Neutral Citation Number: [2021] EWCA Civ 184

Case No: C6/2019/2662

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal
Judge Allen

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2021

Before :

LADY JUSTICE KING
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

The Queen on the application of KALSI & Ors	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Sibghat Kadri QC and Arthur Blake (instructed by **AKL Solicitors**) for the **Appellant**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 4th February 2021

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Approved Judgment

Lady Justice Elisabeth Laing DBE :

Introduction

1. This is an appeal from a decision of the Upper Tribunal (Asylum and Immigration Chamber) ('the UT'). The UT had refused permission to apply for judicial review on the papers. The application for permission was renewed. The UT again refused the permission after a hearing.

2. On this appeal, the Appellant ('A') was represented by Mr Kadri QC and Mr Blake. The Respondent ('the Secretary of State') was represented by Mr Malik. I am grateful to counsel for their written and oral submissions. I also thank all counsel for their willingness to respond helpfully and with good humour to the many questions they were asked during the hearing.

The decision which is the subject of the application for judicial review

3. The decision challenged in the claim form (which is not dated), is a decision of the Secretary of State made on 11 April 2019 (see section 3 of the claim form). The index for the bundle for this hearing confirms that impression. The decision of 11 April 2019 is described in the index as 'Copy of the decision challenged in the Judicial Review'. For reasons which will become clear, I will refer to that decision as 'decision 6'. However, the grounds in the claim form are, in substance, a challenge to a later decision, dated 23 May 2019. Again, for reasons which will become clear, I will refer to that decision as 'decision 7'. The first paragraph in the section in the grounds headed 'Submissions' asserts that decision 7 is 'irrational and contrary to law'. A relies in support of that argument on evidence submitted to the Secretary of State in the application for administrative review which generated decision 7, and not on evidence submitted before decision 6 was made. The final sentence of the section headed 'Submissions' repeats that contention. No challenge to decision 6 is articulated in the claim form. When asked during the hearing which decision A challenged, Mr Kadri QC told us that it was decision 6.

Sequence of applications

4. It is difficult to understand the rival arguments on this appeal without an understanding of the sequence of the recent applications by A to, and the decisions of, the Secretary of State. Before the hearing, the Court asked the parties to send it copies of the relevant decisions, many of which were not in the bundle for the appeal.

5. That sequence is summarised in decision 4.

6. A was last granted leave as a Tier 1 Entrepreneur Migrant valid from 18 December 2013 to 18 April 2017. On 18 April 2017 A submitted an in-time application ('application 1'). Application 1 was refused ('decision 1'). Section 3C of the Immigration Act 1971 extended A's leave until the decision on A's application for administrative review of decision 1 was served on A, on 27 February 2018.

7. On 8 March 2018, A made a further application for leave to remain as a Tier 1 Entrepreneur Migrant ('application 2'). Paragraph 39E of the Immigration Rules ('the Rules') was applied to disregard the period of overstaying between 27 February 2018 and 8 March 2018. Application 2 was refused, but not on the grounds that A was an overstayer (in short, A had not provided sufficient evidence of the necessary funds). Application 2 was refused on 1 May 2018 ('decision 2'). According to A's grounds

for applying for judicial review, he applied for an administrative review of decision 2 on 15 May 2018. The refusal was maintained in a decision dated 12 June 2018 ('decision 3').

8. A made a further application for leave to remain as a Tier 1 Entrepreneur Migrant on 2 July 2018 ('application 3'). Application 3 was refused on 30 August 2018 ('decision 4'), explicitly on the grounds that A was excluded from applying for leave to remain as Tier 1 Entrepreneur Migrant because he was an overstayer when he made the application, and paragraph 39E of the Rules did not apply to him. The decision letter is confusing on a first reading, because it seems that the Secretary of State awarded A maximum points for the all the relevant attributes (internal pages 3-4) but then said (internal page 4) that, in line with paragraph 245DD(o) of the Rules, the Secretary of State had not, in fact, assessed the application in accordance with paragraph 245DD(k) of the Rules. The Secretary of State reserved the right to do such an assessment in any challenge to decision 4, or in any further application for leave to remain as a Tier 1 Entrepreneur. The decision letter said that A could apply for administrative review within 14 days, but only if A thought that there had been a case-working error. A did not have to leave the United Kingdom during that 14 day-period, or while any application for administrative review was being decided.

9. According to A's grounds for applying for judicial review in this case, he applied for an administrative review of decision 4 (the date of that application is not given in the claim form) ('application 4'). According to the claim form, that refusal was maintained in a decision which the Court has not seen, apparently on 9 October 2018 ('decision 5'), and apparently on the grounds that A was an overstayer when he made application 3. According to the claim form, A then applied for judicial review of decision 4. The Secretary of State agreed to settle that claim on the basis of a consent order dated 19 January 2019. The Secretary of State agreed to reconsider decision 4. Mr Kadri referred to that litigation during his oral submissions. None of the papers relating to that litigation is in the bundle. Since I have not seen any of the relevant papers, I cannot give those submissions any weight. However, it is likely that the consent order provided for decision 4 to be quashed, and I will assume that that is so.

