Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16690/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision & Reasons Promulgated**
On 25 March 2021	**On 3 June 2021**

Before
THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

MUHAMMAD IMTIAZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z. Malik QC, instructed by Hiren Patel Solicitors.
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before us following the quashing by the Administrative Court of an earlier refusal of permission to appeal. The order of the High Court was made by Master Gidden in the usual form, simply quashing the decision to refuse permission, despite an indication by Mostyn J that an order would be made in a different form, in particular, directing the Upper Tribunal to grant permission to appeal and transferring the costs of the Judicial Review proceedings to the Upper Tribunal to be dealt with at the conclusion of the appeals.

2. Before us, Mr Malik QC indicated that he was content to operate on the basis of the order as made, and that he required permission to appeal. On

behalf of the Secretary of State, Ms Cunha told us that she did not resist the application for permission to appeal. It appeared to us that the matters to be canvassed before us were clearly arguable, and we therefore granted permission. With the agreement of the parties, we accordingly pass to substantive consideration of the appeal.

3. The appellant is a national of Pakistan, who entered the United Kingdom in 2009, with leave. He was granted further leave, most recently as a Tier 1 Entrepreneur. That leave was due to expire on 20 May 2018.

4. On 18 May 2018 the appellant submitted an application for further leave as a Tier 1 Entrepreneur. That application was refused, with a right to administrative review, on 13 March 2019. The appellant exercised the right to administrative review, but the decision was maintained in a decision of 29 April 2019. On 11 May 2019 the appellant made a further application for leave as a Tier 1 Entrepreneur. It is common ground that at the time of making that application the appellant did not have existing leave; but it is also common ground that the application was made within 14 days of the expiry of his leave. On 23 September 2019, the 11 May application not having been decided, the appellant made an application for indefinite leave to remain on the basis of 10 years' continuous lawful residence. On 27 September 2019 the Secretary of State refused the application for indefinite leave to remain on the basis of 10 years' continuous lawful residence. The primary reason for that refusal was that the appellant's lawful residence amounted to only 9 years and 6 months, his subsequent residence, following the expiry of his leave earlier in 2019, having been unlawful. In making the decision, the Secretary of State went on to consider other elements of the rules relating to family life and private life, and to the appellant's article 8 rights outside the rules. She noted that the appellant's family were not in the United Kingdom but that he could be reunited with them and they could live together as a family in Pakistan. The conclusion was that the appellant did not qualify for leave under any of the provisions of the Rules, and that there was no reason why refusing him leave, and requiring him to return to Pakistan, would be a breach of any provision of the Human Rights Act 1998.

5. It is convenient at this point to make two observations. The first relates to the calculation of the period of lawful leave. Although the appellant's leave expired before he made his most recent application for leave as a Tier 1 Entrepreneur on 11 May 2019, because he made that application within 14 days of the expiry of his leave, that period of overstaying fell to be disregarded for the purposes for his need to show, in an application for Tier 1 leave, that he was not in the United Kingdom "in breach of immigration laws" (see paragraphs 245DD(g) and paragraph 39E of the Statement of Changes in Immigration Rules, HC 395 (as amended)). Questions had arisen as to the extent to which a period of overstaying disregarded in this way impacted upon a person's full record of the legality of presence in the United Kingdom. The fact that lead cases were to be heard by the Court of Appeal was the primary reason for Mostyn J's grant of permission in the Judicial Review to which we referred at the beginning

of this decision. The Court of Appeal gave its judgment on 22 October 2020: Hoque v SSHD [2020] EWCA Civ 1357. The "disregard" provisions of paragraph 39E do not apply to the requirement in paragraph 276B(i)(a) that the applicant have at least 10 years' lawful residence in the United Kingdom. It is therefore clear that in the present case this point was correctly taken by the Secretary of State in relation to the application for leave to remain on the grounds of 10 years' lawful residence: the appellant has not had 10 years lawful residence in the United Kingdom.

