



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04882/2018

THE IMMIGRATION ACTS

Heard at Field House
On 22 November 2018

Decision & Reasons Promulgated
On 17 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

Mr VIPULKUMAR KANTILAL RANA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jaquiss, Counsel, instructed by AY&J Solicitors

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 This is an appeal against the decision of Judge of the First tier Tribunal Guring-Thapa dated 23 August 2018 in which the judge dismissed the appellant's appeal against the decision of the respondent dated 9 February 2018 refusing his human rights claim.
- 2 The appellant is a national of India. It is necessary in this appeal to set out the appellant's immigration history in some detail, taken from the respondent's decision

letter of 9 February 2018 and other sources. He first entered the United Kingdom on 1 August 2008 with entry clearance as a student, valid from that date to 31st December 2009. He made an application for further leave to remain as a student, which was granted on 29 December 2009, valid until 19 December 2011. In his much later application for indefinite leave to remain made on 10 July 2018, the appellant stated that since his arrival in the UK in 2008, he had been absent only from 27 May 2011 to 27 August 2011, a total of 92 days. [Bundle section B page 21].

- 3 The appellant's wife, TVR, appears to have entered the UK on 30 May 2009 as the appellant's dependent. It would appear that TVR herself obtained leave to remain under the points based scheme; after leaving the UK on 27 May 2011, the appellant re-entered the UK on 27 August 2011 with entry clearance as a Tier 1 *dependent partner*, i.e. the dependent of TVR, valid to 6 May 2013. The appellant was later granted further leave to remain as a Tier 1 dependent partner from 15 March 2013 to 17 June 2017.
- 4 On 30 May 2017 the appellant made an application for indefinite leave to remain as the dependent of a Tier 1 migrant. This is the application which resulted in the decision under appeal. However, prior to a decision being taken on this application, the appellant varied the settlement application to an application for leave to remain on human rights grounds outside the rules (see: (i) covering letter dated 12 October 2017 from AY& J Solicitors, at [C1-C5] of the Respondent's bundle; (ii) date stamp of 16 October 2017 on the FLR(HRO) form at [A1], and (iii) the date of 8 November 2017 being recorded in the decision letter of 9 February 2018 for the date of this variation). The rationale for that variation is not entirely clear but it does not need to be for present purposes.
- 5 In the decision of 9 February 2018, the respondent does not actually state what TVR's immigration status was. The respondent specifically accepted that the application did not fall for refusal on grounds of suitability under Section S-LTR of Appendix FM. However, the application was refused for the following reasons:
 - (i) the respondent was not satisfied on the evidence presented that the appellant was TVR's 'partner' under GEN.1.2 (perhaps a somewhat surprising approach, given the immigration history of the appellant and his wife and the various grants of leave to enter or remain that they had been given in relation to one another);
 - (ii) EX.1 was not met, because of (i) above, and because the appellant's children were not British nor had lived continuously for at least the 7 years immediately preceding the date of application;
 - (iii) under para 276ADE(1), (private life), there were no very significant obstacles to the appellant's integration into India;
 - (iv) there were no circumstances outside the rules, under Article 8 ECHR, under which the respondent considered it appropriate to grant leave to remain to the appellant.

