

B E T W E E N:-

THE QUEEN
(on the application of
TEJESHWAR SINGH MAHAL)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ORDER

UPON hearing counsel for the applicant (Michael Biggs) and counsel for the respondent (Paul Corben) on 24 August 2021 in respect of the applicant's claim for judicial review of the respondent's decision by letter dated 12 September 2019 (by which his further submissions were rejected pursuant to paragraph 353 of the Immigration Rules).

IT IS ORDERED THAT:-

- 1) The application for judicial review is allowed.
- 2) The 12 September 2019 decision is quashed.
- 3) The respondent is to pay the applicant's costs of this application for judicial review, which are to be assessed on the standard basis if not agreed.

Signed: *Helen Rimington*

Upper Tribunal Judge Rimington

Dated: **9th November 2021**

Applicant's solicitors:

Respondent's solicitors:

Home Office Ref:

Decision(s) sent to above parties on: 12.11.2021

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IN THE UPPER TRIBUNAL
JUDGMENT GIVEN FOLLOWING HEARING

JR/5263/2019

Field House,
Breems Buildings
London
EC4A 1WR

24th August 2021

THE QUEEN
(ON THE APPLICATION OF MR TEJESHWAR SINGH MAHAL)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE RIMINGTON

- - - - -

Mr M Biggs, Counsel instructed by ATM Law Solicitors appeared on behalf of the Applicant.

Mr P Corben, Counsel instructed by the Government Legal Department appeared on behalf of the Respondent.

- - - - -

ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

- - - - -

JUDGE RIMINGTON: The appellant challenges the decision of the Secretary of State dated 12th September 2019 ("the Decision") by which his further human rights submissions advanced in an application dated 9th May 2019 were refused under paragraph 353 of the Immigration Rules as a fresh claim.

2. The applicant's grounds advanced the following:

- (i) the respondent failed to consider the applicant's argument that the previous decision dated 14th May 2018 (refusal of further leave to remain as a Tier 2 (General) Migrant) was procedurally unfair and unlawful because it was made without first giving the applicant notice of the revocation of the applicant's sponsor's licence. Following the Supreme Court's decision to grant permission to appeal from the decision in **Pathan & Anor v Secretary of State for the Home Department** [2018] EWCA Civ 2103 the respondent failed to consider a central aspect of the applicant's purported human rights claim.
- (ii) the 14th May 2018 decision was vitiated by procedural unfairness and was therefore unlawful and that factor was highly significant in the proportionality of requiring the applicant to leave the UK. On any rational view the applicant's further human rights submissions carried a realistic prospect of success.

Immigration History

3. The applicant entered the UK on 1st September 2009 as a Tier 4 Student with leave valid to 30th October 2013 and on application his leave was extended as a student to 24th August 2014. On 19th August 2014 he applied for leave to remain as a Tier 2 (General) Migrant with his sponsor, Flexistay, and leave was granted to 14th September 2017. On 24th August 2017 the applicant applied for further leave to remain as a Tier 2

(General) Migrant, again with Flexistay. On 27th April 2018 Flexistay's sponsor licence was revoked. On 14th May 2018 the applicant's application was refused. The applicant had a right to administrative review, which he exercised but the administrative review upheld the refusal on 17th June 2018. The applicant did not and has never challenged that points-based refusal by way of judicial review.

4. On 3rd July 2018 the applicant made an application relying on his private life in the UK. This was refused on 30th January 2019 and certified as clearly unfounded under Section 94 of the Nationality, Immigration and Asylum Act 2002. The Secretary of State maintains the applicant had and still has a right to an out of country appeal against that decision but has not sought to exercise that right of appeal and nor has he challenged the certification by way of judicial review.
5. On 9th February 2019 the applicant made a further human rights application and this was refused on 26th April 2019 and deemed not to amount to a fresh claim under paragraph 353 of the Immigration Rules. The applicant has not challenged that decision by way of judicial review.
6. Finally, on 9th May 2019 the applicant made a further application for leave to remain on human rights grounds and this was refused on 12th September 2019 ("the Decision") and again not deemed to amount to a fresh claim. It is this decision which is under challenge.
7. Mr Biggs expanded upon his skeleton argument in his oral submissions, underlining that notice of the revocation of the employer's licence on 27th April 2018 was only communicated to the applicant on 14th May 2018 in the decision refusing further leave to remain.

8. Following the refusal of his 3rd July 2018 human rights application on 30th January 2019 and which was certified and a further refusal on human rights (private life) grounds on 9th February 2019, the applicant made further submissions on 9th May 2019 supported by a covering letter dated 10th June 2019 which identified the first basis of his human rights claim to be the wrongful refusal of his previous and historic Tier 2 application on 14th May 2018. It was pointed out in the further submissions that the 14th May 2018 decision was unlawful because it was procedurally unfair. It was also noted in the submissions that the Supreme Court had granted permission to appeal to the Court of Appeal's decision in **R (Pathan & Anor) v Secretary of State for the Home Department**, indicating that it was arguable that this decision was wrong and would be overruled and that the decision made prior to the Supreme Court's decision would be premature and a failure to consider the applicant's case properly.
9. Nonetheless, the Decision was made by the respondent prior to the Supreme Court decision, concluding that the fresh submissions, taken together with the evidence and argument previously considered, did not have a realistic prospect of success. The respondent effectively expressly refused to consider the applicant's representations to the effect he had been prejudiced by the 14th May decision.
10. The respondent explained in her Decision at paragraph 20:

"Regarding a claimed issue with your previous Tier 2 application it has been noted that this was refused on 14th May 2018 with an ADMIN Review (AR). AR had been completed on 17th June 2018 where the AR had maintained the decision. As your application has been submitted on the basis of your family and private life in the UK and human rights, this has not been considered [my underlining]. As stated above,

it is open for you to make a Tier 2 application if you feel you meet the requirements."

11. The response to the pre-action Protocol letter stating the respondent had acted unlawfully by failing to consider the **argument** relating to the procedural unfairness responded that:

"Your client could have brought a challenge to the decision dated 14/05/2018 within the time remit of Civil Procedure Rules. The SSHD is satisfied that the decision dated 12/09/2019 is lawful therefore your claim is rebutted.

