Neutral Citation Number: [2021] EWCA Civ 1357

Case No: C6/2020/1423

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal Immigration and Asylum Chamber
Upper Tribunal Judge Craig

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 September 2021

Before:

LADY JUSTICE SIMLER
LORD JUSTICE ARNOLD
and
LADY JUSTICE ANDREWS

- -

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
WAQAR ALI	**Respondent**

- -
- -

Mr Zane Malik QC (instructed by **Government Legal Department**) for the **Appellant**

Mr Rashid Ahmed and **Mr Zeeshan Raza** instructed by **(Marks & Marks Solicitors)** for the **Respondent**

Hearing date: 21 July 2021

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Approved Judgment

Lady Justice Simler:

Introduction

1. This appeal concerns a narrow question of construction of the phrase "in-time" for the purposes of paragraph 39E(2) of the Immigration Rules in the context of applications for leave to remain in the United Kingdom. The question arises in relation to the Tier 1 (Entrepreneur) Migrant route but applies equally to many other leave to remain routes where applications for leave are made after the expiry of existing leave.

2. Where paragraph 39E applies "*any current period of overstaying will be disregarded*" when deciding whether the requirements that must be satisfied for the particular leave route chosen are satisfied. Paragraph 39E applies in two situations: under subparagraph (1) where the leave application is made within 14 days of expiry of leave and there was good reason why the application could not be made "in-time"; or under subparagraph (2) where the application was made following the refusal of a previous "in-time" application and within a prescribed time period. It is common ground that subparagraph (1) does not apply in this case. The question raised by the appeal is whether "in-time" in paragraph 39E(2) simply means before the expiry of a person's leave as the appellant, the Secretary of State for the Home Department ("the SSHD") contended; or whether, in a case where the Immigration Rules provide for or permit an application to be made within a period of up to 28 days after the expiry of a person's leave, the additional 28-day period is also in-time for these purposes, as the respondent contended and as the judge found below.

3. Mr Ali, the respondent to the appeal, is a national of Pakistan. He came to the UK in January 2010 with entry clearance as a student and his leave to remain was extended several times. Thereafter, Mr Ali made a series of applications for leave (dealt with in more detail below) but all were refused. Following the refusal, dated 6 March 2019, of an application for administrative review, Mr Ali sought judicial review. Following a hearing on 3 February 2020 by a decision dated 10 July 2020, the Upper Tribunal (Immigration and Asylum Chamber) (UTJ Craig) granted judicial review and quashed the decision of the SSHD refusing to grant his application for leave to remain. This appeal is a challenge to that decision.

4. Mr Zane Malik QC appeared for the SSHD and Mr Rashid Ahmed and Mr Zeeshan Raza appeared for Mr Ali. I am grateful to all counsel for their helpful submissions.

Sequence of applications

5. Although the background facts are not relevant to the resolution of the appeal, it is necessary to understand the sequence of applications made by Mr Ali in order to address the arguments advanced by the parties.

6. Mr Ali was last granted leave on 8 March 2013 to remain in the UK as a Tier 1 (Post-Study) Migrant valid until 8 March 2015. Before the expiry of his leave, on 27 February 2015, he made an in-time application as a Tier 1 (Entrepreneur) Migrant ("application 1"). This was refused on its merits by a decision dated 8 May 2015, the SSHD finding that he was not a genuine business person. The decision letter of 8 May 2015 set out his in-country appeal rights, the fact that his previous leave would be extended until

such time as any appeal was resolved, and that any new application should be made "*before your current leave expires*".

7. Mr Ali exercised his appeal rights by appealing to the First-tier Tribunal ("the FTT"). There was a hearing at which he gave oral evidence and was cross-examined. By a decision dated 23 March 2016 his appeal was dismissed and he was refused permission to appeal both by the FTT and, on renewal, by the Upper Tribunal ("the UT") by a decision dated 14 October 2016. It is common ground that having continued to be lawfully present pursuant to section 3C Immigration Act 1971 ("3C leave") until this decision, on 14 October 2016 he became appeal rights exhausted and his 3C leave came to an end. From that date his presence in the UK was without leave and he was in breach of immigration law by remaining here.

