to HMRC, and for HMRC to retain that passport.

12. It is important to note that there has as yet been no charging decision against X or, as I understand it, any of the individuals subject to the criminal investigation. The most up to date evidence

on this particular issue (contained in a letter to X from HMRC, dated 13 November 2019) states that:

> "As you are aware, this matter is part of a large scale investigation, which will be submitted to the Crown Prosecution Service in stages in due course. Therefore, it is for this reason that your bail return date has been revised to a date when it is anticipated that an indication a charging decision is likely to have been made by the Crown Prosecution Service."

13. That bail return date now stands as 13 August 2020.

14. I record at this juncture that X has always strenuously denied any involvement in the alleged criminal conspiracy.

Procedural matters

15. Three specific procedural matters arose in respect of the hearing on 31 January 2020. First, on 17 January 2020 the applicants made an application to rely on further evidence. This consisted of updated witness statements from X and the second applicant, both dated 15 January 2020, together with additional evidence relating to the criminal investigation (specifically, an expert report by Michael Handy on the issue of the authenticity of signatures apparently used on documents being considered by HMRC) and the claimed prejudice caused to the applicants by the respondent's ongoing failure to decide the applications for further leave to remain. By an order sealed on 24 January 2020, Upper Tribunal Judge Gleeson granted the application to admit the new evidence on the basis that as the respondent's failure to make decisions was a continuing event, it was appropriate to permit the applicants to adduce evidence as to claimed prejudice caused to them by that failure.

16. The second matter relates to new evidence sought to be adduced by the respondent in the form of a witness statement Ms Angela McMahon, dated 27 January 2020. Ms McMahon, an Investigation Officer at HMRC, has already provided a witness statement. The new witness statement was drafted in order to respond to X's latest witness statement, referred to above. However; as acknowledged by Mr Malik, the respondent had failed to make any application to adduce this new evidence. He informed me that the order of Judge Gleeson had only been received by the respondent on 30 January 2020 and the timescale for making an application was extremely short. Whilst that may be the case, for the following reasons I decided that Ms McMahon's new witness statement should not be admitted.

17. First, the new witness statement pre-dated Judge Gleeson's order and there could have been an application from the

respondent, in anticipation of the applicants' further evidence being admitted, to have Ms McMahon's witness statement admitted.

18. Second, in any event, an application could have been made on 30 January or, at the very latest, on the morning of the hearing itself. No such application was forthcoming.

19. Third, there has been no satisfactory explanation for the failure to have made any application.

20. Bearing in mind the need for procedural rigour in judicial review proceedings, fairness and the interests of justice did not require the admittance of the respondent's new evidence.

21. Mr Malik confirmed that he was content to proceed with the hearing notwithstanding my decision on this point.

22. The third procedural matter relates to anonymity. An application for an anonymity direction was made by the applicants on 29 January 2020. Two arguments were put forward: first, that disclosure of the applicants' names (in particular X's) could potentially create a risk to them if they were to be returned to Yemen at some point (although there is no prospect of that as matters currently stand). Second, that the presence of two minor children in these proceedings was a powerful factor in favour of anonymity.

23. At the end of the hearing I ruled that an anonymity direction was appropriate. I have given full consideration to the importance of open justice. The first argument put forward on the applicants' behalf carried a degree of merit, but by itself was insufficient to justify anonymity. However, the fact remains that the sixth and seventh applicants are minor children, and in all the circumstances of this case, the need to protect them from being identified (particularly by way of so-called "jigsaw identification") is sufficiently powerful to displace the presumption of naming the applicants. I record here that the respondent's position on this issue was neutral.

The relevant legal framework

24. I do not propose to set out each and every legislative provision and other materials that have been referred to in this case. These are all to be found in the bundle of authorities.

25. The relevant provisions of the Immigration Act 1971 ("the 1971 Act") are as follows:

> **"1. – General principles.**
>
> (1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come

and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

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

(3) Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as “the common travel area”.

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

…

3. – General provisions for regulation and control.

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

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

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

(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely —

(i) a condition restricting his [work] or occupation in the United Kingdom;

(ia) a condition restricting his studies in the United Kingdom;

(ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;

(iii) a condition requiring him to register with the police.

(iv) a condition requiring him to report to an immigration officer or the Secretary of State; and

(v) a condition about residence.

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality). If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid).

(3) In the case of a limited leave to enter or remain in the United Kingdom, –

(a) a person’s leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and

(b) the limitation on and any conditions attached to a person's leave (whether imposed originally or on a variation) shall, if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave.

