Neutral Citation Number: [2024] EWCA Civ 81

Case No: CA-2022-00156

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
UT JUDGE FRANCES
JR/475/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2024

Before :

LADY JUSTICE KING
LADY JUSTICE WHIPPLE
and
MR JUSTICE COBB

- -

Between :

THE KING **on the application of** **(1) GUREN ZHOU** **(2) YI FEI** **(3) ZIYU ZHOU**	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Michael Biggs (instructed by **Eldwick Law**) for the Appellants
Tom Tabori (instructed by **Government Legal Department**) for the Respondent

Hearing dates : 24 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Cobb :

Introduction

1. This is an appeal against the decision of Upper Tribunal ('UT') Judge Frances, dated 22 July 2022, by which she refused the Appellants permission to apply for judicial review. By their application before the UT, the Appellants had sought to challenge decisions of the Respondent dated 28 July 2021 and/or 22 February 2022 deferring a substantive decision on their applications (dated 3 June 2021) for leave to remain in the United Kingdom. The First and Second Appellants are husband and wife; the Third Appellant is their daughter. They are all Chinese nationals. The appeal is brought with permission of Males LJ dated 24 July 2023.

The factual background

2. The First Appellant arrived in the United Kingdom from China in August 2005, with leave to enter until 2006. He was permitted to remain in this country under a sequence of subsequent permissions until April 2018. The Second Appellant joined him in 2010. The Third Appellant was born in China but has in fact lived in this country for most of her life. In March 2018, the First Appellant applied for indefinite leave to remain as a Tier 1 General (Migrant) Worker under the points based system; this application was refused. He applied for administrative review of that decision which was also refused. In 2019 he applied for judicial review of the decision, but this application was withdrawn by him in March 2020.

3. On the 24 March 2021, the First Appellant was arrested with others on suspicion of money laundering over an 18 month period; he was interviewed by the police. He was released pending further investigation and charging decision. He denies involvement in any wrongdoing.

4. On 3 June 2021, the First Appellant applied for leave to remain in the United Kingdom as a Tier 2 Skilled Worker (a financial analyst). I shall refer to this as the 'June 2021 application'. He was sponsored by a financial services company which wished to employ him; the Second and Third Appellants simultaneously applied for leave to remain as the First Appellant's dependants. By this time, all the Appellants had been overstayers under the Immigration Act 1971 for many months; from June 2019 they were on immigration bail.

5. In response to that application, on 28 July 2021 the Home Office (Work Sponsored Routes Team) sent a communication to the First Appellant in these terms:

> "Although we would normally decide your application within eight weeks from the date it was submitted, unfortunately this is not going to be possible in your case.

> This is because records show that you have an outstanding criminal prosecution. No decision will be taken on your application until this matter has been concluded…" (Emphasis by underlining added).

6. It is now accepted by the Respondent that the Home Office team was wrong then to rely on an 'outstanding criminal prosecution' as a reason for deferring the decision; no charging decision had then (or indeed even now) been made in relation to the matters in respect of which the First Appellant had been arrested, and there was no outstanding or pending criminal prosecution. It is also clear (and rightly conceded on behalf of the Respondent in the UT) that the First Appellant's situation did not fall within the Home Office's 'Impending Prosecutions' Guidance (2016) (then in force). That guidance was supplemented by the Home Office's guidance 'General Grounds for Refusal – Criminality' of November 2021, and replaced in August 2022 by the Home Office's guidance 'Pending Prosecutions'. In the response to the judicial review before the UT in 2022 the Respondent referred to this explanation for her decision as a "technical breach", given that, irrespective of the import of the 2016 Guidance, there was and is in fact an outstanding criminal investigation, which she maintained gave her an implied power to defer determination of the application for leave to remain. I return to this later.