8. Mr Ali did not leave the UK. Instead, on 9 November 2016 (just less than 28 days after the expiry of his leave), he made a fresh application to remain, still as a Tier 1 (Entrepreneur) Migrant ("application 2"). The SSHD disregarded the period of overstaying between 14 October and 9 November 2016 (in accordance with the Immigration Rules as they stood at that time) because it was a period of less than 28 days and dealt with the application on its merits. However, by a decision dated 6 January 2017, application 2 was refused by the SSHD. Again Mr Ali was warned of his liability to detention and removal and of the consequences of illegally overstaying. He did not leave but instead, applied for administrative review. The refusal decision was maintained on administrative review by a decision dated 16 February 2017, though not served until 18 February 2017. The letter made clear that Mr Ali should leave the UK, failing which he would be liable to be detained and removed. It also set out in detail the consequences of illegally staying in the UK.

9. Within 14 days of the 18 February decision, on 4 March 2017, Mr Ali made a fresh application for leave as a Tier 1 (Entrepreneur) Migrant ("application 3"). Application 3 was refused by a decision dated 28 January 2019 which again set out the consequences of illegal overstaying. The basis for this refusal was paragraph 245DD(g) of the Immigration Rules which excludes those who have overstayed after the expiry of their leave unless one of the exceptions in paragraph 39E of the Immigration Rules applies. The SSHD concluded that none of the exceptions in paragraph 39E applied to Mr Ali's current application: paragraph 39E(1) did not apply because the application was not made within 14 days of the expiry of his 3C leave on 14 October 2016; and paragraph 39E(2) did not apply because his application was not made within 14 days of the refusal of an "in time application" or the refusal of an application to which paragraph 39E(1) had been applied. Although the letter appears to have awarded maximum points under each relevant heading, it also stated that the SSHD had not carried out an assessment in line with paragraph 245DD(o) as detailed in paragraph 245DD(h) of the Immigration Rules.

10. Again Mr Ali did not leave following receipt of that decision. Rather, by letter dated 6 February 2019 he sought a review of the decision to refuse application 3. By a decision dated 6 March 2019, the SSHD maintained the refusal decision for the same reasons. The SSHD explained that application 1 was in time and had been refused on its merits. The fact that Mr Ali was an overstayer was disregarded for the purposes of application 2 because the application was made within 28 days of the earlier refusal. By the time of application 3 Mr Ali was an overstayer for 5 months and his current application had been refused accordingly.

The Legal Framework

11. Section 1 of the Immigration Act 1971 ("the 1971 Act") provides 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 UK by permission and subject to such restrictions and controls as are imposed by the 1971 Act. For those without a right of abode in the UK, section 1(4) recognises that the SSHD lays down rules as to the practice to be followed for regulating their entry into and stay in the UK. The requirement to have a grant of leave to enter or remain in accordance with the provisions of the 1971 Act for persons who are not British citizens is provided for by section 3(1) of that Act.

12. 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."

13. The Immigration Rules are made by the SSHD under section 3(2) of the 1971 Act which provides for the SSHD 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…".

14. The conditions for leave to remain as a Tier 1 (Entrepreneur) Migrant are in paragraph 245DD of the Immigration Rules. This paragraph identifies a series of cumulative requirements that must be met in order to qualify for leave to remain under this route. So far as relevant to this appeal, 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."

15. This version of subparagraph (g) was inserted in the Immigration Rules by a Statement of Changes (HC 667) and, subject to certain transitional provisions, came into force on 24 November 2016. In the earlier version (in force for the four years prior to 24 November 2016) paragraph 245DD(g) of the Immigration Rules provided that "*the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded*". (The earlier version was inserted in the Immigration Rules by Statement of Changes in Immigration Rules, HC 194 with effect from 1 October 2012.)