(4) A person’s leave to enter or remain in the Uni ted Kingdom shall lapse on his going to a country or territory outside the common travel area (whether or not he lands there), unless within the period for which he had leave he returns to the United Kingdom in circumstances in which he is not required to obtain leave to enter; but, if he does so return, his previous leave (and any limitation on it or conditions attached to it) shall continue to apply.

...

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.

(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).

...

Schedule 2

1. –

(1) Immigration officers for the purposes of this Act shall be appointed by the Secretary of State, and he may arrange with the Commissioners of Customs and Excise for the employment of

officers of customs and excise as Immigration officers under this Act.

...

(3) In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State, and medical inspectors shall act in accordance with such instructions as may be given them by the Secretary of State or, in Northern Ireland, as may be given in pursuance of the arrangements mentioned in sub-paragraph (2) above by the Minister making appointments of medical inspectors in Northern Ireland."

26. References have also been made to the Data Protection Act 2018, the General Data Protection Regulations 2016 (Regulation (EU) 2016/679: "GDPR"), the Charter of Fundamental Rights of the European Union ("CFR"), and the European Convention on Human Rights ("ECHR").

The parties' arguments

27. With particular reference to para 18 of the amended grounds, the applicants' challenge can be summarised as follows:

i. The respondent has no express or implied power to suspend/delay/defer a decision on an application for leave to remain pending the outcome of a criminal investigation;

ii. The respondent is bound to decide the applications in accordance with the applicable Rule and any relevant policy, and if the requirements of the Rule are satisfied, leave to remain must be granted;

iii. When deciding X's application, the respondent is bound to apply the presumption of innocence when/if considering paragraph 322(5) of the Rules, given that X has not been convicted of an offence;

iv. If X is subsequently convicted of an offence, the respondent has the power to revoke any leave granted to initiate deportation proceedings;

v. The outstanding applications must also be determined in accordance with EU law principles of proportionality as this case concerns the sharing of data between government agencies;

vi. The respondent's ongoing failure to decide the applications has caused real prejudice to the applicants;

vii. The failure to decide the applications is, in all the circumstances, unreasonable and disproportionate.

28. The respondent's case can be summarised as follows:

i. It is not irrational to delay making a decision on the applicants' outstanding applications for leave to remain on the basis that the course of action proposed by them would involve obtaining and considering a very large amount of evidence collated by HMRC as part of its ongoing criminal investigation.

ii. Taking this alternative course of action would not be an efficient use of public funds;

iii. The issue of proportionality does not arise in this case, but even if it did, the respondent's position is proportionate in all circumstances.

29. In responding to the respondent's detailed grounds of defence, the applicants' reply emphasises the assertion that there is simply no power for the respondent to suspend or delay decision-making in the circumstances of this case.

30. During the course of argument, Mr Malik confirmed that there was no policy, published or otherwise, relating to the situation in which the applicants find themselves.

31. I record here that Dr Chelvan did not rely upon the contents of X's latest witness statement, dated 15 January 2020, when making his submissions.

Analysis and conclusions

32. Although the terms "delay", "suspend", and "defer" have been variously employed to describe the respondent's failure to make a decision on the applicants' outstanding applications, for the purposes of my analysis and conclusions, I shall refer only to the first of these. As helpfully confirmed by Dr Chelvan at the outset of the hearing, the challenge put forward in this case is to be categorised as unlawful "delay" by the respondent.

33. I have sought to gather together the different strands of the grounds of challenge in order to provide a clear structure to my consideration of the issues. In so doing I have formulated the following questions:

i. Question 1: is there an express power available to the respondent to delay making decisions on the applicants' outstanding applications?

ii. Question 2: if there is no express power, is there an implied power?

iii. Question 3: if there is a power to delay (express or implied), is the respondent's decision to delay nonetheless irrational?

iv. Question 4: is a response delay unlawful by reference to any other sources of law, in particular GDPR, CFR, or ECHR?

Question 1: is there an express power to delay making a decision on the applications for leave to remain?

34. The first question to address is whether there is an express power available to the respondent to delay making a decision on the applicants' applications.

35. It is apparent from the 1971 Act that there is no express provision contained therein which specifically allows for a delay in decision-making in cases where an applicant is subject to criminal investigation or indeed for any other identified reason. Mr Malik has not contended for a contrary position.

36. The Rules do not expressly provide for a delay in decision-making pending the outcome of a criminal investigation or on any other basis. Again, Mr Malik has not sought to suggest otherwise.