*Permission to appeal in the case of **Pathan** was granted on 18th March 2019, however, case law in the Court of Appeal still stands. In the light of the above, the decision dated 12/09/2019 is fair as your client did not suffer unfairness in all considerations as confirmed, therefore this claim is rebutted."*

12. An application for judicial review was issued on or around 11th October 2019 and permission was granted by Upper Tribunal Judge Kopieczek on 7th November, who observed that the Supreme Court had indeed granted permission to appeal in **Pathan & Anor** and further that whilst the respondent's fresh claim decision

*"does refer to the argument raised by the applicant in terms of the **Pathan** point, there is some arguable merit in the applicant's contention that the respondent does not actually engage meaningfully with that issue".*

The Legal Framework

13. The correct approach when a decision under paragraph 353 of the Immigration Rules is in issue was set out in **WM (DRC) v Secretary of State for the Home Department** [2006] EWCA Civ 1495, [2007] Imm AR 337 by the Court of Appeal at paragraphs 6 to 11 and specifically paragraph 11 states as follows:

"11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

14. In the event the Supreme Court upheld the applicant's appeal in **R (on the application of Pathan(Appellant) v Secretary of State for the Home Department (Respondent)** [2020] UKSC 41, which was decided on 23rd October 2020. **Pathan** held that the applicant was entitled to prompt notice of the revocation of the Tier 2 sponsor's licence and that the failure to do so was sufficient to render the decision to refuse his Tier 2 application unlawful regardless of what the applicant would or would not have done had he received prompt notice of the revocation. The Tier 2 refusal therefore fell to be quashed.

15. The applicant's grounds were subsequently expanded upon as follows:

Ground 1

16. It was argued that the refusal of the Decision to hold consideration of the substance of the application until the Supreme Court had decided the appeal in Pathan or to engage with the points raised in the letter of 12th September 2019 was unlawful. Indeed, the letter of 12th September 2019 refused specifically to engage with the relevant points. Thus, the respondent could not satisfy the demands of anxious scrutiny. The applicant's arguments as to historical illegality and unfairness in relation to Pathan might tell in favour of the applicant.

17. When considering this issue the Tribunal should take account of the Supreme Court's decision in Pathan and evaluate the materiality of a public law error in the light of the current and correct law and failure to do so would place the Tribunal in breach of the Human Rights Act 1998.

18. Secondly, the effect of the judgment of the Supreme Court in Pathan was retrospective further to Kleinwort Benson Ltd v Lincoln City Council Kleinwort and Ors [1998] UKHL 38, [1999] 2 AC 349.

19. Thirdly, the respondent's refusal to consider the relevant elements of the applicant's further submissions to delay consideration demonstrated that the respondent had failed to properly consider the content of the letter.

Ground 2

20. In relation to ground 2, there was no dispute that the applicant relied upon new matters not previously considered in support of the 9th May 2019 application and the question was

whether the Secretary of State would have to accept that the applicant's further submissions had a realistic prospect of success and the reasonableness of the respondent's application of paragraph 353 fell to be determined in the light of the Supreme Court's decision in Pathan.

21. **AB (Sudan) v Secretary of State for the Home Department** [2013] EWCA Civ 921 at paragraph 31 did not assist the Secretary of State because the case concerned an appeal from the decision of the Administrative Court to refuse to grant a stay. Although the reference to **R (Bahta) v Secretary of State for the Home Department** [2011] EWCA Civ 895 by Jackson LJ that "what the Court of Appeal says is the law, is the law, unless and until overruled by a superior court or by Parliament" was correct, it did not take matters further because the position now was that the Court of Appeal's decision in Pathan had been overruled and moreover, at the time the respondent was aware that the Supreme Court had given permission to appeal in Pathan.
22. Pathan stated that the applicant was entitled to prompt, that is immediate or almost immediate notice of revocation of the sponsor's licence.
23. At paragraph 134, Lord Kerr and Lady Black held in Pathan:
- "The fairness of withholding the information is not to be judged on an ex post facto basis. ... If it was not fair then, it cannot be converted to a condition of fairness because of Mr Pathan's subsequent failure to put forward an employer who could have provided a CoS acceptable to the Home Office."*
24. It was submitted that the decision challenged in Pathan was materially identical to the 14th May 2018 decision. It was submitted it was not appropriate to consider the failure to

give prompt notice in hindsight. What mattered was that the applicant had not been given prompt notice and **had been** deprived of any opportunity, however small, to take action to improve his situation.

25. Prompt notice must mean that notice is given with all reasonable celerity in the circumstances. There was no reason given why the applicant could not have been sent notice of the revocation immediately or after a very short delay and the respondent had not advanced any such reason.
26. It would have been procedurally unfair to have brought forward the 14th May 2018 decision (ie compress the two decisions which are taken naturally taken consequentially) to avoid the advantage conferred on the applicant by the duty to give prompt notice (see paragraph 110 of **Pathan**).
27. The respondent in **Pathan** also asserted she was not satisfied that his work with his Tier 2 sponsor was genuine, but this was not relied on by the Supreme Court and although the Supreme Court was fully aware that the respondent was not satisfied with Mr Pathan's role this made no difference to its reasoning and the respondent does not rely on this point in the decision and this forms no part of the decision-making in this issue.
28. The fact that the applicant did not challenge the 14th May 2018 decision or that he did not pursue an out of country appeal is irrelevant to whether **Pathan** shows that the 14th May 2018 decision was procedurally unfair, the real point being whether the illegality of the 14th May 2018 decision can be relied on to support a human rights claim.
29. As explained in **Patel** (**historic injustice; NIAA Part 5A**) **India [2020] UKUT 351 (IAC)**, the fact that a migrant has been unlawfully refused leave to remain in the past is relevant and

potentially dispositive of a claim made pursuant to Article 8 ECHR.

