Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09288/2018 (V)

THE IMMIGRATION ACTS

Heard by a remote hearing
On 29 October 2021

Decision & Reasons Promulgated
On 17 November 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MITALKUMARI MORARBHAI AHIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Gajjar, Counsel instructed on behalf of the appellant
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. The hearing before the Upper Tribunal is a resumed hearing following the decision of the Upper Tribunal promulgated on 14 June 2021.

2. At the hearing before the Upper Tribunal on 2 June 2021 it was conceded on behalf of the respondent that the decision of the FtTJ involved the making of an error on a point of law and that the decision should be set aside.

3. In that decision I set out the reasons for reaching the conclusion that the decision of the FtTJ (Judge Saffer) (hereinafter referred to as the "FtTJ") involved the making of an error on a point of law, the FtTJ having dismissed the appeal against the decision of the respondent made on the 4 April 2018 refusing her human rights claim.

4. This decision should be read alongside the earlier decision promulgated on 14 June 2021 setting out the position of the parties.

5. This decision follows a remote hearing which has been consented to and no objection has been made by the parties. The form of remote hearing was a video hearing by way of Microsoft teams. It was accepted by all parties that it was not necessary for a face to face haring and that all issues could be fairly determined in a remote hearing as set out in the directions.

The background:

6. There is a long litigation history relevant to these proceedings. I have been provided with a comprehensive bundle of documents on behalf of the appellant which provides a background history alongside decisions reached by the FtT, the Upper Tribunal, proceedings by way of judicial review, a Cart JR, and a consent order. Mr Gajjar has provided an addendum skeleton argument where he has assisted in further identifying the relevant chronology pertinent to this appeal.

7. The appellant is a citizen of India who applied for entry clearance as a student in July 2007 and arrived in the United Kingdom on a student Visa on 23 July 2007 valid until 12 November 2008.

8. On 30 October 2008 she made an application for leave as a Tier 1 (PSW) migrant which was granted until 9 July 2011. On 9 July 2009 further leave was granted in that capacity until 9 July 2011. On 29 March 2011 the appellant made an application for further leave in this capacity and on 4 July 2011 leave was granted under the Tier 1 route until 4 July 2013.

9. Subsequent to that leave being granted the appellant travelled back to India for a visit and returned to the UK on 7 December 2011 but was detained at the port along with her husband. They were re-entering at the airport following a holiday. Her leave was curtailed. FtTJ Lal made reference to the reasons for this curtailment at paragraph 2 of his decision and that the only decision before him was the IS82C in which it was stated that false representations had been employed or material facts or a change of circumstances had occurred, and reliance was placed on information provided by the appellant in an interview in respect of a self-employed earnings. Thus the curtailment took place because her employment and income were doubted by the Secretary of State.

10. On 8 December 2011 the appellant and her husband were removed from the United Kingdom with a right of appeal once they had departed.

11. On 29 December 2011 her appeal was submitted.

12. The appeal against that decision was allowed by FtTJ Lal in a decision promulgated on 11 June 2012 on the basis that the decision of the respondent was "not in accordance with the law". The decision is set out at p.113 AB. Judge Lal referred to the "abject failure of the respondent to supply copies" of the interview. He also had evidence in the form of a filed tax return and a reference from one of the students who had used the appellant's company. The FtTJ concluded at paragraph 6, that he was satisfied that the appellant was earning enough income to qualify for entry clearance as a Tier 1 migrant at the relevant time consistent with the grant of her original leave to enter. He stated "the tribunal has no credible evidential basis to conclude that the appellant either used false representations or did not disclose material facts or indeed admitted a change of circumstances had arisen when she (was) stopped on her way back to the UK in December 2011. The tribunal has not been supplied with any evidence of the interview record to balance this against the appellant's account and in the absence of the same it is unable to attach weight to the allegations made in the IS82C, as they appear in the face of it to be without any real foundation." He therefore allowed the appeal finding the respondent's decision of 7 December 2011 was not in accordance with the law.