37. In my judgment, the absence of an express power to cover the particular circumstances arising in the present case is unsurprising. It would no doubt be burdensome and very probably unworkable for primary legislation and/or the Rules to specify any and all categories of cases in which a delay in decision-making might be appropriate. Even viewed from a wider perspective, the absence of any express general power to delay the decision-making process in any given case or classes of case is not a "trump card" in the applicants' favour. It cannot have been the intention of Parliament to require that all aspects of administrative decision-making in immigration cases be the subject of provisions under primary or secondary legislation (or indeed the Rules) which expressly identify the specific power in question (see R (on the application of New London College Limited) v Secretary of State for the Home Department [2013] UKSC 51; [2013] 1 WLR 2358, discussed in greater detail, below).

38. The existence of a policy (published or otherwise) on the issue cannot have any bearing on to the existence of an express power to delay. The policy guidance cited in the present case ("general grounds for refusal", version 28.0, published on 10 April 2017) states that an application for leave to remain “must” be put “on hold” if the individual concerned is subject to a pending prosecution. X is not of course subject to a pending prosecution and both parties agreed that this policy guidance is inapplicable.

39. In light of the above, I conclude that there is no express power under the 1971 Act or the Rules for the respondent to delay making

a decision on applications for leave to remain where the applicant is subject to a criminal investigation. However, this does not entitle the applicants to succeed in their challenge.

Question 2: is there an implied power to delay making a decision on the applications for leave to remain?

40. In my judgment, the absence of an express power to delay does not, *for that reason alone*, lead to the conclusion that there cannot be an implied power.

41. Having said that, an implied power must exist in order for the respondent's decision to delay making a decision on the applicants' applications to be potentially lawful; if there is no such power, the respondent's defence to this application for judicial review would fall at the first fence.

42. Dr Chelvan strongly urges the Tribunal not to "add in" a power into the 1971 Act that is not expressly stated therein, or set out in the Rules or, as a minimum, described in a published policy. I disagree with the submission that an identification of an implied power would be tantamount to reading in a new species of executive power that does not already exist. If an implied power to delay deciding an application exists, it has done so prior to my decision in this case, albeit that there are no (at least as far as either myself or the parties are aware) decided cases on the particular issue currently in play.

43. It is of note that there is nothing contained in sections 3 and 4 of the 1971 Act or the Rules which stipulate any timeframe for deciding applications for leave to remain in the United Kingdom. Nor do any provisions brought to my attention expressly preclude a power to delay decision-making either in respect of an individual application or a specific cohort. To this extent, the wording of the relevant legal sources does not assist the applicants' case.

44. In addition, the decision of Collins J in FH and Others v Secretary of State for the Home Department [2007] EWHC 1571 (Admin) is predicated upon the absence of express provisions for deciding applications (in that case, for asylum) within a particular timeframe. The Secretary of State's concession in that case that there was an "implicit obligation" to decide asylum applications "within a reasonable time" articulates the point (see para 6).

45. I disagree with the point made at para 4 of the applicants' amended grounds of challenge, which asserts that once a person is subject to investigation (or a charging decision or prosecution), they generally fall within the jurisdiction of "criminal agencies" and (presumably) outside the regime of immigration control. I do not see any legal source material or reason in principle to support that

contention. It must be the case that an individual may be subject to both immigration control and a criminal investigation at one and the same time. Subject to any strong contraindications, I see no basis upon which it can be said that once an individual who is otherwise subject to immigration control falls under a criminal investigation, the respondent is thereby in some way precluded from exercising any powers in respect of her decision-making (subject of course to ordinary public law constraints).

46. In my view, the crux of the issue under Question 2 is the judgment of Lord Sumption (with whom Lords Hope, Clarke and Reed agreed) in R (on the application of New London College Limited). That case concerned the system for licensing educational institutions to sponsor students under Tier 4 of the Points-Based System under the Rules. New London College had its licence revoked by the respondent. The revocation had been affected by reference to policy guidance issued by the respondent, guidance that had not been incorporated into the Rules. The appellants asserted that for this reason, the guidance was unlawful. The Court accepted the argument of the Intervener that the licensing system contained in the policy guidance did not fall within the scope of sections 1(4) and 3(2) of the 1971 Act. However, the respondent had acted lawfully in establishing and administering the licensing by virtue of a broader implied power arising under that Act. At paras 28 and 29, Lord Sumption held as follows:

