In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR-2021-LON-001664

In the matter of an application for Judicial Review

The King on the application of
M A

Applicant

and

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Canavan

Having considered all documents filed, and having heard Mr M. Biggs, for the applicant, and Mr Z. Malik KC, for the respondent, at a hearing on 30 August 2023

IT IS ORDERED THAT:

Anonymity

1. The applicant and her legal representatives were aware of the reasons why the respondent decided to delay a decision in relation to the application for leave to remain when the claim was filed. It was reasonable to expect that those reasons would be discussed in any judgment. However, it seems that no application for an anonymity order was made in the original application, the amended grounds, upon renewal, and I have no note or recollection of a formal application being made at the substantive hearing of this claim. The application for anonymity could and should have been made earlier. Nevertheless, the applicant's husband has a professional occupation, which might be negatively affected by the publication of the details of the HMRC investigation. At this stage no charges have been brought and it is appropriate to make an anonymity order.

2. **Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the applicant and her husband are granted anonymity. No-one shall publish or reveal any information, including the name or address of the applicant or her husband, likely to lead members of the public to identify them. Failure to comply with this order could amount to a contempt of court**.

Substantive claim

3. The application for judicial review is dismissed for the reasons given in the judgment handed down on 08 November 2023 (attached).

Costs

4. The respondent has been wholly successful in defending the claim and comes within the first category of cases outlined in *M v Croydon* [2012] EWCA Civ 595. The normal course of action would be for the applicant to pay the respondent's costs. Having considered the submissions made in relation to costs and the Statement of Costs I consider that they are not disproportionate to the claim. The costs include the initial drafting and preparation of the case, which included responding to additional amended grounds filed by the applicant. The respondent also took instructions and prepared witness statements in response to the claim. The costs also include preparation up to and including attendance at a substantive hearing. The applicant shall pay the respondent's costs summarily assessed at **£16,981.06**.

Court of Appeal

5. The application for permission to appeal largely repeats the arguments already made in relation to the first ground without particularising an error of law in the Upper Tribunal's decision beyond expressing a disagreement with the conclusions. The Upper Tribunal gave adequate reasons to explain why the decision to delay was not outside a range of reasonable responses to the circumstances nor too remote given the next foreseeable point for considering the position was likely to be a charging decision made by the CPS. In doing so, the Upper Tribunal did conduct an evaluation of the relevant circumstances of the case. It is not arguable that an appeal would have a real prospect of success in light of the decision in *R (X) & Ors v SSHD* [2021] EWCA Civ 1480.

6. Pursuant to rule 44(4B) of The Tribunal Procedure (Upper Tribunal) Rules 2008 permission is refused because the Upper Tribunal decision does not disclose any arguable error of law.

Signed: *M.Canavan*
Upper Tribunal Judge Canavan

Dated: **08 November 2023**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *8 November 2023*

Solicitors:
Ref No.
Home Office Ref:

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 point 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).

Case No: JR-2022-LON-001664

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

08 November 2023

Before:

UPPER TRIBUNAL JUDGE CANAVAN

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Between:

THE KING
on the application of
M A

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr M. Biggs
(instructed by Lambeth Solicitors), for the applicant

Mr Z. Malik KC
(instructed by the Government Legal Department) for the respondent

Hearing date: 30 August 2023

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J U D G M E N T

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Judge Canavan:

1. The applicant seeks to challenge the respondent's ongoing delay in deciding an application for leave to remain as the spouse of a person who is present and settled in the UK. The application was made on 01 March 2020.

2. The respondent states that the application is on hold pending the outcome of a criminal investigation involving the applicant's husband, 'RM'.

3. The applicant and her husband are citizens of Pakistan. It is said that the applicant entered the United Kingdom on 04 April 2016 as the dependent of a Points Based System (PBS) Migrant. On 20 February 2017 she applied for further leave to remain as the dependent of a Tier 1 Migrant. On 06 March 2018 the applicant was granted leave to remain until 06 March 2020 i.e. for two years.

4. On 27 February 2019, RM applied for Indefinite Leave to Remain (ILR), which was granted on 08 March 2019.

5. On 19 October 2020 the applicant made a complaint about the delay in deciding the application for further leave to remain. A copy of the original complaint does not appear to be in the bundle, but the respondent replied in an email dated 09 November 2020. The respondent informed the applicant that, before making a decision, a number of mandatory checks needed to be completed. Although the respondent aimed to decide applications within the published service standards, this was not always possible because the length of time taken to conduct the checks was dependent on the individual circumstances of each case. In this case, further extended checks needed to be carried out. The respondent informed the applicant that she would contact her when she had made a decision or if she required further information.