10. In the bundle for this hearing there is a letter from the Secretary of State to AKL Solicitors ('AKL') dated 18 February 2019. AKL represented A at that stage, and still do. The Secretary of State was reconsidering application 3 in line with the consent order. The Secretary of State said that Royal Mail's website confirmed that decision 3 was signed for on 15 June 2018. The letter continued, 'Please could you confirm your reasons for considering this decision to have been served on 20 June 2018. If you have any supporting evidence for this date of service, please could you send it to me…'

11. AKL then wrote to A's former representatives, GB Immigration (GBI') on 26 February 2019. AKL said that decision 3 'was signed for as received by your office on 15th June 2018'. AKL asked GBI to explain 'how you arrived at the date of service as 20th June 2018 as this is now becoming an issue in respect of our client's judicial review and this is a very important point which needs to be addressed urgently'. AKL enclosed some correspondence, but it is not clear what that was. The letter of 26 February was sent by email.

12. Mr Navinder Kalsi of GBI replied by email to AKL on 1 March 2019. He said that, as he had explained on the telephone, the recorded delivery slip was signed for by 'a

Tobin'. There was no-one in GBI with that name. GBI were in a serviced office, so it seemed that another tenant had signed the slip. It was not 'provided in our post until 20th June, which is the date we have worked from'.

13. Mr Kalsi was later able to trace the person who signed the slip. He was Luke Tobin, 'a former tenant of the building with whom I shall request to send over confirmation of the same…' Mr Kalsi sent a further email that day to AKL, forwarding an email from Luke Tobin. Luke Tobin's email said, 'Hi Navinder, Thanks for your email. This letter was signed for on the 15/06/2018 and added to your letter box when I next returned to the office on the 20/06/2018'. Mr Kalsi's email to Mr Tobin is not in the bundle.

14. AKL thanked GBI in an email dated 1 March 2018. AKL said that 'As a competent lawyer, you were duty bound to establish the date when the documents were served at your offices rather than the date on which they were brought to your knowledge. If you had carefully searched the royal mail website, you would have established that the decision was served on 15, and you ought to have worked your dates from that day rather than any other dates. We reserve our client's position in respect of any losses due to your negligence'.

15. On 5 March 2018, AKL replied to the Secretary of State's letter of 18 February. They said that, as the Secretary of State had probably gathered, they did not act for A at the time, and they 'therefore had to seek clarification from the former Solicitors'. AKL added that they had managed to speak to the former representatives, and 'they inform us that even though the document was signed for in the serviced offices on 15th June 2018 it was not properly served onto them until 20th June 2018, this is due to the fact that they operate from a serviced office and the document was delivered to the wrong party by the Royal Mail. The person who signed for this document is from another office and he by mistake accepted the delivery and thereafter did not pass it onto the Solicitors until 20th June 2018'.

16. The letter of 5 March does not refer to the correspondence I have described in paragraphs 11-14, above. A's junior counsel, Mr Blake, told the Court that AKL had emailed this material to the Secretary of State. He provided an email dated 5 March 2018 from AKL to the 'Sheffield Development Team' at the Home Office. The email included a Home Office reference number. It said, 'Please see the attached our letter and email from former solicitors'. Mr Malik had anticipated that the Court might ask about this material. He had taken instructions, which, he accepted, were not as comprehensive as they might have been, because, in the current circumstances, his client had not able to get hold of the physical file. He told the Court that the notes (I assume he meant the notes on the GCID database) did not show that any evidence had been supplied by AKL. While he did not concede that the material in that exchange of emails was before the Secretary of State when decision 6 was made, he said that he was 'content for the Court to take the case at its highest and proceed on the basis that it was before the Secretary of State'.

17. The Secretary of State reconsidered application 3 in a decision dated 11 April 2019 ('decision 6'). Application 3 was refused again on the grounds that A was an overstayer when he made application 3 and that paragraph 39E of the Rules did not apply to him. The Secretary of State rejected A's argument that he had valid leave to remain when he made application 3. The Secretary of State quoted the relevant paragraphs of the Immigration Rules and explained that although paragraph 39

prevented application 2 from being excluded from consideration by the operation of paragraph 245DD(g) of the Rules, it did not extend A's leave. A had not had valid leave to remain since 27 February 2018, and when he made application 3, he was an overstayer.

18. The Secretary of State then considered A's argument that paragraph 39E(2)(b)(iv) applied to his case. A contended that application 3 was made within 14 days of receiving decision 3. The Secretary of State said that A's representations claimed that the administrative review decision (that is, decision 3) was served on 20 June, but the Royal Mail website showed that it was signed for on 15 June 2018. The Secretary of State referred to the letter of 18 February (see paragraph 10, above). The Secretary of State had asked for A's reasons for stating that the decision was served on 15 June, 'along with any supporting evidence'. The Secretary of State then referred to ALK's letter of explanation (presumably AKL's letter of 5 March 2018, see paragraph 15, above), summarising the explanation thus: [AKL] 'had explained that they did not represent A on his previous application but that the legal representative in question advised them that Royal Mail had made the delivery to another office in your building. This meant that the notice of decision did not reach the correct office until 20 June 2018. No supporting evidence was provided'.