13. Following the decision in the appellant's favour, the respondent did not take steps to implement that decision. There is reference in the decision of Judge Hindson that "numerous letters were sent by the appellant's previous representatives" (see para 13; p131AB).

14. Judicial review proceedings were then filed in the High Court challenging the delay in implementing that decision (in January 2013) and by 14 March 2013 a consent order was agreed between the parties in which the Secretary of State agreed to granting leave to enter subject to the judicial review application being withdrawn (see order p116AB).

15. On 21 June 2013 the appellant was granted a month's temporary admission which would give her leave until 21 July 2013. This did not give her the right to work. The appellant's intention was to return to the UK, to recommence her employment and re-establish the business that she previously had.

16. On 20 July 2013 she applied for leave to remain using the FLR(O) form following her re-entry, but that application was refused on 23 January 2014.

17. The application acknowledged that she could not meet the immigration rules but explained that this was due to the fact that she had not been granted the right to work in the temporary admission she was granted on 21 June 2013 and her ability to earn was a prerequisite to her application under the points-based system.

18. The appellant was granted an in country right of appeal and the appeal came before FtTJ Hindson. It was argued at the hearing that the appellant's circumstances were "exceptional" and that she ought to be granted leave "outside the rules" to put her back into the position she would have been had her leave previously granted had not been curtailed (see paragraph 17).

19. It does not appear that FtTJ Hindson had a copy of the decision of Judge Lal as he stated at paragraph [18] that he had not been provided with the decision. However the judge stated "I have a great deal of sympathy with the position of the appellant. It seems that the respondent has completely ignored the decision of the First-tier Tribunal and has done the absolute minimum in order to comply with the consent order made in the High Court. However it is not open to meet interfere with that process. It seems to me that the appropriate step is for the appellant to seek judicial review of the decision by the respondent to issue a 1 month visa with no entitlement to work. So far as the case before me is concerned, I am restricted to considering whether there are circumstances such that leave should be allowed outside the rules. "The judge observed that he sympathised with the view of counsel that the appellant had been treated unfairly by the respondent but that he did not consider that that was a matter that he could take into account when deciding the appeal.

20. Following this, permission to appeal to the Upper Tribunal was sought and also a judicial review application was filed challenging the decision of 23 January 2014 in line with FtTJ Hindson's decision (according to the chronology which was not the decision which granted one month's leave).

21. Those proceedings continued in the Upper Tribunal through 2014 until 2016 when the Upper Tribunal struck out the judicial review claim. On 29 January 2016 the Upper Tribunal struck out her judicial review claim for failing to comply with rule 28 A of the procedure rules by failing to provide a certificate of service within time (see order of UTJ Frances). The appellant stated that she had faxed the certificate of service but when she called the tribunal to confirm this, she was informed that they did not accept service through fax (see letter dated 28 October 2015).

22. An application to appeal to the Court of Appeal against the UT's decision striking out the judicial review claim was refused by the Upper Tribunal in August 2016 which ended the litigation at that stage. The appellant simultaneously sought permission to appeal to the Upper Tribunal against the determination of FtTJ Hindson, but this was refused on 19 November 2014 which led to the appellant being appeal rights exhausted.

23. Further submissions were made either on 23 July 2017 (according to the chronology) or 7 September 2017. It is not entirely clear from the papers what happened in September 2017 or the basis of those submissions but on 21 March 2018 a further application for leave to remain on the basis of long residence (paragraph 276B of the Immigration Rules) was made.

24. The application was refused on 4 April 2018, and it was this decision which came before FtTJ Saffer and is the subject of these proceedings.

25. In his decision promulgated on 26 October 2018 he dismissed the appeal.

26. The appellant sought permission to appeal to the Upper Tribunal but that was refused by the FtT and upon renewal to the Upper Tribunal (UTJ Hanson) permission was refused on 11 February 2019.