6. The applicant made a further complaint about the delay on 15 June 2021. In the email she outlined the chronology of events and the number of times that she had contacted the Home Office about the application. The applicant said that she had been waiting for 15 months for a decision. The respondent replied on 30 June 2021. She repeated the information given in the correspondence dated 09 November 2020 about the length of time sometimes needed to conduct checks. She explained that enquiries are routinely made with other government departments and external agencies. Unfortunately, due to the considerable time needed to conduct these checks, the respondent was unable to provide a timescale as to when a decision would be made in relation to the application

7. Vijay Kerai, an Investigation Officer in the Fraud Investigation Service at HM Revenue and Customs ('HMRC'), prepared a statement on 29 June 2023. On 23 January 2020 the applicant's husband was arrested along with seven other individuals. RM was interviewed under caution in relation to a complex criminal investigation into money laundering. He was released without charge.

8. Mr Kerai states that it is a multi-suspect investigation regarding fraudulent credits into various company tax accounts from stolen credit cards. It is believed that the suspects involved, including RM, facilitated the fraudulent credits and laundered the proceeds once a repayment was generated. Search warrants were executed for materials, some of which belonged to RM. The team reviewed 65 digital devices along with material generated from searching nine premises, some of which belonged to RM.

9. On 17 June 2022 RM was among three suspects who were rearrested and interviewed again under caution after the materials from the searches had been reviewed. Again, it seems that he was released without charge. Mr Kerai states that it is suspected that over £1.3 million was credited into various company tax accounts. RM works as an accountant. RM is the tax agent for some of the companies involved in the investigation. It is believed that bank accounts under the control of RM have been used to launder proceeds of crime after HMRC made repayments into nominated bank accounts. It is said that the HMRC's Fraud Investigation Service intends to submit the case to the Crown Prosecution Service 'imminently'.

10. Daniel Belmore, of the Home Office Migrant Criminality Policy Unit, prepared a statement dated 07 July 2023. Mr Belmore summarised the course of the HMRC investigation. He stated that if the applicant's husband were to be convicted for serious fraud, it is likely that the respondent would take action to revoke his ILR and would consider deportation action. The Home Office would take a view in due course whether there was any evidence to indicate a link between the applicant and her husband's activities. Even if there is no link, the application for leave to remain relies on her husband's status.

11. Mr Belmore says that it is not Home Office policy to grant applications for leave to remain in cases involving pending prosecutions with the expectation that leave to remain will be curtailed once a conviction is secured. The applicant continues to benefit from leave extended under section 3C(2)(a) of the Immigration Act 1971 ('IA 1971') and will continue to do so until her application is decided. He acknowledged that the applicant herself is not the subject of a criminal investigation and that there was likely to be a sense of uncertainty during any period of delay. He also acknowledged that the applicant wished to travel abroad to visit her parents who are said to be unwell and that her inability to do so might cause 'some stress and anxiety'. In response to other concerns about the impact of the delay, Mr Belmore said that the applicant is still entitled to work and that the Home Office issues guidance for employers which includes advice about people with outstanding applications. The Home Office also operates a helpline for employers. In short, there are mechanisms for employers to check the immigration status of a person remaining with section 3C leave.

12. Mr Belmore says that it is in this context that the respondent has put on hold the application for further leave to remain. There will be a regular review and the respondent will consider the application at 'the earliest opportunity'. However, the respondent has taken the view that it would be reasonable and proportionate to await the outcome of the HMRC investigation and/or any criminal proceedings relating to the applicant's husband before deciding the application given the seriousness and scale of the HMRC investigation. It would not be proportionate for the respondent to review the large amount of material involved in the investigation for herself.

13. At the date of the hearing, three years and six months have passed since the application for further leave to remain. During that time, the applicant's leave has been extended by the operation of section 3C IA 1971.

14. The applicant applied for permission to bring judicial review proceedings on 22 October 2022. Upper Tribunal Judge Pickup refused permission on the papers in an order sent on 20 January 2023. In an order sent on 18 April 2023, Upper Tribunal Judge Gill gave permission for the parties to amend their grounds and adjourned a renewal hearing listed on 20 April 2023. Upper Tribunal Judge Kamara subsequently granted permission at a hearing on 03 May 2023.

The applicant's case

15. The applicant's amended grounds argued:

    (i) The respondent's ongoing delay 'is inconsistent with, and contrary to, the Immigration Rules and is therefore *ultra vires* the statutory scheme and unlawful'.

