Neutral Citation Number: [2024] EWCA Civ 407

Case No: CA-2023-001822

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
DEPUTY UPPER TRIBUNAL JUDGE MONSON
CASE NO. UI-2022-0023328

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 April 2024

Before:

LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LADY JUSTICE WHIPPLE

- -

Between:

MN WOHHAB AL-AZAD	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zane Malik KC and George Mavrantonis (instructed by **City Heights Solicitors**) for the **Appellant**
Emilie Pottle (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 16 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the proper interpretation of paragraph 322(1A) of the Immigration Rules and the application of paragraph 322(5) of those rules. In essence, the appellant, Mr Al-Azad, applied on 17 January 2013 to vary his existing limited leave to remain in the United Kingdom on the basis that he satisfied the requirements for the grant of leave as a Tier 1 (Entrepreneur) Migrant. On 21 December 2018, while that application was still outstanding, the appellant sought indefinite leave to remain on the ground that he had 10 years' continuous lawful residence in the United Kingdom. The respondent, the Secretary of State for the Home Department, refused to grant indefinite leave to remain as the appellant had made false representations in the application for leave to remain as a Tier 1 (Entrepreneur) Migrant and he considered that paragraph 322(1A) required refusal in such circumstances and, alternatively, he concluded that he would have refused leave under paragraph 322(5).

2. The appellant appealed against that decision to the First-tier Tribunal ("the FTT") contending that any false representations had been made in connection with the previous application for leave to remain as a Tier 1 (Entrepreneur) Migrant, not the later application for indefinite leave to remain on grounds of long residence. He contended that paragraph 322(1A) did not apply in those circumstances and did not require the application for indefinite leave to remain to be refused. The appellant further contended that the respondent's conclusion that he would have been refused indefinite leave to remain under paragraph 322(5) because of his conduct was flawed. The FTT dismissed the appeal. The Upper Tribunal dismissed an appeal against the decision of the FTT.

3. The appellant has permission to appeal to this Court against the decision of the Upper Tribunal on two grounds, namely:

   (1) The FTT had misconstrued paragraph 322(1A) of the Immigration Rules. The Upper Tribunal's conclusion that there was no material error in the FTT's decision was, therefore, wrong in law; and

   (2) The FTT had erred in law in failing to conduct the two-stage balancing exercise required under paragraph 322(5) of the Immigration Rules. The Upper Tribunal's conclusion that there was no such error in the FTT's decision was, therefore, wrong in law.

4. By a respondent's notice, the respondent relies upon the reasoning of the FTT and the Upper Tribunal and, seeks to uphold the decision on the following additional grounds:

   (1) The alleged errors are academic because the appellant has not appealed against the FTT's finding that his application did not meet the requirements of paragraph 276B(ii)(c) of the Immigration Rules; and

   (2) Even if the FTT erred in law in relation to paragraph 322(5) of the Immigration Rules, any error was not material because any rational tribunal must have come to the same conclusion.

THE LEGAL FRAMEWORK

The Legislation

5. Subject to immaterial exceptions, non-British citizens require leave to enter the United Kingdom: see section 1 of the Immigration Act 1971 ("the Act"). Such persons may be given leave to enter or, if they are in the United Kingdom, leave to remain. Leave may be granted for a limited time or indefinitely. Where a person is granted limited leave, that leave may be varied including by extending the duration of the leave: see section 3(3) of the Act. The Secretary of State must from time to time make statements of the practice to be followed governing entry and stay within the United Kingdom and must lay those statements before Parliament: see section 3(2) of the Act. These statements of practice comprise the Immigration Rules.

6. Section 3C of the Act deals with continuation of an existing leave to enter or remain pending a decision on an application to vary an existing leave. So far as material, it provides as follows:

> "3C (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,
>
> (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), …
>
> (c) an appeal under that section … is pending, …
>
> (3A) Leave extended by virtue of this section may be cancelled if the applicant— …
>
> (b) has used or uses deception in seeking leave to remain (whether successfully or not)…

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a)…..".

The Immigration Rules

Making Applications

7. The Immigration Rules make general provisions governing leave to enter or remain in the United Kingdom. These include provisions governing how to make a valid application for leave to remain in the United Kingdom and how to apply to vary an existing leave to remain.