> "28. So in my opinion Mr. Drabble's submission is unsupported by authority. But is it right in principle? In my view it is not. It has long been recognised that the Crown possesses some general administrative powers to carry on the ordinary business of government which are not exercises of the royal prerogative and do not require statutory authority: see B.V. Harris, "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225. The extent of these powers and their exact juridical basis are controversial. In R v Secretary of State for Health Ex p C [2000] 1 FLR 627 and Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government [2008] 3 All ER 548, the Court of Appeal held that the basis of the power was the Crown's status as a common law corporation sole, with all the capacities and powers of a natural person subject only to such particular limitations as were imposed by law. Although in R (Hooper) v Secretary of State for Work and Pensions [2005] 1 WLR 1681, para 47 Lord Hoffmann thought that there was "a good deal of force" in this analysis, it is open to question whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like. But the question does not need to be resolved on these appeals because the statutory power of the Secretary of State to administer the system of immigration control must necessarily

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

47. Mr Malik relies heavily upon what is said in the final sentence of para 28 and the totality of para 29 to support his contention that there is clearly an implied power arising from the 1971 Act permitting the respondent to delay making a decision on X's application, and indeed on any other application of an individual subject to a criminal investigation. He categorises the decision to delay as coming within the "range of ancillary and incidental administrative powers not expressly set out in the [1971] Act."

48. Dr Chelvan's principal argument against this is the absence of any express provision under the 1971 Act, or within secondary legislation and the Rules, relating to cases in which an applicant for leave to remain is also the subject of a criminal investigation in respect of which there has been no charging decision. It is said at the very least, and effectively as a prerequisite to the existence of

an implied power, there should be a published policy from the respondent on this category of case.

49. For the reasons set out below, I accept Mr Malik's position and reject that of Dr Chelvan.

50. First, I have already concluded that there is an absence of an express power under the 1971 Act, but this is not determinative of the existence of an implied power. The same applies to the absence of any specific provisions relating to delay in secondary legislation or the Rules.

51. Second, Lord Sumption's conclusion that the respondent enjoys a power extending beyond that which requires certain measures to be laid before Parliament, and to include "a range of ancillary and incidental administrative powers not expressly spelt out in the Act", is in my judgment of direct application to the present case. Here, the respondent's decision to delay is not concerned with the substantial requirements to be met for leave to remain (in other words, the criteria under paragraph 245DD of the Rules). The delay is, by definition, a state of affairs arising prior to any application of the substantive requirements of the Rules. This is to be properly categorised as an example of the exercise of a power "ancillary and/or incidental" to immigration control. It follows that there was no requirement for the respondent to incorporate any provisions relating to delay in deciding a particular class of applications into secondary legislation or the Rules.

52. Third, in my judgment the absence of a policy (published or otherwise) dealing with the particular type of case arising in these proceedings does not constitute a basis for concluding that the New London College case can properly be distinguished and, for that reason alone, the respondent possesses no implied power to delay. It is correct that the New London College case was concerned with policy guidance (relating to sponsor licensing of educational institutions). However, Lord Sumption's conclusion that the guidance in question was lawful by virtue of the implied "range of ancillary and incidental administrative powers" is not in my view properly to be confined to cases in which a specific policy exists. To do so would effectively result in a policy becoming a condition becoming a condition precedent to the existence of the type of implied power to which Lord Sumption was referring. That would, in my judgment, constitute an unjustifiably restrictive interpretation of his conclusions.

53. Dr Chelvan also relies on the fact that in FH and Others, the court had regard to the White Paper entitled "Fairer, Faster and Firmer - a Modern Approach to Immigration and Asylum" (see para 13). As I read that decision, the central conclusions reached by Collins J (none of which are said to be incorrect) are not predicated

upon a consideration of the White Paper. Rather, the guidance on delay is based upon ordinary public law principles, specifically that of irrationality leading to unlawfulness.

54. During the course of argument, I was referred by Dr Chelvan to the litigation in MM (Lebanon) [2017] UKSC 10; [2017] WLR 771. He submitted that when applications were put on hold pending the outcome of the appeal to the Court of Appeal, the respondent had published a policy explaining this. In Dr Chelvan's submission, this indicated that delays in deciding applications should, indeed must, be the subject of a policy. Having undertaken my own researches after the hearing, I was only able to find a document entitled, ''Minimum income threshold: information for applicants", updated on 16 July 2014. This confirmed that decisions would be made on those applications which had been "on hold". I was not able to find the predecessor to this document, which had apparently been first created 18 April 2014. In any event, on the assumption that there had been a policy statement on the delay in those applications, for reasons previously stated, I conclude that it does not follow that any and all decisions to delay must be made pursuant to a policy.