7. On 15 February 2022, the Appellants served on the Respondent a pre-application letter of claim. This provoked a reply on 22 February 2022 in these terms:

> "… Although we would normally decide your application within eight weeks from the date it was submitted, unfortunately this is not going to be possible in your case. This is because your application raises exceptionally complex issues and we require further time to consider your case thoroughly and reach a decision.
>
> I am sorry for the delay in dealing with your application and for the inconvenience this is causing. Please be assured that we are doing all we can to make a decision on your case as quickly as possible.
>
> We expect to make a decision on your application by 5th April 2022, but we will write to you again if this is not going to be possible." (Emphasis by underlining added).

8. On 4 April 2022, the Appellants issued proceedings for judicial review seeking to challenge the decisions of 28 July 2021 and 22 February 2022 "in the absence of a decision on their pending immigration applications". The Respondent filed an acknowledgement of service and set out her grounds for contesting the claim.

9. On 10 May 2022, the National Crime Agency ('NCA') e-mailed the Respondent as follows:

> "I can confirm that on the 10/05/2022 a case file … was submitted to [a] Senior Crown Prosecutor … for a decision to charge. This is regarding money laundering offences

> believed to have been committed by [the First Appellant] and others. After consultation with the Crown Prosecution Service ('CPS'), a provisional date of late August 2022 was given for a decision to be made by the lawyer. Obviously this is subject to change and is dependent upon further consultations with the CPS and lawyers etc. A Released Under Investigation (RIU) letter will be sent in due course to [the First Appellant] and others … I am aware that this matter has taken some considerable time to reach this stage, but I am confident of a positive response from the CPS. Thank you for your patience in this matter and I will update as and when I am able".

10. On 7 June 2022, UT Judge Sheridan considered the Appellants' application for permission to apply for judicial review on the papers. He refused it. The Appellants renewed their application for an oral hearing.

The Upper Tribunal's decision

11. Following an oral hearing on 22 July 2022, UT Judge Frances refused the Appellants' renewed application for judicial review. The order reads as follows:

> "(1) The applicants challenge the respondent's ongoing failure to decide their applications for further leave to remain as a skilled worked and dependants made on 3 June 2021. The respondent wrote to the applicants on 28 July 2021 stating the applications would not be decided within the standard processing time of eight weeks owing to 'an outstanding criminal prosecution'.
>
> (2) It is not in dispute the applicants' leave to remain expired on 8 October 2018 and they have remained in the UK without leave since then. On 24 March 2021, the first applicant was arrested on suspicion of money laundering and released under investigation pending a Crown Prosecution Service charging decision.
>
> (3) The alleged mistake of fact is not material given the respondent's guidance: 'grounds for refusal criminality' (the guidance) is not relied on by the respondent.
>
> (4) Following *R (on the application of X and others) v SSHD* [2021] EWCA Civ 1480, the respondent has an implied power under the Immigration Act 1971 to defer, or delay, taking a decision on an application for leave to remain. The issue is whether that power had been exercised lawfully. I am not persuaded that this decision can be distinguished on its facts or on the basis the court did not consider the guidance.

> (5) The investigation into money laundering offences is relevant to the first applicant's character and conduct. There is evidence that the investigation is ongoing and the case file has been submitted to the Senior Crown Prosecutor for a decision to charge.
>
> (6) The application for further leave was made out of time. Any prejudice or detriment suffered by the second and third applicants as a result of being subjected to the 'hostile environment' was not caused by the respondent's delay. On the facts asserted, Article 8 is not engaged.
>
> (7) The respondent's delay in taking a decision on the applications for leave to remain was not arguably unlawful or irrational."

12. It is against this decision that the Appellants now appeal.

13. The application for permission to appeal was placed before Males LJ on 23 June 2023. Doubtless he was mindful of the indication from the NCA in May 2022 (see §9 above), so he directed the Respondent to file a statement in accordance with CPR PD52C.19 within 21 days, to advise whether the First Appellant had indeed been charged with any (and if so what) offence. On 17 July 2023, the Government Legal Department on behalf of the Respondent replied by letter:

> "… the CID records, updated on 10 July 2023 states: - 'Impending Prosecution'. Please do not casework, place case on hold new checks 6 weeks".

The letter contained a request for more time to provide the key information, but in fact no further information was provided.