6. In relation to another matter, the Secretary of State was clearly wrong. It is not the case that the whole of the appellant's family is outside the United Kingdom. Following the death of a family member in 2018, the appellant's wife and his two younger children went to Pakistan, where they remain. The appellant's oldest child, SI, remained in the United Kingdom. (There is room for confusion, because the initials of another of the children are also SI, but we shall use "SI" to refer to the child who is in the United Kingdom). It is clear from what we have already said that the Secretary of State took no account of the position of SI. That is of some importance, because SI has health difficulties, of which there appears to have been evidence before the Secretary of State, and there is certainly evidence that has been adduced in the appeal process.

7. The appellant appealed to the First-tier Tribunal. The grounds of appeal, as supplemented, and as considered by the First-tier Tribunal, raise three issues. The first is that which has now been disposed of by Hoque. The second is that the appellant's application for leave to remain as a Tier 1 Entrepreneur (in relation to which the overstaying would fall to be disregarded) was still pending and awaited decision. The third head of the grounds related to SI's condition and the consequences of his having to depart from the United Kingdom.

8. At the hearing before the First-tier Tribunal there was no appearance by or on behalf of the respondent. Judge Birrell heard oral evidence from the appellant and took into account the documentary evidence adduced. Counsel for the appellant before her did in fact accept that the appellant could not meet the requirements of paragraph 276B(i)(a). In relation to the second ground, she referred to the decision of Mr Akhlaq Choudhury QC (as he then was) in R (Chaparadza) v SSHD [2017] EWHC 1209 (Admin). We shall discuss this case in some detail later in this decision. For the moment it suffices to say that Judge Birrell declined to follow Chaparadza on the ground that in reaching the conclusion that he had done in that case, Mr Chowdhury had not been referred to paragraph 34BB of the Immigration Rules. (We discuss this below at [12] ff.) Judge Birrell therefore decided that only the long residence application was before the Secretary of State, and that application had been correctly decided in accordance with the Rules.

9. Judge Birrell then went on to look at the evidence outside the Rules. Her summary of the evidence before him was as follows:

> "45. It is argued that returning to Pakistan would not be in the best interests of [SI]. I have read all of the medical evidence relating to him which is at AB 35-97: from Dr Cowling an associate specialist in Community Paediatrics, Catherine Himsworth a speech and language therapist, Lisa Henderson the co Ordinator of the paediatric cochlear implant programme, Dr Veronica Kennedy Consultant in Audio vestibular medicine and the most recent letter from Dr Cowling.
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> 46. [SI] has Pendred syndrome which has caused profound sensori-neural hearing impairment. He has cochlear implants. In association with his hearing loss he has significantly impaired language and communication skills which impact on his learning, behaviour and general development (AB 35). He attends a specialist school for children with hearing impairment. I note that the cochlear implants are described as 'highly technical and specialist pieces of equipment' and that from the various organisations [SI] is receiving a high level of support.
>
> 47. It is argued by the Appellant that the necessary support and expertise to deal with the cochlear implants and to enable the [SI] to continue to improve in his speech and language development will not be available in Pakistan. I remind myself that the Appellant bears the burden of proof in this appeal. While the Appellant in evidence suggested that his wife had spoken to specialists in Pakistan, I did not hear evidence from his wife or from any of the experts she spoke to in Pakistan. I was not provided with any background material at all about the provision of care and support for deaf children in Pakistan. Even the Appellant in his evidence stated that the Doctors there had told his wife they could not say whether they could treat his son without examining him and therefore they did not exclude the possibility of treatment being available. None of the Doctors in the UK claim to have any particular knowledge and expertise in relation to medical care in Pakistan with Dr Cowling only able to state "I am not sure whether this sort of specialist support would be available if the family were to return to Pakistan.
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> 48. [citing AM (section 117B) Malawi [2015] UKUT 0260 (IAC)].
>
> 49. While every case is fact specific I find that the evidence placed before me falls short of establishing that returning to Pakistan would be contrary to [SI]'s best interests as there was no evidence about such care in Pakistan only supposition on the part of the Appellant and those who care for [SI] and have no knowledge of what is available there."