- 6 The appellant duly gave notice of appeal to the First-tier Tribunal.
- 7 However on 10 July 2018, the appellant submitted an application to the respondent for settlement under paragraph 276B of the Immigration Rules on the grounds of 10 years' continuous lawful residence, his leave to remain having being statutorily extended under s.3C Immigration Act 1971 during the currency of his appeal.
- 8 On 17 July 2018, the appellant made an application to the First-tier Tribunal to vary his grounds of appeal, inviting the Tribunal to consider the requirements of paragraph 276B.
- 9 When the matter was heard by the judge at the Nottingham Justice Centre on 24 July 2018, there was no attendance by the respondent.
- 10 In relation to the appellant's request that the judge consider the appellant's potential entitlement to leave to remain under paragraph 276B, the judge held as follows:
- "18. The main thrust of Mr. Gajjar's submission was that the removal of the appellant and his family is disproportionate under article 8 ECHR because the appellant meets the requirements for the grant of indefinite leave to remain under paragraph 276B of the Immigration Rules. Therefore, this must be treated as a weighty factor in an assessment of proportionality under Article 8.
19. I asked Mr. Gajjar if this would appear to be a new matter to which the respondent need to consent. His response was that the respondent had been sent the bundle and the appellant's representatives wrote to the respondent on 10/7/2018 attaching the application for indefinite leave to remain based on the completion of 10 years continuous lawful residence in the UK (B1 - B 40). At B3, which is the extract from the respondent's guidance states that under sections 3C and 3D of the Immigration Act 1971, it is not possible to submit a new application while an appeal is outstanding. However, the applicant can submit further grounds to be considered appeal. The guidance is that the application for long residence must be avoided and refunded the fees. The respondent should then create a file or sub-file and send it to the Presenting Officer's Unit dealing with the appeal. Also, a letter must be sent to the applicant or their representative informing them that their application has been linked with their outstanding you appeal.
20. I find that the issue of whether or not the appellant meets the requirements of paragraph 276B cannot be considered by me as I would be the primary decision-maker. It is asserted that the appellant meets all the requirements such as personal history including character, conduct, associations and employment record. I find that I cannot be the primary fact finder in assessing such factors. Therefore, I cannot make a finding that the appellant meets the requirements of paragraph 276B."
- 11 The judge then went on to consider the proportionality of the respondent's decision to refuse the appellant's human rights claim. Notwithstanding that the respondent had not been satisfied that the appellant and his wife were partners as defined under appendix FM, the judge accepted at [22]:

“I accept that there is family life between the appellant and his family. They will be removed as a family unit. I accept that the appellant and his family have established a limited private life in the UK.”

- 12 The judge directed herself in law as to the application of part 5A NIAA 2002, considered a number of considerations under those provisions, and held at paragraph 35 as follows:

“35. I find that it is in the children’s best interests to be with their parents and to return to India. It is not the case that the family will be destitute upon their return. The appellant and his wife are well-qualified individuals with considerable employment and self-employment experience. I find that these are skills and experience which can be utilized upon their return to India. Both the appellant and his wife have close contact with their family members in India. There is no reason why family members in India cannot provide short-term support to the appellant and his family until such time as they are able to re-establish themselves in that country.

36. Looking at all the circumstances and balancing the respective interests of the parties, I find that the decision is proportionate.”

- 13 The appellant applied for permission to appeal against that decision in grounds dated 31 August 2018, on grounds, in summary, that the judge had erred in law:

- (i) in misdirecting herself in law by finding that she could not consider the long residence argument advanced by the appellant;
- (ii) in failing to properly balance the appellant’s elder child K’s best interests with the public interest of removing the appellant, as required by Kaur (children’s best interests/public interest interface) [2017] UKUT 14, and in failing to have regard to the fact that K was at a crucial stage in her education, and the judge had failed to have regard to relevant guidance on this issue in EV (Philippines) and Others v SSHD [2014] EWCA Civ 874.

- 14 On 18 October 2018 First-tier Tribunal Judge Beach issued a decision which on its face stated simply that ‘Permission to appeal is granted’. Below that decision, under the heading ‘reasons for decision’, was the following:

“... ”

3. The First tier Tribunal Judge raised the issue of whether the appellant’s reliance on long residence in the 276B was a new matter to which she needed consent from the respondent [19]. At paragraph 20 of the decision, the First-tier Tribunal Judge finds that she would be the primary decision-maker if she considered the long residence grounds but she does not state whether she finds it to be a new matter or why she cannot consider it in the light of the respondent’s policy.

4. The appellant also asserted that the First-tier Tribunal failed to give sufficient weight to the circumstances of the appellant’s daughter. The First tier Tribunal Judge has carefully considered the family’s circumstances including those of the appellant’s daughter (who is not a qualifying child). Permission to appeal is not granted in respect of that ground.