30. In a notional appeal before a First-tier Tribunal it might be accepted that the 14th May 2018 decision had not been taken at all because it was unlawful and thus his later applications should be treated as if they had been made in time with the benefit of Section 3C of the Immigration Act 1971. That is the logical conclusion deduced from **R (Ahsan) v Secretary of State [2017] EWCA Civ 2009** at paragraph 120 and effectively would have a knock-on effect on the remaining decisions such as the certification decision of 30th January 2019 of his human rights claim.
31. As the applicant arrived in the UK on 1st September 2009 there would be a realistic possibility he would have accrued ten years' lawful residence and would be eligible to seek indefinite leave to remain under paragraph 276B of the Immigration Rules. The Tribunal might consider that he was deprived of an opportunity to submit an in time variation of his Tier 2 application or deprived of the chance to raise a human rights claim which would trigger an in country right of appeal and in itself fell to be considered an historical injustice (deprivation of in country right of appeal) further to **AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12.**
32. The 14th May 2018 decision caused the applicant substantial prejudice by depriving him of the possibility of regularising his stay and this should be identified for the purposes of historical injustice and the assessment of proportionality.
33. Further, it could be argued that the respondent's failure to provide prompt notice was an example of historic, not merely historical injustice because it was unclear how many people had been affected by the respondent's practice in this

respect, and, was an instance of general and systemic failure which would have resulted in a significant number of unlawful decisions and fall within the category identified at paragraph 39 of Patel namely "a particular class of persons ... wrongly treated, in immigration terms, in the past" so that "this injustice should be recognised in dealing with relevant applications made now".

34. Mr Biggs argued that the respondent noted that it was the requirements of paragraph 353 which were relevant, not whether Pathan was wrongly decided, but Mr Biggs submitted that what mattered was how the unfairness and unlawfulness of the 14th May 2018 decision was relevant to the further submissions that resulted in the Decision and whether in the light of the decision in Pathan those submissions have a realistic prospect of success.

35. The respondent relied on TN (Afghanistan) and Ors v Secretary of State for the Home Department [2015] UKSC 40, [2015] 1 WLR 3083 at 70 and 73 and EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, [2009] 1 AC 1159 to argue that the illegality of the 18th May 2018 decision was irrelevant. Mr Biggs submitted that TN applied to a statutory appeal in an asylum claim and there was no argument provided by the Secretary of State to support the contention that TN also manifestly applied to a human rights claim. If the respondent's point was that the First-tier Tribunal could not consider whether an appellant had been the victim of an historical or historic injustice the submission was obviously wrong; indeed Patel confirmed that the unlawful refusal of an historical application for leave was relevant to the evaluation of proportionality under Article 8(2) of the ECHR.

36. It was simply wrong to argue that the illegality and unfairness of the 14th May 2018 decision was not capable of

constituting an historical injustice that might support the applicant's Article 8 claim and indeed, there was a link between the unlawful refusal of 14th May 2018 and the applicant's current situation. The 14th May 2018 decision made the applicant an overstayer and undermined any chance he had of regularising his status by way of an in time application or perhaps at all and denied him the opportunity to make a human rights claim before he became an overstayer, thereby depriving him of the chance to pursue an appeal in country with the benefit of an extension of leave under Section 3C of the 1971 Act.

37. The Secretary of State in response submitted that at the time of the applicant's application for further leave and at the time of the respondent's refusal the law was as set out by Singh LJ in the Court of Appeal (in **Pathan**) and could not have succeeded under the law as set out by Singh LJ. The ratio of the **Pathan** judgment in the Supreme Court was summed up at paragraph 143 by Lord Kerr and Lady Black:

"143. We consider that it is necessary, in a case where all members of the court have provided judgments, to identify the core of the decision of the court. Here, it consists in (1) the decision that the appeal must be allowed (as agreed by us in our joint judgment and by Lord Wilson and Lady Arden in their respective judgments, albeit that there are differences of reasoning), (2) the determination (agreed by at least four members of the court) that there was a duty on the Secretary of State to notify Mr Pathan promptly of the revocation of his sponsor's licence, [my emphasis] it being procedurally unfair not to do so, and (3) the determination (agreed by us and Lord Briggs) that there is no positive obligation on the Secretary of State to provide a period of time

following notification to enable an applicant to make an alternative application or otherwise to react to the revocation of the sponsor's licence."

38. The respondent submitted that there was no duty of any prior notification and no obligation on the Secretary of State to grant any period of grace in order to make a further application for leave. Nor was there any obligation on the Secretary of State to defer taking a decision on the application. What was fair depended on the facts of the case and the extent of the principle was narrow. For example, the principle would not apply when the applicant is aware of the loss of the sponsorship licence or complicit in why the licence had been lost.
39. It was submitted there were several significant differences between Mr Pathan's case and the applicant's situation.
- (i) There was no evidence of a significant delay between the sponsor's licence being revoked and the application being refused. In Mr Pathan's case there was some three months and in this case just seventeen days.
 - (ii) The revocation of the sponsor licence was taken as a result of investigations into the sponsor which found that the applicant's job role had been over-exaggerated and not considered to be genuine (this is the first time this was asserted).
 - (iii) Mr Pathan had brought an in time challenge to the decision not to grant him further leave. The applicant had not (the fact is that we can see now that the decision to refuse him leave was procedurally unfair).
40. It was trite law that an applicant could not claim a human right to remain in the UK merely by pointing to a prior unlawful decision even if that were established. The Tribunal

was not required to address the issue as if they were retaking the initial decision or to put the applicant back in the position that they would have been but for any unlawfulness they identify. That was the mistaken route in **Rashid v SSHD [2005] EWCA Civ 744** and was soundly deprecated in **TN**. At paragraph 70 the Supreme Court clearly set out the differences between an immigration challenge and a claim in tort. As the court held:

"In Ravichandran the court rightly held that on an asylum appeal the question is one of present status: does the appellant meet the criteria of the Refugee Convention or is he in need of humanitarian protection?"

41. The respondent submitted that **TN** also manifestly applied to human rights claims and **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41** is to the same effect at paragraph 13 save that it concerned unreasonable delay. It acknowledged that a delay in decision-making might influence the balancing exercise and if the delay was shown to be a dysfunctional system which yielded unpredictable, inconsistent and unfair results, then that system will be given less weight in the balancing exercise, but an Article 8 claim did not succeed without a family or private life to bite on and as set out in **Patel v Secretary of State for the Home Department [2013] UKSC 72**, "Article 8 is not a general dispensing power". As stated in **Hysaj v Secretary of State for the Home Department [2020] UKUT 00128 (IAC)** at 73:

"Prior illegality requires more than a mere unlawful decision having been taken at some stage in the past. There must be sufficient causal connection between the alleged historic injustice caused by the illegality and the alleged prejudice caused by the decision to justify the intervention of a court or Tribunal. A judge must be

perceptive as to efforts seeking to elevate an unfavourable previous decision into one that establishes such grave injustice as to be illegal."