10. Judge Birrell therefore concluded that the best interests of all the children would be to return to Pakistan with their parents. She went on to work through s 117B itself, and concluded as follows:

> "56. When considering where the balance lies between the best interests of the children on the one hand where I have set out above that the best interests of the children are to return with their family to Pakistan, and the importance of maintaining immigration control on the other, I am mindful of the fact that the children should not be punished for the actions of their parents. But I am entitled to take into account the fact that they are not British Citizen children and are not entitled as

> of right to benefit from the education system and other public services of this country. Whilst it will inevitably cause … some distress and hardship to this family to return to their home country after nearly 10 years in the UK, I am not persuaded that this will be sufficiently grave to outweigh the wider interests of maintaining immigration control. The Appellant is well educated and it was not suggested that he would be unable to find work. They have family there and would therefore have a network of social support. While I acknowledge that there will be challenges for [SI] in particular who has benefitted from the wide range of support for deaf children in the UK the Appellant failed to provide any persuasive evidence to suggest that such support and treatment was unavailable in Pakistan. While the treatment may not match the high standards available in the UK that is not the test. Without knowing what is available in Pakistan I can give no weight to Ms Pinder[']s argument that [SI] would be left unable to communicate and be socially isolated. I find that the evidence provided in relation to [SI] falls very far short of reaching the threshold required to engage Article 3.
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> 57. I am satisfied that in this case the application failed to comply with the Immigration Rules and no compelling circumstances were identified why those Rules should not be applied in this case in the usual way, there was nothing disproportionate in applying the Rules in accordance with their terms, with the effect that Appellant[']s application failed. In determining whether the removal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellant[']s life in the United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the Appellant[']s removal."

11. She accordingly dismissed the appeal.

12. Before us, the first issue is the effect the application for indefinite leave to remain on 23 September 2019. Did it supplement or augment the pending application of 11 May 2019 for leave to remain as an entrepreneur, or did it supersede it, so that the application for leave as an entrepreneur no longer required determination? Mr Malik submitted that we should follow Chaparadza.

13. In that case the Court was concerned with a claim for unlawful detention. One of the issued raised was that the claimant had leave to remain in the United Kingdom during the period of detention. That claim depended on two points of statutory interpretation. The facts were that the claimant had had leave to remain which was due to expire on 31 July 2011. Before the expiry of that leave he made a further application for leave to remain. That application was refused, but the notice of the refusal was incorrectly served. Before it had been correctly served, on 2 June 2013, the claimant claimed asylum. On 2 July 2013 the asylum claim was refused. On the first issue of statutory interpretation, the judge found that the failure correctly to serve the notice of refusal of the original application for leave meant that it was still pending, awaiting a lawfully-notified decision, at the time of the asylum claim.

14. The second point is that relevant to this case. At the time of the claimant's detention, although the asylum claim had been determined and refused, there had still been no decision on the original application for further leave. It was common ground that, because the original application was made before the expiry of existing leave, section 3C of the Immigration Act 1971 operated to extend the existing leave until the decision on the application. The question was therefore whether the original application still awaited a decision, or whether the decision on the asylum claim was sufficient to determine it.

15. Section 3C of the Immigration Act 1971 is as follows:

> "Continuation of leave pending variation decision
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> (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),
>
> …
>
> (d) an administrative review of the decision on the application for variation—
>
> (i) could be sought, or
>
> (ii) is pending.
>
> (3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.
>
> (3A) Leave extended by virtue of this section may be cancelled if the applicant—
>
> (a) has failed to comply with a condition attached to the leave, or
>
> (b) has used or uses deception in seeking leave to remain (whether successfully or not).
>
> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

> (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).
>
> (6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations—
>
> (a) may make provision by reference to receipt of a notice,
>
> (b) may provide for a notice to be treated as having been received in specified circumstances,
>
> (c) may make different provision for different purposes or circumstances,
>
> (d) shall be made by statutory instrument, and
>
> (e) shall be subject to annulment in pursuance of a resolution of either House of Parliament."