19. The Secretary of State then said that he had considered whether 'the circumstances of your case merit the exercise of discretion'. The letter continued that, after the date of service claimed by AKL, there were still 9 days in which the application could have been submitted. No explanation had been given, 'in or with the application, the subsequent administrative review or legal proceedings detailing why an application could not be made within this timeframe'. In the light of that, the Secretary of State had decided that it was not appropriate to exercise any discretion and to maintain the refusal. The letter said, in bold, with reference to paragraphs 245DD(g) and 39E of the Rules, the application had 'therefore' been refused. That paragraph is repeated on the next page of the decision letter.

20. Again, the Secretary of State appears to have awarded A all the points he claimed, but the decision letter contains the same apparently contradictory paragraphs as the letter for decision 4 (see paragraph 8, above).

21. A applied for administrative review of decision 6 on 26 April 2019 ('application 5'). That application is in the bundle. It apparently consisted of a completed application form and a nine-page document entitled 'Grounds on which Administrative Review is Sought' ('the GAR').

22. The application form (internal page 1) described the outcome of decision 6 as 'I was granted leave to remain or indefinite leave to remain, but want a mistake in that grant to be corrected.' I do not understand that description of decision 6. Decision 6 is summarised at some length. The text against the box 'Case working error you believe was made in your decision' is 'No, a different case working error was made'. The text against the box 'Explain why you think the decision is wrong' describes the history, including the consent order, and decision 6. There is no explanation of what is wrong with decision 6 in this, or any other, part of the form.

23. A summarised the history in the GAR. A submitted that decision 6 was 'not properly conducted and was procedurally unfair'. The application for administrative review was only three days late. The delay was caused by A's previous legal representatives. A submitted that the law on delay in applying for judicial review was relevant in the

context of an application for administrative review. A cited section 31 of the Senior Courts Act 1981 and Part 54.5 of the Civil Procedure Rules ('the CPR'). The Court can extend the time for applying for judicial review. The cases show that 'the Courts are prepared to exercise greater latitude to extend time in favour of a person who has relied on legal advice. See *R (Tofiq) v Immigration Appeal Tribunal* [2003] EWCA (Civ) 1138 (paragraph 25). I note that *Tofiq* is not a decision to that effect. It is a decision to remit to the Immigration Appeal Tribunal the question whether 'it was satisfied that because of special circumstances it [was] just for the time limit to be extended' for it to consider granting an extension of time, pursuant to an express power to extend time. A referred to two other cases.

24. A also submitted that the Secretary of State had failed to take into account that A's 'application for leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant has been ongoing since April 2017'. Through no fault of A, his applications were refused and subjected to previous reviews. The Secretary of State had accepted that decision 4 was 'not in accordance with Immigration Rules and law'. A submitted that there had already been 'delay of some two years in dealing with his application already'. Those facts were relevant to the exercise by the Secretary of State of his discretion and had not been referred to. It was unreasonable of the Secretary of State not to exercise discretion in A's favour. A said he would 'rely on the fact that there has been a delay outside the permitted 14 days under paragraph 39E it is an appropriate case for the exercise of discretion in his favour'. He submitted that 'the refusal of the application would amount to an infringement of his rights on the basis that his previous solicitors might have failed to act timeously'.

25. On 29 April 2019, AKL again wrote to GBI. AKL said that they had put forward GBI's explanation to the Secretary of State. The Secretary of State had said that the explanation failed to 'provide reasons even if it was received on 20th June why did you not make an application within the 9 day period which was still available'. AKL asked GBI 'to provide us as previously volunteered that you would provide a statement from the person who had signed for the recorded delivery and a further statement from you providing when you came into possession of the refusal letter decision the reason for not utilising the 9 days to submit the application'. AKL said this was urgent and asked GBI to deal with it within 24 hours. There is no reply to this letter in the bundle.

26. On 23 May 2019, the Secretary of State maintained the refusal decision ('decision 7'). The Secretary of State had carefully considered the points made in the application for administrative review and had maintained the decision for the reasons given in decision 7. The Secretary of State summarised the application for administrative review: A had argued that the exercise of discretion was improper and unfair; any delay had been caused by his previous representatives, and the original caseworker had failed to take into account that the application had been on foot since April 2017. The Secretary of State's records showed that A's 'request for discretion' had been considered and discussed by senior caseworkers 'and therefore we are satisfied that the decision not to exercise discretion in your favour was properly conducted'. The onus was on A to ensure the application was submitted in time. 'Your previous application [sic] is deemed to have been served to you on 15 June in accordance with available evidence from Royal Mail website'. From the context, the decision maker must be referring, not to an application, but to decision 3. Whether an application was submitted in time was considered under the Rules. The application was considered

under paragraph 245DD(g) with reference to paragraph 39E. The Secretary of State had asked for reasons why the application was submitted late but 'unfortunately the reasons you provided did not warrant an exercise of discretion. You are therefore considered to have overstayed your valid leave and your current application does not meet the conditions to be considered as an exception under paragraph 39E…' The provisions of the CPR were irrelevant. Applications for leave and for administrative review are governed by the Rules.