    (ii) The respondent's ongoing delay is unreasonable and irrational.

16. In relation to the first ground, Mr Biggs asserted that the applicant satisfies the requirements of the immigration rules and would only be ineligible if the respondent revoked her husband's ILR. Seemingly contrary to the assertion made in the grounds that the delay was *ultra vires* (beyond the power) of the statutory scheme, he accepted that the respondent had power to delay an application. However, he argued that the power was 'ancillary' or 'incidental' and was subject to limitations. He asserted that in this case the power was being used to circumvent the rules.

17. Mr Biggs sought to distinguish the facts of this case with the applicants in *R (X) v SSHD* [2021] EWCA Civ 1480 ('*X v SSHD*'). In that case the applicant who was being investigated was applying for leave to remain along with his dependents. The outcome of the application was dependent on the character and conduct of the main applicant. In this case, RM has been granted ILR. At this stage there is nothing to suggest that there would be any 'Suitability' issues relating to the applicant herself.

18. Mr Biggs argued that if the reasons for the delay are inconsistent with the immigration rules, then the respondent did not have the power to delay. The ground given for delaying the application in this case did not concern a requirement under the immigration rules. A supervening administrative act, to revoke RM's ILR, would be needed before the application could be refused.

19. An additional argument, which was not pleaded in the grounds, related to the remoteness of the reason given for the delay. There was no evidence at this time to suggest that the applicant has been involved in any of the matters that are the subject of the HMRC investigation which might impact on the applicant's ability to meet the requirements of the immigration rules.

20. In relation to the second ground, Mr Biggs argued that there was no rational link between the reason given for the delay and the requirements of the immigration

rules. There had been no consideration of the likely length of any further delay given that no charging decision had been made. Even if the applicant's husband was charged, it would take some time for a trial to take place. Even if he was convicted, a further decision would need to be made in relation to revocation of his ILR before a decision could be made in relation to this application. The existing delay of over three years was outside a range of reasonable responses to the circumstances in this case.

The respondent's case

21. In relation to the first ground, Mr Malik argued that the respondent clearly had power to delay an application and pointed out that it was not solely a statutory power. He relied on the decision in *X v SSHD*. The argument that the respondent's reason for delaying the application did not relate to a condition in the immigration rules was considered in *X v SSHD* and rejected. He argued that the respondent is not acting inconsistently with the immigration rules.

22. In response to the argument that the reason for the delay was too remote, Mr Malik referred to the decision in *X v SSHD*. The test was whether there was a rational link between the reason for deferring the decision and not remoteness or relevance. He argued that it was rational for the respondent to wait until she had all the relevant information before making a decision. RM had asserted that he was of good character when he applied for ILR. The ongoing investigation will determine whether it might be appropriate to take action in relation to his immigration status or not. There is no suggestion that the applicant might have been involved in criminal activity, but the application does rely on her relationship with her husband. It was reasonable to wait for the outcome of the investigation before making a decision.

23. In relation to the second ground, it was clear from Mr Belmore's statement that the position would be kept under review and the proportionality of any ongoing delay will be considered. The respondent is likely to review the position when a charging decision has been made. The respondent was aware of the length of time that had passed and was entitled to take into account the fact that the applicant's leave was extended by section 3C IA 1971. The respondent acknowledged that there might be difficulty in travelling. It was reasonable for the respondent to await the outcome of the criminal investigation rather than having to review the evidence relating to that investigation for herself solely for the purpose of determining this application.

Decision and reasons

24. It is necessary to set out what the Court of Appeal found in *X v SSHD* before considering its relevance to this application.

25. In *X v SSHD* the Court of Appeal considered whether the Secretary of State has an implied power to defer consideration of an application for leave to remain pending the outcome of a criminal investigation, and if so, whether she exercised that power lawfully.

26. The facts of *X v SSHD* were that the first appellant had been granted limited leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant. The other appellants were given leave to remain as his dependents. In 2016 a criminal investigation was begun in relation to the actions of the first appellant. He was suspected of involvement in a conspiracy involving tax fraud. In April 2017, the first appellant and his dependents applied to extend their leave to remain. The applications were put on hold pending the outcome of a complex criminal investigation. At the date when the Upper Tribunal heard the application for judicial review in early 2021 HMRC was intending to submit information to the Crown Prosecution Service (CPS). Due to delays caused by the pandemic the earliest date for a possible charge was likely to have been early 2022.

27. The grounds of appeal to the Court of Appeal from the Upper Tribunal were:

    (i) That there was no implied power to delay making a decision while a person was the subject of a criminal investigation.