16. The judge referred to the leading case on the interpretation of s 3C, JH (Zimbabwe) v SSHD [2009] EWCA Civ 78. In that case, the Court of Appeal decided that an application could be varied within the meaning of s 3C(5) by a new application, even for a purpose completely different from the original application. So the way was open to treating the asylum application as varying the original application. On behalf of the Secretary of State, it was argued that if the new application is for a different purpose, it varies the original application by replacing it by the new one. The Secretary of State deployed three arguments to that effect. The first was that as s 3C(4) only permits a single application, the result of variation must also be a single application. The judge rejected that argument, holding that:

> "There is nothing in s 3C of the 1971 Act that precludes an application of varied leave to remain made for one purpose being varied so as to add another purpose for seeking leave to remain.… The Court of Appeal's statement in JH that "there can be only one application for variation of the original leave" does not preclude there being a single application based on more than one purpose. Indeed, given that the Court of Appeal found that the second application could, as a matter of fact, have the effect of withdrawing or varying the first application (see JH at [43]), it seems to follow that a finding that there had not been a withdrawal would necessarily involve a variation comprising the purposes raised in both applications." (at [30]-[31].)

17. The Secretary of State's second argument was based on the accuracy of published guidance. The judge noted that the guidance upon which the Secretary of State relied was not in force at the relevant time and could not, in any event, be regarded as authoritative. The judge said that he could see that the Secretary of State would find it convenient to be faced only with a single application, and to grant leave only for a single purpose, but there appeared to be nothing in the guidance, and he was not referred to any statutory provision, preventing there being an application for leave under more than one head at the same time.

18. The Secretary of State's third argument related to the possibility of abuse if there were multiple applications. The judge held that that had been

dealt with in JH and required no more comment from him. He concluded that in his case the original application was not withdrawn, but was varied so as to include both the application for leave to remain and the asylum claim, and that any decision should have dealt with both elements of the application as varied.

19. Mr Malik asked us to follow the interpretation of the process of varying an application that was adopted in Chaparadza. In the grounds of appeal (not drafted by Mr Malik) it is specifically argued that the First-tier Tribunal Judge was wrong because Mr Chowdhury appears to have had the substance of paragraph 34BB of the Immigration Rules in mind, even if he did not cite the actual rule. At the hearing, Mr Malik dealt with a number of other rules, but did not refer us to any statutory provision.

20. Although as at present advised we incline to the view that the concept of the variation of an application probably ought to be the same whether s 3C applies or not, we think it right to begin our consideration of this issue with the law which does apply to the present case. In this case, the original application was not made during the course of existing leave. Section 3C is therefore not applicable, and its provisions for extending existing leave pending the decision on an application have no impact in this case.

21. The important statutory provision to which neither we nor the Court in Chaparadza were referred is s 50 of the Immigration, Asylum and Nationality Act 2006:

> "50. Procedure
>
> (1) Rules under section 3 of the Immigration Act 1971 (c. 77)—
>
> (a) may require a specified procedure to be followed in making or pursuing an application or claim (whether or not under those rules or any other enactment),
>
> (b) may, in particular, require the use of a specified form and the submission of specified information or documents,
>
> (c) may make provision about the manner in which a fee is to be paid, and
>
> (d) may make provision for the consequences of failure to comply with a requirement under paragraph (a), (b) or (c).
>
> (2) In respect of any application or claim in connection with immigration (whether or not under the rules referred to in subsection (1) or any other enactment) the Secretary of State—
>
> (a) may require the use of a specified form,
>
> (b) may require the submission of specified information or documents, and
>
> (c) may direct the manner in which a fee is to be paid;
>
> and the rules referred to in subsection (1) may provide for the consequences of failure to comply with a requirement under paragraph (a), (b) or (c)." [The rest of the section has been repealed.]

22. The rules made under that section and in force at the time of the events with which we are concerned in this appeal are paragraphs 34, 34A, 34B, 34BB, 34C, 34E, 34F, and 34G. Paragraph 34 is headed "How to make a valid application for leave to remain in the UK", and provides that an application has to be made on an application form which is specified for the immigration category under which the applicant is applying on the date on which the application is made, and lays down various other requirements. Paragraph 34A provides that where an application for leave to remain does not meet the requirements of paragraph 34, "it is invalid and will not be considered". That provision is subject to paragraph 34B, which permits the Secretary of State to give an applicant one opportunity to correct any errors. Paragraph 34BB is as follows:

> "(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 pervious 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 these Rules."