55. Third, a central theme of the applicants' case (certainly in respect of the oral submissions) has been the claimed difficulty, indeed the impossibility, of a reviewing court or tribunal to assess the lawfulness of a decision to delay in the absence of a policy. It is said that this goes to the question of whether an implied power exists at all. I conclude that the absence of a policy goes not to the existence of an implied power, but instead to the issue of whether the exercise of such a power is lawful, A court or tribunal can properly apply well-known principles of public law when undertaking such an assessment.

56. In light of the foregoing, I conclude that there is an implied power under the 1971 Act for the respondent to have decided to delay making a decision on the applicants' applications for leave to remain.

Question 3: is the delay irrational?

57. It is common ground between the parties that the exercise of any power must be exercised according to established principles of public law, specifically the requirement to act rationally,

58. In the context of the delay issue as it arises in the present case, the following basic propositions can be taken from FH and Others:

    i. In order to succeed, the applicants must show that the delay is irrational (para 11);

ii. To be deemed as such, the delay must outside of a "reasonable time" (paras 6 and 11);

iii. What is a "reasonable time" depends on the circumstances of the case (para 8).

59. I now turn to address the relevant circumstances of this case which go to inform my assessment of the rationality of the delay.

60. The applicants' applications have now been outstanding for fairly close to 3 years. That is not an inconsiderable period of time. It is not, however, such an inordinately long period as to render the delay irrational by reference to the passage of time.

61. In my judgment, the absence of a policy covering the situation in which a decision on a pending application is put off during the course of a criminal investigation and before a charging decision is made, does not of itself render the delay irrational. It is the particular circumstances of case which are all- important. An assessment of the rationality of the delay is required in light of those circumstances. The absence of a policy may, in certain cases, make it more difficult for the respondent to adequately justify a delay. Indeed, in my view the absence of a policy covering the present situation is less than ideal. Given that a policy exists in respect of those subject to a pending prosecution (referred to earlier in my decision), it would be desirable for the respondent to formulate one. This might provide greater transparency for applicants (and, where appropriate, their legal representatives). For my part, I would urge the respondent to give careful consideration to this course of action. Having said this, the fact that the current state of affairs may be unsatisfactory or undesirable does not mean that the high threshold of irrationality is met.

62. The core of the respondent's case in seeking to justify the delay as a rational exercise of her implied power relates to the criminal investigation to which X is subject. The potential nature of this investigation set out in the first witness statement of Ms McMahon, dated 9 January 2020, has been summarised in paragraphs 9-10, above. There is no reason for me to doubt the reliability of the evidence provided by Ms McMahon. The respondent's detailed grounds of defence describe the size of the investigation as being “significant”. In oral submissions, Mr Malik employed the terms “unusual” and “exceptional” to describe its nature. Dr Chelvan objected to this phraseology, pointing out that these words had not been employed in the grounds or the respondent’s skeleton argument. In my judgment, the evidence of Ms McMahon unarguably shows that the investigation is highly complex in nature. It makes no material difference as to whether the terms “unusual” or “exceptional” are used to describe the investigation in other ways. For what it is worth, both are apt.

63. The question then arises: has the respondent acted *prima facie* rationally in delaying a decision on the applicants' applications in light of the nature of the criminal investigation? The evidence of Mr Budden is that to make a decision at this stage would not be an efficient use of public funds. Such a course of action would entail the respondent having to review the evidence gathered by HMRC thus far.

64. The use of resources is a relevant factor in assessing the rationality of a delay. At paragraph 11 of FH and Others, Collins J stated as follows:

> "11. As was emphasised by Lord Bingham, the question was whether delay produced a breach of Article 6(1). Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the Wednesbury test and is shown to result from actions or inactions which can be regarded as irrational. Accordingly, I do not think that the approach should be different from that indicated as appropriate in considering an alleged breach of the reasonable time requirement in Article 6(1). What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible."

65. In the present case, it is quite clear that significant resources have already been put into the criminal investigation (the absence of any specific figures is beside the point: the nature and amount of evidence being considered speaks for itself). On behalf of the applicants, it is said that any inefficient use of resources by the respondent could be avoided by HMRC (and possibly the Crown Prosecution Service) sharing relevant information, such that an informed decision could be made on the applicants' applications. In response, Mr Malik submits that as the applications could be granted or refused prior to a charging decision, it was rational for the respondent to delay making her own decision on the applications.