    (ii) That the respondent was seeking to impose an additional unlawful requirement, not to be charged by the HMRC, which was not a condition included in the immigration rules;

    (iii) The decision was based on an incorrect policy and was unlawful and irrational.

28. The Court of Appeal analysed the legal framework relating to the Secretary of State's general powers to regulate and control immigration derived from the IA 1971. The Court of Appeal also considered the terms of the immigration rules relevant to the case. The court found that the Secretary of State has power to do those things expressly authorised by the Act or those things which are ancillary or incidental to the exercise of the functions conferred by the Act [31]. It found that the powers to regulate the entry into or the stay of persons in the UK necessarily involved the Secretary of State having power to establish a system for receiving, considering, and deciding applications. It includes a power in appropriate circumstances to defer taking a decision on an application. That power is ancillary or incidental to the exercise of the functions relating to the administration and control of immigration conferred by the Act [32].

29. The Court of Appeal went on to consider other cases in which the Secretary of State exercised ancillary powers relating to the system of immigration control, including *R (New London College Ltd) v SSHD* [2013] 1 WLR 2358 (system of sponsorship licences) and *R (S) v SSHD* [2007] EWCA Civ 546 (deferral of asylum decisions). It concluded that the Secretary of State ultimately was responsible for determining whether a person met the requirements of the immigration rules. Deferral of a decision on an application for leave to remain pending the outcome of a criminal investigation is a decision by the Secretary of State as to how she proposes to deal with an application [36].

30. The Court of Appeal rejected the argument that a decision to delay pending the outcome of a criminal investigation, in effect, imposed an additional condition that

the appellant must satisfy. It is a procedural decision by the Secretary of State as to how she proposed to deal with the application [41].

31. In relation to the third ground of appeal, the Court of Appeal considered the factual context in which the decision to defer was made. The criminal investigation began many months before the application for further leave to remain was made. It was a complex investigation involving substantial documentation. The appellants had existing leave to remain which would be extended by the operation of section 3C IA 1971 albeit they would not be able to travel outside the UK while the applications were pending [44]. Against that background, the court concluded that there was a rational link between the reasons for deferring a decision and the grounds upon which leave to remain could be granted or refused. An application could be refused under the general grounds for refusal if a person's character and conduct showed that it was undesirable for the person concerned to remain in the UK [45]. The Court of Appeal found that the Upper Tribunal's conclusion that the decision was not irrational in the circumstances of that case did not disclose an error [48].

32. The facts in *X v SSHD* are remarkably similar. In *X v SSHD* the delay was justified, as in this case, by an ongoing complex fraud investigation. The only difference is that, as in this case, RM is not applying for further leave to remain with his wife because he has already been granted ILR. Nevertheless, there is still a rational connection between the reason given for the delay and the grounds upon which leave to remain could be granted or refused.

33. In *X v SSHD* the connection for the main applicant was whether he would meet the 'Suitability' requirements or might be fail with reference to general grounds for refusal if he were to be convicted of a criminal offence. The situation of his dependents is similar to this case. Their cases depended on the main applicant having relevant immigration status as a Tier 1 Migrant.

34. In this case, the applicant must be in a relationship with a person who is present and settled in the UK i.e. her spouse must have ILR to meet the 'Eligibility' requirement. The respondent says that, if the applicant's husband were to be charged and then convicted, she would consider whether it would be appropriate to take deportation action. The effect of making a deportation order is to revoke any existing leave to remain by operation of section 5(1) IA 1971. Currently there is no suggestion that the applicant has any knowledge or connection to the alleged fraud. However, an additional reason given to justify the delay is to review whether the investigation might disclose any evidence that could touch on the applicant's own character and conduct. In such circumstances, there is a rational connection between delaying to await the outcome of the investigation and the grounds upon which leave to remain could be granted or refused.

35. The arguments put forward in the first ground are somewhat confused and in my assessment amount to little more than dressing up the 'additional condition' argument rejected by the Court of Appeal in *X v SSHD*. Seeking to distinguish the argument by describing the decision as being 'inconsistent with the immigration rules' is vague and unparticularised given that it is accepted that the respondent has a power to delay making a decision.

36. It was argued that the applicant meets the requirements of the immigration rules as the circumstances stand at the current time. That would have been the case for the appellants in *X v SSHD* as well. On one side of the case, the applicant in this case, or the appellants in *X v SSHD*, would prefer to have their applications determined before any potential prosecution could damage their chances of succeeding under the immigration rules. On the other side of the case, the respondent has become aware of a matter that might potentially impact on the outcome of the decision and has taken an administrative decision to await the outcome of a criminal investigation before making a decision.

