Upper Tribunal
(Immigration and Asylum Chamber)

Das (paragraph 276B - s3C - application validity) [2019] UKUT 00354 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 July 2019	.....

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE BLUNDELL

Between

(1) TAPAN KUMAR DAS

(2) SUDIPTA MODAK

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(1) The validity of an application for leave to remain is to be determined with reference to the law in force at the time that it is made or purportedly made.

(2) An application which was invalid according to the law in force at the relevant time cannot be rendered valid by a subsequent change in the law.

(3) There must be adherence to proper standards of appellate advocacy in the Upper Tribunal. In the absence of a formal and timeous application to vary the grounds, professional advocates must expect to be confined to the grounds upon which permission was granted.

(4) When permission to appeal to the Upper Tribunal is granted following a successful application to the Administrative Court under CPR 54.7A ('a Cart JR'), permission is granted by reference to the grounds to the Upper Tribunal, not the grounds to the Administrative Court: Shah [2018] UKUT 51 (IAC); [2018] Imm AR 707.

DECISION AND REASONS

1.
The appellants are a married couple of Bangladeshi nationality who were born on 1 April 1980 and 23 September 1987 respectively. They appeal against a decision of the First-tier Tribunal (Judge Keith), dismissing their appeals against the respondent's refusal of their human rights claims.

2.
The first appellant's application was for Indefinite Leave to Remain ("ILR") under paragraph 276B of the Immigration Rules. The second appellant (and their three year old daughter) applied for leave to remain on family life grounds, seemingly anticipating that her husband would be granted ILR and that their applications would be assessed in that light. The respondent did not accept that the first appellant had accrued at least ten years of continuous lawful residence in the United Kingdom, however, and his application was accordingly refused under paragraph 276B(i)(a). The second appellant's application, and the application made by their daughter, was refused in light of the decision on the first appellant's case.

3.
Judge Keith agreed with the respondent's conclusion under paragraph 276B of the Immigration Rules. He found that the first appellant was not able to satisfy the requirements of 276B for the reasons given by the Secretary of State and he found that the appellants' removal from the United Kingdom would not be in breach of Article 8 ECHR. In order to understand the former conclusion, it is necessary to set out the salient parts of the first appellant's immigration history.

4.
The first appellant entered the United Kingdom on 18 January 2007. He held entry clearance as a student which was valid until 12 September 2008. On 11 September 2008, he attempted to make an application for further leave to remain as a student. He used the wrong form, however, and the application was rejected. The respondent contacted him on 11 November 2008 and he subsequently completed the correct form and submitted it to the respondent on 25 November 2008. This application was successful, and he was granted leave to remain from 5 March 2009 to 30 November 2009.

5.
The first appellant secured four further periods of leave to remain. The final period was due to end on 30 June 2017 but the respondent decided to curtail that leave so that it would expire on 29 June 2015. Before that date, the first appellant made an application for leave to remain on human rights grounds. That application was refused. The outcome was reconsidered on 8 April 2016 and the decision was maintained on 25 April 2016. The appellant lodged a notice of appeal to the First-tier Tribunal against that decision on 9 May 2016 but he failed to provide a fee for the appeal. The appeal was accordingly struck out on 1 July 2016. On 28 July 2016, however, the appeal was reinstated following representations made by the first appellant's representatives. The appeal was withdrawn on 10 January 2017, before it could be heard by a judge of the FtT.

6.
The first appellant's application for ILR under paragraph 276B was made (or purportedly made) on 28 December 2016. In her decision of 28 December 2017, the respondent concluded that the events in 2008, which we have summarised at [4] above, broke the first appellant's continuous lawful residence. She declined to exercise her discretion in respect of this gap because the first appellant had not provided any grounds upon which she was prepared to do so.

7.