8. As at December 2018, the relevant rules provided so far as material that:

"**Variation of leave to enter or remain in the United Kingdom**

31. Under Section 3(3) of the 1971 Act a limited leave to enter or remain in the United Kingdom may be varied by extending or restricting its duration, by adding, varying or revoking conditions or by removing the time limit …

Multiple applications

34BB. (1) An applicant may only have one outstanding application for leave to remain at a time.

(2) If an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application.

…..

Variation of Applications or Claims for Leave to Remain

34E. If a person wishes to vary the purpose of an application for leave to remain in the United Kingdom, the variation must comply with the requirements of paragraph 34 (as they apply at the date the variation is made) as if the variation were a new application. If it does not, subject to paragraph 34B, the variation will be invalid and will not be considered.

34F. Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date of such variation.

Date an application (or variation of an application) for leave to remain is made.

34G. For the purposes of these rules, the date on which an application in accordance with paragraph 34E is made is-

…..

3) where the application is made via the online application process, and there is no request for a fee waiver, the date on which the online application is submitted…..".

Eligibility

9. The Immigration Rules set out the different bases, and the relevant eligibility criteria, on which leave to enter or remain may be granted. These include migrants who wish to establish, join or take over one or more businesses in the United Kingdom who may apply for leave to enter or remain as a Tier 1 (Entrepreneur) Migrant. The Immigration Rules also provide for the grant of indefinite leave to remain on the grounds of long residence in the United Kingdom. The relevant rule at the material time for that category of migrants was rule 276A1 and 276. They provided as follows.

"**Long Residence**
Long residence in the United Kingdom
Requirements for an extension of stay on the ground of long residence in the United Kingdom

276A1. The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and (v). …

Requirement for indefinite leave to remain on the ground of long residence in the United Kingdom

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
(ii) Having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his: …
(c) personal history, including character, conduct, associations and employment record; and …
(iii) the applicant does not fall for refusal under the general grounds for refusal. …

> **Indefinite leave to remain on the ground of long residence in the United Kingdom**
>
> 276C. Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met.
>
> **Refusal of indefinite leave to remain on the ground of long residence in the United Kingdom**
>
> 276D. Indefinite leave to remain on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met".

Refusal of Leave

10. Part 9 of the Rules deal with the grounds upon which leave to enter or remain may be refused. Some of the grounds are mandatory, that is, leave is to be refused if the requirements of one of those grounds are met. Some of the grounds are ones which should normally result in the refusal of leave but the Secretary of State may grant leave to enter or remain even if the requirements of that ground are satisfied. The relevant paragraphs in the present case are paragraph 322(1A) (which is a mandatory ground of refusal) and paragraph 322(5) (which is a discretionary ground of refusal). The material provisions applicable to applications made before 1 December 2020 provide as follows:

> **"Refusal of leave to remain, variation of leave to enter or remain or curtailment of leave**
>
> 322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain …
>
> **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused**
>
> …..
>
> (1A) where false representations have been made … in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application. …
>
> **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused**
>
> …..

> (2) the making of false representations or the failure to disclosure any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave. …
>
> (5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including … character or associations …)".

THE FACTUAL BACKGROUND

11. The appellant is a national of Bangladesh born on 1 January 1977. On 16 February 2009, he entered the United Kingdom as a student with a visa valid until 31 May 2010. He was granted limited leave to remain and had successive grants of limited leave to remain. On the last occasion, the appellant was granted leave to remain until 20 January 2013 as a Tier 1 highly skilled person.

12. On 17 January 2013, the appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. Whilst that application was pending, his previous leave to remain was extended by virtue of the provisions of 3C of the Act.

13. On 21 December 2018, the appellant applied for indefinite leave to remain on the basis of 10 years' continued lawful residence in the United Kingdom.

14. Meanwhile, the respondent had been investigating various individuals who were suspected of falsely creating businesses to assist applicants wishing to obtain leave to remain as Tier 1 (Entrepreneur) Migrants as part of an operation known as Operation Meeker. In November 2018, six individuals were convicted of fraud. Five were connected with one of two firms of immigration advisers namely Immigration4U and a second firm. The sixth individual was connected with JTC Accountancy.

15. The appellant's application for leave to remain as a Tier 1 (Entrepreneur) Migrant had been submitted on his behalf by Immigration4U. In that application, it was claimed that the appellant, together with another person, had invested a total of £51,094 (£25,547 each) in a company called A H Palak Ltd. The respondent doubted that this was a genuine business investment. Further, the respondent considered that the accounts of the company included numerous payments to companies or persons which were not genuine transactions. The appellant was invited to comment on those and other matters.