37. The key issues are (i) whether there is a rational connection between the decision to delay and the grounds on which leave to remain could be granted or refused; and (ii) whether the delay is proportionate to the circumstances of the case. In this sense, one of the several strands of argument put forward in relation to the first ground, that there is a limit on the exercise of the ancillary power, is no different to arguing that the length of the delay is constrained by general principles of administrative law. To this extent, the same point relating to the rationality of the decision to delay is at the root of both grounds.

38. The additional argument relating to remoteness is really another way of arguing proportionality as an aspect of rationality. The argument presupposes the full course of hypothetical events that might be necessary before the applicant's husband's ILR could be revoked and the application for leave to remain refused. I accept that the worst-case scenario for the applicant could lead to a potential delay of many years. If her husband were to be charged, a complex fraud trial might be prolonged. If her husband were to be convicted, any decision to deport could also take some time to finalise given that there is likely to be a right of appeal on human rights grounds.

39. However, the question of whether the current delay is lawful does not depend on the worst-case scenario. The situation might change at different stages of the process, which the respondent would be obliged to review before she could justify any continued delay.

40. At this point, it is said that a referral to the CPS is 'imminent'. The respondent is waiting for a decision to be made on whether to charge the applicant's husband. Subject to a significant delay in the charging decision, this is likely to be the next milestone for the respondent to review the proportionality of any continued delay.

41. If her husband is not charged, the reason for justifying the delay would fall away. In such circumstances, it would be difficult for the respondent to justify any further delay. The applicant could reasonably expect a decision to be made promptly given the delay that has already occurred.

42. If her husband is charged, it would be foreseeable that there might be a further significant delay before the next milestone, which would be the outcome a complex fraud trial. If her husband is charged, the respondent would need to review whether further delay is proportionate. At that stage, the respondent would be in a

position to assess whether any information particular to the applicant might have emerged from the investigation. If there is no evidence that might impact on the applicant's own character and conduct, the respondent would need to consider whether continued delay is justified.

43. For the reasons given above, I conclude that there is a rational connection between the decision to delay making a decision and the grounds upon which leave to remain could be granted or refused. Although the facts of this case are one step removed from those in *X v SSHD,* because the applicant's husband already has ILR, the connection is not so remote to the decision to delay that it is unlawful.

44. I have also considered the potential impact of the delay. Nothing in the complaint letters to the Home Office suggested that the applicant was suffering any particular detriment because of the delay. Beyond a bare assertion that the respondent failed to consider the 'hardship or detriment' caused to the applicant by the delay, the amended grounds did not particularise any specific detriment. The highest the evidence seems to go is a general assertion in the original grounds that the applicant could not travel to visit her sick parents and that the couple could not travel together. However, it seems that there was no evidence before the respondent to show what medical conditions the applicant's parents might suffer from or to show that there was anything that might prevent them from visiting the applicant in the UK.

45. Nevertheless, the respondent has engaged with any potential consequences of delay by way of Mr Belmore's statement. He acknowledged that the applicant was not under investigation and that her inability to travel might cause her some stress and anxiety. However, in the absence of any evidence to show the extent of any impact that her continued inability to travel might have, it is not arguable that this point is sufficient to render the continued delay unlawful. Mr Belmore points out that the applicant's leave is extended by way of section 3C IA 1971. She would continue to have a right to work, which can be proved through procedures put in place for employers to check a person's immigration status with the Home Office. In any event, RM told me that his wife does not work. He continues to have ILR and is entitled to work.

46. For these reasons, I conclude that there was insufficient evidence before the respondent to show that the delay is causing the applicant such serious detriment that it would render the decision to await the outcome of the criminal investigation irrational or unlawful.

47. While acknowledging that the delay of over three years is significant, and no doubt frustrating for the applicant, I conclude that the respondent's decision to await the outcome of any charging decision is not unlawful at the current time.

48. There is a rational connection between the decision to delay and the grounds upon which leave to remain might be granted or refused. The justification for the continued delay is not so remote when the next milestone for review is likely to be a charging decision made by the CPS. Depending on the outcome of that decision, the respondent might be obliged to decide the application promptly (if no charges

are brought) or to consider the considerable further delay that is likely to occur while awaiting the outcome of a complex fraud trial (if charges are brought). There is an indication that the applicant would like to visit her parents in Pakistan. However, there was insufficient evidence before the respondent to show that the continued delay is having a such a detrimental impact on the applicant that it might render the decision unlawful.

49. The application for judicial review is dismissed.

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