



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003719

First-tier Tribunal No: HU/52405/2022
IA/03797/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 17 September 2024**

Before

UPPER TRIBUNAL JUDGE LANDES

Between

**ROSE AGBO AGAIKE
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Babarinde (Solicitor, Masons Solicitors)
For the Respondent: Mr Parvar (Senior Home Office Presenting Officer)

Heard at Field House on 23 August 2024

DECISION AND REASONS

1. This is the remaking, under section 12 (2) (b) (ii) of the Tribunals, Courts and Enforcement Act 2007 of the decision of Judge Bell promulgated on 28 March 2023 allowing the appellant's appeal under s 82 (1) (b) Nationality, Immigration and Asylum Act 2002 against the respondent's decision of 25 March 2022 refusing her human rights' claim. This remaking follows the setting aside of Judge Bell's decision by an Upper Tribunal panel for material error of law in a decision and reasons issued on 2 February 2024. The panel directed that the appeal be reheard in the Upper Tribunal. Their error of law decision is attached in the annex below.
2. For clarity and the avoidance of doubt, when I refer to the appellant, I mean Ms Agaike, the appellant before the First-Tier Tribunal, and when I refer to the respondent, I mean the Secretary of State.

Background

3. The appellant is a citizen of Nigeria, born on 14 February 1973. She entered the UK as a domestic worker on 17 July 2011. The immigration chronology is set out in full in Mr Parvar's response of 30 April 2024 to Judge Rimington's directions of 13 March 2024. I reproduce that chronology below. The only disputes were whether the refusal of applications from 25 September 2017 onwards was due to the respondent's error in insisting on payslips and bank statements being provided even though the appellant was unable to work until leave was granted and whether the application of 25 September 2017 was indeed out of time.

17 July 2011	The appellant entered the UK with entry clearance as an overseas domestic worker, valid until 1 January 2012.
29 November 2011	The appellant applied for leave to remain as an overseas domestic worker.
24 January 2012	The appellant was granted leave to remain, valid until 24 January 2013.
18 December 2012	The appellant applied for leave to remain as an overseas domestic worker.
14 March 2013	The appellant was granted leave to remain, valid until 14 March 2014
19 February 2014	The appellant applied for leave to remain as an overseas domestic worker.
7 April 2014	The appellant was granted leave to remain, valid until 7 April 2015.
10 March 2015	The appellant applied for leave to remain as an overseas domestic worker.
30 April 2015	The appellant was granted leave to remain, valid until 30 April 2016.
26 April 2016	The appellant applied for leave to remain as an overseas domestic worker.
22 June 2016	The appellant was granted leave to remain, valid until 22 June 2017.
21 June 2017	The appellant applied for leave to remain as an overseas domestic worker.
14 August 2017	The appellant's application for leave to remain was refused on the basis that she had not demonstrated she would be earning the national minimum wage from her employment with Susan John. The appellant was granted a right to an administrative review of this decision (not exercised).
25 September 2017	The appellant submitted an out of time application for leave to remain as an overseas domestic worker. As part of this application, the appellant claimed that she had not been informed of the decision dated 14 August 2017 by her previous employer and she raised concerns as to their treatment of her. The appellant was subsequently referred to the NRM as a potential victim of modern slavery.
12 January 2018	The appellant received a negative reasonable grounds decision on her referral to the NRM.

19 June 2018	The appellant's application for leave to remain was refused on the basis that she had not demonstrated she would be earning the national minimum wage from her employment with Paul and Helen Bello, and no discretion was given in her favour on the matter of her application being out of time. The appellant was granted a right to an administrative review of this decision.
11 July 2018	The appellant exercised her right to administrative review of the decision dated 19 June 2018.
3 August 2018	The decision dated 19 June 2018 was maintained following administrative review.
16 August 2018	The appellant submitted an out of time application for leave to remain as an overseas domestic worker with respect to her employment with the same employers Bello.
11 June 2019	The appellant's application for leave to remain was refused on the ground that she had not demonstrated she would be earning the national minimum wage from her employment. The appellant was granted a right to an administrative review of this decision.
25 June 2019	The appellant exercised her right to administrative review of the decision dated 11 June 2019.
19 July 2019	The decision dated 11 June 2019 was maintained following administrative review, but the application was further refused on grounds of it being out of time. This resulted in the appellant being granted another right to administrative review.
2 August 2019	The appellant exercised her right to administrative review of the decisions dated 11 June 2019.
30 August 2019	The decision dated 11 June 2019 was overturned following administrative review, since the appellant had provided evidence of a contract dated 13 August 2018 to show that the national minimum wage was met. In addition to this, it was not considered that the out of time component to the refusal of 19 July 2019 was correctly addressed.
25 March 2021	Following a reconsideration, the appellant was granted leave to remain valid until 25 March 2022. This decision was based on the evidence which showed that the national minimum wage was met, and discretion was given in the appellant's favour on the out of time matter.
12 October 2021	The appellant applied for indefinite leave to remain in the UK.
25 March 2022	The appellant's application for indefinite leave to remain was refused with an in-country right of appeal.

4. The appellant's application for indefinite leave to remain which refusal is the subject matter of this appeal, was refused under the immigration rules on the

basis that the appellant had only held continuous lawful residence in the UK from 17 July 2011 until 30 August 2017 and then from 25 March 2021. 30 August 2017 was calculated by the writer of the decision letter as the date to which the appellant's leave under section 3C Immigration Act 1971 continued no doubt because, assuming the decision was served on the second day after it was sent, 30 August was the last day on which administrative review could be sought of the adverse decision of 14 August 2017. In addition, the application was refused because although the appellant had fulfilled the English language part of the requirement, she had not provided evidence to demonstrate she had sufficient knowledge about life in the UK. The respondent concluded that the appellant had not provided evidence to demonstrate that her circumstances were such that discretion should be exercised to permit her to stay indefinitely in the UK without fulfilling the requirements of immigration rules.

5. The respondent considered that the appellant's period of residence of 10 years 8 months was not a significant period when compared to her residence of 38 years in Nigeria before entering the UK. The appellant had evidenced social ties but it was said they did not give rise to exceptional or significantly compelling reasons on which to base a grant of settlement outside immigration rules, and the fact that the appellant was of good character and did not have a criminal record was not considered to be a reason to permit her to remain in the UK.
6. The respondent also considered whether the appellant's circumstances warranted a period of limited leave to remain on the basis of family life, private life, or exceptional circumstances. The appellant had not lived in the UK for 20 years. It was considered given her significant length of residence in Nigeria, she would have retained knowledge of the culture and customs of her country of origin and could use that to reintegrate. She had formed connections in the UK, a place where she held no prior knowledge, so she could equally well make connections in her country of origin where she had spent a significant amount of time. Her mother and siblings remained in Nigeria and so she already had connections there whom she could rely on for support if required. However, it was considered that as an independent adult she would be able to reintegrate without the support of family members, as she had done when relocating to the UK. She could continue her involvement with the church in a similar community in a Nigeria if she wished. The respondent therefore considered that the appellant had not satisfied the requirements of paragraph 276ADE. The respondent considered that the appellant had provided no information or evidence to establish that there were any exceptional circumstances in her case.
7. The appellant has now passed the Life in the UK test, on 31 May 2022.

