



**Upper Tribunal
Immigration and Asylum Chamber**

Judicial Review Decision Notice

The Queen on the application of Kamran Jhangir Kayani

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Allen

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr Z Raza, instructed by Kaizen Law Solicitors, on behalf of the Applicant and Ms M Bayoumi, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 7 October 2021.

Decision: the application for judicial review is refused

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

Order

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

Costs

- (3) The Respondent is awarded her reasonable costs, to be assessed if not agreed.

David Allen

Signed: _____

Upper Tribunal Judge Allen

Dated: **22nd October 2021**

Applicant's solicitors:

Respondent's solicitors:

Home Office Ref:

Decision(s) sent to above parties on: *22 October 2021*

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).

IN THE UPPER TRIBUNAL

HEARING
via Microsoft Teams

JR/674/2021

Field House,
Breams Buildings
London
EC4A 1WR

7 October 2021

**THE QUEEN
(ON THE APPLICATION OF)
KAMRAN JHANGIR KAYANI**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

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Mr Z Raza, instructed by Kaizen Law Solicitors appeared on behalf of the Applicant.

Ms M Bayoumi, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE ALLEN: The applicant is a national of Pakistan who has applied for judicial review of four decisions of the respondent. The first of these is a decision of 14 February 2021 cancelling his indefinite leave to remain and refusing him leave to enter the United Kingdom. The second decision challenged is that of 4 March 2021 rejecting a request for administrative review of the decision of 14 February 2021. The third challenge is to a decision of 21 April 2021 certifying an Article 8 family and private life claim. The fourth challenge is to a decision of 4 May 2021 setting directions for the applicant's removal from the United Kingdom on 20 May 2021.

2. I take the chronology from the detailed grounds of defence. The applicant was granted indefinite leave to remain in the United Kingdom on 14 January 2003 as the spouse of a settled person. He and his wife divorced in 2006, having had two children. He married his second wife in Pakistan in 2010 and subsequently sponsored her to join him in the United Kingdom. They divorced in 2016, having had three children. Following the divorce the applicant returned to Pakistan. He then entered the United Kingdom next in December 2016 and stayed until January 2017 when he returned to Pakistan. He visited the United Kingdom next in December 2018 and remained until March 2019.
3. It is not clear on what date he married his third wife in Pakistan but he has two daughters with her, aged respectively 2 years old and 25 days old at the date on which he most recently sought entry into the United Kingdom.
4. The applicant arrived at Manchester Airport on 14 February 2021 and sought entry for three weeks to visit his sister and presented a Pakistani passport which contained his ILR. He was required to submit to further examination, his fingerprints were taken and a baggage search was conducted. He was interviewed at 10.30 on the morning of 14 February 2021 and on conclusion of the interview he was issued with a

decision refusing entry into the United Kingdom and cancelling his indefinite leave to remain.

5. He signed an administrative review waiver form at around 12.30 p.m. on 14 February 2021 and immigration bail was authorised at 12.45 on that day. Subsequently, on 2 March 2021, he submitted a request for administrative review of the decision of 14 February 2021 but that application was rejected on 4 March 2021 as he had signed the waiver form and the request was submitted out of time.
6. Directions had been made for his removal to Pakistan on 10 March 2021 but he failed to comply and on 25 March he was listed as an absconder.
7. On 6 April 2021 the applicant submitted an application for leave to remain in the United Kingdom on the basis of Article 8 family and private life. That application was refused and certified as clearly unfounded in the decision of 21 April 2021. Directions for his removal to Pakistan on 20 May 2021 were set on 4 May 2021.
8. The challenge to the decisions is summarised in paragraph 14 of Mr Raza's skeleton and the points made there were developed by him in oral submissions. The first argument is that the respondent's decision was procedurally and substantively unfair in that the applicant was not offered an interpreter, nor was the purpose of the interview explained to him, nor was the declaration relating to the administrative review waiver explained to him. It was also argued that notwithstanding the above the decision making was procedurally unfair and/or irrational in failing to make proper enquiry during his interview, and reliance in this regard is placed on the decision in Mushtaq [2015] UKUT 224 (IAC). It is further argued that the respondent failed to follow her published guidance in respect of returning residents, having failed to ask herself the right questions and take reasonable steps to acquaint herself with the relevant information to enable her to answer it correctly. It is further argued that the

conclusion that the applicant was not a returning resident is irrational/unlawful.