66. On one level, there is merit to the applicants' argument on this particular issue. There is no evidence to suggest that HMRC could not share information with the respondent. Having said that, it is a fact that the criminal investigation is ongoing and it is difficult to see how the respondent could obtain a full picture of the relevant circumstances at this pre-charging decision stage. Indeed, the inference must be that HMRC itself does not have a full picture, given that an indication of a charging decision is not likely to be made until August 2020. Even if relevant information were shared by HMRC, it is a rational position for the respondent to adopt that she would have to separately review what would clearly be a voluminous body of evidence in order to arrive at a properly considered decision. It is a highly likely consequence and clearly a rational one to foresee, that this would absorb resources. It is also right that the respondent could, as matters stand, potentially grant the outstanding applications or refuse them. The ability to refuse notwithstanding the absence of a conviction and despite the satisfaction of the substantive requirements of paragraph 245DD the Rules, arises under paragraph 322(5) of the Rules:

> "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused.
>
> ...
>
> (5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security."

67. The applicants assert that the presumption of innocence must apply to X in respect of a decision to delay (or when actually making a decision on the applications themselves). Yet this argument does not assist their case because whilst the presumption must indeed be applied at all stages until conviction, it does not prevent the refusal of an application on "bad character" grounds under paragraph 322(5) of the Rules.

68. In all the circumstances, I conclude that the decision to delay on the basis of resources is not irrational.

69. The applicants submit that the respondent could and should simply decide the applications now and if X is subsequently convicted of any offences, revocation action could be taken at that stage. That is indeed a possibility: the respondent can turn to appropriate tools for this to be done (see, for example, paragraph 323(i) of the Rules). The availability of an alternative course of action does not, however, necessarily or in the particular circumstances of this case render the decision to delay irrational. There is nothing in the 1971 Act or the Rules to indicate that an application for leave to remain must be decided forthwith if the

applicant satisfies all of the substantive criteria (in this case, paragraph 245DD).

70. I now turn to the claimed prejudice caused to X and the other applicants by the respondent's delay. In so doing, I have had regard to all relevant evidence before me, including that admitted by Judge Gleeson (and subject to Dr Chelvan's confirmation that he was not relying on X's latest witness statement as the basis of any of his submissions).

71. The second applicant's detailed witness statement of 15 January 2020 sets out problems encountered by her and her children as a result of their current predicament. In summary, it is said that as a result of having statutorily extended leave to remain under section 3C of the 1971 Act, they experience real difficulties in respect of studies, employment, obtaining a provisional driving licence, obtaining a national insurance number, and (in respect of the two minor children) schooling. There is no particular reason to doubt this evidence, insofar as it goes.

72. The fact remains that all of the applicants continue to enjoy leave to remain pursuant to section 3C. The conditions of their previous grant of leave continue, save for the fact that a departure from the United Kingdom would result that leave coming to an end (I will return to this, below). If it is the case that educational institutions, employers, or other agencies are not sufficiently appreciative of the section 3C leave, that is in reality a matter that must be taken up with them. It is not the case that they have been left with no leave to remain as result of the respondent's delay and I conclude that there is no prejudice as regards the applicants' status in the United Kingdom such that the delay can be said to be irrational.

73. The second applicant and her children cannot leave the United Kingdom without bringing their section 3C leave to an end (see section 3C(3) of the 1971 Act). I can see that this has caused these applicants practical difficulties, including the inability of the third and fourth applicants to go overseas during the course of their studies. This obstacle, and in a real sense the cause of their current predicament in general, is result of them being the dependents of X. It follows from this procedural dependency that once the decision was made to delay X’s application, those of the other applicants were also put on hold. It cannot be said to be irrational for the respondent to have taken this course of action: there was no obligation on her to "sever" their applications from that of X.

74. In my judgment, the other applicants could vary their outstanding applications in order to make independent human rights claims to the respondent (see section 3C(4) and (5) of the 1971 Act). The outcome of such claims would of course be

uncertain, but it would not be unreasonable for them to be made. In addition, I reject Dr Chelvan's contention that the making of such varied applications would result in the applicants losing either their section 3C leave and/or not being able to rely upon their previous grant of leave to remain. A variation of the outstanding applications would not lead to the cessation of the section 3C leave unless and until the varied application was decided and refused (and subject to any potential appellate proceedings). In addition, I cannot see any basis upon which a previous grant of leave is somehow “lost” to an individual who varies an outstanding application during the currency of section 3C leave. There is nothing at page 9 of the respondent's policy on section 3C leave ("Leave extended by section 3C (and leave extended by section 3D in transitional cases)" version 9.0, published on 15 January 2019) to which I was referred at the hearing, which says anything to the contrary.