The issues

8. I discussed the issues with the representatives and in particular what requirements of immigration rules it was said were met.
9. It appeared from Mr Babarinde's amended skeleton argument of 20 August 2024 and what he told me at the beginning of the hearing that the issues were the following:
 - (i) Whether the appellant had 10 years continuous lawful residence in the UK at the date of decision, so that the only difficulty preventing her from achieving

- ILR was her failure to pass the Life in the UK test, in which case she met the requirements of paragraph 276A04 immigration rules;
- (ii) If not, whether the appellant met the requirements of paragraph 276ADE immigration rules;
 - (iii) If not whether the decision was proportionate, and when considering proportionality whether the appellant should be treated as if she had achieved 10 years' continuous residence given the appellant's circumstances known to the respondent (in particular that she had been eligible to apply for settlement as a domestic worker from 17 July 2016 and that the respondent had made mistakes in considering the appellant's applications).

The evidence

- 10. The documentary evidence before me was in the form of a recently prepared appellant's bundle of 203 pages. Mr Babarinde told me that he was not relying on any of the evidence originally before the FTT.
- 11. Ms Agaike adopted her undated witness statement beginning at p 1 of the bundle which she signed and dated at the hearing.
- 12. In cross-examination the appellant said (in summary) that she had been living with her parents before she came to the UK, but her father had passed away last month. It was put to her that her statement suggested that her parents were both alive and she repeated that her father had passed away the previous month and she had not mentioned it in the statement because she had forgotten. She had three younger siblings living in Nigeria. She explained that before she came to the UK she had been working for 5 years as a domestic worker with the person who brought her to the UK. She could not go back to Nigeria as she had been in the UK for a very long time and she would find a very difficult life in Nigeria, conditions were worse than when she had left originally.
- 13. In re-examination and in answer to my questions the appellant said that there was nothing left for her to go back to in Nigeria. As she could not work here, she was struggling and she had not been able to raise money to treat her father and her siblings had dropped out of school because she could not help them. She could not go back without anything; she had come to the UK on the basis she would be able to obtain indefinite leave to remain after 5 years. The appellant agreed she was still in contact with her family and said that they knew about the problems she had in the UK and that was why her father had a heart attack. They had nothing to help her, her siblings were not working, and they were not going to school, they survived on food from the family farm.

Submissions

- 14. Mr Parvar relied on his skeleton argument of 22 August 2024, the respondent's review and his responses to directions dated 8 March and 30 April 2024 as well as the original refusal letter.
- 15. He said that the appellant's section 3C leave came to an end on 30 August 2017. The fact that there was no exercise of the right to administrative review meant that her subsequent applications were out of time.

16. Looking at case working records, he submitted that the refusals were correct on the basis that the national minimum wage requirements were not made out and they were not made out until the appellant produced the contract dated 13 August 2018.
17. I asked Mr Parvar the basis on which the respondent had exercised the discretion to grant leave in the decision of March 2021 following reconsideration. The decision itself said *"We have applied discretion in making this consideration, specifically with reference to 39E of the immigration rules."* I said that the discretion did not appear to me to be one which came within paragraph 39E. We looked at paragraph 39E (1) and (2) of the immigration rules. Between September 2017 and March 2021 the rules were essentially the same, except that in June 2018 the rules were amended with effect for applications made from the beginning of July 2018 to delete from the end of paragraph 39E (2) (a) the words *"or to which sub-paragraph (1) applied"*. The relevant sub-paragraphs read (in September 2017):
- "39E. This paragraph applies where:
- (1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or
- (2) the application was made:
- (a) following the refusal of a previous application for leave which was made in-time or to which sub-paragraph (1) applied; and
- (b) within 14 days of:
- (i) the refusal of the previous application for leave; or
- (ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or
- (iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or
- (iv) any administrative review or appeal being concluded, withdrawn or abandoned or lapsing"
18. Mr Parvar said that the application of 25 September 2017 was not made within 14 days of the expiry of the time-limit for making an in-time application for administrative review of the decision of 14 August 2017, as the time limit had expired on 30 August 2017. I asked him if there was any basis for the exercise of discretion with respect to overstaying other than paragraph 39E as the letter set out and he said he was not aware of any. He said the disclosed notes did not explain the basis on which discretion had been exercised. I said on whatever basis discretion had been exercised, as the application had been treated as if it were in time then the appellant must be treated as if she had leave from 16 August 2018 rather than from March 2021 and he agreed that must be so. Nevertheless, Mr Parvar submitted that the appellant would still not have 10 years continuous residence because of the gap in leave. He submitted that she did not, in fact, come within paragraph 39E and so her period of lawful continuous residence in effect started again and even if it was treated as starting again in August 2018 as opposed to March 2021 it was still not 10 years' lawful residence.
19. Mr Parvar submitted that the appellant relied on the fact she could have made an application for indefinite leave to remain in 2016, but that would have been not only a different application but one with a different fee. The appellant would still have had to pass the English language and the Life in the UK tests; he described it as a "stretch" to make a submission along those lines when the appellant had not made submissions on that basis to the respondent at any point in 2016 or 2017.

20. He said that the First-Tier Tribunal had found against the appellant on paragraph 276ADE, and he invited me to make similar findings. The appellant was an individual in good health who had spent more of her life in Nigeria; he had some concerns as to whether her father had passed away given her own witness statement adopted today referred to her parents in the plural. One would have thought that would have been mentioned especially if the appellant's late father's heart attack had been due to worry over the appellant's immigration circumstances. The reality was that even if, unfortunately, her father had passed away, the appellant was more than capable of reintegrating into Nigeria and would have her mother and siblings; she had not given an account of any problems with her family and so as set out in the skeleton argument it was submitted she would have a full and successful life in Nigeria.
21. Mr Parvar said he could not add in oral argument to the written submissions about proportionality. He said that paragraph 276A04 was only relevant if the appellant had a period of 10 years' continuous lawful residence.
22. Mr Babarinde maintained that it was clear from p 22 of 25 of the GCID case record sheet that the period for which discretion was being considered was whether the application of 25 September 2017 was out of time. I observe that the case record clearly shows that it was that time period in respect of which representations were made. He observed that the application of 25 September 2017 would have to be treated as being in-time as otherwise the application of 16 August 2018 would have been out of time and so the appellant would not have been granted leave in 2021.
23. I asked whether he was saying that because discretion had been applied he could add together the periods of leave so that the appellant would have 10 years in total lawful continuous residence at the date of decision and he said he could not say that because of the case of R (on the application of Afzal) [2023] UKSC 46. He said that his submission was that once discretion had been exercised then the respondent should have considered granting further leave, that was the whole point, that was how paragraph 276A04 "kicked in". The appellant was trying to do everything right and it was unfair to hold it against her. One of the reasons the appellant had never made an application for indefinite leave to remain before was that she was dependent on her employer, the application was beyond her own control. It was not suggested that it was the respondent's fault that the appellant did not make an application for settlement, but it was still relevant to proportionality.
24. He said that it was still his submission that the decision of 25 September 2017 was substantively wrong because the respondent was asking for payslips when the appellant did not have the right to work. Mr Babarinde referred me to p 111 of the appellant's bundle and I said that was an entry in 2019 and the reference to not being able to supply pay slips and bank statements appeared to be a reference to the appellant's representative's submissions identifying that as being the problem, rather than the respondent's acceptance that it was the problem. I pointed out that if one read on to p 112 the case notes clearly referred to the initial employment contracts from the new employer showing the appellant would not have been paid NMW.
25. Mr Babarinde submitted that the appellant should be considered for the purpose of proportionality as if she did have 10 years' lawful residence. In any event the