5. Permission to appeal is granted in respect of the long residence grounds only.”

Procedural issues, including the scope of the present appeal

15 In preparing to hear this appeal, I caused directions to be issued to the parties on 20 November 2018. In fact, my proposed directions, emailed to administration at Field House were not copied correctly into the directions actually issued. The directions actually issued were as follows:

“The Deputy Upper Tribunal Judge hearing the forthcoming hearing on 22.11.18 directs the parties to be prepared hearing to address the Tribunal on the matters below:

(i) Was the grant of permission to appeal dated 18.10.18 compliant with the procedural requirements of Rule 34(4)(b), The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, and of Ferrer (limited appeal grounds; Alvi) Philippines [2012] UKUT 304 (IAC)?

(ii) If not, what is the effect of such non-compliance?

(iii) Did the Appellant serve a statement of additional grounds under s.120 NIAA 2002 in relation to his claim that he satisfied the requirements of ILR on long residence grounds under para 276B of the Immigration Rules?

(iv) If not, what is the effect of that?

(v) What is the application of para 37 of *Amirteymour v The Secretary of State for the Home Department* [2017] EWCA Civ 353, and para 67 of *Patel & Ors v Secretary of State for the Home Department* [2013] UKSC 72 on the present appeal?

(vi) Does the mere effluxion of further time since the appeal was brought, such that Appellant may potentially now have resided lawfully in the UK for a continuous period of 10 years, and may potentially have a claim under para 276B, to be considered by the First tier Tribunal?

(viii) In the event that the Upper Tribunal finds an error of law in the Judge’s decision and sets it aside, does the Respondent give, insofar as it is needed, consent for the Upper Tribunal to consider the Appellant’s claim under para 276B? If not, why not?

16 Para (vi) of my proposed directions was incorrectly transcribed, and para (vii) left out all together. They should have read:

“(vi) Does the mere effluxion of further time since the appeal was brought, such that Appellant may potentially now have resided lawfully in the UK for a continuous period of 10 years, and may potentially have a claim under para 276B, amount to a ‘new matter’ under s.85(6), NIAA 2002?

(vii) Did the Respondent give consent for the Appellant’s claim under para 276B to be considered by the First tier Tribunal?”

- 17 Both parties had received the directions issued by the Tribunal (albeit not quite in the form intended) and Ms. Jaquiss has provided a supplementary skeleton argument addressing those issues.
- 18 In summary, Ms. Jaquiss argues that the issuing of a grant of permission to appeal was noncompliant with the relevant First-tier Tribunal Procedure Rule, as the Tribunal did not give notification to the appellant of the right to make a renewed application for permission to appeal to the Upper Tribunal.
- 19 She argued however that there was no material effect of the noncompliance if I dealt with the matter in accordance with the case of Safi & Ors (permission to appeal decisions) [2018] UKUT 388 (IAC) (13 November 2018), and to treat the decision as granting permission to appeal on all grounds. Ms Jaquiss argued that Safi was authority for the proposition that what was of greatest importance determining the scope of an appeal before the Upper Tribunal was the terms of the *decision* granting permission to appeal, ordinarily at the top of the decision. What was of lesser importance were the *reasons* for that decision, stated underneath. She referred to the headnote:

“(1) It is essential for a judge who is granting permission to appeal only on limited grounds to say so, in terms, in the section of the standard form document that contains the decision, as opposed to the reasons for the decision.

(2) It is likely to be only in very exceptional circumstances that the Upper Tribunal will be persuaded to entertain a submission that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all of the grounds accompanying the application for permission, regardless of what might be said in the reasons for decision section of the document.”

and the following extracts:

“35 ... As we have said, given that the decision to grant permission was, on its face, unrestricted, the "reasons" section of the document would need to be unambiguous in order to contradict that general grant.

...