27. Judicial review proceedings were commenced in the High Court challenging the decision of the Upper Tribunal to refuse permission to appeal the decision of FtTJ Saffer. Permission was refused by Mr Justice Spencer on 17 April 2019. An appellant's notice seeking permission to appeal to the Court of Appeal was filed. There is reference to further submissions being filed in May 2019 although it is not clear to me what those further submissions related to.

28. In the interim, the Secretary of State set removal directions for the appellant's removal but on 14 June 2019 Males LJ made an order staying removal and granting permission to the Court of Appeal. His order is set out in the bundle at page 15. It states as follows:

> "I consider that the grounds of appeal are arguable. It appears that the applicant's leave to remain which included the right to work was unlawfully curtailed by the SSHD and, moreover, that the SSHD failed to provide the applicant with equivalent leave when the unlawful nature of the curtailment was established by decision of the FTT from which the SSHD did not appeal. Instead, and only following proceedings for judicial review, the SSHD provided the applicant with one month's temporary admission which did not include the right to work. The result was that when applying for leave to remain the applicant could not satisfy the requirements of the rules because she did not have a right to work. Her applications therefore refused only because the SSHD failed to restore the applicant to the position she was in before the unlawful curtailment of the previous leave. I consider that this is, at any rate arguably, a real injustice to the applicant and not just as FTT judge Saffer described at [13] of the decision "unfortunate". If this is so, it would be surprising if the court was powerless to provide her with a remedy". He therefore concluded that the case satisfied the test for a 2nd appeal and should be considered by the Court of Appeal.

29. This led to a consent order being reached between the parties on 18 November 2020 and that the appeal against the refusal of permission to apply for judicial review was allowed which led to the decision to refuse permission to appeal made by the UTJ being quashed.

30. On 4 December 2020 Mr Justice Lane reconsidered the application for permission which was then granted for the following reasons:

"It is arguable that the judge erred in not taking adequate account of the unlawful curtailment of the appellant's leave; and the subsequent response to the allowing her appeal, whereby she was given only temporary admission, without the right to work, which meant that, when applying for leave to remain, she could not meet the requirements of the immigration rules. Ground 2 is likely to have been overtaken by events but may be advanced, if not."

31. Thus, the appeal returned to the Upper Tribunal to consider the grounds of challenge originally issued in 2018 against the decision of Judge Saffer.

32. There were 2 grounds relied upon by the appellant in the original grounds of challenge. The 1st ground was the failure to lawfully determine the key issue of whether there has been "historic injustice" committed by the respondent and the consequences that flowed from that commission in a proportionality assessment. At paragraph 10 of the grounds, it is stated that the appeal is directed at the FtTJ's treatment of the key issue of "historic injustice." The grounds go on to set out the case law relied upon by the appellant and at paragraph 28 the grounds conclude that it is submitted that there was a "historic injustice or wrong or error" in curtailing her leave as she was in fact working, which was connected to the deprivation of her status as a PBS migrant and that the historic error was compounded further as a consequence of not reinstating her previous status upon re-entry. Further submissions were made concerning the weight given to such an historic error and at paragraph 29 of ground 1 it is stated that the appeal raises important points of principle in relation to the 4th Razgar question of "interference necessary in a democratic society".

33. Ground 2 was based upon the failure of the judge to note the consequences of there being an outstanding application and that the judge failed to make any findings as to the consequence of the representations made on 23 July 2017 and the impact that they may have upon the public interest and the lawfulness of the proposal to remove the appellant.

34. As set out in the decision of the Upper Tribunal, it was accepted on behalf of the respondent that the decision of the FtT (Judge Saffer) involved the making of an error on a point of law. The respondent did not oppose the appellant's application for permission to appeal and invited the Tribunal to set aside the decision of the FtT. The respondent confirmed as follows:

"The respondent does not oppose the appellant's application for permission to appeal and invite the tribunal to determine the appeal with a fresh remote (continuance) hearing to consider the relevance of the cancellation of the appellant's leave; the subsequent appeal which found the cancellation was unlawful and what impact this has on the appellant's immigration history and current application."