14. Males LJ gave permission to appeal on 24 July 2023; he was of the view that "it is arguable that there has been more than enough time for the prosecuting authorities to decide whether to charge the [First Appellant] and that a decision on the application should now be made".

15. On 9 August 2023, the Appellants issued a further application for leave to remain in the United Kingdom (the 'August 2023 application'). This is expressed in the accompanying letter as an application "to vary their outstanding application for [Leave to Remain]". In this application, the Second Appellant is the lead applicant; the First and Third Appellants apply as her dependants. The application is made under Article 8 ECHR (the 'family route'). Mr Tabori told us that this application will therefore be processed by a different team from the team who determined the June 2021 application.

16. In respect of the August 2023 application, Mr Tabori advised us that it is likely that the Respondent will again defer a decision in relation to the First Appellant's application (in which he now applies as a dependant) given the ongoing police investigation and the absence of a charging decision. In this regard, he added that on 18 January 2024 (i.e., four working days before the appeal hearing) the NCA

apparently provided further evidence to the CPS in relation to its criminal investigation concerning the First Appellant, and (once again) it is said that a decision on charge is soon to be expected. Mr Tabori could not say how the Respondent would be likely to respond to the new application by the Second and Third Appellant.

Review or Re-Hearing

17. Mr Biggs invited us to consider dealing with this appeal by way of a re-hearing of the application for permission to apply for judicial review, rather than a review of the decision of UT Judge Frances (per CPR rule 52.21(1)(a)/(b)). He relied on the case of *Audergon v La Baguette Ltd & others* [2002] EWCA Civ 10 at [83](3) ("the decision to hold a rehearing must inevitably rest on the circumstances of the particular appeal"). Insofar as any assistance in deciding that question is available, some is to be found in *Asiansky Television plc & Anor v. Bayer-Rosin* [2001] EWCA civ 1792 (cited extensively in *Audergon*) wherein at [82] Dyson LJ, as he then was, commented that a rehearing may be appropriate:

> "… if the judgment of the lower court is so inadequately reasoned that it is not possible for the appeal court to determine the appeal justly without a rehearing; or if there was a serious procedural irregularity in the court below so that, for example, the appellant was prevented from developing his case properly".

18. The request for a re-hearing in this case was plainly driven by the Appellants' contention that it would be in the 'interests of justice' for this court to consider the continuing deferment of the substantive decision by the Respondent on the Appellants' application for leave to remain, while awaiting a charging decision in respect of the First Appellant. However, the submission failed, in my judgment, to take proper account of the fact that any re-hearing of the application for permission to apply for judicial review by this court would need also to consider the impact of the August 2023 application, as to which, crucially, the Respondent has not yet made any decision. A re-hearing in this case would in the circumstances be largely, if not entirely, futile. I was therefore unpersuaded that it is in the interests of justice to proceed in the way proposed by Mr Biggs. I am of the view that the appeal should be determined, conventionally, by way of review of the decision of the UT.

The August 2023 application and this appeal

19. Mr Tabori raised the preliminary point that the August 2023 application had effectively rendered the appeal academic. The appeal before us concerns the Respondent's decisions to defer determination of an application which will, in light of more recent events, in fact no longer be considered. He suggested that this short point should summarily dispose of this appeal. He relied on rule 34BB of the Immigration Rules which provides that:

> "(1) Where an applicant has an outstanding application for entry clearance or permission to stay which has not been decided ("the previous application"), any further application for entry clearance or permission to stay will be treated as an application to vary the previous application and only the

> most recent application will be considered" (Emphasis by underlining added).

20. Rule 34BB is buttressed by the Home office Guidance on "Validation, Variation, Voiding and Withdrawal of Applications" (Version 7.0) ('the Variation Guidance') which provides that:

> "Where a person submits an application under the Immigration Rules and has a previous application that has not yet been decided, the latest application varies the previous application and only the new application will be considered" (Emphasis by underlining added).