9. I do not propose to set out the terms of the interview in full but rather to refer to particular points of significance within it. At page 1 it can be seen that the applicant answered yes when asked if he understood the interpreter and also answered yes when asked whether he was happy to be interviewed in English. The first question was as follows:

"Tell me why you have come to the United Kingdom today?"

His answer was:

"My passport is finished so I came back. In and out stamp".

10. He was then asked at question 2 whether he meant that he wished to renew the passport or renew his status here and said "yes within the two years and see my kids as well". He was then asked whether he wanted to renew his status and replied yes. He was proposing to stay for three weeks and had a return ticket.
11. He was then asked questions about when he first came to the United Kingdom and said that it was to join his wife and he obtained a residence permit in 2003 and that was the permit he wished to renew. It was put to him that if he stayed away more than two years the permission would lapse and was that correct and he replied yes. He was asked about whether he was still married to his first wife and said they were divorced and he had no contact with her. They had two children who lived in the United Kingdom. He was asked whether he still had contact with his children and said he "tried but is nothing no". He had last seen them in 2006. He had two brothers and two sisters in the United Kingdom. He had no property in the United Kingdom nor did he have a business here. He had had a job as a packer in a Ford factory in 2005 and the last time he had worked in the United Kingdom was in a chip shop for a month in 2019.

12. He was asked whether he had remarried since his first divorce and said yes in 2010 and they had divorced in 2016. The girls were with their mother in the United Kingdom. He was asked whether he had any contact with the second wife and her daughters and said no he had tried.
13. He had gone back to Pakistan in 2016 and had made the two visits subsequently that I have set out above.
14. He was asked whether he had another wife in Pakistan and said yes and gave her name and said that they had two daughters, one aged 2 and one 25 days old. He agreed that the younger child was born in January this year. It was put to him that he had left her and travelled just so he could stay within the two year Rule and he replied yes.
15. He worked in Pakistan and also owned property and had a house there. He was asked whether he was in the United Kingdom to visit his brothers and sisters and keep his visa going and replied yes. The final question was as follows:

"You have a very young child in Pakistan. If your visa was not about to expire would you have come here?"

to which the answer was "no".

16. There has also been provided the Home Office minute sheet from the date of the applicant's interview which summarised the applicant's immigration history and noted that in light of that it was apparent that he resided in Pakistan and only visited the United Kingdom for short periods and that given the timing of his visits to the United Kingdom it was equally apparent that these were contrived in order to comply with the two year Rule and maintain his UK residence status. The officer said that he subsequently interviewed the subject in English, a language he spoke well. The applicant declined the offer of an interpreter. The officer then summarised the content of the interview, noting among other things the applicant confirmed he was seeking entry as a visitor, that he had had no contact with his first family since 2006 nor with

his second family since 2016, that Pakistan was his sole domicile and that if it were not for the fact that his residence status would lapse if he were to absent himself from the UK for a period greater than two years he would not have travelled to the United Kingdom that day. His case was referred to another officer who authorised refusal of entry in accordance with Part 9.18.1 and cancellation of the applicant's ILR in accordance with Part 9.20.1. The officer served the applicant with form IS82 and explained his right to an administrative review. The applicant was said immediately to have recognised that administrative review was academic given that he was to return to Pakistan in line with his existing ticketing and was therefore happy to sign form IS301.

17. In his submissions Mr Raza placed weight in particular on ground 1, accepting that the challenge to the certification of the human rights claim was heavily dependent on a positive finding in respect of ground 1 concerning the cancellation of indefinite leave to remain. He referred to the relevant provisions of the Immigration (Leave to Enter and Remain) Order 2000, in particular at parts (iv) and (v), which underpinned paragraph 18 of HC 395. He argued that this was an important context and that created a positive presumption that when a person had indefinite leave to remain and had not been absent from the United Kingdom for more than two years then they would be readmitted.
18. Mr Raza also noted the recent change to the Immigration Rules concerning people who had been away from the United Kingdom for more than two years, and there was a further relevance to the presumption he identified, at paragraph 7.1. In addition, there was now the very recent Home Office guidance of 4 February 2021 upon which reliance was placed. Mr Raza also referred to the guidance in authorities such as Mahad [2009] UKSC 16 and Odelola [2009] 1 WLR 1230 on the proper interpretation of the Immigration Rules. The statutory presumption referred to earlier was the correct context for the interpretation of paragraph 18.