27. The Secretary of State was satisfied that 'the original caseworker has considered your Immigration History in full and that your last valid leave expired on 18 April 2017. Therefore we are aware that you have tried to regularise your stay since April 2017'.

28. The Secretary of State summarised the arguments in application 5 (the concession of the judicial review; an allegation that the Secretary of State had delayed for two years; claims that A had invested in the United Kingdom meant that discretion should be exercised in his favour, and that the refusal was an infringement of A's rights because A's previous representatives had failed to act 'timorously'; and returning A to his home country would mean that he had no redress against his previous representative). The Secretary of State acknowledged that he had conceded the judicial review. Nevertheless, A's request that the Secretary of State exercise discretion did not include concerns about how long it had taken the Secretary of State to make a decision, and 'therefore this element was not considered'. The Secretary of State did not believe that this factor, if considered, would change the outcome. The Secretary of State accepted that A had scored the points required by Appendix A, B and C of the Rules. A had not met paragraph 245DD(g) and paragraph 39E of the Rules, however. A had been given an opportunity to provide reasons why application 3 should have been accepted, but those did not warrant an exercise of discretion. The Secretary of State could not comment on any dispute which A might have with his previous representatives. Leave could not be granted as a form of redress against them. The refusal was maintained.

The claim form

29. I have summarised the claim form in paragraph 3, above.

The acknowledgement of service

30. The Secretary of State contended that A's last leave, as extended by section 3C of the Immigration Act 1971 ('the 1971 Act') expired on 27 February 2018. A made an in-time application for further leave to remain on 8 March 2018 and an in-time application for administrative review of the refusal of that application. The Secretary of State maintained the refusal in a decision served (and signed for) on 15 June 2018. A made a third application for leave to remain on 2 July 2018, more than 14 days after the conclusion of the previous administrative review (on 15 June 2018). Paragraph 39E therefore did not apply. The acknowledgement of service then explains that A and his dependants had been overstayers since 27 February 2018 and that paragraph 39E ceased to apply when A filed his application on 2 July 2018, as that was more than 14 days after the conclusion of the application for administrative review. The Secretary of State had no discretion, as refusal was mandatory.

31. I do not consider that the acknowledgement of service clearly makes the point that, because A was an overstayer when he made application 3, the points he raised in his latter applications for administrative review could not help his case at all. Instead, the

acknowledgement of service engages with those points as if they are legally relevant, rather than explaining that they only arose if the overstaying argument was wrong.

The decision of the UT on the papers

32. On 9 August 2019, Upper Tribunal Judge ('UTJ') Kebede refused permission to apply for judicial review. She said that A was an overstayer when he made his application, and did not meet the exception in paragraph 39E of the Rules, because he made his application outside the 14-day period after service of the previous decision on 15 June 2018. The Secretary of State was bound to refuse the application. In any event, the Secretary of State gave full and careful consideration to the material advanced by A and gave cogent reasons for not exercising any discretion. The focus of this reasoning is the service of decision 3, not the application of paragraph 39E.

The decision of the UT after the oral hearing

33. UTJ Allen considered that the key issue was timing. He considered that decisions 6 and 7 should be read together, and that the Secretary of State was entitled to reach the view that discretion should not be exercised in A's favour. The focus of this reasoning is the service of decision 3, not the application of paragraph 39E.

The grant of permission to appeal

34. Males LJ granted permission to apply for judicial review on 28 February 2020. He said that the UT appeared to have refused permission to apply for judicial review because the Secretary of State's refusal to exercise discretion was unchallengeable. There was a prior question, which was the date from which the 14-day period should run. A's case, supported by evidence, was that time should run from 20 June, the date when his solicitors received decision 3. The Secretary of State referred to that evidence, but did not explain why it was not accepted (if that was the case). The administrative review simply said that no evidence was provided, when it appeared that it had been. If time ran from 20 June, the application was in time. The appeal was arguable.

The legal framework

The Immigration Act 1971

35. Section 1 of the 1971 Act is headed 'General principles'. It provides, in summary, that people who have a right of abode in the United Kingdom may come and go freely, but that those who do not may only do so, and live work and settle in the United Kingdom by permission and subject to such regulation and control as is imposed by the 1971 Act.

36. Section 1(4) of the 1971 Act recognises that the Secretary of State lays down rules '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 in the United Kingdom…' Section 3(2) of the 1971 Act requires the Secretary of State 'from time to time (and as soon as maybe)' to '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…', and makes further provision about the procedure for laying such statements before Parliament.