35. The decision promulgated on 14 June 2021 sets out the reasons given for setting aside the decision by consent.

36. Having set out the background, I now deal with the evidence relevant to the remaking of the decision.

The evidence:

37. Following the hearing on the 2 June 2021, directions were sent to the parties as to the filing of further evidence and skeleton arguments. Provision was made for an updating witness statement from the appellant and for her to give oral evidence if her representatives considered it necessary to the proceedings. Mr Gajjar informed the tribunal that it had been agreed that the appeal should proceed by way of submissions and that this had been communicated in advance of the hearing.

38. The appellant provide a consolidated bundle setting out the evidence relied upon for the remaking of the decision. It included documents relating to the history of the litigation proceedings and also included an updated witness statement of the appellant and skeleton argument drafted by Mr Gajjar of Counsel.

39. No further evidence was filed on behalf of the respondent. Mr Diwnycz confirmed that the bundle had not been received by the respondent but that he had been sent the documents by Counsel and had the opportunity to read and consider them. I have the respondent's original bundle that was before the FtTJ.

The submissions:

40. Mr Gajjar on behalf of the appellant relied upon his skeleton argument which he supplemented with his oral submissions. They can be summarised as follows.

41. In his skeleton argument he provides a chronology of events by reference to the bundle of documents filed. He also summarises the appellant's immigration history. I have set out the material aspects of that history and chronology of events in the earlier part of this decision.

42. Turning to his submissions, Mr Gajjar submits that the appeal should be allowed under article 8 of the ECHR on the basis that the appellant has been a victim of historical injustice as a result of the actions of the respondent and that the injustice dilutes/diminishes the public interest in her removal and renders it disproportionate in all the circumstances.

43. In his written submissions he sets out submissions relating to the section 117B public interest considerations as follows. As regards section 117B(1) he submits that there is no public interest in her removal from the United Kingdom relying on the decision in Patel for the following reasons:

    (1) The appellant relies on the summary contained in the grant of permission by Males LJ. As the Court of Appeal remarked on the grant of permission, it

would be surprising if the court/tribunal is powerless to provide her with a remedy.

(2) The respondent's actions were unarguably unlawful. The appellant's immigration history shows that she temporarily left the United Kingdom in 2011 while she had valid leave to remain until 4 July 2013 as a Tier 1 (General) migrant. On 7 December 2011 she and her husband were detained and on 8 December they were removed. The Tier 1 general route that the appellant was on was a route to settlement and this would be of the 5 year route. Were it not for the respondent's actions, the appellant would have been entitled to ILR both as a Tier 1 general migrant and on the basis for long residence.

(3) The appeal against the decision of 7 December 2011 had to proceed by way of an out of country appeal. This was allowed by the First-tier Tribunal on 11 June 2012 on the basis that the respondent had offered no evidence of the alleged deception. It took a judicial review application in the High Court on 30 January 2013 which was settled by consent in March 2013 for the respondent to implement the First-tier Tribunal decision to allow the appeal.

(4) However instead of reinstating the appellant's previous leave with a right to work/engage in business on 21 June 2013 the appellant was given a single month leave without the right to work. This meant that the appellant was unable to work/engage in business and could not meet the requirements to apply for an extension of leaves a Tier 1 (general migrant).

(5) Having applied for leave to remain on 20 July 2013, it was refused by the respondent on 23 January 2014 with a right of appeal. Judge Hindson expressed sympathy towards the appellant and advised that the appellant should challenge the respondent's actions by judicial review.

(6) The appellant filed her judicial review claim, but it was struck out on 14 April 2015 on the basis that a certificate of service had not been properly filed; the strike out was maintained by the Court of Appeal.

44. As to the judicial review claim, Mr Gajjar submitted that the fact that the claim was struck out cannot, when viewed in the round, undermine or reverse the appellant's argument that the public interest in her removal has been eradicated given the respondent's actions from December 2011 onwards. As the respondent had made an unsustainable allegation of deception, had delayed implementing the June 2012 decision allowing appeal and then only giving a single month leave to remain without the right work cannot avoid scrutiny simply because the judicial review claim struck out.