appellant had been working as a domestic worker since she was 33, she was now in her early 50s and after 13 years in the UK she would be going back to Nigeria, without being able to work as her original expectation had been when she came to the UK. The appellant had come to the UK as a low-paid worker and the whole process she had gone through was a continuous process of abuse as a domestic worker. The respondent had either delayed decisions or not made the right decisions. Life in Nigeria was very different from when the appellant had left. No-one would consider someone of her age as a domestic worker. Her prospects of enjoying a normal private life in Nigeria were very slim. Her siblings at home were in no position to accommodate her. She had no major health issues, but it would be near impossible for her to pull herself together again and fit back into society. The appellant had now passed the English language and life in the UK tests and there would be no purpose in removing her.

Discussion and analysis

The reasons why the applications of 21 June 2017 and 25 September 2017 were refused

26. The appellant's bundle contains the appellant's home office records. The reasons for refusing the application of 21 June 2017 can be found at p 52, because it was considered that the appellant was not being paid the national minimum wage of £7.50 per hour. That same page records that on 14 August 2017 the decision was sent to the appellant by recorded delivery.
27. An application made on 25 September 2017 is then noted. The entries at ps 70 and 71 of the appellant's bundle refer to the appellant being employed by new employers and being paid £700 a month for a 40-hour week, which equated to £5.16 an hour which did not meet the national minimum wage – the evidence being seen by contract/employers' letter. A note says, *"therefore application falls for refusal as she is an overstayer and salary does not meet NMW."* It was also noted that the applicant was to be referred to the NRM and representatives had asserted that her former employer had failed to disclose the refusal of August 2017 to her and the appellant was only made aware when helpers from the appellant's church confronted the former employer. The former employer had also written enclosing a termination letter saying that the appellant's contract had been terminated on 28 August 2017 due to the refusal of 14 August 2017.
28. In December 2017, it was noted (see p 72) that a revised terms and conditions of employment had been submitted dated 1 December 2017, but it was said *"application will still be a refusal as out of time and therefore not to be outcomed."*
29. The appellant received a negative reasonable grounds decision from the NRM in January 2018, but it appears that this took some time to reach the relevant team making the decision on her domestic worker application. The appellant's representatives wrote in requesting a decision in June 2018. The conclusion by the respondent was that *"the application was out of time and the applicant is still not being paid the NMW."* The note at the bottom of p 74 explains that the revised terms and conditions of December 2017 show a salary of £800 per month with working hours of 8 to 5 pm with alternate weekends off. The conclusion was that this equated to £4.25 per hour and did not meet the minimum wage. The refusal decision was sent out.

30. I do not have the letter from the appellant's representatives of July 2018 in which they applied for administrative review but p 77 of the appellant's bundle notes that the application for review made two points, firstly that the decision maker had failed to use discretion about the appellant's former employer not having notified her of the refusal of 14 August 2017 properly in-time, and secondly that the calculation of hourly rate had not been properly made, as the appellant's contractual working hours were 40 per week, extra hours to be negotiated at a rate not lower than the national minimum wage and the decision maker had failed to consider an additional sum for accommodation. The decision maker explains why they have maintained the decision, setting out their arithmetic and calculating that in fact the appellant's average hours per week work out at 54 and even taking the accommodation offset into account the hourly rate from the contract worked out at £4.25.
31. Mr Babarinde has not explained how the respondent's calculation was wrong. On the evidence available to me I am satisfied that the application made in September 2017 was correctly refused in June 2018 and the administrative review also refused on 3 August 2018 because the appellant was not being paid the national minimum wage. It is not a question of payslips; it was the actual employment contract which the respondent considered. The respondent's note at ps 111 - 112 (see paragraph 34 below) makes it clear that the respondent's position has always been that the first contract to show that the NMW was met was the employment contract of 13 August 2018. I am satisfied that this is correct.
32. The appellant made a further application on 16 August 2018. The respondent's database entries showed that there was some delay in considering the application because there was a request for a fee waiver and then debate about whether the IHS had been paid. The application was considered and refused in June 2019 although the calculation showed that the applicant was being paid the NMW (see p 102). An administrative review was sought of the refusal and the caseworker looking at that review sent an email to the original caseworker asking what had been looked at to refuse the application, as the appellant had no payslips or bank statements to corroborate the contractual salary as she had no leave so had not started working. The original caseworker's email explains that there was nothing other than the application to evidence what the hourly rate and monthly wage was; further information was sought but it was not made clear, and it was just stated that she did not have anything as she had no leave. The calculation had been done because the previous refusal had been for failure to meet the NMW (p 104). The notes on p 105 set out the administrative review refusal saying that the appellant had overstayed, and although the applicant had requested discretion, they did not provide any reasons why discretion should be applied.
33. A second administrative review was permitted in August 2019 because discretion had not been addressed. The initial application had given reasons for the exercise of discretion sought and so it needed to be addressed; the application was to be reconsidered (p 108).
34. The respondent's note made on 5 November 2019 (ps 111 - 112) needs to be read in its entirety. The respondent makes clear that the initial employment contracts from the appellant's new employer show that the appellant would not have been paid NMW, but the employment contract of 13 August 2018 did meet NMW. The respondent then continued to consider discretion and overstaying. It

is not clear why there is a gap of more than a year between the note of 5 November 2019 and 25 November 2020 when some action seems to have been taken on the discretion point, although that had not been finalised when the appellant's new representatives wrote on 8 March 2021 to complain about the delay of more than a year (ps 112 - 113).