16. Paragraph 6 of the introduction to the Immigration Rules (both versions) defines "*in breach of immigration laws*" as "*without valid leave where such leave is required, or in breach of the conditions of leave.*" In the same section "overstayers" and "overstaying" are defined as when "*the person has stayed in the UK beyond the latest of the time limit attached to the last permission granted … or the period that the permission was extended under section 3C or 3D of the Immigration Act 1971*."

17. Paragraph 39E of the Immigration Rules was originally inserted in the Immigration Rules by HC 667 and as indicated, subject to certain transitional provisions that are not material, it came into force on 24 November 2016. It only applied to applications made on or after that date (and in Mr Ali's case, only applied to application 3 accordingly). It is headed "Exceptions for overstayers" and at the material time read as follows:

> "39E. 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[1]; 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 of appeal (where applicable); or any administrative review or appeal being concluded, withdrawn or abandoned or lapsing."

18. The parties both rely on the Explanatory Memoranda accompanying the Statements of Changes to the Immigration Rules as admissible when construing these provisions. In *Pokhriyal v SSHD* [2013] EWCA Civ 1568, [2013] WLR (D) 471, Jackson LJ said:

> "43. …I do not think it is possible for the Secretary of State to rely upon extraneous material in order to persuade a court or tribunal to construe the rules more harshly or to resolve an ambiguity in the Government's favour. The Secretary of State holds all the cards. The Secretary of State drafts the Immigration Rules; the Secretary of State issues IDIs and guidance statements; the Secretary of State authorises the public statements made by his/her officials. The Secretary of State cannot toughen up the rules otherwise than by making formal amendments and laying them before Parliament. That follows from the Supreme Court's reasoning in *R (Alvi) v Secretary of State for the Home Department* [2021] UKSC 33; [2021] 1 WLR 2208."

I respectfully agree and Mr Malik QC was content to accept this approach.

The decision of UTJ Craig

19. UTJ Craig granted Mr Ali's claim for judicial review and quashed the SSHD's decision refusing application 3, holding that paragraph 39E(2) of the Immigration Rules applied to Mr Ali because application 2 was made "in-time" and application 3 was made within 14 days of the refusal of application 2. The judge concluded that application 2 was "in-time" because, although it was made after expiry of leave to remain, it was made within

[1] In the earlier version of Paragraph 39E(2)(a) of the Immigration Rules, the words "or to which sub-paragraph (1) applied" appeared after "in-time". Those words were deleted by HC 1154 with effect from 6 July 2018. The amendment is immaterial on the facts and does not apply to this case because of the associated transitional provisions.

the 28 day period permitted by the Immigration Rules then in force. UTJ Craig held at [27]:

> "27. While I understand the force of Mr Malik's submissions, which were well made and are certainly arguable, looking at the language used within the Rules as they were at the time the second application had been made, it was at that time simply provided that a period of 28 days after the expiration of an applicant's leave would be disregarded by the respondent when consideration was given to that application. There is nothing in the Rules as they were then to suggest that such an application would not be "in-time". If at that date, Counsel had been asked to advise as to the time in which the application for leave had to be made, he or she would quite properly have replied that it was within 28 days of when that applicant's previous leave had expired. In other words, in my judgement, using the language in its natural meaning, any application made within 28 days of the expiration of leave would, for the purposes of the application, be made "in-time". An in-time application, in my judgement, is an application made within the time limit provided within the Rules for that application to be considered on its merits; that was within 28 days of leave expiring, because that period of overstaying would be disregarded."

Since application 2 was made within the time allowed for by the Immigration Rules in light of the disregard, it followed that it was an "in-time" application. Application 3 was made in-time under paragraph 39E(2) because it was made following the refusal of application 2 (which was itself in-time under paragraph 39E(2)(a)) and within 14 days of the conclusion of the administrative review of application 2 on 18 February 2017 (bringing it within paragraph 39E(b)(iv)). The refusal of application 3 was therefore unlawful and fell to be quashed.