The Decision Letter

16. By letter dated 28 May 2021, the respondent refused to grant the appellant indefinite leave to remain. The respondent decided that the appellant was not engaged in a genuine business. He had formed a partnership with the other person (whom he had not previously met and who had been introduced to him by the immigration advisers) with a view to appearing to satisfy the requirements for the grant of leave to remain as Tier 1 (Entrepreneur) Migrant. That application had been fraudulently facilitated by Immigration4U. Further, the respondent considered that the information submitted by the appellant in support of the application for leave to remain as a Tier 1

(Entrepreneur) Migrant was false. The respondent first considered the application under the heading "322(1)(A) False Representations/Documents submitted in support of current application". This part of the decision letter said:

> "Consideration has been given to paragraph 322(1)(A) of the immigration rules… You have not submitted evidence to demonstrate that you were a genuine director of AH Palak involved in the day to day running of the business at the time of your application. You have not provided any evidence of a business plan to the Home Office. You provided the Home Office with a business agreement between your company and Fotik Khan. Fotik Khan is linked to the Operation Meeker fraud by its directors and by its addresses as demonstrated in our decision. You have not provided a credible explanation relating to how you obtained this business agreement and it is considered that this agreement was fabricated on balance of probabilities to make your company appear to be operating genuinely……
>
> It is considered therefore … that false representations were made in your Tier 1 Entrepreneur application dated 17/01/13, which has been varied to your current application.
>
> It is considered on balance of probabilities that you appointed Immigration4U to assist in the submission of your application and in the submission of false representations in order for your application to succeed.
>
> A refusal under general grounds 322(1)(A) is a mandatory refusal whether the false representations or documents were submitted with or without your knowledge. Nevertheless, the SSHD is satisfied that the representations and documents were submitted with your knowledge. On balance of probabilities it is considered you have failed to provide credible explanations in relation to questions asked by the SSHD, nor have you provided documentary evidence that you were a genuine entrepreneur at the time of your application."

17. Next, under the heading "322(5) – Character and conduct" the decision letter considered what it described as the credibility of the investments funds involved given that the appellant had not been able to demonstrate the source of the funds, the business agreement, the fabricated transactions and other matters. The decision letter said:

> "Accordingly, whilst account has been taken of all the known factors that would weigh in favour of granting the application, they do not outweigh the adverse impact on the public interest of allowing an application that relies on residence gained in part through dishonest conduct and false representations. The SSHD is committed to upholding high standards of conduct in the provision of evidence in support of immigration

> applications as this is essential to the integrity of the system and overall fairness of results as between applicants.
>
> This type of dishonesty in immigration purposes is a serious matter that undermines the fair administration of the immigration system. Such dishonesty would justify refusal under paragraph 322(5) of the Rules by reference to the public interest in principle notwithstanding the potential adverse consequences of such a refusal for the individual interest. In this instance, this type of dishonesty falls within the scope of paragraph 322(5) where the public interest requires refusal of indefinite leave to remain."

18. Finally, under the heading "276B (ii) (c) Character and Conduct" the decision letter said this:

> "Furthermore, consideration is also given to paragraph 276B (ii) (c) of the long residence rules under which you make your application for indefinite leave to remain. Character and conduct in the UK goes beyond criminal convictions. Having given consideration to your personal history, which includes your character and conduct in the UK, it is considered that it would be undesirable on public interest grounds to grant Indefinite Leave to Remain, and the benefits that this status would bring.
>
> Your application therefore does not meet the requirements of 276B (ii) (c)."

19. The decision letter continued by saying that "We have considered and assessed any exceptional mitigating factors you set out within your response including your personal history and length of residence". It then set out those factors. They included the fact that the appellant had worked for more than 10 years with a reputable company and had paid national insurance and tax. He had no criminal convictions. He was a member of community associations such as the Greater Dhaka Association UK and volunteered at his local Islamic cultural centre. This section of the decision letter concluded by saying:

> "Your circumstances have been considered carefully and the positive contributions you have made whilst in the UK are admirable. However, we are satisfied that based on the information you have provided, there are no such exceptional circumstances that outweigh the deception involved in the submission of a non-genuine financial transactions and business agreements in support of your application and leave outside the rules is not appropriate".