35. The respondent's notes show that the discretion point was chased and then on 25 March 2021 there is a note indicating "*discussed with HEO OK to grant until 25/03/22*" (p 114). I can see no reason given for the positive exercise of discretion. The appellant's residence permit shows that she was granted leave to remain as a domestic worker until 25 March 2022.

Did the appellant have 10 years' continuous lawful residence at the date of the decision?

36. It is not disputed by the respondent that the appellant had continuous lawful residence from 17 July 2011 (the date she entered the UK) until 30 August 2017 which is the date the respondent says the time for bringing an administrative review against the adverse decision of 14 August 2017 expired.
37. It is not disputed by the respondent that the appellant had leave once again on at the latest, 25 March 2021 and as she appealed in time from the adverse decision of 25 March 2022, that leave is still continuing under the provisions of section 3C Immigration Act 1971.
38. The first question is whether the appellant's leave continued after 30 August 2017. Mr Babarinde submitted (see paragraph 22 above) that the respondent must have accepted by their exercise of discretion under paragraph 39E that the application of 25 September 2017 was in-time.
39. On reflection after the hearing, I consider that Mr Babarinde was right and I was wrong in the initial impressions I expressed to Mr Parvar at the hearing.
40. The appellant's then representative's covering letter with the application of 25 September 2017 set out that her previous employer had failed to disclose to her that her application had been rejected on 14 August 2017 and that had been the subject of a report to the local MP. The letter said that the appellant had only been aware of her position when the pastor and church members confronted the employer "*a week ago*" (i.e. around 18 September). The implication from the letter was that the confrontation of the employer may have been prompted by the appellant's receipt of the respondent's letter of 14 September 2017 containing a s120 notice.
41. Under section 3C (1) (2) (d) Immigration Act 1971 as in force in September 2017, where a person who has limited leave to remain applies in-time for the variation of that leave and the application for variation is made before the leave expires and the leave expires without the application for variation having been decided, leave is extended by virtue of this section during any period when -
- "an administrative review of the decision on the application for variation -
- (i) Could be sought, or
 - (ii) Is pending"

42. Rule 34R(1)(a) of the immigration rules in force in September 2017 provided that the application for administrative review must be made “where the applicant is in the UK and not detained, no more than 14 calendar days after receipt by the applicant of the notice of the eligible decision”.
43. Home office records show that the refusal decision of 14 August was posted to the applicant by recorded delivery to the address which was her employer’s home on 14 August 2017. The Immigration (Leave to Enter and Remain) Order 2000 Article 8ZB provides that where a notice is sent in accordance with article 8ZA (which provides amongst other forms of service for postal service to an address provided for correspondence by the person or the person’s representative) -
- “it shall be deemed to have been given to the person affected, unless the contrary is proved -
- (a) Where the notice is sent by postal service -
- (i) On the second day after it was sent by postal service in which delivery or receipt is recorded if sent to a place within the United Kingdom...”
44. The deemed service provisions were considered by the Court of Appeal in R (on the application of Masud Alam) [2020] EWCA Civ 1527. They considered that there was no requirement for the decision to have been read and understood by the person affected but the law did require that persons affected should have the opportunity to make themselves acquainted with the decision - they considered that failing to open an envelope or allowing mail to accumulate in a mailbox would not enable the person to whom the mail was addressed to establish that the notice was not received [26] [29]. It is evident from their discussion on the facts of Mr Alam’s case that if Mr Alam had been able to establish that the notice had been delivered but intercepted by a flatmate and not handed to him, he would have been able to rebut the presumption (see [48]).
45. If therefore the respondent (when they ultimately looked back after administrative review) accepted the representations on behalf of the appellant that because of the actions of her employer she was not aware of and had no opportunity to make herself acquainted with the refusal decision of 14 August 2017 until around 18 September, or the slightly earlier date when she would have received the letter of 14 September enclosing the s120 notice, then the application of 25 September 2017 would have been made when she still had leave under section 3C, as she was within the 14 day time period for bringing an administrative review. I observe that there was no evidential basis for doing other than either a) maintaining that the appellant had not rebutted the presumption that the decision was validly served on the second day after posting i.e. 16 August, or b) accepting the appellant’s account that she had rebutted the presumption as due to the actions of her employer she was not made aware of the decision until at the earliest the middle of September. I too, accept on the facts that the appellant has rebutted the presumption of service, as she was not aware of the contents of the refusal decision until the middle of September 2017. The representations in the letter of 25 September 2017 were made at the first opportunity, and the appellant has been consistent about being unaware of the refusal at the time. The negative reasonable grounds decision from the NRM does not undermine such a conclusion as the basis for their conclusion that the appellant was not subjected to domestic servitude was that she was paid reasonably for her work and there was no evidence of having to work excessive hours or in unbearable conditions or being ill-treated or humiliated. The decision did not make any findings on the question of when she received the refusal decision of August 2017.

46. The application of 25 September 2017 was refused on 19 June 2018. It does not seem that the decision letter was served until 2 July 2018 (see note in home office records at p 76 appellant's bundle) and there was no suggestion therefore that the request for administrative review of 11 July 2018 was out of time. However, on 3 August 2018 the decision was maintained following administrative review and so following my findings in the paragraph above the appellant's leave under section 3C would have ended then, 7 years and a couple of weeks after she entered the UK.
47. The application of 16 August 2018, which was ultimately successful after the administrative reviews, was made within 14 days of the appellant's leave expiring. This application came within the provisions of rule 39E (2) (b) (iv) as although it was made when the appellant had no leave it was made following the refusal of a previous application for leave which was made in-time (given my findings and what I find must have been the respondent's acceptance of the date the appellant received the decision of 14 August 2017) and within 14 days of any administrative review being concluded. That is why the respondent was ultimately able to conclude, using rule 39E, that they could grant leave for a further year as a domestic worker. I note that by the time of the appellant's application of 16 August 2018, the words "*or to which sub-paragraph (1) applied*" had been deleted from paragraph 39E(2)(a) so that the only basis the respondent could possibly have had for disregarding overstaying under rule 39E would be if the previous refused application (i.e. the 25 September 2017 application) had been made in-time. I was wrong to observe at the hearing that the respondent must when granting the appellant further leave as a domestic worker, have treated the appellant as having leave from 16 August 2018; they had no need to do so because she came within the rule 39E exception for overstayers once they had treated the application of 25 September 2017 as in fact being made in-time.
48. However, whether or not the application could have been decided more quickly, the respondent did grant leave again on 25 March 2021. As Mr Babarinde accepted on the authority of R (on the application of Afzal) v Secretary of State for the Home Department [2023] UKSC 46; [2023] 1 WLR 4593, the fact that under paragraph 276B(v) of the immigration rules, periods of overstaying where paragraph 39E of the immigration rules applied would be disregarded meant only that a book-ended period of overstaying did not break continuity between the periods of residence with leave before and after it, so that they could be added together in calculating the 10-year period for continuous residence in the UK. It did not mean that the period of overstaying could be counted as an addition for the purposes of that calculation.
49. At the date of the decision of March 2022, the appellant had a further year's leave in the UK. As the period of overstaying where paragraph 39E immigration rules applied can be disregarded but cannot be counted as an addition, but the two book-ended periods can be added together, at the date of the decision the appellant had on my findings above, 7 years and a couple of weeks plus one year continuous residence in the UK so just over 8 years.
50. The appellant did not therefore have 10 years continuous residence in the UK at the date of decision.
51. I note however that the appellant's leave continues under the provisions of section 3C as she made an in-time appeal from the adverse decision and that

appeal is still ongoing. I observe therefore that in March 2024 she would have achieved 10 years' continuous residence in the UK by adding together the bookended periods of leave from mid-July 2011 until the beginning of August 2018 and from the end of March 2021 ongoing. I consider the consequences of that conclusion below.