The appeal

20. Mr Malik contended on behalf of the SSHD that application 2 was not made in-time, and it followed that application 3 was not an application made "*following the refusal of a previous application for leave which was made in-time*" under paragraph 39E(2)(a) or (2)(b)(i).

21. His submissions in summary were, first, UTJ Craig's reading of paragraph 39E(2) was inconsistent with the natural and ordinary meaning of the words used: the phrase "in-time" contemplates a period prior to expiry of a person's leave to remain. Once that leave expires the person's residence is unlawful. The fact that such a person is permitted to make an application for leave to remain within a specified period of overstaying does not mean their residence is lawful. It simply means that the SSHD will not refuse the application on the ground that the person is in breach of the UK's immigration laws. An application made after expiry of leave to remain is not "in-time". That is supported by the fact that paragraph 39E is headed "Exceptions for overstayers".

22. Secondly, following *Mahad v Entry Clearance Officer* [2009] UKSC 16, [2010] 2 All ER 535, UTJ Craig's reading of paragraph 39E(2) was inconsistent with the Immigration Rules as a whole and the function they serve in the administration of immigration policy. In particular, paragraph 39E(1) refers to an application made after *"the applicant's leave expiring"* as one that is not made "in-time". It would make little sense to give the phrase "in-time" a different meaning for the purposes of paragraph

39E(2). Further, paragraph 6 of the Rules defines "*in breach of immigration laws*" as including "*residence without valid leave where such leave is required*" and accordingly, an application made after expiry of leave cannot be considered as "in-time". UTJ Craig's approach undermines the overall scheme of paragraphs 245DD(g) and 39E of the Immigration Rules by allowing Mr Ali to have a third bite of the cherry and undermines the purpose of placing greater rigour on the aim of discouraging overstaying.

23. Thirdly, UTJ Craig's approach was inconsistent with the Explanatory Memorandum to HC 667, which made changes to "*reform the periods within which applications for further leave can be made by overstayers*". Reliance was placed on paragraphs 7.45, 7.46 and 7.48 as demonstrating that "in-time" means an application made *"before any existing leave expires"*. Statements made in Parliament are relevant when it comes to the interpretation of the Immigration Rules because they are "*statements of policy not the law of the land*": see *Adedoyin v SSHD* [2010] EWCA Civ 773, [2011] WLR 564 at [87]. If there is any ambiguity, it should be resolved by reference to this Explanatory Memorandum. Reliance was also placed on *Kalsi v SSHD* [2021] EWCA Civ 184 where at [64]-[68], Elizabeth Laing LJ held that "in-time" in paragraph 39E means *"before an applicant's leave expires".*

24. Finally, Mr Malik relied on *Odelola v SSHD* [2009] UKHL 25, [2009] 1 WLR 1230, where the issue was whether an application for leave was to be decided in accordance with the version of the Immigration Rules in force at the date of the decision or at the time the application was made. The House of Lords held that unless specified otherwise, the Immigration Rules take effect whenever they say they take effect and that applies to all leave applications, including those pending and those yet to be made (see [39]). Accordingly, an application is decided according to the version of the Immigration Rules in force at the date of the relevant decision, and not when the application was made.

25. Mr Ahmed and Mr Raza for Mr Ali sought to uphold UTJ Craig's decision for the reasons he gave. They did not dispute the chronology and sequence of applications set out above. However, paragraph 39E was not in force at the time of application 2, and the phrase "in-time" which features in paragraph 39E was not a feature of the existing Immigration Rules and was not a defined term. The earlier Immigration Rules were more favourable to Mr Ali because the word "current" did not appear to qualify the period of overstaying that could be disregarded, and there was no restriction in paragraph 245DD(g) on the periods of overstaying which could be disregarded, so long as the application was made within 28 days of leave expiring.