41. Henceforth, it is not to be regarded as merely good practice to do what is set out in paragraph 80 of Rodriguez; we regard it as essential for a judge who is granting permission only on limited grounds to say so, in terms. The place to do so is in the section of the document that contains the decision.

42. There is one point of detail in paragraph 80 with which we would respectfully disagree. We do not consider that it is appropriate to state "Permission is granted, limited as hereafter set out", unless the limitation occurs specifically in the section of the completed document which contains the decision, as opposed to the reasons for that decision; that is to say, in the first and not the second section (see paragraph 27 above).

43. Thus, permission granted on limited grounds should state "Permission is granted, limited to grounds 1 and 4" (as the case may be) or "Permission is

granted on grounds 1, 2 and 3 but is refused on grounds 4 and 5" (as the case may be).

44. The "reasons for decision" section is to be construed as just that; i.e. the reasons for the decision which has just been made. The reasons for decision must not include any words that are intended to form part of the decision. The reasons section is the place where the reasons for refusing permission, either generally or on particular grounds, should be stated, pursuant to the duty imposed on the judge by rule 34(4)(a) of the 2014 Rules or, in the case of the Upper Tribunal, rule 22(1) of the 2008 Rules.

...

46. Henceforth, it is likely to be only in very exceptional circumstances that the Upper Tribunal will be persuaded to entertain a submission that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all of the grounds accompanying the application for permission. That is highly likely to be so, regardless of what may be said in the reasons for decision section of the document.

- 20 For his part, Mr. Avery argued that the decision of 18 October 2018 did not amount to a grant of permission on both the first and second grounds. He submitted that the last sentence of paragraph four, and paragraph five of the decision made it unambiguous that permission was being refused on the second ground.
- 21 At the hearing, I reserved my position as to what the scope of the appeal would be, but invited submissions from the parties in relation to both of the appellant's grounds of appeal, in the event that I ruled that both grounds could be argued.
- 22 I find that the decision granting permission to appeal was not compliant with the procedural requirements of Rule 34(4)(b), The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, which require that:
- “(4) If the Tribunal refuses permission to appeal it must send with the record of its decision –
- (a) a statement of its reasons for such refusal; and
- (b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the manner in which, such application must be made.”

No notification was given in the Tribunal's letter accompanying the grant of permission informing the appellant that he could renew his application for permission to appeal on any ground on which permission had been refused. I also find that, however unambiguous the terms of the 'reasons for decision' may be, permission to appeal has been granted generally, as is apparent from the terms of the decision itself, which appears above the reasons for the decision. I apply paragraphs 40 to 46 of Safi. Insofar as there is any doubt in my mind that it is correct in law to treat permission as having been granted on both grounds, I bear in mind that the second ground relates to the best interests of a child, and where that ground appears

to be arguable (and I so find, contrary to Judge Beach's view), I should, in the light both Safi and the best interests of the child, be slow to exclude that issue as part of the appellant's case before the Upper Tribunal.

The substantive issues before this Tribunal

23 Ms. Jaquiss relied on her first ground of appeal arguing that the judge had erred in law in failing to consider the appellant's potential entitlement to leave to remain under paragraph 276B of the immigration rules. Her position, as set out in her skeleton argument on 21 November 2018 paragraph 10 was that the no section 120 notice had been served on the appellant.

24 In fact, I disagree. The decision letter of 9 February 2018 provides at page 6 as follows:

"If you think there are other reasons why we should allow you to stay in the UK

If you think you have a legitimate reason to remain in the UK you need to make an occasion to stay. Details of how to apply can be found in the immigration pages of www.gov.uk.

If you do not tell us as soon as you can of any reasons why you should be allowed to stay and you apply later you may lose any right of appeal again a refusal of that application."

25 Section 120 10 IAA 2002 provides as follows:

"120 Requirement to state additional grounds for application etc

...

(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out—

(a) P's reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which P should not be removed from or required to leave the United Kingdom."