21. The rules make clear that a second or subsequent application will trigger a notification from the Respondent to an applicant to the effect that "the application is being treated as an application to vary and that any previous application will have been varied" (rule 34BB(4)). It will also generate a refund of the fee of the first application (page 23 of the Variation Guidance). We were told that these steps have not in fact yet been taken in this case because of an apparent ongoing digital technology issue at the Home Office.

22. Mr Biggs accepts that his clients' application for leave to remain will now be considered on their August 2023 application, which of course post-dates the decision under appeal. He argues that it is still relevant for this court to consider the decision of the UT to refuse the application for permission to bring judicial review against the Respondent's decisions on the June 2021 application; he contends that the earlier decisions will be relevant to (and may possibly be re-stated in respect of) the August 2023 application, and ought therefore to be considered on this appeal.

23. Although raised as a preliminary point, Mr Tabori did not seek to persuade us to rule on this discretely before considering the merits of the appeal. We therefore heard the arguments on the appeal. I set out my conclusions on this preliminary point at §32 below.

The arguments

24. It is the Appellants' case that UT Judge Frances was wrong to conclude that there was not a properly arguable case when she refused their applications for permission to apply for judicial review of the Respondent's decision(s) to *defer* determining their applications (June 2021) for leave to remain in the United Kingdom.

25. While the Appellants accept that the Respondent has an incidental power to defer decision-making (acknowledging the import of the Court of Appeal's decision in *Regina (X and others) v Secretary of State for the Home Department* [2021] EWCA Civ 1480) ('*R (X) v SSHD*'), they nonetheless asserted that in order to be lawful, the decision to defer must take full account of the individual facts of the case, and the delay caused by the deferment must not be unreasonable in all the circumstances. In this case, the Appellants contended that the UT Judge failed to take proper account, when rejecting their application, of the fact that they are currently subject to the so-called 'hostile environment' which includes severe restrictions on the right to work, rent accommodation, access to the National Health Service, and/or the ability to have

a bank account; reliance was placed in this regard on *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673 at [81] and [91] ('*Balajigari*'). They also contended that the UT Judge was wrong to reject the Article 8 rights of the Appellants; Mr Biggs accepted that although not specifically pleaded, the Article 8 rights fell to be considered "as a corollary" of his arguments about the 'hostile environment'. They further asserted that the UT Judge failed to consider the absence of any reference by the Respondent in her decision to the best interests of the Third Appellant (in this regard, relying on section 55 Borders, Citizenship and Immigration Act 2009).

26. Mr Biggs further argued that the UT Judge was wrong to reject as unarguable the Appellants' case that the Respondent's *delay* in making the substantive decision on these facts was unlawful (in the sense that it was in breach of an implied statutory obligation to make a decision within a reasonable time) or unreasonable (in the *Wednesbury* sense). The point on delay was not front and centre of the pleaded grounds before us, but I accept that it was incorporated into the Grounds of Appeal by way of cross-reference to the Grounds of Claim before the UT. He emphasised passages from Andrews LJ's judgment in *R (X) v SSHD* (notably at [52]) and the judgment of Carnwath LJ, as he then was, in *R (S) v SSHD* [2007] EWCA Civ 546 at [51] ('*R (S) v SSHD*'). It is right to note that the decisions of both UT Judge Sheridan and UT Judge Frances referred to the "ongoing failure" of the Respondent to decide the Appellants' applications for leave to remain. Indeed such a finding (i.e., of ongoing failure) was essential in the court below (albeit not now) given that the Appellants would otherwise have been significantly out of time in launching their application for judicial review against the Respondent's first (28 July 2021) decision (CPR rule 54.5).

27. The Grounds of Appeal further included complaint that the Respondent had initially allegedly unlawfully deferred the decision because the First Appellant was the subject of an 'outstanding criminal prosecution'; it was said that she had misapplied the 2016 Guidance. The Appellants now accept that the Respondent was entitled to take into account the arrest of the First Appellant, and the ongoing police investigation into alleged criminal activity, irrespective of the precise terms of the 2016 Guidance. In any event, the Respondent's second decision (22 February 2022) made no reference at all to any alleged 'prosecution' of the First Appellant.