26. The natural and ordinary meaning of "in-time" as this applied to application 2 before the amendment introducing paragraph 39E, is that to be in-time an application must be permitted and capable of being considered. Since the disregard applied to enable application 2 to be made and considered because it was made within the 28-day grace period, application 2 was "in-time". This conclusion is reinforced by the last bullet point of paragraph 7.18 of the Explanatory Memorandum accompanying HC 194 (set out below) where the contrast is made between "in-time" applications and those made in the period "more than 28 days" afterwards. If this conclusion means that there were different interpretations to be applied to the words "in-time" as between application 2 and application 3, that is a function of the fact that the Immigration Rules changed

between those applications. It also followed that there could be a difference of interpretation of "in-time" as between paragraphs 39E(1) and (2).

27. Moreover UTJ Craig's approach was supported by paragraph 7.48 of the Explanatory Memorandum to HC 667. This permitted applicants to make third applications, and to have "a third bite of the cherry". The phrase "out of time" in paragraph 7.48 was to be read in the context of the phrase "in-time" having been introduced by amendment, but it was not in force at the time application 2 was made. Finally, the narrow ambit of the appeal is reinforced by *Kalsi*, where all of the applications made post-dated 24 November 2016 and so all fell within the amended Immigration Rules and the guidance in HC 667, leading to the conclusion that application 3 in that case was "*made under the amended Rules"* and was not in-time. Mr Ali's case was different for the reasons given and *Kalsi* was not determinative of the result in his case accordingly.

Analysis and conclusions

28. The sequence of applications made by Mr Ali demonstrates that application 2 for leave to remain as a Tier 1 (Entrepreneur) Migrant was made after his existing leave had expired on 14 October 2016, and he was therefore here in breach of immigration laws. In other words, he was an overstayer; a person who had stayed in the UK beyond the expiry of the time limited leave last granted or beyond the period of his 3C leave.

29. At the time he made application 2, paragraph 245DD of the Immigration Rules then in force (in other words on 9 November 2016), made clear that an application for leave *must be* refused if the applicant does not meet the listed requirements. Those requirements included the requirement not to be in breach of immigration laws in paragraph 245DD(g), which provided:

> "(g) The applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded."

30. This provision (and others like it) had been amended by the Statement of Changes in Immigration Rules, HC 194, in October 2012 to introduce the requirement that at the time of an application for leave to remain, applicants (including under the points-based system) must not be in the UK "*in breach of immigration laws*". HC 194 defined that phrase (see page 3) as

> "without valid leave where such leave is required or in breach of the conditions of leave"

but went on to provide, in relation to a long list of application routes, that a period of overstaying for 28 days or less would be disregarded. As the Explanatory Memorandum to HC 194 (which was laid before Parliament) explained at paragraph 2.1, one of its objectives was:

> "To introduce a consistent approach to dealing with applications for leave to remain from migrants whose previous period of leave has expired, by enabling migrants whose previous period of leave has expired to qualify for leave to remain where the application is made within 28 days of the expiry of the previous leave."

31. The uniform 28 day grace period introduced into the Immigration Rules, was an exception to the general rule that applications for leave had to be made before the expiry of an existing period of leave. It recognised that the expiry of an existing period of leave, or the deadline in this context, could be missed without fault on the part of an applicant or their advisers. It introduced a consistent approach to addressing this problem by allowing up to 28 days after the expiry of leave, by way of exception, in which to make an application for leave for all types of migrants whose previous period of leave had expired. In other words, it enabled *overstayers* to make an application after the deadline for doing so had expired but only for a limited period.

32. The Explanatory Memorandum to HC 194 explained that a number of safeguards were in place to ensure that the amended rules were fair and proportionate, including:

> "7.18 …..
>
> - Where an applicant submits an application before their previous period of leave to enter or remain expires, but the application is rejected as invalid after their leave expires, the 28-day window in which the application may be submitted as an overstayer will start from the date on which the application was rejected, rather than when leave expired.
>
> - Caseworkers will continue to have discretion to consider exceptional cases. Applicants who have overstayed by more than 28 days may provide evidence of exceptional circumstances which prevented them from submitting their application in-time. ….."