Paragraph 276 ADE immigration rules

52. Judge Bell found that there would be no very significant obstacles to the appellant's integration into Nigeria as of 23 March 2023, the date of the hearing before her, and her conclusions were not challenged as being in error of law.
53. It would be difficult for the appellant to return to Nigeria after living in the UK for more than 13 years and having come to the UK with her and her family's expectation of being able to help them through her domestic work in the UK. I appreciate that she is now in her early fifties and has no experience other than as a domestic worker. I had no background material about the job market in Nigeria, but it is a reasonable inference that the appellant would have only a limited number of unskilled jobs available to her. However the appellant does not have any major health problems that would prevent her from working or would mean that she requires care. Although the appellant's family may well be disappointed that she was not able to help her siblings through school, her family know about her problems and she is still in contact with them, it was not suggested that they had rejected her. Whilst she would not have much on return to Nigeria, I find that she would be able to stay with her family and survive as she said her siblings did, on the food from the family farm, until she can find a job. She has at least one surviving parent and siblings to help her adapt again to life in Nigeria and there is nothing to indicate she has lost touch with the culture in which she was brought up and lived and worked into her thirties. She has a relationship with her church community in the UK; of course, it would be a different relationship with a different church community in Nigeria, but she would be able to practise her religion in Nigeria and the communal practice of religion would assist her in forming ties with fellow congregants. I am not therefore satisfied that there would be very significant obstacles to the appellant's reintegration into Nigeria.

Engagement of Article 8 ECHR

54. I am satisfied that Article 8 ECHR is engaged; indeed the contrary has not been suggested. The appellant has lived in the UK for more than 13 years and has a strong private life in the UK, volunteering with the church and for an organisation which supports marginalised and vulnerable women.

Proportionality

55. Mr Babarinde raised a number of matters which he said reduced the public interest or were otherwise relevant to the question of proportionality.
56. For the reasons I have explained at paragraphs 26 to 31 above, I do not consider that the applications of June 2017 and September 2017 were wrongly refused by the respondent. The proposed contracts (not the payslips) showed that the appellant was not earning at a level equivalent to the national minimum wage. There was a referral to the NRM, but that resulted in a negative decision

with respect to modern slavery which was not challenged. Accordingly, there is nothing to reduce the public interest in this respect.

57. It is right that the respondent should have appreciated rather earlier that they were being asked to consider timeliness and rule 39E immigration rules, and the first decision of June 2019 was wrong with respect to the minimum wage. However even if the appellant had been given leave to remain on 11 June 2019 instead of 25 March 2021, she would only have achieved 10 years' continuous residence by late May/early June 2022, so that she would not have reached the 10-year threshold at the date of decision. I observe that in any event would be taking matters at their highest, because the appellant would only have been granted leave for one year at a time as a domestic worker so if she had been granted leave earlier she would have had to have a basis for continued application to the respondent.
58. I do not find that the respondent should have considered it relevant that the appellant could, potentially from July 2016, have applied for indefinite leave to remain with five years continuous leave as a domestic worker. She might have done, but as Mr Parvar submitted, it was a different application with a different fee and the appellant would have needed to have passed the English language and life in the UK tests. I observe that the application for indefinite leave still required the appellant to be able to show that she continued to be required for employment as a domestic worker in a private household. It was not an unfettered right to apply for settlement whatever a person's current working position. I appreciate that the rules in operation for those who first entered before July 2012 created a tie to an employer which could potentially be exploited, but then it also created opportunities to settle in the UK if a person was fortunate enough to have a benevolent employer, opportunities which would not otherwise be likely to be available to that person, and as I have said above the appellant was not found to have been a victim of modern slavery.
59. Mr Babarinde submitted that paragraph 276A04 was applicable. At the time of the decision under appeal, that paragraph read:
- “Where a person who has made an application for indefinite leave to remain under this Part does not meet the requirements for indefinite leave to remain but falls to be granted limited leave to remain under this Part on the basis of long residence or private life in the UK, or outside the rules on Article 8 grounds:
- (a) The Secretary of State will treat that application for indefinite leave to remain as an application for limited leave to remain...”
60. If the appellant had had 10 years continuous residence in the UK at the date of decision then as she had not passed the life in the UK test, whilst she could not qualify for indefinite leave to remain, she could have qualified for an extension of stay on the grounds of long residence under paragraph 276A1 immigration rules on the basis that she met the requirements of paragraphs 276B (i) – (ii) and (v), i.e. the continuous lawful residence, suitability and not being in the UK in breach of immigration laws except for overstaying being disregarded. In that case she would have fallen to be granted limited leave to remain under paragraph 276A04. However I have found she did not have 10 years' continuous residence at the date of decision. Paragraph 276A04 was therefore not applicable. She did not fall to be granted limited leave on private life grounds either and there was no obvious reason to grant her leave outside the rules. Mr Babarinde seemed to be suggesting that she should have been granted leave so that she could continue to live in the UK until she obtained settlement but there would have been no valid

reason for the respondent to grant leave on that basis. I observe that it was not submitted at the time that her application should, for example, be considered under the domestic worker provisions if she did not qualify for leave to remain on the basis of 10 years' continuous residence.