28. Mr Biggs finally submitted that if as a consequence of the judicial review leave to remain had been granted, it could later be curtailed under Part 9 of the Immigration Rules; this was rightly not pursued with any vigour.

29. On behalf of the Respondent, Mr Tabori argued that the Respondent possesses a number of implied ancillary and incidental administrative powers to facilitate the effective administration of the system of immigration control; these are not expressly spelt out in the Immigration Acts: *R (New London College Ltd) v SSHD* [2013] 1 WLR 2358 at §28-29 (Lord Sumption). He argued that those implied powers include a power to decide when and how applications for leave to remain are to be dealt with, including a power in appropriate circumstances to defer taking a decision on an application: see also *R (X) v SSHD*, §31 (Lewis LJ). Exercise of that power is subject to judicial review on established public law grounds (ibid.).

30. He observed that the claim based on Article 8 ECHR was not heralded in the Grounds of Appeal. Insofar as the Appellant purports to rely on this now, he argued that reliance on Article 8 in this case is misplaced because the claimed interference is self-induced; before their June 2021 application for leave to remain, the Appellants had already put themselves in a position of being unable to return to the United Kingdom following any trip to China. They had already been refused indefinite leave to remain. They were subject of notices of liability to removal. He referenced the *Gillberg* principle (cf. *Gillberg v Sweden*, application no 41723/06, decision dated 3 April 2012 [GC]), namely, that Article 8 cannot be relied on in order to complain of personal, social, psychological and economic suffering which is a foreseeable consequence of one's own actions, such as the commission of a criminal offence or similar misconduct: *Denisov v Ukraine* (Application no. 76639/11) [GC], §§98 and 121. Moreover, he argued, the claimed interference is *de minimis* in the case of the Third Appellant given that at its height, the evidence of the First Appellant is that she has "become rather withdrawn and anxious due to these ongoing issues".

31. Mr Tabori further contended that any alleged 'error of fact' which may be deduced from the 28 July 2021 decision was immaterial because, as the UT Judge held, a power to defer a decision exists behind the investigations of third party agencies; this was identified by the Court of Appeal in *R (X) v SSHD* §31 and was held to have been rationally exercised on the very similar facts of that case.

Discussion and conclusion

32. I turn, first, to the Respondent's preliminary submission that the appeal is now academic in light of the August 2023 application (see §19-23 above). Counsel agree, and the position is indeed clear, that the August 2023 application has materially varied the June 2021 application; indeed, the grounds on which the Appellants' application for leave to remain is based are now completely different. I agree with Mr Tabori that the 'clock effectively stopped' on the challenge to the deferment of the decision on the earlier application (and associated delay) on 9 August 2023. Both counsel agree that the Respondent will now be required to make his substantive decision on the Appellants' application for leave to remain in the United Kingdom on the basis the 'family route' rather than the 'skilled worker route'. It seems to me that the decision(s) on the June 2021 application, which were the focus of the earlier application for permission to apply for judicial review in the UT, are now likely to be irrelevant, or largely so. For these reasons, I found myself persuaded to Mr Tabori's submission that the August 2023 application has rendered the appeal academic.

33. Had this preliminary point been taken discretely, and had it required a separate and immediate determination, it follows that this court may well not have gone on (had we followed the direction of Lord Slynn in his speech in *R v Secretary of State for the Home Office ex parte Salem* [1991] 1AC 450 (HL) at pp.456-457) to hear, let alone determine, the merits of the arguments on the appeal. However, the point was taken within, and as part of, the appeal hearing itself, and I therefore address the arguments on the merits which were ably presented on both sides.