37. Section 3C of the 1971 Act automatically extends a person's leave to remain in certain circumstances. So far as relevant, it provides:

> *'(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 …*
>
> *(d) an administrative review of the decision on the application for variation -*
>
> *(i) could be sought, or*
>
> *(ii) is pending.'*

The Immigration Rules

Points-based applications

38. The requirements for leave to remain as a Tier 1 (Entrepreneur) Migrant are in paragraph 245DD of the Rules. So far as relevant, it provides:

> *'To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused…*
>
> *Requirements: …*
>
> *(g) The applicant must not be in the UK in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded.'*

39. Paragraph 39E of the Rules provides:

> *'This paragraph applies where:*
>
> *(1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the*

control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or

(2) the application was made:

(a) following the refusal of a previous application for leave which was made in-time; and

(b) within 14 days of:

(i) the refusal of the previous application for leave; or

(ii)the expiry of any leave extended by section 3C of the Immigration Act 1971; or

(iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or

(iv)any administrative review or appeal being concluded, withdrawn or abandoned or lapsing.'

Applications for administrative review

40. The rules about making a valid application for administrative review are at paragraphs 34M to 34Y of the Rules. An application which is not made in accordance with paragraphs 34N-34S is invalid and will not be considered (paragraph 34M). Only one valid application for administrative review may be made in respect of an eligible decision, unless an earlier application for administrative review has resulted in the maintenance of the decision under review, but with different or additional reasons to those specified in the decision under review (paragraph 34N(1) and (2) and paragraph AR2.2(d) of Appendix AR to the Rules).

41. An application for administrative review may not be made if, after receiving notice of an eligible decision, an applicant, during the period when an application for administrative review could be made, makes an application for leave to remain (paragraph 34N(4)). The application must be made in relation to an eligible decision (paragraph 34P). An application for administrative review must be made (in a case like this) 'no more than 14 calendar days after receipt by the applicant of the eligible decision' (paragraph 34R(1)(a)). The Secretary of State may accept an application out of time 'if the Secretary of State is satisfied that it would be unjust not to waive the time limit and that the application was made as soon as reasonably practicable' (paragraph 34R(3)). This provision was considered by this Court in *R (Hasan) v Secretary of State for the Home Department* [2019] EWCA (Civ) 389.

42. The procedure and formalities for making applications are governed by paragraphs 34U-34VA. An application may be made on-line (paragraph 34U) or by post or by courier (paragraph 34V). When an application is made by post, it is made 'on the marked date of posting'; if by courier, on the date when it is delivered and if made on-line, it is made on the date it is submitted (paragraphs 34W(1)(a), (b) and (c)). An acceptance that an application has been made is not an acceptance that it is valid.

43. Decisions on applications for administrative review are governed by Appendix AR to the Rules. The introduction to Appendix AR says that administrative review is available when an 'eligible decision' has been made. 'Eligible decision' is defined in paragraph A3.2. A decision to refuse an application for leave to remain as Tier 1 Entrepreneur Migrant appears to be an 'eligible decision' (see paragraph AR3.2). The introduction adds that 'Administrative review will consider whether an eligible decision was wrong because of a case working error and, if it is considered to be wrong, the decision will be withdrawn or amended as set out in paragraph AR2.2 of this Appendix'.

44. 'Administrative review' is defined as a review of an eligible decision 'to decide whether the decision is wrong due to a case working error' (paragraph AR2.1). The possible outcomes of an application for administrative review are described in paragraph AR2.2. Paragraph AR2.4 provides that the Reviewer 'will not consider any evidence that was not before the original decision maker, unless such evidence is submitted in order to show that a 'case working error' as defined in paragraph AR2(11)(a), (b) or (c) has been made'.

45. If the applicant has identified a case working error as defined, the Reviewer may contact the applicant or his representative in writing to ask for relevant evidence. 'The requested evidence must be received at the address specified in the request within 7 days of the date of the request' (paragraph AR2.5). Paragraphs AR9 and 10 provide for when an application for administrative review is, and is not, pending.

46. A 'case working error' includes a case in which an original decision maker's decision to refuse an application 'on the basis that the date of application was beyond any time limit in these Rules was incorrect', and cases in which the original decision 'otherwise applied [the Rules] incorrectly' (paragraph AR2.11). 'Original decision maker' is defined in paragraph AR1.1 as 'the Home Office case worker who made the eligible decision'.

Service of applications for administrative review

47. In response to a request from the Court, Mr Malik drafted a note about the service of decisions made on applications for administrative review. A's representatives helpfully agreed that note.

48. Service is governed by Appendix SN to the Immigration Rules. A decision 'notifying a person of the outcome of an administrative review application' falls within Paragraph SN1.2A(d). Under paragraph SN1.3(c), the decision can be 'sent by postal service to a postal address provided for correspondence by the person or the person's representative'. Under paragraph SN1.9(a)(i), a decision sent 'by postal service' in accordance with paragraph 1.3 'shall be deemed to have been given to the person affected, unless the contrary is proved…on the second day after it was sent by postal service in which delivery or receipt is recorded if sent to a place within the United Kingdom'.