61. I do however consider it to be highly relevant that the appellant has now, indeed had by the end of March 2024, accumulated 10 years' continuous residence as I have explained at paragraphs 40 - 51 above. She has now passed the life in the UK test which she had not passed at the date of decision.
62. I do not consider this to be a "new matter;" the appellant's case has always been (albeit for different reasons) that she satisfied the 10-year long residence requirements of the rules or should be taken as satisfying the same.
63. I appreciate the immigration rules have changed, and the relevant rules can now be found in Appendix Long Residence but in this particular case they are not materially different.
64. So, conducting the balance exercise and considering the factors under s117B of the Nationality, Immigration and Asylum Act 2022, the appellant can speak English and is capable of financial independence although those are of course neutral factors. The appellant has been an overstayer in the past but that was in the particular circumstances set out above, came within the provisions of rule 39E and occurred whilst she was waiting for the outcome of an ultimately successful application. She has done her best to comply with immigration rules and procedures. Whilst statute requires me to give consideration to giving little weight to her private life in the UK because her immigration status has always been precarious, now she has reached the length of continuous residence in the UK which qualifies for long residence and she has passed the necessary tests, there is no public interest in her removal because she meets the requirements of the immigration rules.
65. Even if I am wrong in my analysis above and the application of 25 September 2017 was not in fact in-time, for the reasons I have set out at paragraph 47 above the respondent must have decided to treat the application as if it had been made in-time. Given the history, the attention given to the consideration and the reference to rule 39E in the decision of March 2021, it must have been a deliberate decision so to treat the application. There is no public interest served in now resiling from the consequences of that decision and it would not be fair to do so. Accordingly I consider even on that alternative analysis, there is no public interest in the appellant's removal.

Conclusion

66. The respondent may require a further specific application to be made under the long residence rules provisions which the appellant now satisfies as I have explained above, but in the circumstances it would be disproportionate to remove the appellant before she has an opportunity to make such application and if necessary an application for fee remission (as per the approach at (3) and (4) of the headnote of OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 65 (IAC)).
67. On remaking, the appellant's appeal is allowed.

Notice of Decision

The appeal is allowed.

I make no fee award because the basis on which the appellant has succeeded was not available to her at the date of decision.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 September 2024

Annex (Error of law decision)

**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-003719

First-tier Tribunal Nos: HU/52405/2022
IA/03797/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
2 February 2024**
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Before

UPPER TRIBUNAL JUDGE RIMINGTON

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant/respondent in the FTT

And

**ROSE AGBO AGAIKE
(NO ANONYMITY ORDER MADE)**

Respondent/appellant in the FTT

Representation:

For the Appellant: Mr Parvar, a Home Office Presenting Officer

For the Respondent: Mr Babarinde, a legal representative

Heard at Field House on 23 October 2023

DECISION AND REASONS

Introduction

1. The present appeal is by the Secretary of State for the Home Department, who will continue to be referred to as “the respondent” notwithstanding that she is in fact the appellant in the present appeal. The appellant will continue to be referred to by her previous designation also.
2. The respondent appeals to the Upper Tribunal (the tribunal) with permission of FTT Judge Elliott who identified potential material errors of law in the decision of the First-tier Tribunal (the FTT). In particular, in considering whether the respondent’s interference with her protected human rights would lead to “any unjustifiably harsh consequences for the appellant” and in failing to consider and apply section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), Judge of the First-tier Tribunal C Bell (the judge) had arguably fallen into error. His decision is specifically alleged to lack a reference to paragraphs GEN 3.1–3.3 and a failure to identify the alleged “unjustifiably harsh consequences” which were required to flow

from the appellant's removal if she was to succeed under article 8 of the European Convention on Human Rights (ECHR). There appeared to be no evidence that consideration had been given, or at least expressed, as to the apparent precariousness of the appellant's immigration status and how that affected the public interest in her removal.

3. Judge Elliott therefore gave permission to appeal on the above-mentioned grounds but also stated that all grounds could be argued.

Background

4. Ms Agaike came to the UK from Nigeria, where she was born on 14 February 1973. She entered the UK with leave to enter (LTE) as a domestic worker on 17 July 2011. Her leave was subsequently extended on numerous occasions, it seems on each occasion, as a domestic worker. On 14th August 2017 and 19th June 2018 her 'out of time' applications for leave as a domestic worker were refused. She made a further application as an overseas domestic worker on 16th August 2018 which was initially refused but ultimately that decision was overturned and she was granted leave to remain on 25th March 2021 valid until 25th March 2022. Finally, on 12 October 2021 she applied for indefinite leave to remain (ILR). On 23rd of March 2022 the respondent refused the application but the appellant appealed that refusal on 08 April 2022. The reasons for refusing her application are set out in a decision letter containing 12 pages which is found in the pdf combined bundle of documents that has been prepared for this appeal at page 16 *et seq*. The letter states that the appellant had made a "human rights claim in an application for ILR in the UK on the basis of 'other purposes' outside the Immigration Rules". The application was considered under article 8 of the ECHR.
5. Having set out the history in greater detail than I have above, the respondent treated the application as one outside the Immigration Rules but considered there to be no "truly exceptional reasons" for allowing the case outside those rules. However, given that the application was "for ILR rather than limited leave. Unless there were truly exceptional reasons the expectation would be that applicants would start a route to ILR and serve a probationary period of limited leave before being eligible for to apply for ILR". In other words the respondent did not treat the application as one for limited leave as this was not the application that had been submitted. Indeed, the appellant's undated skeleton argument before the FTT expressly refers to article 8 alone but makes no reference to the Immigration Rules. The respondent indicated that there may be exceptional cases where ILR is the only viable option and a shorter period of leave is not appropriate, particularly where there are "compelling compassionate circumstances". These will only be found to exist where there is sufficient evidence to demonstrate the individual circumstances are not just unusual but can be distinguished to a high degree from other cases, to the extent that it is necessary to deviate from a standard grant of 30 months leave to remain. The respondent noted that the application was supported by a covering letter from the appellant's representative stating that the application for settlement was on the basis of 10 years continuous lawful residence in the UK. Therefore, the application was considered under paragraph 276B of the Immigration Rules. That paragraph sets out the requirements to be met for ILR on the grounds of 10-years continuous lawful residence in the UK. The respondent had to have regard to the public interest, there must be no reasons why it is undesirable for the person concerned to be granted ILR and the respondent had to consider various factors in considering the application. Clearly, this was the basis on which the application was considered by the respondent, who also had regard to

an apparent period of unlawful residence in this case. The period of lawful residence, according to the respondent, came to an end on 30 August 2017 when the appellant had been in the UK for six years and one month. Accordingly, the appellant did not qualify for 10 years continuous lawful residence, it was contended. The appellant had not held any lawful residence at the time of her subsequent applications including the one currently under consideration following the above refusal. The refusal proceeded to state that following expiry of leave there was no legal basis to remain in the UK. The appellant was not granted lawful residence again until March 2021 which was still three days short of one year at the time of consideration. Accordingly, at the time of consideration of the application the appellant did not satisfy the requirements of paragraph 276B(i) (a) and the application was refused under paragraph 276D. That paragraph allowed the respondent to refuse ILR in a case where the requirements of paragraph 276B were not met.