Accordingly, to ensure fairness following the introduction of a consistent rule to the effect that leave would be refused to applicants who had overstayed for more than 28 days, in a 3C leave case, because leave was automatically extended pending determination of the application, the 28 days would run from the date of rejection of any application made before the original period of leave expired. But in other cases where the existing leave period had expired, caseworkers would retain a residual discretion to entertain applications in exceptional cases and in particular, for overstayers. For those who overstayed by more than 28 days, they could provide evidence of exceptional circumstances that "*prevented them from submitting their applications in-time*".

33. It was submitted on behalf of Mr Ali that the second bullet point in paragraph 7.18 supports his case and demonstrates that an application made within the 28 day period was in-time under the Immigration Rules in force at the time of application 2, the contrast being made with applications made after the 28 day grace period expired. I disagree. Read in context and in light of the other paragraphs, the reference to "in-time" applications is to applications made before the expiry of the deadline for making a valid application, namely the expiry of existing leave (including where applicable, as extended by 3C leave). That is consistent with the approach to 3C leave and the application of the 28 day grace period in 3C leave cases. All other applications (whether within or outside the 28-day grace period) made after the expiry of existing leave were out of time, but the disregard applied if made within the 28 day grace period after leave expired.

34. Thus, at least from the time of the amendments to the Immigration Rules made by HC 194 in October 2012, a breach of immigration laws, including overstaying, was consistently treated as an automatic ground for refusing leave to remain irrespective of the merits of the application. In other words, the deadline for any application for leave (subject to the exception) was the expiry of an existing period of leave. An application for leave would be refused (including under paragraph 245DD(g) of the Immigration Rules) unless brought before the expiry of the existing leave, or exceptionally within the 28 day grace period. The 28 day period could have been, but was not, expressed as extending the deadline for an application for leave that would be considered on its merits. That period expressly remained a period of overstaying with all the consequences attached to that. In that regard, it operated differently from section 3C of the 1971 Act: section 3C automatically extended a person's leave to remain in the circumstances identified, whereas the 28 day period was expressed to be a relatively short period of overstaying after expiry of leave, that would exceptionally be disregarded notwithstanding the breach of immigration laws.

35. There is nothing in the words of paragraph 245DD(g) (or the other rules amended to reflect the introduction of the 28 day grace period) that extended the time limit for making an application for leave. The deadline for making such an application remained the date of expiry of any existing period of leave (including section 3C leave) as the SSHD decision letters sent to Mr Ali in the period prior to November 2016 made clear. And although an application made within the 28 day grace period after expiry of an existing period of leave was not expressly described as "late" or "out of time", that is the inevitable inference to be drawn from the fact that the deadline remained the expiry of existing leave and was not extended in any sense.

36. This interpretation is consistent with the broad operation of the immigration laws as summarised above. A person who is subject to immigration control is only permitted to reside in the United Kingdom until the expiry of their leave to remain. If their leave is not indefinite, it is time-limited and expires on a specified date. On expiry of leave to remain, the person's residence in the UK becomes unlawful. The fact that such a person is permitted to make an application for leave to remain within a limited period of overstaying does not alter their residence status during that period or render it lawful. It simply means that the SSHD will not refuse such an application on the ground that the person is in the UK in breach of the immigration laws.

37. Once it is recognised that applications for leave to remain must (in general) be made before the expiry of a person's existing leave, and that this is the deadline within which such applications must (in general) be made if they are to be considered on their merits, it follows that an application made before expiry of the deadline is an "in-time" application, whereas an application made after the expiry of the deadline is *not* "in-time". The grace period (whether 14 or 28 days) disregard is different and distinct from the concept of an "in-time" application. An application made out of time but nevertheless within 28 days of expiry of an existing leave period, could not be refused merely because the application was not made "in-time". The 28 day grace period was an indulgence applied to *late* applications to ensure that where the lateness was relatively short and there was good reason for it, this would not operate as a ground for refusal in and of itself.