42. These decisions were concerned with situations where an unlawful decision had taken place immediately before the Tribunal seized of the matter and there was a fortiori less weight to be given to any unfairness alleged to flow from an historical decision which was not challenged at the time and which can no longer be challenged in time. There was strong public interest in play and it was essential to the proper functioning of the immigration system and the courts that any challenge to a decision be brought promptly. If an individual did not bring any challenge to a refusal at the time they should not be permitted to bring a collateral challenge at a later date by alleging in a future human rights application that the earlier decision was wrong, requiring the Secretary of State and the Tribunal to consider the legality of the hitherto unchallenged historical decision. To do so would remove any finality from the immigration process and render entirely useless the requirement in judicial review that if a decision were to be challenged it must be challenged promptly.
43. The issue before the decision-maker was whether the applicant had provided significantly different material to that previously submitted which had a realistic prospect of successfully persuading a Tribunal he should be entitled to leave to remain on human rights grounds. The question before the decision-maker was not whether it was at that stage arguable that the Court of Appeal had erred in Pathan but was concerned with whether the material before the decision-maker was (a) significantly different and (b) had a realistic prospect of success. The decision-maker acted reasonably in concluding on the basis of the material before her that the applicant did not have an arguable human rights claim.

44. First, the Secretary of State acted reasonably in considering the material on the basis of the law and facts as they were before her and as set out by Jackson LJ in **AB (Sudan) [2013] EWCA Civ 921** at paragraph 31, that is "what the Court of Appeal says is the law, is the law, unless and until overruled by a superior court or by Parliament". The applicant's argument is far-reaching that the Secretary of State should have granted him a human rights appeal to the FtT on the basis that an historic decision that he had not challenged might have been decided wrongly if the Supreme Court changed the law.

45. Secondly, the Secretary of State was unarguably correct in observing the general weakness of the applicant's Article 8 claim.

(i) The applicant was an overstayer who could only claim approximately nine years of residence in the UK with only approximately eight years and five months being lawful including Section 3C leave as his last substantive grant of leave expired on 14th September 2017.

(ii) His private life had remained precarious throughout his time in the UK and so could be given little weight.

(iii) Knowledge of the English language and life in the UK did not carry any real weight.

46. Thirdly, there was nothing before the Secretary of State which would arguably bolster the applicant's Article 8 claim so that it had a realistic prospect of success before a First-tier Tribunal Judge. Thus, the applicant would have to show that he had been the victim of such grave historic injustice that he should be entitled to further leave now, that is, even on the law as it is now known after the Supreme Court's ruling.

47. The applicant cannot show that he was the victim of historic injustice so as to trigger the corrective principle in the limited form that it survived (but this is not being expected because the question now is whether he has ten years' leave under the Immigration Rules).
48. The corrective principle only applies where there is "conspicuous unfairness amounting to abuse of power" (paragraph 36, Pill LJ, **Rashid**). There had been no such unfairness and the applicant could not show that he fell within the **Pathan** principle. The licence was revoked because the sponsor had exaggerated his role, the notification of revocation and the refusal were served together in a matter of days. He did not challenge the refusal at the time as he should have done. He had not been the victim of unfairness and even if he had he must take responsibility for the consequences of not bringing a challenge in the past.
49. Even if the applicant were a victim of historical injustice, which is denied, he would have to show a sufficient causal link between that injustice and his current situation but there is no such causal link unlike those cases where it can clearly be seen that but for the unfairness the applicant would have received a grant of leave. The reality is that his sponsor had lost its licence, so his application was bound to fail in any event. The court in **Pathan** rejected the submission that applicants whose sponsors lost their licences whilst their application was being considered should be given any benefit of substance so as to allow them to make a fresh application. Contrary to the representations that the applicant put before the decision-maker, the Secretary of State was not required to give 60 days' further leave to permit the applicant to make a new application.

50. Thus, even if it were found that the applicant should have received notification of the sponsor's licence earlier, then "what extra benefit of substance would he have gained which requires him to be granted leave now?"

51. There was no evidence that the applicant would but for any unfairness have been able to make an application for further leave which would have succeeded so as to give him an Article 8 right to remain now and the applicant had made a number of further applications for leave, each of which had failed. Indeed, it was his argument before the decision-maker he was still seeking leave to remain as a Tier 2 applicant.

52. It was denied that the decision-maker did not take into account all of the submissions put forward on the applicant's behalf and she made specific reference to the Pathan argument from paragraphs 19 to 20 but:

(i) She was not required to find that the historic PBS decision - unchallenged as it had been - should be set aside merely on the basis that the Supreme Court had given permission to the appellant in Pathan to appeal (but this was not decided in the decision which was challenged).

(ii) She was only required to consider the Article 8 claim as it was before her.

(iii) In any event, the respondent carefully considered all of the reasons put forward by the applicant in the PAP response.

53. In his skeleton argument before the Tribunal Mr Corben submitted that the judicial review before the Tribunal was not that the decision of the 14th May 2018 should be quashed and the applicant could not challenge the lawfulness of that decision directly. It was the later, 12th September 2019

Decision which it was requested should be quashed. On 15th August 2017 the respondent's Sponsor Licence Unit visited the premises of Flexistay Limited, who were the applicant's nominated sponsor, and as a result of concerns the visit resulted in the suspension of Flexistay's sponsor licence. Mr Corben acknowledged in his oral submissions quite fairly that this suspension was not prior to the receipt of the applicant's Tier 2 application but it was clear that no decision was taken on the applicant's Tier 2 application until a further decision was taken in respect of the suspended sponsor licence, which was ultimately revoked on 27th April 2018.