26 Section 96 NIAA 2002, which I do not set out, clearly makes provision for the respondent to certify a claim for leave to remain as being non-appealable, on the grounds that it represents a claim which could have been set out in a reply to a notice given under section 120.

27 I find that the notice set out in the refusal letter (para 24 above) represents a notice given under s.120 NIAA 2002. The caution within that notice advises that a delay in providing further grounds may result in loss of appeal rights. This is clearly a reference to the interrelation between s.120 and s.96 NIAA 2002.

- 28 Further, I find that the appellant's application of 10 July 2018 represented a statement of additional grounds made to the respondent, in response to the respondent's notice under s.120 NIAA 2002. The application was made within the permitted 28 day period prior to the asserted 10 year anniversary of lawful residence in the UK on 1 August 2018 (the appellant having arrived on 1 August 2008). He made the application as soon as he could.
- 29 It is correct in law, however, that the respondent is prohibited from considering such a purported application, by provisions of Section 3C Immigration act 1971; hence the terms of the respondent's policy as relied upon by the appellant, and as set out in the judge's decision at her paragraph 19.
- 30 Ms. Jaquiss' position was that the judge erred in law in stating that she could not consider the appellant's potential satisfaction of paragraph 276B, as that would require her to be the primary decision-maker, or because she would not be the primary fact finder in relation to matters such as character, conduct associations, and employment record.
- 31 Mr. Avery argued that the judge did not misdirect herself in law, and made a finding, declining jurisdiction, which was sustainable.

The appropriate approach

- 32 The law relevant to the judge's approach is contained in s.85 NIAA 2002 as amended by Immigration Act 2014:
- "85 Matters to be considered
- (1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
 - (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84 against the decision appealed against.
 - (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
 - (4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.
 - (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
 - (6) A matter is a "new matter" if—
 - (a) it constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of –

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.”

33 The following authorities are also relevant:

- (i) *Amirteymour v The Secretary of State for the Home Department* [2017] EWCA Civ 353 (10 May 2017)

“37. The object of a "one stop notice" under section 120 is to make the applicant bring forward his whole case regarding his claim to be allowed to remain in the UK so that it can be considered in one go in all its aspects, either by the Secretary of State or (after the Secretary of State has taken a relevant decision) by the Tribunal on an appeal which is on foot in respect of such a decision. Where such a notice is served, the Tribunal has jurisdiction to consider all claims made in response to it, whether or not they were raised before the Secretary of State at the time she made the relevant decision against which the appeal is brought: see *AS (Afghanistan)*; *Lamichhane v Secretary of State for the Home Department* [2012] EWCA Civ 260; [2012] 1 WLR 3064, [43] (Stanley Burnton LJ); and *Patel v Secretary of State for the Home Department* [2013] UKSC 72; [2014] AC 651 at [44] (Lord Carnwath JSC) and [67]-[70] (Lord Mance JSC).”

- (ii) *Patel & Ors v Secretary of State for the Home Department* [2013] UKSC 72 (20 November 2013)

“67. When section 85(2) requires the Tribunal to "consider any matter raised in the [section 120] statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against", it is therefore referring to new reasons or grounds not previously covered by the decision appealed against. So long as they "[constitute] a ground of appeal of a kind listed in section 84(1)", they can be relied upon. By inference, it can be said, it is or becomes legitimate to treat them as constituting a ground of appeal, even though they were not raised before or decided by the Secretary of State.”

- (iii) *Mahmud (S. 85 NIAA 2002 - 'new matters' : Iran)* [2017] UKUT 488 (IAC)

“1. Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.

2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.

3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This

requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.”

(iv) Quaidoo (new matter: procedure/process) Ghana [2018] UKUT 87 (IAC)

“1. If, at a hearing, the Tribunal is satisfied that a matter which an appellant wishes to raise is a new matter, which by reason of section 85(5) of the Nationality, Immigration and Asylum Act 2002, the Tribunal may not consider unless the Secretary of State has given consent, and, in pursuance of the Secretary of State's Guidance, her representative applies for an adjournment for further time to consider whether to give such consent, then it will generally be appropriate to grant such an adjournment, rather than proceed without consideration of the new matter.