38. This interpretation is also consistent with the operation of section 3C of the 1971 Act which protects an individual who has applied to vary his or her leave before the existing

leave expires but whose application is determined *after* the period of leave expires from becoming an overstayer. It does so by expressly treating the leave as extending until all rights of appeal or review are exhausted (subject to exceptions which are not material for these purposes). The individual does not become an overstayer (in other words, a person in breach of immigration laws) until such time as the expiry of his or her 3C leave. Given the need not to be in breach of immigration laws when an application is made, the clear implication is that the deadline for any application to vary or extend a person's leave to remain is the expiry of that leave.

39. If this understanding of the position prior to the introduction of paragraph 39E is correct, the change introduced by paragraph 39E with effect from 24 November 2016 was consistent with the earlier approach and involved no radical change of policy in the introduction of the phrase "in-time".

40. It is common ground that paragraph 39E used the phrase "in-time" for the first time in the context of an application for leave to remain. These words are not defined by the Immigration Rules, but their natural and ordinary meaning is before the expiry of a relevant time limit or deadline. In the context of rules making it a breach of immigration laws to be in the UK once a period of valid leave has expired, and requiring an application for further leave to be made before that expiry, the deadline or time limit for making such application is the expiry of an existing period of leave to remain.

41. Paragraph 39E(1) of the Immigration Rules refers expressly to an application made after *"the applicant's leave expiring"* as one that is not made "in-time": an application made within 14 days of a person's leave expiring is not "in time" because if it were, there would be no need to require an explanation of why it could not be made in time. Accordingly, "in-time" in subparagraph (1) must mean before the expiry of the applicant's existing leave. This is the relevant time limit or deadline. If "in-time" in paragraph 39E(1) of the Immigration Rules has that meaning, I agree with Mr Malik that it makes little sense to give the same phrase a different meaning for the purpose of subparagraph (2) as the respondent invited the court to do, particularly in light of the history of the rules and the broader immigration law context.

42. The interpretation of "in-time" as meaning before the expiry of a period of existing leave is also supported by the reference to section 3C in paragraph 39E(2). A person can only obtain an extension of leave under section 3C if they have made an application for further or varied leave prior to the expiry of their leave to remain. Without paragraph 39E(2) (ii), the abolition of the 28 day period of grace would mean that a person who applied in time and was refused leave, and exhausted their rights of appeal, would no longer be able to make a second application without being automatically disqualified. The policy therefore maintained the ability of people in this situation to have a second bite of the cherry in terms of making a second application, but simply reduced the time available for making that second application.

43. If, as the respondent contended, the words in paragraph 39E (2) (a) *"a previous application for leave which was made in-time"* include an application made within 28 days of the expiry of previous leave because that is the time permitted by the Immigration Rules then in force, during the grace period a qualifying overstayer would be in the same position as someone who applied in time and got a section 3C leave extension. If that were the case, there would have been no need for the express reference to time running from the expiry of leave extended by section 3C in

subparagraph (b)(ii) because the remaining sub-paragraphs of 39E (2) (b), (iii) and (iv), would apply to anyone who applied before or within the grace period after expiry of their previous leave without distinction between the two categories. Put another way, the grace period (14 days) would run from the exhaustion of a person's appeal rights whether their application was made before, or up to 28 days after, their original period of leave expired. Paragraph 39E(2)(ii) would have served no useful purpose and been unnecessary.