The appellants were represented by a different firm of solicitors before the First-tier Tribunal. In the grounds of appeal before Judge Keith, it was submitted that the first appellant had been assured by the respondent in 2008 that his application for further leave would be treated as if it had been 'in time' when he resubmitted it using the correct form. It was also submitted that the respondent should have exercised her discretion in respect of the gap in autumn 2008. The judge recorded that the central issue was agreed to be the gap in the first appellant's lawful residence between 12 September 2008 and his application for leave to remain as a student, which was subsequently granted on 5 March 2009: [3] and [14]. It was made clear that there was a residual argument in relation to Article 8 ECHR in the event that the central issue was resolved in the respondent's favour: [16].

8.
Judge Keith analysed the evidence given by the first appellant with some care. The evidence included a contemporaneous note which had been made by the first appellant on 18 November 2008, recording a telephone call between him and a member of the respondent's staff. Having considered that evidence, the judge did not accept that the respondent would have assured the first appellant that his application would be treated as 'in-time' when it was resubmitted using the correct version of the form. He found that the application which the first appellant had attempted to make in September 2008 was 'invalid and was treated by the respondent as such.': [36]. For reasons he gave at [37]-[39], the judge did not consider there to be any breach of Article 8 ECHR in returning the appellants and their daughter to Bangladesh.

9.
The appellants' former solicitors sought permission to appeal to the Upper Tribunal. The application was refused by First-tier Tribunal Judge Hollingworth on 20 October 2018. A renewed application was made to the Upper Tribunal by a second set of representatives but that was refused by Upper Tribunal Judge Kebede on 6 January 2019. Judge Kebede noted that the grounds sought to invoke various aspects of the respondent's policies which had not been brought to Judge Keith's attention. She concluded that he had given sustainable reasons for finding that the appellants could not meet the Immigration Rules and that their removal would not breach Article 8 ECHR.

10.
With the assistance of their current representatives, the appellants made an application to the Administrative Court under CPR 54.7A. On 25 March 2019, Sir Stephen Silber granted permission to apply for judicial review. The only reason given for that decision was that 'The grounds reach the threshold for obtaining permission'. In an order dated 2 May 2019, Master Gidden noted that neither party had requested a substantive hearing and he quashed Judge Kebede's refusal of permission. On 29 May 2019, therefore, the Vice President granted permission to appeal in light of the High Court's decision, reminding the parties that the Upper Tribunal's task was that set out in s12 of the Tribunals, Courts and Enforcement Act 2007.

11.
We have thus far omitted any description of the grounds which were presented to Judge Kebede or to Sir Stephen Silber. We have done so intentionally, and in light of the fact that counsel, who appeared for the appellants before us, sought at the outset of his submissions to focus his argument very specifically on one point. He sought to submit that Judge Keith had erred in his assessment of the respondent's contention that the appellant's September 2008 had been invalid. He asked us to consider the chronology. The first appellant had applied for further leave to remain on 11 September 2018. He had used the wrong form, in that he had used the version of form FLR(S) which had been issued in April 2008, whereas he should have used the version of the form which had been issued in

August 2008. There was nothing in the respondent's bundle, however, to support the assertion that she had written to the appellant stating that his application was invalid. Counsel submitted that Judge Keith had erred in relying on the respondent's assertion that there had been any such notice when there was no evidence in support of that assertion: MH (Pakistan) [2010] UKUT 168 (IAC); [2010] Imm AR 658. Citing Mirza [2016] UKSC 63 ; [2017] 1 WLR 85 and OS (Russia) [2012] EWCA Civ 357; [2012] 1 WLR 3198, he submitted that unless there was proper notice of invalidity, the application was valid. Even if it was de facto invalid, he submitted that it was not de jure invalid. The burden was on the respondent, submitted counsel, to show that the application was invalid and she had failed to do so. The significance of this was that the application of 11 September 2008 was to be treated as valid and in-time, with the consequence that the first appellant had enjoyed statutorily extended leave under section 3C of the Immigration Act 1971 throughout the period in question. As a result, counsel submitted that the first appellant had enjoyed continuous leave between from January 2007 to January 2017 and the judge of the FtT had erred in concluding otherwise.