20. The decision letter then set out a summary in the following terms:

> "Summary

> Taking into account the information contained within the minded to refuse letter and your responses, the SSHD is satisfied that false representations were made within your application dated 17/01/13 for leave to remain as a Tier 1 Entrepreneur, therefore a refusal with reference to general grounds paragraph 322 (1)(A) and 322 (5) is appropriate. Your application dated 17/01/13 has been varied to your current application, therefore a refusal on general grounds paragraph 322 (1)(A) is mandatory, if false representations are considered to have been made with or without your knowledge, in order to seek leave to remain. Nevertheless, I am satisfied that you were aware of the false representations being made.
>
> Given the above, your application is refused under paragraph 276D as you do not meet the long residence requirements of 276B (ii) and (iii). It is also considered you do not meet the general ground requirements of 322 (1)(A) and 322 (5).
>
> In all cases that do not meet the rules, we will consider whether the exercise of discretion is necessary. Your representations have been considered however the Secretary of State is not satisfied that yours is a case that should be considered for the exercise of discretion".

The Appeal to the FTT

21. The appellant appealed to the FTT. In its judgment at paragraphs 3 and 4, it noted that the decision letter was particularly detailed and laid out the reasons why the respondent asserted that the appellant had used deception in making his application for Tier 1 (Entrepreneur) Migrant status in January 2013. It noted that, given that the parties were aware of the reasons given by the respondent and the Home Office evidence, the FTT would only summarise the case. The FTT then considered the allegation that the appellant had made false representations or provided false documents. It found that the respondent had established that the "appellant was knowingly involved in false representations as part of the making of the January 2013 application" (paragraph 80 of its reasons).

22. The FTT considered and rejected the argument that the 2013 Tier 1 application and the 2018 application were different applications and any false representations made or documents submitted in relation to the 2013 application did not relate to the 2018 application for the purposes of paragraph 322(1A). It held that:

> "84. Ultimately, I find that the relevant rule is 322(1A) on the basis that the law clarifies (in respect of the application of section 3C of the 1971 Immigration Act), that there is only one application at any one time until it is decided (in simple terms), see for instance the decision of the Court of Appeal in JH (Zimbabwe) v Secretary of State for the Home Department [2009] EWCA Civ 78.

> 85. Whilst it is of course true that the original Tier 1 Entrepreneur application was varied to an application for Indefinite Leave to Remain (by reference to the 10 years lawful residence provisions in 276B of the Rules) nonetheless the 'application' remains that made originally on 17 January 2013 and then eventually decided by the Respondent on 28 May 2021. On that basis the Respondent is right to say that false representations have been made in the context of 'the application'."

23. At paragraphs 90 and 91 of its reasons, the FTT considered paragraphs 322(5) and 276B of the Immigration Rules and concluded that:

> "90. Should I be wrong, and noting that the Secretary of State has raised 322(5) in any event, I also conclude that the discretion in 322(5) should not be exercised in the Appellant's favour. Whilst there is no dispute that the Appellant has associated himself with community groups and good causes in the UK, his knowing acquiescence in the making of false representations is a particularly serious matter in my view and does go materially to his character."
>
> 91. For the same reasons I also conclude that the Appellant falls foul of the character, conduct and association/public good requirements in 276B(ii)(c) and S-LTR.1.6 of Appendix FM. ….."

The Upper Tribunal Decision

24. The Upper Tribunal dismissed an appeal against the decision of the FTT. The material paragraphs of its decision are paragraphs 46 to 49 where it said this:

> "46. However, I do not consider that there was a material error in the Judge treating paragraph 322(1A) as being applicable in circumstances where it was not in dispute that other relevant suitability provisions were engaged, and it was agreed that, if deception was made out, the appellant's appeal fell to be dismissed. In short, whether or not paragraph 322(1A) was rightly relied upon by the respondent is academic."
>
> 47. Ground 6 is that the Judge did not follow the required two-stage process when assessing the applicability of paragraph 322(5) of the Rules. In addition to the concession to which I have referred earlier, whereby the appellant conceded that the appeal should be dismissed even if it was only the discretionary grounds for refusal that applied, the required balancing exercise was in any event performed by the Judge at [90] …..
>
> 48. At [91], the Judge said that for the same reasons he concluded that the appellant fell foul of the character, conduct

> and association/public good requirements in 276B(ii)(c) and S. LTR1.6 of Appendix FM.
>
> 49. In conclusion, the Judge gave adequate reasons for the findings which he made, which were reasonably open to him on the evidence, and the Decision was not vitiated by a material error of law."