34. In my judgment, UT Judge Frances was not just entitled, she was indeed right, to found her refusal to give permission to the Appellants to pursue judicial review on the basis of this court's judgment in *R (X) v SSHD* (see §11(4) above). In almost every sense, the judgments in that case answered the Appellants' arguments notwithstanding

the somewhat different factual context. Lewis LJ recognised and articulated (at [31]) the Respondent's power to act in ways expressly authorised by the Immigration Act 1971, and/or to act in ways which are ancillary or incidental to the exercise of the functions conferred by the Act. At [32] he added:

> "The function of regulating immigration in this way necessarily involves the Secretary of State having power to establish a system for receiving, considering and deciding on such applications. It includes a power to decide when and how such applications are to be dealt with including a power in appropriate circumstances to defer taking a decision on an application. That power is ancillary or incidental to the exercise of the functions relating to the administration and control of immigration conferred by the Act. The exercise of that power will be subject to review in accordance with the established rules of public law to ensure that the decision is not irrational and does not run counter to the purposes of the Act. A power to defer a decision pending the outcome of a criminal investigation is, therefore, incidental and ancillary to the Secretary of State's functions under the Act. There is no rational basis for interpreting the scope of the power to defer a decision as excluding deferrals pending the outcome of a criminal investigation. Rather, the question is whether, on the facts of a particular case, the exercise of a power to defer taking a decision on an application (whether pending the outcome of a criminal investigation or some other reason) is a lawful exercise of that power". (Emphasis by underlining added).

35. On the facts of this case, as on the facts in *R (X) v SSHD*, it is relevant to note further what Lewis LJ said at [45]:

> "… there is a rational link between the reasons for deferring a decision on the applications for leave and the grounds upon which leave may be granted or refused. Rule 245DD(1) provides that the application for leave to remain must not fall for refusal under the general grounds. These include the ground in paragraph 322(5) of the Rules, namely the undesirability of permitting the person concerned to remain in the United Kingdom in the light of "his conduct … character or associations". The information emerging in the criminal investigation into an alleged conspiracy to commit fraud or alleged money laundering was, potentially, relevant to the first claimant's conduct, character or associations. The respondent is entitled to make further enquiries or seek further information if she considers that that information is potentially relevant to the decision to be taken". (Emphasis by underlining added).

36. I was unpersuaded by Mr Biggs' argument that there is any material difference on the facts of this case between an implied statutory duty on the Respondent to make a

decision in a reasonable time or a duty to act reasonably in a *Wednesbury* sense. Insofar as he based his argument on Andrew LJ's judgment in *R (X) v SSHD*, I was not convinced that her judgment bore out his interpretation. In any event, as Lewis LJ (with whom Moylan LJ agreed) said in *R (X) v SSHD* at [32], the real question is whether on the facts of a particular case:

> "… the exercise of a power to defer taking a decision on an application (whether pending the outcome of a criminal investigation or some other reason) is a lawful exercise of that power."

37. What is lawful will be 'fact-sensitive', and what is a 'reasonable time' will inevitably involve a degree of elasticity or 'flexibility' (per Carnwath LJ at [51] in *R (S) v SSHD*). On the facts of this case, and given the apparent seriousness of the matters in respect of which the First Appellant has been arrested and questioned, the UT Judge was entitled in my judgment to the view that the Respondent's decision to defer was lawful.

38. In my judgment, at the time of the UT Judge's decision, and on the facts of this particular case, the delay had not – as she rightly found – become either 'unlawful or irrational' or unreasonable (see §11(7) above). It is notable that in the case of *R (X) v SSHD*, there was an ongoing delay in the decision-making (as a result of the Respondent awaiting a decision of the CPS) which stood at 4½ years at the time of the appeal. In this context, we were also referred to the recently delivered judgment in *R (MA) v SSHD* UT(IAC) (November 2023) (JR-2022-LON-001664: unreported); this was a case, similar in material respects to the instant case, in which an applicant challenged the SSHD's ongoing delay in deciding an application for leave to remain against the background of a criminal investigation into money laundering involving the applicant's husband. In that case, the head of the Home Office Migrant Criminality Policy Unit had given evidence to UT Judge Canavan (in the same vein as his evidence in *R (X) v SSHD* before the UT) to this effect:

> "… it would be reasonable and proportionate to await the outcome of the HMRC investigation and/or any criminal proceedings relating to the applicant's husband before deciding the application given the seriousness and scale of the HMRC investigation. It would not be proportionate for the respondent to review the large amount of material involved in the investigation for herself." (Judgment [12]).