19. The main challenge was with regard to procedural unfairness in respect of the interview on 14 February 2021. Reference was made to the most recent Home Office guidance in particular what was said about cancelling indefinite leave, at page 8 of 20. There was a broad range of relevant factors to assess. There was guidance about people who might be visitors but should still be recognised as being returning residents including people absent for over two years. Examples would be compelling circumstances and future plans and family member issues. In that context the interview should be considered.
20. The interview had shown the intention to create a preordained outcome and that it had already been decided that the applicant was not a returning resident. Alternatively the questions were put in such a way as to lead to that conclusion. There had been no real enquiry as to the applicant's circumstances. Most of the questions were leading questions and most of the answers were just yes or no or brief. There was an absence of any question as to why the applicant had been absent from the United Kingdom from 2016 and also no questions as to his future plans. This view was reinforced by the guidance. A person could be a visitor for this visit but could still plan to settle in the future.
21. As examples of the approach taken were question 2 at the interview and question 3 which illustrated the overall context of the interview. There was an absence of questions on material points.
22. The interview had been in the context of an atmosphere as described by the applicant in his witness statement. The further submissions on 21 April 2021 also addressed the point. He had provided a frank, clear and vivid description. He did not dispute the factual recordings made in the interview, but he disputed the manner in which the interview was made and the lack of questions on relevant matters. He had asked for an interpreter. Also a Punjabi speaking officer had made himself available to explain certain aspects, so the applicant had been unclear as to the purpose of the interview and he could

not engage with the process. It was one person's word against another but if the applicant were correct that he had asked for an interpreter and this request had been declined, it was hardly likely that such a request would appear in the minute sheet. There were clear failures to ask and enquire about all circumstances. The interview procedure failed to follow basic principles of fairness, and reference was made to the guidance, for example, in Mushtaq [2015] UKUT 224 (IAC). This and Anjum [2017] UKUT 406 were PBS cases but the requirements of procedural fairness equally applied there.

23. As regards the argument made at paragraph 11 of Ms Bayoumi's skeleton argument, referring to the further submissions that had been put in, this in no way rectified any procedural errors nor did it even mitigate any such failures. The cancellation of indefinite leave to remain was a separate decision with harsh consequences in contrast to what at best could be achieved from a human rights application that succeeded. It was relevant to note what had been said in Mohibullah [2016] UKUT 00561 (IAC) at paragraphs 77 and 80 in particular in this regard.
24. Finally as regards the challenge to the certification decision, this was, as argued earlier, tied in with the ILR cancellation and if the decision in that regard was unlawful then the applicant had ILR and there was no prospect of removal.
25. In her submissions Ms Bayoumi referred to the fact that the applicant said he had believed the interview was about the cigarettes he had in his possession but there was nothing in the interview to give rise to such an inference or understanding. Rather than being a leading question, question 2 was if anything an open question and the answer was telling. The applicant clearly understood the Rules about returning residents. With regard to his claim not to have understood the questions and having limited English, it was clear, as could be seen from paragraph 17 of Mr Raza's skeleton, that the applicant did not deny the answers he gave but said that

he did not understand their purpose. He had however had ample opportunity to explain his ties to the United Kingdom and why he was in Pakistan and the answer to the final question when he had accepted that he had only come to the United Kingdom because his visa was about to expire, was telling.