THE FIRST ISSUE – THE PROPER INTERPRETATION OF PARAGRAPH 322(1A) OF THE IMMIGRATION RULES

25. Mr Malik KC, together with Mr Mavrantonis, for the appellant submitted that the provisions of rule 332(1A) only applied where the false representations had been made in relation to the application that was being considered and determined by the respondent. There was a difference in law between an original application for leave and a subsequent application. The later application replaced the earlier, or previous, application which simply disappeared and no longer existed and did not need to be determined. The requirement to refuse leave under rule 322(1A) only applied if the false representations had been made in relation to the later application not the previous application. In the present case, the false representations were made in relation to the Tier 1 (Entrepreneur) Migrant application made in January 2013. That, he submitted, was not the application that was considered and refused by the respondent. Rather, it was the application for indefinite leave to remain on the basis of long residence made in 2018 that was refused and no false representations had been made in relation to that application. Mr Malik submitted that that interpretation of paragraph 322(1A) was consistent with the Immigration Rules viewed as a whole, the guidance issued by the respondent, and existing case law and also reflected the underlying purpose of the rules.

26. So far as the Immigration Rules are concerned, Mr Malik relied upon the reference in rule 34BB to the original application being a "previous application". He also relied upon rule 34E which referred to the variation being treated "as if the variation were a new application". Further he submitted that that interpretation was consistent with the guidance given by the respondent on false representations (to which regard could be had in the light of the decision in *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [2014] Imm. A.R. 711 at paragraphs 42 and 43). That guidance provided that if false representations were made in relation to a previous application, a current application for leave should "normally be refused", i.e. it fell to be considered under the rules governing discretionary not mandatory refusal.

27. Mr Malik also submitted that that approach was consistent with two decisions of the Court of Appeal dealing with section 3C of the Act. He relied upon paragraph 35 of the judgment of Richards LJ in *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78, [2009] Imm. A.R. 499 to the effect that where an application is varied, any decision will relate to the application as varied. That, he submitted, indicated that it was the subsequent application (not the initial application) that fell for consideration. He also relied upon paragraph 50 of the judgment of Beatson LJ in *Khan v Secretary of State for the Home Department* [2016] EWCA Civ 56, [2016] 4 WLR 56 to the effect that where there has been a further application to vary leave to remain, there must be compliance with the requirements of the rules at the date of the variation as if the variation were a new application.

28. Finally, Mr Malik submitted that that interpretation would be consistent with a rational policy objective. The respondent may wish to ensure that there have been no false representations made in relation to the application that he is considering and, if there were, the application must be refused. Where the false representations were made in respect of an earlier application, the rules provided that the current application would normally be refused but left open the possibility that other matters, such as the passage of time, or the fact that the earlier false representations were not material, or other factors would justify not refusing the current application.

29. Ms Pottle, for the respondent, submits that it is clear from the Immigration Rules read as a whole that where an application is made to vary an existing leave to remain, and there is a later application, that later application takes effect as a matter of law as a variation of the initial application. Rule 322(1A) applies to the application as varied and the application, as varied, must be refused if false representations were made in relation to that application.

Discussion

30. This ground of appeal depends upon the proper interpretation of paragraph 322(1A) of the Immigration Rules. The principles governing the interpretation of provisions of the Immigration Rules are well-established. As Lord Brown (with whose judgment the other members of the Supreme Court agreed) expressed it in *Mahad v Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 38 at paragraph 10 :

> "10. There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffman said in *MO (Nigeria) v Secretary of State for the Home Department*[2019] 1 WLR 1230, 1233 para 4:
>
> > "Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."
> >
> > … Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."

31. The starting point is the Act itself. Section 3(1) provides that a person may be given leave to enter the United Kingdom or, if in the United Kingdom, leave to remain. That leave may be for a limited period or an indefinite period. If limited, a person's leave may be varied by extending the period for which the person is given leave to remain or granting indefinite leave to remain (see section 3(3) of the Act).