54. Mr Corben pointed to the applicant's administrative review of the 14th May 2018 decision, in which the applicant complained that his application had been refused solely due to the cancellation of his certificate of sponsorship and he had not been informed of the cancellation. Mr Corben submitted that the administrative review did engage with the applicant's complaint but that the onus was on the sponsor and the applicant to keep in touch during the application process and the applicant's sponsor should have informed the applicant of the suspension and subsequent revocation of the sponsor's licence. Mr Corben noted that the representations of 10th June 2019 were a mirror of the submissions made in the request for the administrative review and he accepted that the administrative review submissions were directed at striking down that Tier 2 decision whereas the representations of 10th June 2019 were directed to the issue of proportionality in the assessment of the human rights application.

55. The Decision under challenge at paragraph 20 stated

"Your representative had stated, he would like the application to be placed on hold until the Supreme Court

have determined the Tier 2 issue you have raised in your application. You have referenced the following case laws: Pathan & Islam v SSHD [2018] EWCA Civ 2103 ... a solicitor at ATM Law Solicitors has provided a witness statement regarding Tier 2 and Tier 4. Regarding a claimed issue with your previous Tier 2 application it has been noted that this was refused on 14 May 2018 with an ADMIN Review (AR). AR had been completed on 17 June 2018 where the AR had maintained the decision. As your application has been submitted on the basis of your Family and Private life in the UK and human rights, this has not been considered. As stated above it is open for you to make a Tier 2 application if you feel you meet the requirements".

56. Mr Corben submitted that the refusal Decision at paragraph 20 acknowledged the Tier 2 issue together with the case law identified and the language used at paragraph 20 may indicate that the applicant's representations were simply ignored but that the word "further" had been missed off the end of the sentence "as your application has been submitted on the basis of your family and private life in the UK and human rights, this has not been considered". In other words, the word "further" should be added after the word "considered". Rightly or wrongly, the caseworker did not accept that the refusal decision of 14th May was unfair and/or unlawful.

57. Secondly, Mr Corben did not accept that the applicant before this Tribunal was the victim of procedural unfairness. He submitted there was no duty of *prior* notification and the test for notification and "as soon as reasonably possible" depended on the circumstances and would have to allow for some time for the Secretary of State to notify an applicant of the revocation because systems could not be instantaneous. There was no evidence that but for any unfairness, which was denied, any application for further leave would have succeeded so as

to give him an Article 8 right to remain. Thirdly, Mr Corben submitted that the question was whether the applicant had a reasonable prospect of success in succeeding on the human rights claim. The two previous human rights applications had been refused and were assessed against the provisions of paragraph 276ADE of the Immigration Rules and exceptionally outside the provisions of the Immigration Rules. The application dated 3rd July was refused and certified as clearly unfounded and there was nothing in the material represented to the respondent in the human rights application of 9th February or 9th May/10th June 2019 capable of amounting to a claim that had a realistic prospect of success.

58. On this point Mr Biggs submitted that it was not for the Tribunal to consider this matter but for the Secretary of State. Mr Corben submitted that breach of procedural fairness did not of itself justify a grant of leave to remain on a human rights basis and a judge would have to consider the length of time that the applicant had lived in the United Kingdom and assess proportionality in line with Section 117A and B of the Nationality, Immigration and Asylum Act. It was submitted that it would only be if the applicant could persuade a First-tier Tribunal Judge that there was either no or an extremely limited public interest in removing the applicant that a human rights claim could be successful. The applicant was an overstayer and his last grant of leave expired on 14th September 2017. He had not been prevented from subsequently making applications which had been unsuccessful and held an out of country right of appeal. The respondent considered that it was an error to speculate on what might have occurred to the applicant's subsequent immigration status had the refusal decision of 14th May 2018 not been made and it had not been the subject of judicial review.

59. Mr Corben in oral argument emphasised that the decision of 14th May 2018 stood, and his Tier 2 application was not only dismissed but the applicant could not quash that valid decision.
60. He submitted that the seventeen-day window which the applicant would have been entitled to have had the applicant been notified of the revocation of the sponsor's licence immediately did not satisfy the test in Pathan and any First-tier Tribunal Judge whose view was being evaluated would have to consider that in the balancing exercise and the degree of unfairness. Anxious scrutiny did not mean that the court should strive by 'tortuous mental gymnastics' to find error in the Decision when there was none, LH v Secretary of State for the Home Department [2019] EWHC 3457.
61. I was referred to the administrative review of the 2018 decision whereby the applicant complained that he had not been informed while his application was pending of the revocation of his certificate of sponsorship and that he was unaware of the cancellation and he should have been contacted effectively in breach of natural justice and that the refusal was unfair and unreasonable. That application was sent on 27th May 2018. Mr Corben submitted that the administrative review addressed the issue of unfairness and noted that there was a visit to Flexistay on 15th August 2017 following which the sponsor's licence was suspended and the decision on the application was postponed until an outcome on the licence was known whereupon it was revoked on 27th April 2018, effectively cancelling his certificate of sponsorship. Mr Corben submitted that there was no acceptance by the Secretary of State that the material that the applicant was not told of the revocation was new material. In the Decision under challenge the caseworker at paragraph 20 referred to the administrative review and was well aware of the procedural unfairness claim and concluded

that this was a human rights application and that was as far as the Secretary of State would go.

62. Any notional First-tier Tribunal Judge would look at the scope of the Article 8 claim and note it was limited to a private life. Under the Immigration Rules the applicant had not been in the UK long enough to qualify and he could not show that there would be significant obstacles to his re-integration into India if he were forced to leave the UK. If his application was considered outside the Rules, his leave was always precarious and he had been here under a Tier 2 sponsorship and granted limited leave to remain and therefore his leave throughout was precarious and little weight would be given to that. Even if it were historical injustice this would be at the bottom end of the spectrum. Although the applicant had a theoretical opportunity to put forward a different application at a different time he had no indication that it would have been any different from the later decisions, one of which was certified.
63. The applicant was in the position of having to show that he could enjoy a reasonable prospect of success if made on the basis he was treated fairly but he would not qualify under the Rules or succeed under Article 8 and therefore that should be an end to it.
64. In oral submissions Mr Biggs and Mr Corben agreed that the common law had retrospective effect such that the Supreme Court authority in Pathan would have had effect in 2018.
65. Mr Biggs submitted that the covering letter of 10th June 2019 explicitly set out that permission had been granted to challenge the Court of Appeal decision in Pathan on 18th March 2019, that the decision in relation to Tier 2 had been procedurally unfair and that the applicant had been a victim of historical injustice. Separately, there was a request for