26. The contemporaneous notes of the officer in the Home Office minute sheet were important. The claim that he had asked for an interpreter could be contrasted with what was recorded there, and it was contemporaneous and considerable weight should be attached to it and there was no reason not to note such a request if it had been made and to comply with it. The officer had spoken to the applicant who clearly understood English well and who had declined the offer of an interpreter. His answers showed that he clearly understood the purpose of the interview. The wording of the form was standard and he had read it and had the opportunity to consider the position and he was having a return flight in three weeks' time.
27. The point about further submissions made in Ms Bayoumi's skeleton was not that it could remedy an error, but if even if there had been an error and in contrast to what was being argued the intention of the interview was not made clear, the further submissions were the applicant's opportunity to make good his claim and not make a claim with regard to a different type of leave. The Article 8 claim was with regard to ties to the United Kingdom and that showed he could come within paragraph 18. The guidance was clear. As was argued in Ms Bayoumi's skeleton and the detailed grounds it was not enough as for example here where the person was not coming to settle. The applicant suggested he would return after three weeks and then return for settlement but that did not mean that he would keep his indefinite leave to remain as he had to show continuing ties to the United Kingdom and intended to return to settle. None of these criteria were made out in the further submissions. The examples in the guidance were with regard to people working and studying overseas but the point was made that these submissions were several months late and

made with the benefit of legal advice and under no pressure such as might be experienced in interview. They were the applicant's opportunity to set out his intentions and his ties to the United Kingdom and he had failed to do so. The point was therefore what a further enquiry on 14 February 2021 would have elicited and if there were a public law error would have made any difference. The claim was bound to fail. The only supporting documents were with regard to his unwell parents and there was nothing about his children or attempts to have contact or other ties. He had no property or business in the United Kingdom. He had his siblings here only. There was therefore little reference to the case law to be made as this was a fact-sensitive case and the principles of procedural fairness had no application here.

28. By way of reply Mr Raza argued that the point about leading questions at the interview was more widespread. It was clear that the questions at interview were mainly leading questions. They had established the applicant's immigration and travel history but there was a clear failure to ask questions about material matters such as the reasons for his absence and his future plans. If there were reasons for absence then there was nothing irrational to him moving on with his life, having married and had children and getting a job. It could not be said that life could not move on because he was going back to look after his parents. The interview alone was the basis of the decision. It was necessary to ask questions to elicit answers on all material matters. Also the wording of paragraph 18(iv), the purpose of settlement, was to be viewed in the context of the primary legislation and there was a clear presumption as Mr Raza had argued. It was clear that the applicant was aware of a need to return within two years but the focus was not ties to the United Kingdom as Ms Bayoumi suggested but was far broader. It was true he had no close family ties in the United Kingdom, they were in Pakistan as he had been there in the exceptional circumstances he described. The guidance required more than ties to the United Kingdom and the context was important.

29. I reserved my decision.

30. It is clear from paragraph 13 of the Immigration (Leave to Enter and Remain) Order 2000 that where a person has leave which is in force and which was given by an Immigration Officer or the Secretary of State for a period exceeding six months, such leave shall remain in force either indefinitely if it is unlimited or until the date on which it would otherwise have expired if limited. It is however clear that where the holder has stayed outside the United Kingdom for a continuous period of more than two years the leave where it is unlimited or any leave then remaining shall thereupon lapse.

31. Mr Raza has argued that this together with paragraph 18 of HC 395 create a presumption that a person with indefinite leave to remain who has not been absent for more than two years in the United Kingdom will be readmitted. Paragraph 18 states as follows:

"18. A person may resume their residence in the UK provided the Immigration Officer is satisfied that the person concerned:

(i) had indefinite leave to enter or remain in the United Kingdom when he last left; and

(ii) has not been away from the United Kingdom for more than two years; and

(iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and

(iv) now seeks admission for the purpose of settlement".

32. There is no real materiality to paragraph 7.1 of HC 1154 which in this context does no more than to emphasise that changes have been made in the Rules to clarify the distinction between those who have been absent from the UK for less than two years and so retain their indefinite leave status from those whose

indefinite leave has lapsed due to an absence of more than two years.

33. It is relevant also to note relevant parts of the Home Office policy entitled "Returning residents", published on 4 February 2021. At paragraph 5 the following is stated:

"A person who has been absent from the UK for less than two years will retain their indefinite leave and does not need to apply for entry clearance before resuming their residence in the UK. Border Force officers will assess whether a person can be admitted for entry under the requirements of paragraph 18".

34. It is said at page 7 that no further enquiries should be necessary unless there is substantial evidence to doubt the person's true intentions or any entitlement to that residency.