49. The Secretary of State has published guidance about administrative reviews headed 'Administrative Review' (version 10.0). Pages 18-21 of this guidance concern the service of 'eligible decisions' and 'administrative review decisions', under the heading 'when was the decision served?'. The Court's attention was not drawn to any specific provision of this guidance.

50. The note observes that articles 8ZA and 8ZB of the Immigration (Leave to Enter and Remain) Order 2000 ('the 2000 Order') are materially identical to paragraphs SN1.3 and 1.9 of Appendix SN. This Court recently considered issues relating to the service of decisions governed by articles 8ZA and 8ZB in *Alam v Secretary of State for the Home Department* [2020] EWCA Civ 1527. Floyd LJ gave a judgment with which the other members of the Court agreed.

51. The question in *Alam* was what is required in order to 'give notice in writing' of decision curtailing a person's leave to remain. The relevant provision of the 1971 Act, section 4(1), requires the Secretary of State to exercise the power to curtail leave 'by notice in writing given to the person affected'. Article 8ZA of the 2000 Order provides for how such notice may be 'given'. One method is that the notice 'may be sent by postal service to a postal address provided for correspondence by the person or the person's representative'. Article 8ZB is headed 'Presumptions about receipt of notice'. Article 8ZB(1) provides, in short, that where a notice has been sent in that way, it is deemed to have been given to the person affected unless the contrary is proved.

52. Floyd LJ, giving a judgment with which Henderson and Phillips LJJ agreed, held in paragraph 19 that paragraph 8ZB(1) creates a rebuttable presumption that valid service had been effected on a particular day if one of the specified methods of service is used. The debate concerned what amounted to 'giving of notice'. He held that 'giving of notice' for the purposes of section 4(1) and the 2000 Order did not require the person concerned to have read and understood the notice. In paragraph 30, he said that notice can be given if the notice is put into the hands of the person affected, and that 'documents arriving by post will normally be received if they arrive addressed to the person affected at the dwelling where he or she is living, at least in the absence of positive evidence that mail which so arrives is intercepted'. He added, in paragraph 31, that the burden of providing non-receipt 'in the face of convincing evidence leading to the expectation of receipt, will not be lightly discharged. In particular it will not be discharged by evidence, far less by mere assertion, that the notice did not come to the attention of the person affected'.

Submissions

53. In his skeleton argument, Mr Blake argued that the Secretary of State had accepted that A's previous solicitor had not received decision 3 until 20 June 2018, because it had been wrongly delivered to another occupant of the offices in which the solicitor's offices were contained. The Secretary of State having accepted the facts, merely recorded that they were not enough to warrant the exercise of discretion. If time ran from 20 June, it expired on 4 July, and application 3 was in time. Alternatively, if time ran from 15 June, application 3 was only three days late. This delay was the fault of the Royal Mail, or of A's previous solicitor. The Secretary of State had fettered his discretion by not considering the exercise of discretion outside the Rules. The UT's decisions did not deal with these points.

54. In his oral submissions, Mr Kadri accepted that A was an overstayer from 27 February 2018 onwards. He did not accept, however, that application 3 was out of time. A was entitled to make application 2. The Secretary of State accepted that A was allowed to make the application, and was now, for the first time, arguing that the fact that A was an overstayer, was conclusive. The Secretary of State had not relied

on that argument before the UT and could not do so now. The Secretary of State was now relying on an interpretation of the Rules which was never intended.

55. In his reply, he submitted that the effect of paragraph 39E is that overstaying is ignored and forgiven. Application 3 followed an application which was in time. The Secretary of State had never taken this point in the earlier application for judicial review, which had been withdrawn by consent (and on the basis that the Secretary of State would reconsider decision: see the Secretary of State's letter of 18 February 2019, which I summarise in paragraph 10, above). His client spent a lot of time and money and the Secretary of State had said nothing.

56. Mr Kadri accepted that the relevant provisions enabled the Secretary of State to give notice to an applicant to his last known address by recorded delivery. The postal address given by A was '[GBI] 5, Upper King Street, Leicester.' The evidence showed that service was not effected until 20 June 2018. The presumption of valid service had been rebutted by the evidence on which A relied. That meant that A had 14 days from 20 June in which to make application 3. Indeed, that was why Males LJ had granted permission to appeal. The UT had never considered that evidence.

57. In any event, the Secretary of State had a residual discretion to do what was fair and what justice required. He relied on *R v Secretary of State for the Home Department ex p Mehta* [1975] 2 All ER 1087. A mistake by a solicitor could amount to special circumstances. A qualified for leave. People who came here to invest money and provide employment were given 14 days by the Rules even if they were overstayers.

58. Mr Malik made three points in his skeleton argument, which he supported by referring to the relevant provisions of the Rules, and the authorities.

    i. A was an overstayer when he made application 3. That meant that the Secretary of State had to refuse application under the Rules.

    ii. In any event, decision 3 had been properly served on 15 June, and application 3 was not made within 14 days of that date.

    iii. The Secretary of State has no residual discretion to grant leave under the points-based scheme ('the PBS') if there is a mandatory ground of refusal under the Rules.