12.
We observed to counsel that these arguments did not feature at all in the grounds which had been presented to the FtT, the UT or the Administrative Court. At all previous stages, the grounds had proceeded on an acceptance that there had been a gap in the appellant's lawful residence as a result of the problem with the September 2008 application. There had been no application to vary the grounds, nor had there been any notice to the Tribunal or the respondent that a new point was to be taken. In the circumstances, we put this case back in the list to give counsel an opportunity to consider whether he wished to develop submissions on the grounds of appeal.

13.
On reconvening, counsel submitted that there had been no formal concession made that the September 2008 application had been invalid; that the grounds for judicial review in any event contained this 'theme'; that the respondent had been on notice that this point might be in issue; and that the respondent's current approach to the use of incorrect forms demonstrated some leniency, which was relevant to the way in which the Tribunal should consider the point: SF (Albania) [2017] UKUT 120 (IAC); [2017] Imm AR 1003.

14.
We asked counsel to consider the version of paragraph 34C of the Immigration Rules which had been in force in September 2008 and to consider whether the stipulation that an application which did not comply with paragraph 34A 'will be invalid and will not be considered' might distinguish the situation from that which arose under the Biometric Regulations in Mirza . Counsel was not able to make any submission in response. We also asked counsel about two aspects of the chronology which we have set out at [4] above. Firstly, whether it could properly be said that an appeal was pending between the date on which it was lodged without payment of a fee and the date on which it was reinstated when the fee was received. He was unable to assist us on that point. Secondly, we asked whether the appellant could properly be said to have made a valid application for ILR in December 2016, given that his leave was said to be extended by operation of section 3C of the Immigration Act 1971 at that point. Counsel was unable to assist us with this point either, although he noted that the respondent had expressed no concern in her original decision about the continuity of lawful residence in 2016.

15.
In the circumstances, we indicated that we did not need to hear from the Presenting Officer and that the appeal would be dismissed for reasons which would be given in writing.

Discussion

16.
It has recently been necessary for the Court of Appeal to underline the importance of adherence to proper standards of appellate advocacy in immigration appeals. It is not permissible, whether in that court or in the Upper Tribunal, for advocates to consider that they are at liberty to advance any argument which occurs to them, whether or not it appears in the grounds of appeal and whether or not any notice of the argument has been given to the respondent or the Upper Tribunal. [1] The grounds of appeal frame the arguments which are to be advanced. As Hickinbottom LJ said in Harverye [2018] EWCA Civ 2848, the grounds are the well from which the argument must flow: [57]. And as Lewison LJ stated in ME (Sri Lanka) [2018] EWCA Civ 1486, the arguments which can be raised on appeal are limited by the grounds of appeal for which permission has been granted: [22]. These observations apply with equal force to appellate proceedings before the Upper Tribunal. An application may be made to vary the notice of appeal but, in the absence of such a notice, advocates should expect that scope of their argument will be restricted to the grounds upon which permission was granted.

17.
Judge Kebede's decision was quashed by the order made by Master Gidden. Permission to appeal was then granted by the Vice President. The grounds upon which permission was granted were obviously those which were presented originally to the Upper Tribunal, no other grounds having been advanced to the Upper Tribunal. Two points were advanced in those grounds. Firstly, that Judge Keith had erred in failing "to consider whether discretion should be exercised to disregard the break in the First Appellant's lawful residence". Secondly, that the proceedings before the FtT had been procedurally unfair because the respondent had failed to bring relevant policy guidance to the attention of the judge. Neither of those grounds contain a glimmer of the argument which counsel sought to advance before us, which was that the application of September 2011 was valid, or was not correctly classified as invalid in circumstances in which the respondent had given no, or no adequate, notice of invalidity. It was improper, in these circumstances, for counsel to seek to advance this argument before us. In any event, the point is wholly without merit, for the following reasons.

18.
It is accepted by the appellant that he submitted the wrong application form on 11 September 2008. He submitted his application on Form FLR(S), version 04/2008. On 18 August 2008, however, a new version of the form was issued. This was version 08/2008, which was specified for use in applications made on or after that date. When the appellant came to make his application in mid-September 2008, it was the newer version of the form which was to be used.