45. Mr Gajjar submits that the error was minor and that instead of posting a certificate of service she had faxed it to the tribunal. The claim was properly served on the respondent.

46. In any event she would not have needed to file a judicial review claim if it had not been for the respondent's unlawful actions which were those which had troubled Lord Justice Males and led to him granting permission.

47. As to the section 117B public interest considerations, it is submitted that the appellant speaks English and would not be a burden on the public purse and has no difficulty in integrating into British society. As a section 117B(3), it is submitted that the appellant's history and United Kingdom shows she has studied and then went on to establish a business and was earning an income. This ended when the respondent began a series of unlawful actions in December 2011 which the tribunal is now invited to remedy. There is no reason to dispute the submission that if she is given the right work, the appellant will forge a successful career in the United Kingdom and make meaningful contributions to the economy. As to section 117B(4) it is submitted that the requirement for little weight to her private life on the basis that she is in the UK unlawfully should be approached with caution (and avoided) given that her unlawful status is a direct result of the respondent's unlawful actions. As regards section 117B (5) it is submitted that the duty to place little weight on the appellant's private life on the basis of her precarious status is undermined by the appellant's submission that she would (and should) have been entitled to ILR had not been for the respondent's unlawful actions and, given the time of entry, were it not for the historical injustice at play, she would have been entitled to apply to naturalise as a British citizen some time ago.

48. In his oral submissions Mr Gajjar referred to the Supreme Court's decision in Majera. He recognised that the fact not on point, but paragraph 56 of that decision provided some assistance in considering this appeal and that even if the FtTJ's decision was defective in law it must be complied with unless successfully varied or set aside. When applied to the circumstances of this appellant, she had an appeal in 2012 which found that the decision of the respondent in curtailing her leave was not in accordance with the law. The decision of the FtTJ was not a defective decision but a lawful decision which had not been challenged. Despite this the respondent failed to properly implement that decision and the effect of that meant that the curtailment decision which was unlawful ended the appellant's leave. There then followed a substantial delay by the respondent in implementing the decision which led to an application for judicial review which was settled by consent. However instead of restoring her Tier 1 leave, the respondent granted a single month temporary admission which did not give her any right to work. As she had been a Tier 1 general applicant, the inability to work prevented the appellant from resuming her employment/self-employment so that she could meet the immigration rules. The history had shown that the appellant had done the best she could. She had applied for leave to remain using the FLR(O) application form which was then refused. The FtTJ (Judge Hindson) had accepted her immigration history and had sympathy for her position but stated that she should make an application for judicial review. There were problems as to the validity of that application and was struck out due to the certificate of service

being faxed. The appellant had set out the circumstances in her updated witness statement.

49. Mr Gajjar submitted that the above immigration history has an impact upon the article 8 assessment and that the overarching position on behalf of the appellant was that the SSHD's actions from 2011 onwards had constituted "historical injustice" following the position set out in the decision of Patel. He further submitted that the task would be to assess the impact on 1 of the 2 provisions either section 117B (1) or section 117B (5) but not to double account. He submitted that the historical injustice significantly diluted the public interest in the appellant's removal.

50. When dealing with the issue of the striking out of the application due to the defective service, he submitted that when balancing the scales the administrative error was one that should have little or no impact on the submission that the public interest in the appellant's removal has diminished. He submitted that even after the administrative error, the Secretary of State had ample opportunity to correct the position by giving the appellant some form of leave on the previous path. Furthermore, the decision of Judge Hindson was arguably wrong when requiring her to file judicial review proceedings as the appellant had an effective remedy by considering the historical injustice element of the claim consistent with the decision reached in Patel. If this had been available in 2014, Judge Hindson's position may have led him to reach a different decision rather than stating that an application for judicial review should be made and would have gone on to find that the appellant's removal was disproportionate and not in accordance with the law. Mr Gajjar submitted that those reasons there should be very little, or no weight held against the appellant for that administrative error.