6. The application was also considered outside the Immigration Rules on the basis that the appellant had by the date of consideration of the application (25th March 2022) resided in the UK for a total period of 10 years and eight months but this was not considered to be a sufficiently significant period of residence given that the appellant had spent 38 years of her life in Nigeria prior to entering the UK. Furthermore, the respondent considered the extent of the appellant's social ties in the UK but considered them not to give rise to "exceptional and compelling reasons on which to grant settlement outside the Immigration Rules". The appellant had made no representations with regard to any family life in the UK and although she was of good character, had committed no offences and had not been in receipt of public funds, the respondent considered there to be no very significant obstacles to her integration into Nigeria. The respondent noted that the appellant had a mother and siblings living in Nigeria and there would therefore be family members who she could rely on for support during a period of adjustment and she would no doubt find societies and institutions that she could associate with in her own country. The application was therefore refused under paragraph 276 ADE (1)¹ (vi). The application was also refused under the exceptional circumstances route under the ECHR based on the 10-year private life route (paragraph 276CE). The respondent concluded that there were no "exceptional circumstances" which justified acceding to the appellant's application outside the Immigration Rules.

The hearing

7. At the hearing we established that the decision challenged was the one dated 23 March 2022 summarised in the previous paragraph. It was pointed out by Mr Babarinde that he had not received the directions for hearing or a bundle. It appeared to be conceded that the appellant did not satisfy the requirements for paragraph 276B of the Immigration Rules but he pointed out that his client had met the requirements of paragraph 276A04. That paragraph provides that where a person has made an application for ILR (under Part 7 - other categories) if that person "does not meet the requirements for ILR" the Secretary of State "will treat the application (for ILR) as one for limited leave to remain" (paragraph 276A04 (a)). On that basis, Mr Babarinde argued, his client ought to have been given LTR under that part. Further or alternatively, she should have been granted LTR on the basis of long residence, appendix private life or outside the rules on article 8 grounds. In the circumstances, the Secretary of State ought to have treated the application for ILR as an application for limited leave to remain (LLTR).

¹ Paragraph 276ADE as well as BE and C and DE - H were substituted from 20th of June 2022 by "Appendix Private Life" but this decision was taken before that date.

Accordingly, his submission was that his client "... should get another period of leave". He also submitted that this would result in her achieving the 10 years continuous lawful residence which, we understood him to suggest, would result in the appellant being granted ILR in due course. It was pointed out by the tribunal that the paragraph referred to (paragraph 276A04) was not referred to in the decision or the skeleton argument. Eventually it was established that Mr Babarinde had submitted an amended skeleton argument but he conceded that it did not make reference to paragraph 276A04 either. Therefore, the judge decided the case on the basis that it was application outside the Immigration Rules. Nevertheless, it was submitted that the respondent had allegedly acted unreasonably in refusing the application and that her refusal was a disproportionate interference with the appellant's protected human rights. Mr Babarinde had submitted, in his amended skeleton argument, that it was unreasonable in the circumstances to refuse the appellant's application given her long period of lawful leave.

8. Mr Parvar submitted that his appeal should be allowed. This was not a "historic injustice" type of case-where the appeal might be allowed outside the rules - as this is not how the case had been placed before the judge. In any event, this was not a case of a historic injustice. Even if were the case- it would be contrary to the authorities and could not succeed without more ado (see **Ahmed [2023] UKUT 00165** , having been referred to the earlier case of **Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC)**). Dove J at paragraph 32 of Ahmed decided that:
9. "The category of "historic injustice" is limited to a very limited number of specific cases where the UK government has belatedly recognised that a particular class of person has been wrongly treated."
10. Clearly, this has no relevance to this appeal, Mr Parvar submitted.
11. Mr Parvar submitted that there were no unjustifiably harsh consequences that would flow to the appellant within the terms of GEN 3.1 - 3.3 or otherwise. GEN 3.3 (1) provides that in considering an application for entry clearance or leave to enter or remain the decision maker must take into account as a primary consideration the best interests of any child so we are far from clear as to its relevance here. Section 117B (5) deals with precarious immigration status and not cases where a person was in the UK unlawfully. It had not been suggested the appellant had been in the UK unlawfully but it had been the case she had been here precariously given that she had been on various temporary forms of leave. The appellant's application had therefore been rightly considered outside the rules. However, the judge's assessment had been flawed, which had materially cast doubt on his conclusion. ILR was rejected in paragraph 15 of the decision because the only basis that it had been argued for was that the appellant had 10 years continuous lawful residence within paragraph 276B. The judge had not been referred to 276A04 Nor was it raised before the judge, for example, in the amended skeleton argument to which Mr Babarinde had referred (dated 27th of February 2023).
12. Mr Babarinde referred to the amended skeleton (the tribunal had both the original skeleton argument and the amended version in its consolidated bundle). It was pointed out that his client had dismissed his former solicitor and instructed Mr Babarinde-hence there were two skeleton arguments. He said that his client had raised the argument that she had established private life in the UK, however. Breach of paragraph 276A04 was not mentioned but this should have been in the judge's mind. Because the appellant had continuous leave, it was submitted that

there was no material error of law. GEN 3.1 - 3.3 did not apply. He accepted that the appellant was here precariously. It was pointed out that the judge appeared to be criticised for failing to look at “very serious obstacles”. But the appellant was here lawfully for ten years, she had established her case, he said.

13. Mr Parvar said this would have been a new matter. He could not see how she could succeed under 276A04 either.
14. Judge Rimington pointed out that in the light of the apparent acceptance of the original decision having been erroneous it may be appropriate for the respondent to consider the new point that had been raised.
15. Mr Parvar thought that at its highest it could be taken as a historical injustice in the case, which had not been accepted by the respondent. However, Mr Parvar agreed that it would be appropriate to take instructions. He said it may be the respondent could re-consider the matter having given full consideration to the provision (276A04). It was pointed out that this was a settlement application. It is accepted that the provision was not referred to in either the application or the refusal or at the hearing before the FTT. Mr Parvar confirmed he would take instructions on the matter as to the next steps it would be appropriate to take.
16. The decision was reserved.

Discussion

17. The application was argued on the basis that the appellant satisfied the requirements of the Immigration Rules in relation to a period of 10-years continuous lawful residence (paragraph 276 B) or it was said to be the case that her application should be considered outside those rules. It is noted that the appellant’s application was based upon her private life in the UK and not upon any family life or upon any life formed with a dependent relative.
18. As Judge Rimington pointed out, paragraph 276A04 had not been raised before the judge or indeed in the application and the judge cannot be criticised for failing to consider something that was not before him. The refusal indicates that the appellant did not qualify under 276B (continuous lawful residence). The appellant had applied for ILR outside the rules. Private life had been developed over a period of lawful residence but that did not necessarily result in a grant of leave. The judge concluded that the appellant should not be treated like an illegal overstayer.
19. Regardless of whether 276A04 applied, it was not considered or placed before the FTT. The respondent considered whether it was appropriate to accede to the application on the basis that there should be limited leave to remain but the respondent did not consider there to be any very significant obstacles to the appellant’s return to Nigeria. The application was not considered under the specific rule to which we were referred, nor was that rule referred to by Mr Babarinde in his oral or written submissions. It only appeared for the first time in his Rule 24 response.
20. It would not be appropriate to consider the merits of an application under that provision, given that this is a second appeal when it has not been referred to or considered by the respondent. It would not be a material error of law for the judge to have decided the appeal before him based on the evidence and submissions

placed before him rather than a provision (276A04) to which his attention was not drawn.