35. At page 8 it is said that if the enquiring officer has doubts that the passenger still qualifies as a returning resident, they should be further examined and a decision made either to refuse leave to enter or readmit the passenger as before. It is said that a person may qualify in another capacity but the onus is on them to seek entry in that capacity. Later on that page it is said that if upon conducting a thorough examination an officer is satisfied that the person has indefinite leave but that they are not returning to the UK to settle, either now or in the future, then they must cancel the indefinite leave due to a change of circumstances. The individual will have a right to an administrative review unless they waive their right to it.

36. I do not read this quite as creating a presumption that a person who has indefinite leave to remain will be readmitted when they have not been absent for more than two years. There is certainly not a legal presumption. There may be an element of factual presumption to it, but equally it is clearly set out in the Rules and in the guidance what factors will come into play which may lead to a refusal of indefinite leave to remain, as was done in this case.

37. I deal first with the contention that the applicant said he wanted an interpreter and was refused one and that as a consequence there was procedural unfairness in that regard. I do not accept this contention. It is clear from the interview record that the applicant was asked at the start of that interview whether he was happy to be interviewed in English and he answered yes. It is also clear from the contemporaneous Home Office minute sheet that the applicant was interviewed in English which was a language he spoke well and he declined the offer of an interpreter. As Ms Bayoumi argued, there is no reason why if he had sought an interpreter, an interpreter would not have been provided. I do not accept the argument that Mr Raza makes that there was some sense of a climate of looking for a refusal in this case. The applicant could at any stage have explained that he did not understand the question being asked and indeed it is now the case that he is not so much arguing that he did not understand the questions and that he does not factually dispute the answers recorded but argues that he did not understand the purpose of the interview, nor the purpose of him signing the relevant forms including the administrative review waiver form. Again, the officer's minute makes it clear that when the right to an administrative review was explained to the applicant he immediately recognised that it was academic given that he was to return to Pakistan in line with his existing ticketing and was therefore happy to sign the waiver form. Again I accept the officer's account of this. He had no reason to be untruthful about this.

38. When one turns to the content of the interview, it is abundantly clear also that the applicant understood the questions that were being asked. Though it is certainly the case that a number of the questions were in leading form and elicited brief, frequently yes or no answers, it is equally true that relevant detail was provided by the applicant in response to the questions asked. It is in my view telling that in response to question 1 when he was asked to say why he had come to the United Kingdom today, in response to a

properly open question, he said: "my passport is finished so I came back. In and out stamp." It is true that in response to question 2 when he was asked whether he meant he wished to renew the passport or renew his status here he said: "yes within the two years and see my kids as well", but the officer was properly entitled to take into account in considering his intentions in particular with regard to paragraph 18(iv), that it was clear from his answer to question 19 that he no longer had contact with the children of his first marriage and had not seen them since 2006 and that likewise, in response to question 38 he said he had no longer had any contact with his second wife and their daughters and as a consequence it was properly open to the officer to conclude that he had not shown that he was now seeking admission for the purpose of settlement. The officer properly took into account the fact that he has no home or job in the United Kingdom and that his only family here are brothers and sisters. By contrast he has a home, a job and a wife and family in Pakistan.

39. I do not consider that the officer was under any obligation expressly to ask the applicant why he had been absent from the United Kingdom for such a period of time or what his future plans were. The applicant had made it clear that he had come to visit his sister for three weeks and though there was the reference to seeing his children it was very clear from his subsequent answers that the visit was essentially designed to maintain his indefinite leave to remain status. He provided no evidence either then nor has he subsequently of any efforts he had actually made to try and make contact with the children of his previous marriages, and it is telling in response to question 58 that he in effect said that he would not have come to the United Kingdom if his visa had not been about to expire. In my view the officer was abundantly entitled to conclude as he did that the requirements of paragraph 18(iv) were not met in this case and as a consequence to cancel the applicant's indefinite leave to remain and refusing leave to enter the United Kingdom.

40. In light of my conclusions on that point little need be said about the other grounds. The human rights claim was given full and careful consideration in the context of the Immigration Rules and outside the Rules and it was entirely soundly concluded that the human rights claim totally lacked merit and as a consequence it was properly certified, appropriately thorough reasoning being given to both the certification decision as well as the substantive decision. I also accept that the application for administrative review was out of time and in any event the applicant had waived his right to administrative review. The challenge to the directions for removal has become academic in light of the cancellation of those directions.

41. As a consequence this application is refused.~~~0~~~~