51. Mr Gajjar placed significance in weight on the grant of permission by Lord Justice Males and whilst this was not a binding decision on the tribunal, the grant of permission was in line with the facts of this case.

52. Mr Gajjar submitted that if the tribunal agreed that the removal of the appellant was disproportionate in view of the historical injustice it would be a matter for the Secretary of State to provide a grant of leave. Previously the appellant was on the Tier 1 general route and was left wrongfully with no leave. That route applied for those who could make a significant contribution to the economy, and she had the right of not being of deprived of this.

53. There were no written submissions filed on behalf of the respondent. Mr Diwnycz did not seek to challenge the chronology of events outlined and highlighted by Mr Gajjar and did not seek to make any substantive submissions.

54. At the conclusion of the submissions I reserved by decision which I now give.

Analysis:

55. Article 8 of the ECHR provides as follows:

" **Article 8 - Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home, and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

56. In R (Razgar) v SSHD [2004] UKHL 27 at [17], Lord Bingham set out the 5-stage approach when applying Art 8:

" In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

57. The burden of proof lies upon the appellant to establish, on a balance of probabilities, a breach of Art 8. However, once Art 8.1 is engaged it is for the Secretary of State to establish any justification under Art 8.2.

58. Question (5), and the issue of proportionality, (per Lord Bingham at [20]):

" ... must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. "

59. Further, in determining the issue of proportionality, a court of tribunal must have regard to the factors set out in s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended) (see s.117A(2)) which provides as follows:

" **117B Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-"

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-"

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to-"

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-"

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

60. Ultimately, whether the case is considered to concern a positive or a negative obligation, the question is whether a fair balance has been struck. As was explained in *Hesham Ali* at paras 47-49, that question is determined under our domestic law by applying the structured approach to proportionality which has been followed since *Huang*.

61. The introduction of Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') has not altered the need for a two-stage approach to article 8 claims. Ordinarily, the Tribunal will firstly consider an appellant's article 8 claim by reference to the Immigration Rules ('the Rules') that set out substantive conditions without any reference to Part 5A considerations. Such considerations only have direct application at the second stage of the article 8 analysis, when the claim is considered outside of the Rules.

62. It has not been argued on behalf of the appellant that she can meet the requirements of article 8 under the Rules, including paragraph 276ADE(1)(vi), and so "exceptional circumstances" are required to establish that removal would be a disproportionate interference with their article 8 rights. This requires the appellant to establish that her removal to India would result in 'unjustifiably harsh consequences': *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823.

63. As for article 8 outside of the Rules, I am required to undertake a proportionality evaluation. I am therefore to undertake an evaluation of exceptional circumstances outside the Rules which requires taking into account as a factor the strength of the public policy in immigration control as reflected in the Rules: *TZ (Pakistan) v. Secretary of State for the Home Department* [2018] EWCA Civ 1109, [2018] Imm AR 1301, *per* the Senior President of Tribunals at [33]. The Supreme Court confirmed in *Hesham Ali v. Secretary of State for the Home Department* [2016] UKSC 60, [2017] Imm AR 484, at [46], that I am to attach considerable weight to the respondent's policy.

64. My task is to address the test of whether a fair balance is struck between competing public and private needs in the requirement that the appellant return to her home country as confirmed by the Supreme Court in *R (Agyarko) v. Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823, at [41]-[60].

65. The respondent accepts that the appellant has established private life rights in this country and also accepts the chronology and relevant immigration history as set out above. It I am satisfied that the proposed interference will have consequences of such gravity as to potentially engage the operation of article 8, and it is accepted on behalf of the appellant that the proposed interference is in accordance with the law. As for stages 4 and 5 of the structured approach, I observe Lord Bingham's confirmation at [17] of *Razgar* that in practice these steps are usually, and unobjectionably, taken together. Mr Gajjar did not assert that the proposed restriction on the appellant's article 8 rights was plainly unnecessary. As the Court of Appeal observed in relation to immigration matters in *VW (Uganda) v. Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] Imm AR 436, at [23], it will be rare that stage 4 will be answered in an appellant's favour.