59. In his oral submissions, Mr Malik accepted that A was lawfully in the United Kingdom when he made application 1. Paragraph 39E did not apply to that application. It was common ground that A was an overstayer from 27 February 2018 onwards. But he made application 2 within 14 days of the expiry of his leave, with the result that that application was protected by paragraph 39E. That was why the Secretary of State did not refuse application 2 on the grounds that A was an overstayer, but on other grounds. By 2 July 2018, by contrast, A had been an overstayer for four months. He was not, therefore, protected by paragraph 39E. The Secretary of State refused that application on the grounds that A was an overstayer. The reference to 'a previous application which was made in-time' in paragraph 39E(2)(a) was to an application which was made during the currency of A's leave. Paragraph 39E did not apply to later applications. For that reason alone, application 3 fell to be refused. The Secretary of State was not only entitled, but obliged, to refuse application 3.

60. I understood, in his exchanges with the Court, that Mr Malik acknowledged that some of the decision letters could have been better expressed. He reminded the Court that decision letters are not written by lawyers, but by caseworkers, and submitted that the decision letters should be read as a whole. He submitted, in effect, that the reasoning about service of decision 6 was surplusage, because application 3 was bound to fail on the ground that A was an overstayer when he made it.

61. At the start of his oral argument about service, Mr Malik submitted that A could not discharge the burden of showing that decision 3 had been effectively served. Contrary to Mr Kadri's submissions, the burden of proof was not on the Secretary of State. The key paragraph of *Alam* was paragraph 30. Decision 3 was received by A because it was received at the postal address provided by A. To prove the contrary, A had to show that decision 3 was not received at the address he provided. The Court should seek to give the Rules a practical effect, by reading the words in their natural meaning (*Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 2 All ER 535). As exchanges with the Court developed, he appeared to retreat somewhat from that position. In the end, it seemed to me that he accepted that the evidence showed that A did not get decision 3 until 20 June 2018. Even if, however, application 3 was made within 14 days of the service of decision 3, the last decision, it was not made within 14 days of the expiry of A's leave, or within 14 days of the service of the decision on A's last in-time application.

62. The Court should not endorse the submission that the Secretary of State had some residual discretion to exercise in a case like this. Such a discretion would undermine the PBS and make it unworkable. The suggestion that it existed is contrary to authority. He cited ten decisions of this Court to that effect in his skeleton argument, culminating in *Junied v Secretary of State for the Home Department* [2019] EWCA (Civ) 2293 at paragraph 13. *Mehta* was irrelevant. It is an old decision and concerns an express power to extend time. The authority which is in point is *Al-Medhawi v Secretary of State for the Home Department* [1990] 1 AC 876.

Discussion

63. I will now consider the three issues which underlie Mr Malik's three arguments (see paragraph 58, above). I will do so in what seems to me to be a logical order.

Was the Secretary of State bound to refuse application 3 because A was an overstayer when he made it?

64. Mr Kadri accepted that when A made application 3 (for leave to remain as a Tier 1 Entrepreneur Migrant) he was an overstayer. The effect of paragraph 245DD is clear. Leave as a Tier 1 Entrepreneur Migrant cannot be granted if the applicant is in the United Kingdom in breach of the immigration laws, unless paragraph 39E applies. The first issue is whether paragraph 39E applies. Unless it does, the Secretary of State had no power to grant leave to remain, and was obliged to refuse the application.

65. The parties agreed that the relevant part of paragraph 39E is sub-paragraph (2). The first question is whether application 3 was made following an application for leave which was made in time. I accept Mr Malik's submission that an application made 'in-time' is an application which is made before an applicant's leave expires. That is the only sensible meaning which that phrase can be given in this context (see the reference to 'in-time' in the immediately preceding sub-paragraph).

66. The last application by A which was made in time was application 1, which was refused in decision 1. A's leave, as extended by section 3C of the 1971 Act, expired on 27 February 2018, the date when the decision on A's application for administrative review of decision 1 was served on A. Application 2 was not, therefore, 'in-time' for the purposes of paragraph 39E, but was within paragraph 39E(2)(a) and (b)(iv), because it was made following the refusal of a previous, in-time application (application 1) and was made within 14 days of the service on A of the Secretary of State's decision on A's application for administrative review of decision 1. Paragraph 39E permits an applicant who has overstayed for a short time to make a further application, which will be considered on its merits. It does not extend that applicant's leave, however, and so does not extend the period within which an application may be made 'in time'.

67. Application 3 did not fall within paragraph 39E(2), however, for two reasons. First, when A made application 3, he had been an overstayer for some four months. Application 3 'followed' application 2. Application 2 was not made 'in-time' (see the previous paragraph). Application 3 was not, therefore, an application made 'following the refusal of a previous application for leave which was made in-time' for the purposes of paragraph 39E(2)(a). Second, the reference to 'the previous application for leave' in paragraph 39E(2)(b)(i) can only, in this context, be a reference to the 'previous for application for leave which was made in-time' in paragraph 39E(2)(a). Application 3 was not made within 14 days of the end of the decision-making process in relation to 'the refusal of the previous application for leave', that is, a previous application for leave which was made in time.