23. Paragraph 34E is as follows:

> "If a person wishes to vary the purpose of an application for leave to remain in the United Kingdom, the variation must comply with the requirements of paragraph 34 (as they apply at the date the variation is made) as if the variation were a new application. If it does not, subject to paragraph 34B, the variation will be invalid and will not be considered."

24. In our judgement it is clear that the provisions relating to the way in which an application can be made and varied, and the consequences of failure, fall within s 50 and accordingly have the authority derived from that section of the statute. There can be no proper doubt that they apply to the facts in this case. The position is that it was not open to the appellant to have more than one application under consideration at once. More particularly, the application which was being considered needed to be an application which could have been made in the first place. It is that provision, found in paragraph 34E taken in combination with paragraphs 34 and 34A, that prevents old purposes surviving when new purposes are introduced by a variation. The result of the variation needs to be an application which could have been made originally. There is no provision for making an application which combines elements of leave to remain as an entrepreneur and indefinite leave to remain on the basis of 10 years

residence, so an application as varied cannot contain that combination either. It follows that the appellant cannot succeed on this ground.

25. With the greatest respect, and without making any detailed investigation into the terms of paragraphs 34 and following of the Immigration Rules as they applied to the claimant in Chaparadza, it appears that in any event the latter case should not be followed in circumstances where the present Immigration Rules apply. As we remarked earlier, there seems no good reason for adopting a different interpretation of what is a "variation" between cases where s 34C applies, and cases where it does not. Further, it is clear that both on its face and as explained by the Court of Appeal in JH, s 3C envisages that only one application will be pending, and there seems no good reason for not interpreting the word "application" in the way that paragraphs 34ff require.

26. We turn now to the other ground, which is that the judge erred in his approach to the evidence supporting the article 8 claim outside the rules. We can deal with this rather more briefly. The case as put to the First-tier Tribunal was that the child SI's treatment would be affected by his departure from the United Kingdom. There was, however, no evidence as to the availability of treatment in Pakistan, and we think it is fair to say that there was no suggestion that such treatment would not be available. The grounds of appeal assert that the judge failed to take into account the effect on SI of there being a change in the persons who were treating him. But the truth of the matter is that there is no evidence of that either. There is no proper basis upon which it can be asserted without evidence that a Pakistani child with the medical conditions exhibited by SI can be properly looked after only in the United Kingdom, or that in SI's case the disruption to his treatment would be such as to show that it would not be in his best interests to return with his father to the country of which both parents and all the children are nationals. The evidence clearly does show that the appellant himself is well-educated and likely to be prosperous in Pakistan; his wife who is in Pakistan with two of the children, is herself apparently qualified as a pharmacist. The two children with her have evidently adapted to living in Pakistan, and there seems to have been no suggestion that it was not in their best interests to travel with her to Pakistan when they did so.

27. Mr Malik's principal oral argument before us was that as the appellant had nearly attained the 10 years residence under the Rules, that might be sufficient to tip the balance in his favour. There are two problems with that submission. The first is that it is not easy to see how that is supposed to combine with SI's condition as making the appellant's case under article 8. The second is that the defects in the evidence about the availability of treatment in Pakistan, to which the judge referred, removed the force of the argument based on SI's condition in any event. Thus, all that is being said is that the appellant should succeed under article 8 on the basis of 9 years and 7 months lawful residence in the United Kingdom, because if he had completed 10 years lawful residence he would have succeeded under the rules. We do not know whether the miss is even

"near": in any event, it is not sufficient to establish a case under article 8. Further, this argument was not made to the First-tier Tribunal. Instead, the First-tier Tribunal Judge was faced with a different submission, inconsistent with that now being advanced: the argument before him was that the appellant had been in the United Kingdom lawfully for over 10 years. That was simply wrong.

28. For all these reasons, it appears to us that the decision the judge made on the evidence before him was not only open to him: it was virtually inevitable. Certainly he made no error of law in reaching it.

29. For the foregoing reasons, having granted permission, we dismiss the appeal.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 12 May 2021