66. I therefore proceed to consider stage 5 and undertake the proportionality enquiry, noting that it is only possible to form a judgement about the infringement of an individual's rights in the light of all the circumstances of a particular case, and so my enquiry is fact specific to this particular appellant.

67. As part of the adoption of the structured approach, and the consideration of proportionality at stage 5, I am required to consider the statutory provisions of Part V of the 2002 Act. I take into account that section 117B, which is relevant to my enquiry in this matter, must be construed to ensure consistency with article 8 and so there must be injected into it a limited degree of flexibility so that the application of the statutory provisions will always lead to an end result consistent with article 8: *Rhuppiah v. Secretary of State for the Home Department* [2008] UKSC 58, [2018] 1 WLR 5536, at [36], [49]. Consequently, the limited degree of flexibility may permit an appellant to succeed in establishing "exceptional circumstances" or that there are "unjustifiably harsh" consequences though they have been unable to satisfy the relevant provisions of the Rules.

68. The key issue to determine is whether there has been historical injustice by the respondent and the consequences that follow from any such injustice when undertaking the proportionality assessment.

69. There has been no dispute at this hearing that the factual circumstances and relevant immigration history of the appellant as set out in the chronology and as summarised in the earlier part of the decision is incorrect. Neither has it been argued that that factual background does not fall within the ambit of "historical injustice" on behalf of the respondent.

70. The decision of *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 351(IAC) is relevant to this appeal . The headnote of that decision reads as follows:

> "A. Historic injustice
>
> (1) For the future, the expression "historic injustice", as used in the immigration context, should be reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now (e.g. Patel and Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17; AP (India) v Secretary of State for the Home Department [2015] EWCA Civ 89).
>
> (2) The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike cases of what might be described as "historical injustice", the operation of historic injustice will not depend on 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.

B. Historical injustice

(3) 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. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (e.g. AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (e.g. EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (e.g. Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category.

C. Part 5A of the Nationality, Immigration and Asylum Act 2002 and the weight to be given to the maintenance of effective immigration controls

(4) In all cases where, for whatever reason, the public interest in the maintenance of effective immigration controls falls to be given less than its ordinary weight, the usual course should be for the judge so to find in terms, when addressing section 117B(1) of the 2002 Act. The same result may be achieved, at least in some situations, by qualifying the consideration in section 117B(4) that little weight should be given to a private life formed when the person concerned is in the United Kingdom unlawfully. Judicial fact-finders should, however, avoid any recourse to double-counting, whereby not only is the weight to be given to effective immigration controls diminished but also, for the same reason, a private life is given more weight than would otherwise be possible by the undiluted application of section 117B(4).

(5) The weight to be given to the public interest in the maintenance of effective immigration controls is unlikely to be reduced because of disappointments or inadequacies encountered by individuals from teaching institutions or employers."

71. Having considered the factual circumstances of the appellant and in the context of the decision in Patel (as cited) I am satisfied that the appellant does fall within the category of case identified as "historical injustice". As I have set out, there has been no dispute on the part of the respondent at the hearing that the circumstances of this appellant do fall within that category.

72. The appellant's immigration history demonstrates the following her arrival as a student in 2007 she was granted subsequent leave until 4 July 2013; the latter leave she was granted was as a Tier 1 (General) migrant. The Tier 1 route that the appellant was on the route to settlement and would have been the 5 year route. The appellant began a business which had been generating an income. However when she temporarily left the UK with a husband for a holiday in December 2011 she was detained and then removed from the UK. The appeal, which was an out of country appeal against the respondent's decision to have curtailed to leave, was subsequently allowed by the FtTJ (Judge Lal) who found that notwithstanding the respondent's assertion of false

representations/deception, the appellant provided evidence that she had been working and had an income from that employment. Thus it is common ground that the curtailment of her leave in December 2011 was found to be unlawful by the FtTJ. The respondent did not seek to challenge that decision of the FtTJ.