32. A person may apply to the Secretary of State to vary an existing leave. He may subsequently make a further application seeking to vary the existing leave on a different basis or for a different period. That is what happened here. The appellant initially applied to vary his existing leave to remain and be granted a further limited period of leave to remain as a Tier 1 (Entrepreneur) Migrant. He subsequently sought to alter the basis upon which, and the period for which, his existing leave to remain should be varied by seeking indefinite leave to remain on the basis of long residence in the United Kingdom. The issue in the present case concerns the relationship between the two applications to vary an existing leave.

33. I am satisfied that the proper analysis is that the original application to vary the existing leave to remain is itself varied by the later application. The original application remains in existence, albeit that the basis upon which leave to remain is sought has changed. It is that application, as varied, which is considered and determined by the Secretary of State. Put simply, the original application does not, as Mr Malik submitted "simply disappear". It is not replaced by the later application. It is not withdrawn. It remains in existence albeit in varied form. If false representations are made in relation to that application (i.e. that application as originally made and then as varied), rule 322(1A) requires that the variation of leave be refused.

34. That conclusion follows from a consideration of the Immigration Rules in force at the material times and the provisions of section 3C of the Act. I deal first with the relevant provisions of the Immigration Rules in force at the material time (the provisions have subsequently changed). Paragraph 34BB is headed "Multiple Applications". Paragraph 34BB(1) expressly provides that an application "may only have one outstanding application for leave to remain at a time". The remainder of the rule then addresses the question of how to resolve a situation where two (or more) applications have been made. Paragraph 34BB(2) provides that where one application has been submitted but it has not been decided, and an applicant submits another application, that later application "will be treated as a variation of the previous application". In other words, paragraph 34BB(2) provides that the later application is not a free-standing application calling for determination; rather it varies the original and undetermined application. There is nothing in the language of paragraph 34BB that says, or suggests, that the original application has been replaced or substituted and no longer needs to be determined.

35. That interpretation is also consistent with paragraph 34E. That deals with the situation where a person wishes to vary the purpose of an application for leave, i.e. he has an existing outstanding application but wishes to vary that application. The "variation" must comply with the requirements of the rules as at the date the "variation" is made "as if the variation were a new application". In other words, rule 34E proceeds on the basis that the later application is a "variation" of the original application, not a new application.

36. That interpretation of paragraph 322(1A) is also consistent with section 3C of the Act and the case law dealing with that section. Section 3C provides that the section applies (a) where a person has limited leave to remain in the United Kingdom and he applies to the Secretary of State for the variation of that leave (b) that application is made before the existing leave expires and (c) the existing leave expires without the application for the variation of the existing leave having been decided. The existing

leave is extended until the application for the variation of that leave is decided or withdrawn or any appeal is determined or the time for appealing has expired.

37. That, of course, was the situation in the present case. The appellant had leave to remain until 20 January 2013 as a Tier 1 highly skilled person. He applied, on 17 January 2013, before his existing leave ended, to vary his existing leave and to be granted a further period of leave to remain as a Tier 1 (Entrepreneur) Migrant. His existing leave as a Tier 1 highly skilled person was therefore extended under section 3C(2) until the January 2013 application to vary his existing leave was decided.

38. Section 3C of the Act provides that a person "may not make an application for variation of his leave" to remain while his existing leave is extended by virtue of section 3C. He may seek to make a variation of an application made before the end of the period for which his existing leave was granted: see section 3C(4) and (5). In other words, the Act contemplates that the application made during the period for which the existing leave had been granted will remain in place and will need to be decided (unless withdrawn) but no further applications may be made. Any further application may, however, be treated as a variation of the original application made during the period for which the existing leave was granted. But the application as made during the period for which the existing leave had been granted remains in existence (albeit now varied) and it is that application as varied which is to be determined.

39. That that is how section 3C operates is made clear by reading the whole of paragraph 35 of the judgment of Richards LJ in *JH (Zimbabwe)* where he said:

> "35. The key to the matter is an understanding of how s.3C operates. I have set the section out at para 10 above. The section applies, by subs.(1), where an application for variation of an existing leave is made before that leave expires (and provided that there has been no decision on that application before the leave expires). In that event there is, by subs.(2) , a statutory extension of the original leave until (a) the application is decided or withdrawn, or (b), if the application has been decided and there is a right of appeal against that decision, the time for appealing has expired, or (c), if an appeal has been brought, that appeal is pending: I paraphrase the statutory language, but that seems to me to be the effect of it. During the period of the statutory extension of the original leave, by subs.(4) no further application for variation of that leave can be made. Thus, there can be only one application for variation of the original leave, and there can be only one decision (and, where applicable, one appeal). The possibility of a series of further applications leading to an indefinite extension of the original leave is excluded. However, by subs.(5) it is possible to vary the one permitted application. If it is varied, any decision (and any further appeal) will relate to the application as varied. But once a decision has been made, no variation to the application is possible since there is nothing left to vary."