21. The judge referred at paragraph 4 b. of his decision to paragraph 276 ADE (1) (iv). It appears that should be a reference to paragraph 276 ADE (1) (vi) as the judge did refer to the “very significant obstacles” test in that sub-paragraph. The judge correctly concluded that the appellant did not face “very significant obstacles” to her integration into the country to which she would have to go if required to leave the UK even though she had left Nigeria 11 years before the hearing. There is no cross-appeal against the judge’s conclusion in relation to that paragraph of the Immigration Rules.
22. The judge’s finding therefore was that the appellant had not met the rules at the date of the hearing. The case of **Patel [2013] UKSC 72 at [57]** was referred to by Mr Parvar, who suggested it provides authority for the proposition that article 8 may not be used as a “general dispensing power” (for overriding the requirements of the Immigration Rules). However, when considering article 8 outside the rules, the judge did not refer to section 117 B (5) of the 2002 Act which provides that little weight should be given to a private life established by a person at a time when that person’s immigration status is “precarious”. We agree with the respondent’s grounds where it states that whether or not the appellant’s leave came to an end in 2017 her status throughout her stay in the UK was precarious. Whether or not she was of good character or had not committed offences were not relevant.
23. We also agree with Mr Parvar in his oral submissions that this was not a case where there was some historic injustice which had to be righted. The appellant clearly made a series of applications for leave but that did not give her a right to a permanent form of leave to remain in the UK. However, it had been conceded that an earlier refusal decision had been made incorrectly by the Secretary of State in 2017 and the question was raised as to the issue of ‘historical’ rather than ‘historic injustice’ which should be weighed into the Article 8 proportionality exercise. That said even serious historical injustice does not allow appellant to succeed without more. We note that the decision of 25th March 2021 appeared to *withdraw* the decision in relation to her 2017 application and grant her leave until 25th March 2022 and she subsequently made an in time application. Albeit as the judge rightly noted that the appellant had not passed the Life in the UK test at the time of the application or Secretary of State decision, and had only passed in May 2022, it is arguable that under **Afzal [2021] EWCA Civ 1909** therefore the appellant had not had periods of overstaying. That may have implications for the article 8 assessment.
24. In fairness to the judge’s concise and well-structured decision, the judge correctly refers to section 117B of the 2002 Act, stating in paragraph 21 that the maintenance of effective immigration control is in the public interest but she mistakenly looked solely at the question of unlawful residence under section 117B (4), which is only one of the “public interest” considerations that the FTT has to have regard to. That provides that little weight should be given to a private life established by a person at a time when that person is in the UK unlawfully. It has never been contended by the respondent that the appellant has been in the UK unlawfully but she has been here precariously. Indeed, the respondent contends that she did not achieve 10 years continuous lawful residence because her last period of leave expired in 2017.

25. It is a material error of law not to refer to section 117B (5) although it may well be that the judge was not referred to the appropriate authorities on the question of the meaning of “precarious”. Following the case of **Rhuppiah v Secretary of State for Home Department (2019) 33 IANL 27** it is clear that a person’s immigration status is “precarious” when that person is in the UK without indefinite leave to remain. A fundamental problem related to the approach to section 117B which had not been fully considered and had wrongly been characterised as being limited to asking whether the appellant had been in the UK unlawfully, when in fact the question (under section 117 B (5)) ought to have been: was the appellant here precariously? Which she was.
26. Accordingly, there was a material error of law in the judge’s failure to mention 117 B (5). The judge failed to take account of the fact that the appellant’s immigration status was “precarious”. This meant that many of the factors deployed by the appellant in this case as demonstrating her fitness to remain in the UK, such as her good character, lack of offending and lack of reliance on public funds, were in fact neutral factors.
27. We do not agree that the lack of reference to GEN 3.1 – 3.3 , as contended in the respondent’s grounds of appeal to this tribunal, are relevant. GEN 3.1 – 3.3 applies to cases of family life not to cases of private life.
28. There was also a lack of reasoning in the conclusion that the appellant qualifies under article 8 outside the Immigration Rules. We agree with the respondent that the reasoning in paragraphs 20 – 24 appears to be inadequate. We agree the judge appeared to have allowed the appeal on the basis of the previous mistaken refusal of leave in 2017 without proper analysis and application of the correct tests. In particular, it appears that the judge concluded that the respondent’s decision to refuse her application for ILR constituted a disproportionate interference with her rights under article 8 of the ECHR was reached without giving proper consideration of the facts of the case and the legislative framework above.
29. Further, based on the case law, it had to be shown that there would be “unjustifiably harsh consequences” of her removal before her application would be able to succeed outside the Immigration Rules (see **Agyarko v Secretary of State for the Home Department [2017] UKSC 11**).
30. There was no general dispensing power by reference to article 8. The fact that the appellant was unable to satisfy the Immigration Rules did not mean article 8 could automatically be relied on by her. The FTT had first to ask whether the appellant satisfied the requirements of the Immigration Rules. If she did, it would be extremely difficult for the respondent to justify her decision. However, if she did not fall within the Immigration Rules, and did not fall within one of the category of cases where it may be said that unjustifiably harsh consequences would flow to the appellant from her removal. The judge simply did not apply that test. That was an error of law.
31. In terms of disposal, the case should be retained to be re-made by the tribunal but in the meantime the respondent helpfully indicated that:
- (i) instructions would be taken on the issue of the position of the respondent and the previous mistaken refusal of 14th August 2017 and whether it is considered the appellant has had any period of overstay and

the implications for the appellant's current appeal in the light of current caselaw;

(ii) whether consent would be given for the 'new matter' raised in relation to the then paragraph 276A04.

Notice of Decision

32.The tribunal finds a material error of law. The decision of the FTT is set aside.

33.The tribunal will re-make the decision following a further hearing.

34.We direct the Secretary of State to file and serve submissions in relation to the points raised at paragraph 31 above no later than 28 days from the date this decision is SENT.

35.At that remaking hearing either party shall be at liberty to file and serve additional updating evidence updating with the tribunal as to the appellant's present circumstances.

36.Any updated evidence is to be filed with the tribunal and served on the other parties no later than seven days before that hearing.

37.The parties are to file and serve any skeleton argument no later than three clear days before the adjourned hearing with attached authorities.

W.E.HANBURY

Judge of the Upper Tribunal
Immigration and Asylum Chamber