75. In his first witness statement of 14 August 2017, X asserts that his inability to leave the United Kingdom has had a significant impact on his ability to earn an income. This is because he is a renowned Islamic scholar whose particular abilities in reciting the Qur'an results in numerous engagements overseas. It is the case that his section 3C leave would also come to an end if he left the United Kingdom. However, he is subject to criminal bail and as matters stand, is unable to travel as a direct result of this. The respondent's delay is immaterial in this respect.

76. In respect of the sixth and seventh applicants, there is no evidence of significant prejudice affecting their best interests. I would certainly appreciate that an inability to travel abroad may cause upset, but that does not in my view constitute a matter going to core aspects of their well-being and development.

77. The respondent's delay is no doubt causing the applicants a degree of stress and anxiety. They are clearly in a precarious situation. Without wishing to diminish the consequences of this, it is the case that no medical evidence has been provided to the respondent to show that there are any particularly significant problems arising out of this state of affairs.

78. Finally, I consider the question of timeframes. As noted earlier, the applicants’ applications have now been outstanding for close to 3 years. HMRC have stated that that an indication of a charging decision is likely to have been made by the middle of August 2020. Of course, if a decision is made to charge X, the consequent proceedings are likely to be ongoing for a considerable time thereafter. On the other hand, it may be that if the charging decision is favourable to X, matters will be brought to an end relatively quickly.

79. In this regard, Mr Malik has submitted that the threshold of irrationality for the delay has not yet been crossed, but he candidly accepts that this might change in the future, depending on all the circumstances. Having taken further instructions, Mr Malik offered the following on behalf of the respondent:

> "The respondent commits to making a decision on the applications within 3 months of any prosecution being concluded or, if a prosecution does not proceed, then 3 months from the point at which is it is decided that no such prosecution will be brought."

80. Dr Chelvan responded by submitting that this stated position was of no assistance to the applicants. On any view, he submitted, a lengthy delay was still to be faced with all the stress and anxiety that this will inevitably bring.

81. Again, I am cognisant of the stress and anxiety being caused by the current state of affairs. It is the case that there are still some 6 months to go before an indication will be given as to a charging decision. Even then, if a decision is made to pursue charges against X, a prosecution is likely to be a lengthy exercise. As matters currently stand, however, I conclude that this facet of the continuing delay does not, individually or in combination with other factors, cross the irrationality threshold. As Mr Malik has rightly pointed out, this may change. All depends on the particular circumstances pertaining to the point in time which the applicants' situation is being considered.

82. Bringing all of these matters together, I conclude that the delay is not, as matters stand, irrational

Question 4: GDPR, the CFR, and Article 6 ECHR

83. As noted earlier, I received no oral submissions on this aspect of the applicants' cases Dr Chelvan was content to rely upon the amended grounds and skeleton argument in this regard.

84. As I understand the argument being put forward, it is submitted that because HMRC have supplied, or may in due course supply, information to the respondent, such sharing of "personal sensitive data" engages the GDPR and the CFR.

85. For the following reasons, I reject this argument.

86. First, in my judgment the applicants' cage falls to be decided on ordinary Wednesbury grounds alone: this is a "delay" case and the threshold to be met is that of irrationality. It has not been shown by evidence that "personal sensitive data" of the applicants which was not already known to the respondent has in fact been provided by HMRC. The central thrust of the respondent's defence to the

applicants' case is that she should not be put in a position where she has to obtain and then review all of the evidence being collated by HMRC. GDPR and in turn the CFR, are not engaged.

87. Second, if I am wrong about that, and with reference to Article 5 GDPR, there is no evidence to suggest that any sharing of relevant data that may have occurred has been done so in a manner other than is lawful, fair, and transparent.

88. Third, if proportionality is in play, I conclude that the respondent's current stance is proportionate. Whilst on the one hand it may be said that the respondent could simply decide the outstanding applications, grant leave to remain, and revoke it if X is subsequently convicted, on the other side of the balance sheet is the legitimate concern in respect of resources expended in obtaining and reviewing all relevant evidence collated thus far by HMRC and the absence of significant prejudice to the applicants. balance is in favour of the respondent.

89. This conclusion carries over to any engagement of Article 8 of the Charter of Fundamental Rights of the European Union.

90. Article 6 ECHR is referred to in the amended grounds. It has not been explained how this provision is engaged by the applicants' case. In any event, Article 6 has no application in respect of immigration matters, as opposed to criminal matters (see R (MK (Iran)) v SSHD [2010] EWCA Civ 115 and the authorities discussed therein). Whereas X is under criminal investigation, the judicial review proceedings relate to the immigration matter concerning the delay in deciding applications for leave to remain.