40. Furthermore, it is clear that a change in the basis upon which variation of the existing leave is sought, or a change from limited to indefinite leave to remain may constitute

a variation of an earlier application as appears from paragraphs 37 to 39 of Richards LJ judgment in *JH (Zimbabwe).*

41. The decision in *Khan* is also consistent with the approach of treating a later application in such circumstances as a variation of the original application. That case concerned rule 34E (in materially similar, but not identical, terms to the rule in force at the material time in this case). The decision in *Khan* is concerned with the date at which certain requirements must be met and concludes that it is the time at which a variation to an existing application is made. Paragraph 50 of the judgment recognises that the variation is treated "as if" it were a new application for those purposes. It was not seeking to characterise a second or later application in such circumstances as a free standing application that fell for determination.

42. The guidance on which Mr Malik relies does not in truth assist in determining the issue that arises in this case (even assuming it is admissible as an aid to interpretation of the rules). The reference in the guidance to "a previous application" is not addressed to the question of whether a later application is to be treated as a variation of an earlier application or as a separate and free-standing application.

43. The interpretation of paragraph 322(1A) that I consider correct does not give rise to unexpected or unusual consequences such that it would be inconsistent with any rational policy and unlikely to be what the Immigration Rules were intended to mean. Rather, the purpose underlying paragraph 322(1A) is that people who apply to the Secretary of State for leave to remain are expected to be honest in their dealings with the Home Office. If they make an application, and even if they vary the basis on which they are seeking leave, they are expected to be honest throughout the application process. If an applicant has made false representations during the application process, whether at an earlier stage, or a later stage when varying the basis upon which leave to remain is sought, it is rational for the Secretary of State to adopt rules providing that the variation of the existing leave to remain should be refused. True it is, as Mr Malik submitted, the Secretary of State could have adopted a different policy and provided for discretionary rather than mandatory refusal in circumstances such as the present case. The fact that a different policy objective could have been adopted is not, however, a reason for giving paragraph 322(1A) a different meaning from that which emerges from a consideration of the language of paragraph 322(1A) viewed against the background, including the Immigration Rules as a whole and the function that paragraph 322(1A) is evidently meant to fulfil in the functioning of the policy.

44. For those reasons, the application in the present case was that made in January 2013. The latter 2018 application involved a variation of that earlier application to change the duration of and basis upon which the variation of the existing leave to remain was sought. The 2013 application did not cease to exist and it was not replaced. It was not withdrawn. It remained in place, albeit varied, and had to be determined. Consequently, the FTT was right to conclude that the 2013 application, although varied, was the one decided by the respondent on 28 May 2021. False representations were made in relation to that application at one stage of the application process and the application therefore had to be refused by virtue of paragraph 322(1A). The Upper Tribunal did not err in dismissing the appeal against the decision of the FTT. Ground 1 of the appeal fails.

THE SECOND ISSUE – PARAGRAPH 322(5)

45. Mr Malik submitted that paragraph 322(5) involved a two-stage balancing exercise in accordance with the decisions of this Court in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019 1 WLR 4647 and *Yaseen v Secretary of State for the Home Department* [2020] EWCA Civ 157, [2020] 1 WLR 1359. He submitted that, in dismissing the appeal in this case, the FTT considered the conduct in question but did not consider the positive factors in favour of the applicant and did not ensure that a two-stage balancing exercise had been carried out. Mr Malik submitted that there were a number of factors that would be relevant to that exercise. They included when the misconduct occurred (in the case, many years before the decision), the length of residence in the United Kingdom, the fact that residence was lawful, the period of time the appellant had been absent from Bangladesh and any mental health issues. The FTT analysis at paragraph 90 of its decision did not carry out that balancing exercise adequately.