a stay pending the Supreme Court decision in Pathan. Mr Biggs stated that contrary to Mr Corben's argument, the Decision letter was not saying that the applicant failed to raise something new but merely that there was no realistic prospect of success and the unfairness of the decision of 14th May 2018 had not been considered. In effect, there was no anxious scrutiny. It appeared from the respondent's submissions that the respondent's argument was that the applicant should have challenged the 2018 decision and administrative review directly but that was incompatible with the historical injustice argument. The pre-action Protocol response was in fact inconsistent with the Decision itself, and further to the authority of Inclusion Housing Community Interest Company v Regulator of Social Housing [2020] EWHC 346 at paragraph 78, so far as *ex post facto* reasons were concerned, the authorities had drawn a distinction between evidence elucidating those originally given and evidence contradicting the reasons originally given or providing wholly new reasons. There was no evidence that the pre-action Protocol response reflected the reasoning at the time and indeed, the reasoning in the pre-action Protocol response was inconsistent with the Decision. Mr Corben's suggestion that the word "further" should be added to the sentence in paragraph 20 did not fit in with the meaning, was not evidenced and was just a best effort to make sense of the Decision. Further, it made little difference if it was added.

66. Turning to ground 2, Mr Biggs submitted that the Supreme Court in Pathan concluded by a majority that the applicant had been treated unfairly because he had not been notified promptly. Mr Biggs referred to paragraph 109 as holding that the respondent should do something "immediately" and at the very least, that paragraph 132 confirmed that the applicant should be told "as soon as reasonably possible".

67. I asked Mr Biggs what he considered was the effect of Pathan on the validity of the May 2018 decision and he accepted that the question of whether a declaration alone was sufficient to render the decision of no effect was a difficult one, but in this case the applicant relied on historical injustice.
68. He also submitted that Pathan could not be distinguished on the basis of insufficient time. There was a seventeen day period and albeit shorter than the three month period referred to in Pathan there was still time for notification. I should proceed on the basis in any event that the Home Office was required to immediately inform of the licence revocation and I was referred to paragraph 109 of Pathan. In procedural fairness there should be adopted an objective fixed standard. Prompt notification, which was the standard adopted by the majority in the Supreme Court, when properly understood meant immediate.
69. Alternatively, at the very least it must be to give notice as soon as reasonably possible in all the circumstances as per paragraph 132. Indeed, the court proceeded on the basis that Mr Pathan would have three months' notice and that assumed that he would be given notice when the revocation actually occurred. The applicant was not informed of the suspension and he was unaware and left in limbo for an extensive period of time. There was nothing in Pathan to suggest a particular period of time but there would have been at least a couple of weeks within which to take steps.
70. Secondly, the suggestion that the applicant was aware or complicit could not be based on any reasoning found in the decision letter because it did not engage with Pathan at all. The pre-action Protocol response could not give evidence of what was in the mind of the decision-maker and was ex post facto reasoning. There was no evidence to support any

contention that the applicant was involved in wrongdoing. Curiously, if he had been his procedural case would be stronger, as in **Balajigari [2019] EWCA Civ 673**. In **Pathan** the Home Office relied on the supplementary refusal letter but it did not feature either in the Court of Appeal's or the Supreme Court's reasoning as a reason to not quash the decision. Thirdly, despite the fact that the applicant had not challenged the decision directly the historical illegality was relevant.

71. The failure to provide prompt notification amounted to historical injustice and there were endless permutations which could be presented as to what the applicant could have done but he was very significantly prejudiced.

72. I was referred to the case of **Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351**, which distinguished between historic injustice where there should be no public interest in removal and dispositive of the claim and historical injustice where there was a spectrum of cases whereby the public interest in removal might be diluted. Mr Biggs submitted that this case was an example of historical injustice at the higher end of the scale and further, when considering the test at paragraph 39 of **Patel** in conjunction with paragraph 44 of **Pathan**, which referred to the fact that

"the complaint in this sort of case is about a systemic failure. The particular subset of procedural fairness with which this case is involved is a material systemic failure and the applicant is already in the employment of the sponsor but completely ignorant of the circumstances which led to the revocation of the licence".

Thus it was arguable that the applicant was in the territory of historic injustice. Paragraph 120 of **Ahsan** indicated the way in which historic injustice could work and it did not

matter that the decision was not quashed but what mattered was that the First-tier Tribunal was aware of the illegality of the decision and the consequences that it might have. In the way that historical injustice could work, it did not necessarily matter that the decision of 2018 would not be quashed. **AA (Afghanistan) v Secretary of State for the Home Department** [2007] EWCA Civ 12 at paragraphs 18 to 25 recognised the importance to be attached to the loss of a potential right, for example of an in-country appeal when procedurally an applicant's position is worse than it might have been but for, for example, an Adjudicator's error, particularly, at paragraph 23,

"the loss which the appellant has suffered is a consideration which the Secretary of State should consider in the exercise of his discretion as to whether the appellant should now be granted any further leave to remain and, if so, for how long."

The court acknowledged at paragraph 25 that the court could not put the appellant back into the position he would have been but the appellant had suffered a disbenefit as a result of legal errors made in the case and that is something which should be taken into account by the Secretary of State. Similarly, Mr Biggs submitted that in this case the First-tier Tribunal could do so.

73. Mr Biggs submitted that Mr Corben had not engaged with the historical injustice point, that the previous submissions in the written grounds of defence were misconceived and that analysis was no longer advanced. The only historical injustice case referred to, **EB (Kosovo)**, did not assist.
74. The historical injustice is connected to his current immigration status, which may have been different.