68. That being so, I accept Mr Malik's submission that on the correct construction of the Rules, the Secretary of State was bound to refuse application 3. For the purposes of an application for permission to apply for judicial review, the contrary is not arguable.

Did the Secretary of State have a residual discretion to grant application 3?

69. The relevant decision letters assume that the Secretary of State had some discretion to exercise. I consider, that, in context, the discretion to which the letters refer is not a discretion to allow an application despite the fact that the applicant is an overstayer. It seems to me that decision-makers seem to have assumed, wrongly, in my judgment, that the Secretary of State had a discretion to extend the 14-day period referred to in paragraph 39E(2)(b). No such discretion is conferred by paragraph 39E. The only discretion conferred by paragraph 39E is conferred by paragraph 39E(1). That is not, in any event, a discretion to extend the 14-day period, but a discretion to accept an application made within the 14-day period, if the Secretary of State considers that there was a good reason, beyond the control of the applicant or their representative why the application could not be made in time.

70. The question whether the Secretary of State had a discretion to grant an application which the Rules required him to refuse is a distinct question. That question is answered decisively in the context of the PBS, and against A, by the decisions to which Mr Malik referred in his skeleton argument, which this Court is bound to follow. The contrary is not arguable.

Service

71. In the light of my conclusions on the first two issues, this question does not arise. I consider it, nevertheless, not because it could affect the outcome of this appeal, but because it is potentially relevant to the issue of costs. I will deal with it shortly.

72. There was some oral argument about the meaning of the phrase 'postal address' in paragraph SI No 1.3(c). I do not consider that it is necessary to express a view on that issue.

73. The questions I will consider are whether, for the purposes of an application for permission to apply for judicial review, which is what the UT was, and we are, considering, it is arguable that (1) the evidence which, the Secretary of State does not now deny, was before him, did discharge the onus imposed on an applicant by paragraph SN1.9(a)(i); (2) if the onus was discharged, application 3 was made within 14 days of the service of decision 3; and (3) the Secretary of State did not engage with that effect.

74. The effect of paragraph SN1.9(a)(i) is that a decision sent in accordance with paragraph SN1.3(c) is 'deemed' to have been 'given' to the person affected, unless the contrary is proved. In other words, proper postal service is taken not only to show that the decision arrived at the address, but, further, that the decision was 'given' to the applicant. However, that assumption can be displaced by evidence to the contrary. That must include evidence showing that, in fact, the decision was not 'given' to the applicant.

75. I will assume, at this stage, without deciding, that decision 3 was validly served at the postal address given to the Secretary of State. I consider that it is arguable that A had shown, by evidence, that decision 3 was not 'given' to him (or, in this case, to his appointed agent, GBI). AKL had produced material which indicated that, instead of being 'given' to GBI on 15 June 2018, decision 3 was 'given' to Mr Tobin, who did not 'give' it to GBI until 20 June 2018. It is arguable that the material showed that Mr Tobin had no organisational connection with GBI, and that he was not authorised, expressly, or by implication, to accept service on behalf of GBI. If decision 3 was not 'given' to GBI until 20 June 2018, it is arguable that there was no valid service until then.

76. I also consider that it is arguable that the Secretary of State failed to engage with that evidence and its implications in decision 6 (or for that matter, in decision 7). If the evidence did discharge the burden of proof, then application 3 was made within 14 days of the service of decision 3, which was the end of the decision-making process set in train by application 2. However, I have already decided that application 2 was not an 'in-time' application for the purposes of paragraph 39E, so this conclusion does not help A on the substance of this application for judicial review.

77. This conclusion may, as I have indicated, be relevant to the question of costs, however. The reasoning in the Secretary of State's relevant decisions suggests to any reasonable reader that the issue of when decision 3 was served was in some way relevant to the outcome of application 2. The decisions do not clearly explain that even if A's argument about service had been correct, it did not and could not displace the refusal of application 2 which the Rules required. It may be that even if they had, A would still have brought these proceedings, but we will never know. All I will say at this stage is that if the relevant decisions had been clearer, the Secretary of State might well have been on stronger ground on the issue of costs. The incorrect assumption by the relevant decision makers that the Secretary of State had a relevant

discretion to exercise (see paragraph 69, above) appears further to undermine the position of the Secretary of State on costs.

Conclusion

78. For those reasons, I would dismiss this appeal.

    a. The Rules required the Secretary of State to refuse application 3. The contrary is not arguable.

    b. The Secretary of State had no residual discretion to grant application 3. The contrary is not arguable.

    c. A's claims that he made application 3 within 14 days of the service of decision 3, and that the Secretary of State should have acknowledged that that was so are arguable, but they cannot displace my first two conclusions.

LORD JUSTICE LEWIS

79. I agree.

LADY JUSTICE KING

80. I also agree.