46. Ms Pottle submitted that the FTT had carried out the relevant balancing exercise. Its reasons, although brief, were adequate. The FTT was well aware of when the misconduct had occurred and that the applicant had been lawfully in the United Kingdom for over 10 years (and had been away from Bangladesh for that period) as the basis for seeking indefinite leave was that the appellant had 10 years' continuous lawful residence in the United Kingdom. No mental health issues relevant to the balancing exercise had been identified before the FTT. In those circumstances, Ms Pottle submitted that the Upper Tribunal was correct to conclude at paragraph 47 of its judgment that the relevant two-stage balancing exercise had been performed by the FTT.

Discussion

47. As explained above, the application to vary the existing leave to remain had to be refused as the case fell within paragraph 322(1A). In those circumstances, it is not strictly necessary to deal with the alternative possibility of a discretionary refusal under paragraph 322(5). As the point has been argued, and as that was an alternative basis for the decision of the respondent in refusing indefinite leave to remain and the FTT also dismissed the appeal on that basis, it is appropriate to set out my conclusions briefly on that issue.

48. It is accepted in the present case that a two-stage balancing exercise had to be carried out in the sense that the misconduct of the appellant had to be weighed against any positive factors indicating that the variation of leave to remain should not be refused. It is not submitted by the respondent that the misconduct was so extreme that on any view the balance must fall against the appellant.

49. The decision of the FTT needs to be considered in context. As the FTT said at paragraph 3 and 4 of its decision, the decision letter was detailed and that the parties were aware of it. Further, it is clear that the FTT knew that the misconduct occurred in 2013, and that the appellant had been lawfully in the United Kingdom (and absent from Bangladesh) for well over 10 years (indeed the basis upon which he sought indefinite leave to remain was 10 years continued lawful residence). There was no suggestion in the case put to the FTT that mental health issues were relevant to the balancing exercise. Rather the appeal to the Upper Tribunal on this issue related to

whether the FTT had adequately dealt with the appellant as a witness because of his alleged vulnerabilities (and that is not a ground of appeal before this Court). In the circumstances of this case, therefore, the Upper Tribunal was entitled to find that the balancing exercise had been adequately performed. The FTT appreciated that the appellant had associated himself with community groups and good causes (and the details were set out in the decision letter) but considered that the appellant's "knowing acquiescence in the making of false representations is a particularly serious matter" and was not outweighed by the positive factors. I would therefore dismiss ground 2 of this appeal.

THE RESPONDENT'S NOTICE

50. By the respondent's notice, the respondent sought to argue that the appeal was academic as the appellant had not appealed the finding that the appellant failed to meet the requirements in paragraph 276B(ii)(c) and so would not qualify for indefinite leave to remain in any event (irrespective of whether leave was refused under paragraphs 322(1A) or 322(5)).

51. It is correct that the appellant did not seek to appeal against the finding in relation to paragraph 276B(ii)(c) and did not apply to amend the grounds in the light of the respondent's notice. Mr Malik did apply to amend the grounds of appeal during the afternoon on the day of the hearing. He submitted that the issue in relation to paragraph 276B(ii)(c) concerned essentially the same issue as arose in relation to paragraph 322(5), namely whether an adequate balancing exercise had been carried out and that had been foreshadowed in the appellant's skeleton argument. Ms Pottle opposed the application to amend on the grounds that it was too late to amend, that the consideration relating to paragraphs 276B(ii)(c) and 322(5) differed, and she had had no opportunity to take instructions in relation to the issue as the application to amend was not made until the afternoon of the day of the hearing.

52. It is not necessary to deal with the respondent's notice or the application to amend. The fact is that the appellant's application to vary his existing leave had to be refused as the case fell within paragraphs 322(1A). The appeal would fall to be dismissed on that ground in any event.

CONCLUSION

53. Paragraph 322(1A) applies to an application which has itself been varied by a subsequent application seeking to change the basis on which the variation of the existing leave to remain is sought. It is that application, as varied, which is considered and determined by the Secretary of State. Where an applicant has made false representations in relation to that application, paragraph 322(1A) applies and the application must be refused. Further, the Upper Tribunal was entitled to find that paragraph 322(5) had been properly applied in the present case. For those reasons, the Upper Tribunal was correct to dismiss the appeal. I would dismiss this appeal.

LADY JUSTICE WHIPPLE

54. I agree.

LORD JUSTICE BAKER

55. I also agree.