44. This construction is also consistent with the Explanatory Memorandum to HC 667 which introduced paragraph 39E. The Explanatory Memorandum provides relevantly as follows:

> "7.45 While applications for further leave to remain for many rules-based applications are expected to be made in time, i.e. before any existing leave expires, any period of overstaying for 28 days or less is not a ground for refusal as far as those applications are concerned. This 28 day period was originally brought in so that people who had made an innocent mistake were not penalised, but retaining it sends a message which is inconsistent with the need to ensure compliance with the United Kingdom's Immigration laws.
>
> 7.46 The 28 day period is therefore to be abolished. However, an out of time application will not be refused on the basis that the applicant has overstayed where the Secretary of State considers that there is a good reason beyond the control of the applicant or their representative, given in or with the application, why an in time application could not be made, provided the application is made within 14 days of the expiry of leave.
>
> 7.47 Additionally, for those who have been present on 3C leave… the 28 day period is to be reduced to 14 days from the expiry of any leave extended by Section 3C. Without this arrangement, the abolition of the 28 day period will mean that any further application made by persons in this position will be out of time.
>
> 7.48 For those whose previous application was in-time but decided before their leave expired, or was made out of time but permitted by virtue of the provision outlined in paragraph 7.46, the 28 day period will be reduced to within 14 days of:
>
> - The refusal of the previous application for leave.
> - The expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable).
> - Any administrative review or appeal being concluded, withdrawn or abandoned or lapsing

> This is to ensure that individuals to whom these circumstances apply also have 14 days to make a further application." (Emphasis added)

45. The first sentence of paragraph 7.45 explained the situation prior to the change from 28 to 14 days. It explained that the 28 day grace period sent out the wrong message, i.e. that it was acceptable to ignore the expiry of previous leave and make the application as an overstayer, and that no adverse consequences would flow from doing so, provided the application was made within 28 days. The Immigration Rules were tightened up to address this problem. The changes made clear that "out of time" applications would only be countenanced if made within 14 days and there was a good reason for the lateness of the application.

46. I do not accept the submission made on behalf of Mr Ali that the words "*or was made out of time but permitted by virtue of the provision outlined in paragraph 7.56*" in paragraph 7.48 support his interpretation. Although the wording is clumsy and the reference to paragraph 7.56 must have been intended as a reference to paragraph 7.46, I read that paragraph as providing that a previous application made after leave has expired is made out of time but will exceptionally be permitted notwithstanding that it is out of time, provided other conditions are fulfilled. It does not say that an out of time application made within the grace period will be treated as made in-time, nor can that be inferred.

47. *Kalsi* provides further support and reinforces this interpretation of "in-time" as meaning before the expiry of the applicant's leave. At [64] and [65] Elisabeth Laing LJ held:

> "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)."

I respectfully agree.

48. It follows that the last in-time application made by Mr Ali was application 1. His leave, as extended by section 3C of the 1971 Act, expired on 14 October 2016. Although made within the 28-day grace period and therefore considered on its merits in accordance with the Immigration Rules in force at that time, application 2 was not 'in-time' in any sense. Mr Ali was an overstayer in breach of the immigration laws, and in

the UK without leave to remain because his leave period had expired. His leave had not been extended, and his application was made after the expiry of his leave and so was out of time.

49. Application 3 did not fall within paragraph 39E(2). Application 3 followed application 2. Application 2 was not made "in-time". Application 3 was not therefore made following the refusal of a previous in-time application for leave for the purposes of paragraph 39E(2) (a).

50. It follows from my conclusions as set out above, that UTJ Craig erred in law in reaching the conclusion that paragraph 39E(2) applied to Mr Ali's case. Properly understood, Mr Ali could not bring himself within any of the exceptions in paragraph 39E. Accordingly, and for the reasons just given, the decision of the SSHD refusing application 3 under paragraph 245DD(g) because paragraph 39E did not apply was lawful and properly made in accordance with the Immigration Rules. The SSHD had no discretion to do otherwise in the circumstances. There is no unfairness to Mr Ali in this result. His application for leave to remain as a Tier 1 (Entrepreneur) Migrant was properly considered on its merits by the SSHD and he had the opportunity to challenge the SSHD's refusal, again on the merits, before an independent tribunal.

51. For all these reasons, subject to the views of my Lord and Lady, I would allow the appeal, dismiss the application for judicial review and restore the refusal decision relating to application 3.

Lord Justice Arnold:

52. I agree.

Lady Justice Andrews:

53. I also agree.