75. In relation to anxious scrutiny, Mr Biggs relied on LH, specifically paragraph 15, which identified that the defendant had the burden of justifying the decision and that the practical effect of the anxious scrutiny test was "the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account".
76. In relation to WM, it was not for the Tribunal to form its view of the merits of the claim.
77. In short, in the light of the historical injustice no reasonable Secretary of State could conclude that an applicant did not satisfy the paragraph 353 fresh submissions test because this was more than a mere fanciful human rights claim. New matters were raised, not least the grant of permission to the Supreme Court and formed part of the human rights claim which needed to be looked at. Paragraph 353 must be concerned with matters in respect of previous human rights claims and the Tier 2 application and administrative review were not the same as a human rights claim; indeed, administrative review was not available in a human rights claim.
78. Mr Biggs submitted that the Home Office had to consider the totality of the evidence and it was clear that there was new evidence. The earlier administrative review application did not consider the challenge to the 14th May decision in the context of a human rights claim and paragraph 353 was concerned with human rights submissions. This had never been raised before in the context of human rights. Clearly, the Home Office was looking at the merits under paragraph 353 and not saying that new matters have not been raised. The decision clearly stated that there was no realistic prospect of success. It was not accepted that the historical injustice was at the lower end of the scale. The question is whether it

was fanciful to say that the First-tier Tribunal would say he should be given some period of leave and the decision should be quashed.

Analysis

79. A simple chronology is as follows:

The applicant entered the United Kingdom on 1st September 2009 on a Tier 4 (General) Student visa.

His leave was extended (by various grants) to 20th August 2014.

On 19th August 2014 he made an application as a Tier 2 (General) Migrant.

Leave was granted until 14th September 2017.

On 15th August 2017 the Secretary of State made a visit to Flexistay, the applicant's employer.

The appellant made a further Tier 2 application on 24th August 2017.

On 6th March 2018 the sponsor's licence was suspended.

On 27th April 2018 the respondent revoked Flexistay's sponsor's licence.

The application of August 2017 was refused by letter on 14th May 2018 and notice of revocation communicated to him by that decision.

On 9th May 2019 the applicant made further submissions supported by a covering letter of 10th June 2019 (raising the **Pathan** point)

The further submissions were refused by the current Decision under challenge dated 12th September 2019

80. The two grounds of challenge are that (i) the respondent failed to give anxious scrutiny and failed to consider material matters and (ii) that it was irrational for the respondent to reject the applicant's putative human rights claim pursuant to paragraph 353.

81. Paragraph 353 sets out as follows:

"Fresh Claims

353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas."

82. At the hearing before me it was agreed by both Counsel that the decision of the Supreme Court in Pathan was indeed retrospective and applied therefore at the time that the Secretary of State made her decision in May 2018.

83. Although Mr Corben made a valiant attempt to defend the Decision under challenge, on a careful reading of the Decision

as a whole, it clearly did not engage with the unfairness point which was put squarely in the representations and further submissions from the applicant's solicitors on 10th June 2019. Those submissions were made at length in the representations and these outlined that the Supreme Court had granted permission in the case of Pathan. The response was blunt and as follows:

"Regarding a claimed issue with your previous Tier 2 application it has been noted that this was refused on 14th May 2018 with an ADMIN Review (AR). AR had been completed on 17th June 2018 where the AR had maintained the decision. As your application has been submitted on the basis of your family and private life in the UK and human rights, this has not been considered. As stated above, it is open for you to make a Tier 2 application if you feel you meet the requirements."

Mr Corben, as indicated above, suggested that 'further' be added after 'considered'. The addition of the word "further" does not in my opinion add anything to the analysis of the Decision. There is no reasoning given as to the exclusion of the point made in the representations merely that it has not been addressed. I have highlighted paragraph 353 above to show that paragraph 353 relates to a human rights claim, and the natural reading of this decision is clearly that the "Tier 2 issue" was not relevant. The administrative review, however, was concerned with the Tier 2 decision and that the underlying relevance and materiality of that decision in relation to the human rights claim was nowhere taken into consideration.

84. The pre-action Protocol response adds ex post facto reasoning rather than any elucidation of the reasons given in the decision letter and indeed appears to be inconsistent with

the decision letter itself, merely stating on 4th October 2019 that "your client did not suffer unfairness in all considerations as confirmed, therefore this claim is rebutted".

85. Mr Justice Chamberlain in **Inclusion Housing Community Interest Company** at paragraph 78 stated:

"So far as ex post facto reasons are concerned, the authorities draw a distinction between evidence elucidating those originally given and evidence contradicting the reasons originally given or providing wholly new reasons. ... Evidence of the former kind may be admissible; evidence of the latter kind is generally not."

He opined that reasons proffered after the commencement of proceedings must be treated especially carefully because there is a natural tendency to seek to defend and bolster a decision that is under challenge.

86. In essence, the Decision made no reference to the submissions made by the applicant's solicitors in relation to the unfairness point on Tier 2.

87. The Secretary of State was not asked to set aside the PBS decision but to consider and factor in the procedural unfairness previously visited on the applicant, and she specifically failed to address the submissions made on the appeal of **Pathan**, albeit she noted it.

88. To emphasise the point, in **R (YH) v Secretary of State for the Home Department** [\[2010\] EWCA Civ 116](#), at paragraph 24 Carnwath LJ confirmed the "need for decisions to show by their reasoning that every factor which tells in favour of the applicant has been properly taken into account". That did not occur and undermines the Secretary of State's position that

anxious scrutiny occurred. As stated in **LH** at paragraph 15, although there should be no requirement for mental gymnastics

"The concern of the court ought to be substance not semantics' (R (Sarkisian) v IAT [2001] EWHC Admin 486 at paragraph 18). Decision letters should be read in a broad and common-sense way, without being subjected to excessive or over punctilious textual analysis."

89. The omission of an important factor which has now been litigated upon in the Supreme Court and had the real prospect of success at the time of the Decision is a matter of substance not semantics.

90. The Secretary of State disputed the benefit that the time which would be afforded to the applicant following the notice of revocation of licence but fairness is not judged on an ex post facto basis. It is correct that Mr Biggs did not suggest that the 2018 decision was to be quashed (as in **Pathan**) because there was no direct challenge to the decision unlike the position in Pathan, but the circumstances nevertheless could be taken into account. Not least the applicant could have made an in time human rights claim. The fact that his further applications for leave to remain had been refused is not to the point either, because they were made in the context that the applicant no longer had S3C leave.