2. If an appellant considers that the decision of the respondent not to consent to the consideration of a new matter is unlawful, either by reference to the respondent's guidance or otherwise, the appropriate remedy is a challenge by way of judicial review.”

- 34 I find that the judge, in refusing to consider the appellant’s potential satisfaction of 276B, erred in law by failing to direct herself in the appropriate manner.
- 35 Where, as here, an appellant has made a statement of additional grounds following service of a notice to him under s.120 NIAA 2002, there is clearly nothing, applying Amirteymour and Patel, preventing the First tier Tribunal from considering potential arguments under the immigration rules that have not previously been considered by the respondent (unless the matter is a ‘new matter’). Therefore, in appearing to direct herself in law that she was unable to consider the appellant’s application for leave to remain on long residence grounds *on the basis that he would be the primary fact finder*, the judge misdirected herself in law.
- 36 The judge might have had a sustainable reason for refusing to consider the appellant’s satisfaction of the rules on long residence, if this was in fact a ‘new matter’, and the respondent had not given consent for that new matter to be considered.
- 37 However, the judge does not in fact make any finding as to whether or not the 276B issue was a ‘new matter’ as defined under s.85(6) NIAA 2002. The judge does not therefore direct herself in law appropriately as to whether or not she had jurisdiction to entertain such arguments.
- 38 I note here, for the avoidance of doubt, that although the appellant would only, taking his case at face value, have passed the 10 year anniversary of his entry to the UK on 1 August 2018 (i.e. after the date of hearing before the judge on 24 July 2018), this would not have entitled the judge (had she done so) to find that the appellant had not met the requirements of paragraph 276B of the rules, because the decision itself was signed by the judge on 21 August 2018 and promulgated on 23 August 2018, i.e. after the relevant date, and the date of hearing itself would not, in those

circumstances, have prevented the judge from considering the 276B point or would have required her to dismiss it on its merits.

- 39 I am of view the judge's misdirection in law is a sufficient reason to set aside her decision. There is a lack of clarity within the judge's decision as to whether or not the appellant's application for indefinite leave to remain amounted to a new matter, such that I cannot confidently predict what decision the judge would have made, had she directed herself in law appropriately. The question is not straight forward. For example, whereas in Mahmud at [31] the Tribunal was of the view that the birth of a child since the respondent had considered a human rights application would be likely to amount to a new matter, the fact of a pre-existing couple getting married may not.
- 40 In the present case, the only matter which would be said to be new, was the passage of time, from the appellant not yet having lived lawfully in the UK for 10 years, to him having done so. No marriage or even the birth of a child occurred. Merely the passage of time. The judge may well, I find, have found that the matter was not 'new', had she directed herself appropriately in law.
- 41 In fact, it is not necessary, in remaking the decision, for me to come to any concluded view as to whether the passage of time, and the appellants potential satisfaction of para 276B of the rules represents a 'new matter', for the following reason.
- 42 At the hearing before me, I was provided with a letter from respondent dated 6 November 2018 addressed to the appellant's solicitors, stating as follows:
- "I write regarding the completed application form your client submitted for consideration to the home office on 10 July 2018 for leave to remain on the basis of 10 years continuous lawful residence.
- Your client already found an outstanding appeal against the Secretary of State's decision to refuse your client's application for leave to remain outside the rules. Your client is restricted from making a fresh application whilst your client's appeal is outstanding in accordance with section 3C of the Immigration Act 1971 (as substituted by Section 118 of the Nationality, Immigration and Asylum Act 2002).
- Your client may apply to the Asylum and Immigration Tribunal to have your client's case for leave to remain on the basis of 10 years continuous lawful residence to be treated as a variation of your client's grounds of appeal. To this end, your client's documents have been retained in the Home Office file as they may be considered as part of your client's existing appeal.
- Arrangements have been made to refund the fee submitted with this application."
- 43 Although Mr Avery denied that this was the case, I find that the respondent's letter of 6 November 2018 represents the giving of consent, should it be needed, for the Tribunal to consider the appellant's potential entitlement to leave to remain on long

residence grounds under para 276B of the rules. There is no objection within the letter to the Tribunal considering the application and supporting evidence, and indeed, the letter states that the material in support of the application 'may be considered as part of your client's existing appeal'.