19.
At the time that the appellant made this application, the Immigration Rules stated, at paragraph 34A(i), that an application must be made using the specified form. Paragraph 34C of the Immigration Rules was inserted by HC321 on 29 February 2008. From that date until its amendment on 9 July 2012, it provided as follows:

Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A, such application or claim will be invalid and will not be considered.

20.

Counsel sought to submit that the respondent had not given notice of the invalidity of the application, or that she had given inadequate notice. He submitted that the application was deemed to be valid until such notice was provided. He relied upon Mirza in support of that submission. As we suggested to counsel, however, the decision in Mirza is of no assistance to him.

21.
The first two appellants before the Supreme Court had failed, in making their applications for further leave to remain, to comply with the Immigration and Nationality (Fees) Regulations 2011, reg 37. The third appellant had failed to comply with the Immigration (Biometric Registration) Regulations 2008, reg 3. In respect of the first two appellants, who had failed to provide the requisite fees with their applications for leave to remain, the Supreme Court held that regulation 37 was unambiguous. It provided that an application which was not accompanied by the specified fee was not validly made. Lord Carnwath, with whom the other Justices agreed, observed at [33] that “an application which is not validly made can have no substantive effect” and could not engage section 3C of the 1971 Act as a result.

22.
In respect of the third appellant, who failed to comply with the biometric regulations, the position was different, because the requirement to enrol biometric information only arose at a later stage, on receipt of a notice from the respondent: [36]. In those circumstances, Lord Carnwath was unable to accept that the subsequent failure to provide the information should be treated as retrospectively invalidating the application from the outset, thereby nullifying the previous extension of her leave under section 3C: [37]. In respect of those regulations, the respondent had a power to treat the application as invalid and the applications only became invalid from the point that notice was provided.

23.
The appellant’s situation is materially indistinguishable from the situation in which the first and second appellants before the Supreme Court found themselves. His application was invalid when it was made, or purportedly made, because that was the outcome mandated by paragraph 34C. The respondent was not required to give notice in order to render the application invalid. OS (Russia) , or indeed Anufrijeva [2003] UKHL 36; [2004] 1 AC 604, concern the different situation in which effective notice of a substantive decision must be given before it can have legal effect. Here, the Immigration Rules stipulated at the time that the application of September 2008 was invalid when it was submitted, without any requirement of notice. In those circumstances, neither the absence nor the claimed inadequacy of the respondent’s letter from November 2008 is relevant. It is accepted that the application was on the wrong form; it was therefore invalid and was not, contrary to counsel’s submission, capable of engaging section 3C of the Immigration Act 1971.

24.
Counsel made one point which had featured in the grounds of appeal. He submitted that the respondent was now more lenient to those who sought to make applications using an incorrect form. That is indeed the case. The transition to a more lenient approach began with amendment to paragraph 34C in 2012. To the version we have reproduced above was added the following:

Notice of invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day.

25.

The Immigration Rules were subsequently renumbered and it is currently paragraphs 34A-B which cover Invalid Applications. Those paragraphs provide as follows:

34A. Subject to paragraph 34B, where an application for leave to remain does not meet the requirements of paragraph 34, it is invalid and will not be considered.

34B. (1) Where an application for leave to remain does not meet the requirements of paragraph 34(1)-(9), the Secretary of State may notify the applicant and give them one opportunity to correct the error(s) or omission(s) identified by the Secretary of State within the timescale specified in the notification.

(2) Where an applicant does not comply with the notification in paragraph 34B(1), or with the requirements in paragraph 34(G)(4), the application is invalid and will not be considered unless the Secretary of State exercises discretion to treat an invalid application as valid and the requirements of paragraph 34(3) and (5) have been met.

(3) Notice of invalidity will be given in writing and served in accordance with Appendix SN of these Rules.

26.
These amendments are of no assistance to the appellant, however. As we have explained, the Immigration Rules in force at the relevant time deemed the purported September 2008 application to be invalid. That was determinative of the position at that date and the existence of more lenient Immigration Rules or policies at a later date cannot alter the position. SF (Albania) , which was cited but not produced by counsel before us, considered an entirely different situation, in which the Upper Tribunal was invited (by the Secretary of State) to take cognisance of current policy and current facts in considering the balancing exercise under Article 8 ECHR. It is simply illogical, with respect to counsel and the author of the grounds, to suggest that today's Immigration Rules could somehow be applied to the consideration of events which occurred when a different version was in force, particularly when there is no indication that the Rules should have such retrospective effect.