The Judge agreed with this approach and, having considered *R (X) v SSHD* at length, observed that:

> "While acknowledging that the delay of <u>over three years</u> is significant, and no doubt frustrating for the applicant, I conclude that the respondent's decision to await the outcome of any charging decision is not unlawful at the current time". (Emphasis by underlining added).

39. I am conscious that a charging decision is still awaited in this case, nearly three years after the First Appellant's arrest; this is no doubt a particular frustration to the

Appellants, but I suspect also a frustration to the Respondent. In my judgment the UT Judge cannot be criticised for relying in July 2022 on information provided to her by the NCA that the case file had recently been sent to the Senior Crown Prosecutor for a decision as to charge. She was entitled to expect, on information provided to her, that a charging decision would be made later in the summer, albeit "dependent upon further consultations with the CPS and lawyers" (see §11(5) above).

40. The UT Judge rightly reflected in her decision that the June 2021 application was made out of time; she determined that any prejudice or detriment suffered by the Second and Third Appellants as a result of being subjected to the 'hostile environment' was not caused by the Respondent's delay in deciding on their application for leave to remain. It is right to point out that the Appellants had been overstayers and subject to that 'hostile environment' for well over a year by the time they made their June 2021 application. They were subject to notices of liability to removal. Having withdrawn their challenge to the refusal of their previous application for leave to remain, they then chose to remain in the United Kingdom unlawfully, and to endure the so-called 'hostile environment'.

41. The Appellants did not specifically plead reliance on Article 8 ECHR as a free-standing point in this appeal; Mr Biggs concedes that the Article 8 point is essentially a 'corollary' of his submission about the 'hostile environment' in which the Appellants have now lived for some time (see §40 above). While the Article 8 rights of the Appellants were impacted when they were refused indefinite leave to remain in October 2018, they did not in the end challenge that decision. In June 2019 they became subject to notices of liability to removal. This was the situation when the June 2021 application was made; that this situation has continued for much longer than the Appellants had expected does not in my judgment entitle them to assert any unlawful interference with their Article 8 rights as a consequence of the Respondent's decision-making. The decision in *Balajigari* supports them only to a limited extent; the court there merely contemplated at [91] (and not as the basis for the court's decision) that the legal consequences of being in the United Kingdom without leave "may" engage Article 8:

> "… but their impact will vary from case to case and, further, in the generality of cases <u>if the refusal of leave is itself justified the interference caused by the legal consequences of such refusal are very likely to be justified too</u>" (Emphasis by underlining added).

Although not specifically referred to by UT Judge Frances, sections 117A/117B(4)/117B(5) of the Nationality Immigration and Asylum Act 2002 apply in these circumstances, and in my judgment bear materially upon this point.

42. Thus, while the UT Judge's conclusion that Article 8 was "not engaged" on these facts (see §11(6)) is at least vulnerable to challenge, I am satisfied that had the UT Judge explicitly taken into consideration the points discussed above, she would have reached the same conclusion as to the Respondent's lawful and rational decision-making.

43. For completeness, I add that I am unpersuaded by Mr Biggs' further submission that the Respondent had failed to comply with her duty to ensure that her functions are

discharged "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom" (section 55 of the Borders, Citizenship and Immigration Act 2009, as usefully interpreted by Wyn Williams J in *R (TS) v SSHD* [2010] EWHC 2614 (Admin) at [32]: "at least an important consideration"). At the time when the Respondent discharged her functions, the Third Appellant was in the care of her parents, and attending school; that she was an overstayer was essentially a decision of her parents, exercising (as they are entitled to do) their parental responsibility for her. The Third Appellant's 'anxiety' (see §30 above) at the uncertainty of her current situation (however understandable) was not said to have impacted significantly on her welfare, any more than it reached the threshold of seriousness which is necessary to engage Article 8(1): see *R (Crowter) v SSHSC* [2023] 1 W.L.R. 989, §129 (Peter Jackson LJ).

44. For the reasons set out herein, I would dismiss the appeal.

Lady Justice Whipple

45. I agree.

Lady Justice King

46. I also agree.