- 44 The appellant had done everything he needed to do to bring the matter to the attention of the First tier Tribunal - the Judge had sight of the respondent's s.120 notice, a copy of the appellant's statement of additional grounds in response to that notice (the application for leave to remain on long residence grounds), and the Tribunal had been requested by the appellant to consider the same. This is clearly a case, taking into account the guidance at paragraph 37 of Amirteymour, where the Tribunal (whether First tier or Upper) should, having been given consent by the respondent, insofar as it was needed at all, consider the 276B point.
- 45 I therefore set aside the decision of the First-tier Judge.
- 46 I was invited by Ms. Jaquiss to re-decide the appeal, taking into account the appellant's application for indefinite leave to remain, and all the material submitted in support of that. Although Mr. Avery stated that he did not hold all of those papers, his attention was drawn to the most relevant documents, and he did not request any additional time to consider the full application.
- 47 For his part, Mr. Avery objected to the Tribunal considering the appellant's potential satisfaction of paragraph 276B on the grounds that no assessment had been undertaken by the respondent as to whether the appellant had met the requirement under para 276B(ii), that:
- "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:
- (a) age; and
 - (b) strength of connections in the United Kingdom; and
 - (c) personal history, including character, conduct, associations and employment record; and
 - (d) domestic circumstances; and
 - (e) compassionate circumstances; and
 - (f) any representations received on the person's behalf; ..."
- 48 I reject Mr. Avery's submissions in that regard for two reasons. Firstly, to prevent the Tribunal from considering whether the appellant meets the requirements of 276B(ii) on the grounds that the respondent has not yet done so would be contrary to the purpose and effect of s.120 NIAA 2002. The respondent *elected* voluntarily to give the appellant a notice under s.120, and the appellant has taken the opportunity to to make a statement of additional grounds in reply. The relevant authorities, discussed

above, indicate that the Tribunal (subject to the new matter issue) has jurisdiction to consider matters raised in a statement of additional grounds.

- 49 Secondly, I find that the respondent has in any event already carried out an exercise when making the decision 9 February 2018, which is not materially different to the exercise contemplated under 276B(ii). The respondent found, in that decision, that the appellant's application did not fall for refusal on grounds of suitability under section S-LTR of Appendix FM. That provision contains the following mandatory ground for refusal:

"S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

- 50 Further, requirements for indefinite leave to remain under Appendix FM contains the following mandatory ground for refusal at Section S-ILR: Suitability for indefinite leave to remain:

"S-ILR.1.8. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-ILR.1.3. to 1.6.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

- 51 It seems to me that in para 276B(ii), the matters likely to be of greatest concern to the respondent when considering whether there were any public interest considerations making it undesirable for an applicant to be given indefinite leave to remain would be those set out at (ii)(c), being the applicant's personal history, including character, conduct, associations and employment record. There may well be public interest considerations militating against the grant of ILR to a person whose character, conduct and associations suggested that they are part of a criminal gang, even if not having been convicted of an offence. However, the respondent had no complaints, in finding that he did not fall for refusal under S-LTR.1.6 for reason of his conduct, character or associations.