91. Much was made of **TN**, in the respondent's written defence but even that reasoning was not cited as part of the Decision under challenge. The point made in the representations was that permission had been granted to the Supreme Court. The Decision does not reflect any engagement or contemplation of the issue raised and thus does not reflect anxious scrutiny. **TN** is not authority for the proposition that in these circumstances historical injustice cannot be considered.

92. It was not being advanced, as I understood it, by the applicant that leave should necessarily follow because of the possible historical injustice but merely that it be factored in. The relevance of this factor I address in my reasoning on ground 2.
93. In relation to ground 2, the question of the irrationality of the Decision rests on whether there has been proper application of paragraph 353. It was not argued in the Decision that new material was not submitted but that there was no realistic prospect of success.
94. That leads to consideration of the historical injustice owing to the requirement for prompt notification of the revocation of the sponsor's licence as per Pathan. Contrary to the arguments founded on TN, this is not a request for 'correction of injustice' but a request for the Secretary of State when addressing the question of realistic prospect of success before a judge to take into account the issue of historical injustice. Although it was submitted by the respondent that there needed to be either family life or private life on which to 'bite' it was not argued in the Decision that there was no such private life and the threshold to engage private life is not specifically high, AG (Eritrea) v SSHD [2007] EWCA Civ 1285.
95. It was argued that the applicant would only have had seventeen days from when the licence was in fact revoked to the expiry of his leave to make a further application and that there was no requirement for *prior* notification, merely that there needed to be prompt notification.
96. At paragraph 109 of Pathan Lord Kerr and Lady Black in their joint judgment stated, however, that "*thus, the duty to act*

procedurally fairly comprehends an obligation to tell somebody such as Mr Pathan immediately about circumstances which doomed his current application” and further, as Mr Biggs pointed out, at paragraph 132 Lord Kerr and Lady Black stated:

“What was the fair thing to do, procedurally? In our judgment, it was to tell Mr Pathan as soon as reasonably possible after the cancellation of Submania’s licence that this had happened.”

97. The applicant’s employer’s licence was in fact suspended on 6th March 2018, also a fact of which he apparently had no notification. At that point the Secretary of State would have been aware that there was an application from the applicant (made 24th August 2017), not least because it is now maintained, although not in the Decision, that the revocation related to the job of the applicant. The suspension which would also doom his application was known for two months beforehand; the investigation had begun on 15th August 2017, following which the application 24th August 2017.

98. In any event and further in these particular circumstances, I conclude that the insufficiency of the time point does not assist the respondent. Even a few days would be sufficient to allow the applicant to vary his application and I note that Lord Kerr and Lady Black repeated at paragraph 112 of **Pathan** that “a decision that it should have been communicated at the time that revocation occurred involves no more than the assertion of a fair procedure”. I therefore conclude that overall the requirement to notify an applicant of the revocation of the sponsor’s licence should be immediate, and quite probably notice on suspension should be given promptly, particularly where there is no evidence that the applicant was complicit; indeed, this is not alleged in the decision letter.

99. I accept that there was no direct challenge to the May 2018 decision, unlike the decision challenged in Pathan, but the relevance of historical injustice pertaining to that decision does still have to be evaluated in respect of any Article 8 claim. Historical injustice has been held, not least by the President of the IAC, in Patel (historical injustice; NIAA Part 5A) [2020] UKUT 351(IAC) to be a factor to be taken into account. As stated in the headnote of Patel

"Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions".

100. On the debate as to whether the historical injustice falls into historic or historical injustice the test is set out by the Upper Tribunal in Patel (historical injustice) at paragraph 41:

"We consider that, for the future, the expression 'historic injustice' should be reserved for the types of case just described. It has particular characteristics. The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike the classes of case to which we next turn, the operation of historic injustice in the immigration field will not depend upon the particular interaction between the individual member of the class and the Secretary of State. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history."

101. On the facts as I have found them the applicant was simply denied prompt notice contrary to the Supreme Court ruling in

Pathan. I do not find that principle in **Pathan** can be distinguished from this case. I accept the historic injustice is wider than the particular interaction between the individual member of the class and the Secretary of State. However, it is not the case that the injustice here will necessarily be *determinative* of success as there are still the proportionality factors to be assessed (unlike the Gurkha cases that once family life is found historic injustice will be determinative of success (absent countervailing factors such as a criminal record)). For that reason I find no 'historic injustice'.

102. Even if I am wrong about that I conclude that there was historical injustice because the applicant was not given the prompt notice, and both are relevant to the consideration of Article 8.

103. **Ahsan** examined cases where what might be called historical injustice had arisen and at paragraph 120 Underhill LJ suggested that in relation to a human rights appeal the Secretary of State

"could also, and other things being equal should, exercise any relevant future discretion, if necessary 'outside the Rules', on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated.

...

I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy."

104. Historical injustice is evidently a factor which would be considered in an Article 8 claim and even if the claim related to a private life only which was precarious. **Rhuppiah v SSHD**

[2018] UKSC 58 at paragraph 49 has confirmed that the proposition that little weight should be afforded to that private life can be overridden in certain exceptional circumstances. Section 117A(2)(a) necessarily enabled applications occasionally to succeed even where a person's immigration status was precarious.

105. As Mr Biggs submitted, there was uncertainty as to what might have happened if an application had been made but that did not preclude the consideration in relation to Article 8.

106. Patel, Modha & Odedra v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17 held [my underlining]:

"14. You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children - including children on whom the parents themselves are now reliant - may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2)."

107. The critical question that the Secretary of State had to ask herself is set out in WM and there is clearly a causal nexus between the historical injustice to the appellant's current

immigration status and thus consideration of any claim. The previous refusals have all been made on the basis that the applicant had no leave but, as can be seen now from **Pathan**, the immigration status is not necessarily as it was previously construed. Even without Section 3C leave and the application of paragraph 276B the question of historical injustice is relevant to an Article 8 claim. For those reasons, I consider that the consideration was not in accordance with paragraph 353 and **Wednesbury** unreasonable.

108. Accordingly, I allow this application and the Decision of 12th September 2019 is quashed on both grounds.~~~0~~~