27.
The respondent has a published policy which provides guidance to caseworkers on the correct approach to breaks in lawful residence such as this. It is within the Long Residence guidance dated 3 April 2017. Page 15 of that guidance states that the period of overstaying is to be calculated from the end of the last period of leave to enter or remain when an otherwise in-time application was invalid. In the appellant's case, therefore, the period of overstaying was from 12 September 2008, when his leave came to an end, until 5 March 2009, when he was granted further leave to remain. The relevant period is around five months. In such circumstances, the guidance instructs caseworkers to consider "any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying". The guidance states that threshold is high but could include delays resulting from unexpected or unforeseeable causes. Serious illness, travel or postal delays or an inability to provide the necessary documents are given as examples. The circumstances in this case are wholly different. The appellant chose to apply for further leave to remain on the penultimate day of his extant leave and he used the wrong form in attempting to make that application. There are no exceptional circumstances which even arguably fall within the guidance.

28.
In relation to the events of 2008, we conclude as follows. The application which the appellant attempted to make was invalid as a result of paragraph 34C of the Immigration Rules as then in force.

That attempted application did not engage section 3C of the Immigration Act 1971. The respondent was not required to give notice of invalidity in order to bring about the consequences in the two preceding sentences. Judge Keith did not err in the conclusion that he reached in that regard. The fact that the Immigration Rules are now more generous, in affording an applicant an opportunity to remedy such an error, is immaterial. The respondent operates a policy regarding such gaps in lawful residence. It was not drawn to the attention of the First-tier Tribunal but it would not have made any difference to the judge's assessment. We do not consider there to be any legal error in the decision of the First-tier Tribunal for these reasons.

29.
There are additional aspects of the chronology which cause us concern. These form no part of our decision, which is premised on the conclusion that the First-tier Tribunal did not err in law in its examination of the events of 2008. We are conscious of the fact that the appellant might consider making a further application for ILR under paragraph 276B in the future, however, and the observations which follow might assist a future decision maker in considering such an application.

30.
We need not repeat the events of 2016 as we have set them out at [5]-[6] above. The first point concerns the application of section 3C of the Immigration Act 1971 during the period 1 July 2016 to 28 July 2016. As we have recorded above, the appellant's appeal was struck out on the first of these dates, and was only reinstated on 28 July 2016. Our preliminary view, to which counsel had no substantive response, was that section 3C did not apply during this period, since no appeal could properly be said to be pending within the meaning of that section for these four weeks.

31.
The second point concerns the appellant's ability to make the application he made on 28 December 2016. At that stage, it is agreed on all sides that his appeal to the First-tier Tribunal had been reinstated and was awaiting a hearing date. If his leave was extended by section 3C during that time, section 3C(4) applied, and prevented him from making an application for variation of his leave to remain whilst his leave was so extended. As counsel observed, neither of these points was taken by the respondent before Judge Keith or before us but we consider it appropriate to identify them, lest they are relevant for the future.

32.
Counsel did not attempt to submit that the First-tier Tribunal had erred in its concise treatment of Article 8 ECHR insofar as it was relied upon without reference to paragraph 276B. He was right not to do so. Without reference to paragraph 276B, it is unarguably proportionate to remove the appellants and their young daughter. They will return to Bangladesh as a family and there is no proper basis for contending that such a course would give rise to unjustifiably harsh consequences.

33.
In the circumstances, the First-tier Tribunal's decision shall stand.

Notice of Decision

The appeals are dismissed and the decision of the FtT stands.

No anonymity direction is made.

MARK BLUNDELL

Judge of the Upper Tribunal (IAC)

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[1] Counsel has subsequently stated that he was specifically instructed not to apply, at the outset of the hearing, for an amendment of the grounds.