- 52 Although it is apparent that 276B(ii) specifies a number of other considerations, other than character, conduct and associations, which may be relevant when considering whether there were any public interest reasons making it undesirable for him to be given indefinite leave to remain on the ground of long residence, including the applicant's employment record, it is to be noted both S-LTR.1.6 and S-ILR.1.8 (the latter being relevant to ILR under Appendix FM) direct to the decision maker to consider not only conduct, character and associations, but also 'other reasons' making it undesirable to allow them to remain in the UK. I find that 'other reasons' is a term sufficiently wide to encompass all the other specified issues set out at 276B(ii)(a)-(f) which are not set out in terms within S-LTR.1.6 or S-ILR.1.8.

- 53 And yet in the present decision the respondent did not raise any reason at all, when considering S-LR.1.6, to suggest that the appellant's presence in the UK was not conducive to the public good.

54 I find, having given both parties the opportunity to make substantive submission on the appellant's satisfaction of paragraph 276B, as follows:

(i)(a) the appellant has had at least 10 years continuous lawful residence in the United Kingdom; the appellant's immigration history is set out in respondent's decision letter, and Mr Avery was unable to draw my attention to any evidence suggesting that that summary, and the appellant's assertion that he had been absent from the UK for only 92 days in total in the last 10 years, was incorrect;

(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, considering the matters set out at 276B(ii)(a)-(f), and finding that if there were any matters of public interest, these would have been mentioned in the decision letter of 9 February 2018; no such matters are raised; in any event, in relation to the appellant's employment record, the judge noted at [16] that since October 2011 the appellant has been a manager at Primark and was earning £30,000 pounds per year;

(iii) the applicant does not fall for refusal under the general grounds for refusal; the respondent has not raised any such grounds in the decision letter or in submissions;

iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL; the relevant certificates are in the appellant's bundle and have been seen by Mr Avery;

(v) the applicant is not be in the UK in breach of immigration laws. He is lawfully present with leave to remain under s.3C Immigration Act 1971.

55 The appellant has been present in United Kingdom for over 10 years. He asserts that he has a private and family life United Kingdom. I agree with the judge that he has a family life in the UK. I also find that the appellant has a private life in the UK, as a result of his long residence, employment record, and his ownership of property (a house- which was accepted by the respondent in the decision letter).

56 I find that the refusal of the human rights claim amounts to an interference with that private life.

57 I take into account of the considerations in s.117B NIAA 2002:

- (1) The maintenance of effective immigration controls is in the public interest. The public would, I anticipate, be interested to be reassured that persons who actually meet the immigration rules, as here, should be granted leave to remain under them.
- (2) The appellant speaks English.
- (3) The appellant is financially independent.
- (4) The appellant has not been present unlawfully.

- (5) Applying Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, para 44 (“... everyone who, not being a UK citizen, is present in the UK and who has leave to reside here other than to do so indefinitely has a precarious immigration status for the purposes of section 117B(5)”, the appellant’s immigration status, although continuous and lawful, has been ‘precarious’, and little weight should be given to it. However, as per The President in Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC), “The “little weight” provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; “little weight” involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.”

Taking a fact sensitive-approach to the present case, it is to be noted that the appellant’s 10 years lawful residence is the period of time required, under Immigration Rules approved by Parliament, to warrant a grant of indefinite leave to remain. The way that the rules have been drafted clearly intends that weight is to be attached to such a period of lawful residence.

- 58 Positive satisfaction of the immigration rules is a highly material consideration in the determination of the proportionality of an immigration decision. Given that I have found that the appellant meets the requirements for indefinite leave to remain under the rules, I find that there are no public interest considerations justifying the refusal of the human rights claim and requiring the appellant to leave the United Kingdom.
- 59 The respondent’s decision refusing the appellant’s human rights application is therefore unlawful under s.6 Human Rights Act 1998, as amounting to a disproportionate interference with the appellant’s private life.
- 60 Although I have ruled above that the appellant’s second ground could be argued in this appeal, it is unnecessary in the light of my findings above to deal with it.

Decision

The judge’s decision involved the making of a material error of law.

I set aside the decision.

I remake the decision allowing the appellant’s appeal on human rights grounds.

Signed:

Date: 4.1.19



Deputy Upper Tribunal Judge O’Ryan