91. Article 8 ECHR has not been pleaded.

Summary of conclusions

92. My conclusions in this case are as follows:

i. There is no express power for the respondent to delay making a decision on the applicants' applications;

ii. There is an implied power under the 1971 Act for the respondent to delay making a decision;

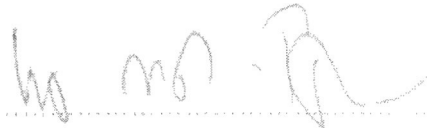
iii. As matters stand, the delay is not irrational;

iv. The delay does not engage GDPR, and therefore does not engage the CFR;

v. If they were engaged, the delay would nonetheless be lawful and proportionate;

vi. Neither Articles 6 nor 8 ECHR are engaged.

93. It follows that the applicants' application for judicial review must be dismissed.

Signed: 

Upper Tribunal Judge Norton-Taylor

Dated: **11 March 2020**

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).

UTIJR6

JR/ 6956/ 2017

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of X and Others

Applicants

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Norton-Taylor

ORDER

UPON consideration of all documents lodged and having heard the parties' respective representatives, Dr S Chelvan and Mr F Asghar, of Counsel, instructed by Asghar and Co Solicitors, on behalf of the Applicants and Mr Z Malik, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 31 January 2020.

AND UPON the handing down of the Decision in this application for judicial review on 12 March 2020

IT IS ORDERED THAT

1. The Applicants are granted anonymity. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or

indirectly identify the Applicants or members of their family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. This application for judicial review is dismissed.

3. The Applicants' application for permission to appeal to the Court of Appeal is refused.

4. The Applicants are to pay the Respondent's reasonable costs, to be the subject of detailed assessment if not agreed.

Permission to appeal

Counsel for the Applicants have drafted grounds seeking permission to appeal to the Court of Appeal. The first of these asserts that the Upper Tribunal has erred by concluding that the there is an implied power and/or that the Respondent has not acted irrationally when the relevant Immigration Rule expressly provides for refusal of an application on bad character grounds. The Tribunal's essential conclusions are based upon the existence of an implied power and the rational exercise thereof in respect of the delay in deciding the Applicants' applications. It was common ground that there was power under paragraph 245DD and paragraph 322(5) of the Immigration Rules to refuse X's application on bad character grounds. However, as stated at [51] and [62]-[68], the Tribunal was concerned with the lawfulness and rationality of the Respondent's stance *prior* to a decision being taken on the applications. On the particular facts of this case, the express provision under the Immigration Rules did not negate the existence of an implied power and/or the rationality of the delay. The argument to the contrary has no realistic prospect of success.

The second ground asserts that the Upper Tribunal committed procedural unfairness by in effect allowing the Respondent to rely on matters put in oral submissions that had not been pleaded in the detailed grounds of defence. The particular expressions used by the Respondent's Counsel at the hearing are noted at [62]. However, the Tribunal proceeded on the basis not of "new" matters raised by Counsel, but on the face of the evidence provided by Ms McMahon in her witness statement. The terms "unusual" and "exceptional" were taken as nothing more than descriptions of what the evidence itself showed. This ground has no realistic prospect of success.

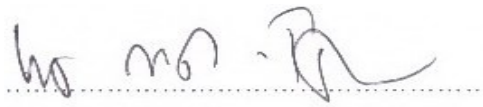
The third ground contends that a grant of permission is appropriate in light of the lack of authority on the issue of whether the absence of a policy is central to the existence or otherwise of an implied power and/or

the rational exercise of any such power. The present case was highly fact-specific, and it is not appropriate to grant permission on the third ground.

Costs

The Upper Tribunal received costs submissions from the Applicants' Counsel, dated 9 March 2020. The position adopted by the Respondent at the hearing and noted at [79] of the decision may be said to be of some assistance to the Applicants. However, the 3-month timeframe for a decision mentioned therein *only* applies *if* a decision is made not to charge X. This is not a sufficient basis on which to make no order as to costs. The submissions also contend that the Respondent raised "new arguments" at the hearing. For reasons set out in respect of the refusal to grant permission to appeal, this contention is misconceived. Again, it does not form a sufficient basis on which to make no order as to costs. Finally, it is not appropriate to reserve costs pending the outcome of any onward appeal to the Court of Appeal.

The Respondent has not filed a schedule of costs. In these circumstances, it is appropriate to order a detailed assessment of the Respondent's costs, if not agreed.

Signed: 

Upper Tribunal Judge Norton-Taylor

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