73. In so far as the decision in *R (on the application of Majera) v SSHD* [2021] UKSC 46 is relied upon by Mr Gajjar, he has directed me to paragraphs 55-56 of that decision which reads as follows:

> "55. A further example is the decision of the Court of Appeal in *R v Kirby (John Martin)* [2019] EWCA Crim 321; [2019] 4 WLR 131, which concerned convictions for the breach of a non-molestation order that was subsequently set aside because of a procedural irregularity. The convictions were upheld. Singh LJ, giving the judgment of the court, based the decision on "a long-standing principle of our law that there is an obligation to obey an apparently valid order of a court unless and until that order is set aside. This is a crucial feature of a civilized society which has respect for the rule of law" (para 13). In that regard, Singh LJ cited *Chuck v Cremer*, *Hadkinson v Hadkinson*, *Isaacs v Robertson* and *M v Home Office*, among other authorities, and followed *Director of Public Prosecutions v T* in distinguishing the case of *Boddington*.
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> 56. In the light of this consistent body of authority stretching back to 1846, it is apparent that the alleged invalidity of the order made by the First-tier Tribunal had no bearing on the challenge to the decision of the Secretary of State. Even assuming that the order was invalid, the Secretary of State was nevertheless obliged to comply with it, unless and until it was varied or set aside. The allegation that the order was invalid was not, therefore, a relevant defence to the application for judicial review of the Secretary of State's decision. As there was no other basis on which the Court of Appeal reversed the Upper Tribunal, and the Secretary of State does not ask the court to dismiss the appeal on other grounds, it follows that the appeal should be allowed."

74. It seems to me that the present appeal is entirely different on its facts. However the point that can be made from that authority is that the decision of the FtTJ, which was not invalid but a lawful decision, remained as such until it was varied or set aside. On the facts of this case, the decision reached by Judge Lal was not challenged by the respondent. However it took further proceedings, by way of judicial review on 30 January 2013 to provide a remedy for the appellant. Judge Lal records in his decision that the appellant solicitors had been sending "numerous letters" to the respondents seeking action. The proceedings were settled by consent and for the respondent to implement the decision reached by the FtTJ. It was now 14 March 2013 and a considerable time after the curtailment of her leave in December 2011.

75. As the history demonstrates, instead of reinstating her previous leave (which, but for the unlawful curtailment was valid until 4 July 2013 and which had with it the right to work and engage in business) the respondent provided the appellant with one month's leave without the right to work. It has not been explained in the material to why only one month leave was provided in light of

the curtailment of her leave. However the ramifications for the appellant following the curtailment of her leave and her removal and the subsequent out of country appeal meant that when she did arrive in the UK she could not apply under the past route as before because she had not been able to work. Nor could she demonstrate on that basis that she was able to meet the requirements for an extension of leave as a Tier 1 (General) migrant. Thus the only application she could have made was the one that she did on 23 July 2013 in an attempt to regularise her status. The application was refused, and her appeal was dismissed.

76. I have considered the decision of Judge Hindson in the context of the submissions made by Mr Gajjar. It is correct that the FtTJ accepted the history of the appellant, and it is also correct that he stated that he had considerable sympathy for her. However he felt unable to take into account the circumstances in her favour. Had the decision in Patel at that time been available to the appellant, the FtTJ would have in all likelihood placed considerable weight upon this in his assessment of proportionality. In my judgement Mr Gajjar's submission to that effect seems justified. I also accept his submission that in the circumstances the FtTJ's observation that the appellant should challenge the decision by way of judicial review would have been unnecessary.

77. The judicial review application did not even get off the ground. The claim was struck out as a result of the appellant having faxed to the certificate of service and thus failed to comply with Rule 28A. I have considered whether the striking out of the claim undermined in any way the appellant's argument relating to the public interest in her removal. There have been no submissions made by the respondent on this issue.

78. On one hand, the fact that it had been described as a "minor" administrative error does not mean that the decision to strike out was unjustified. In fact the decision was upheld to the extent that the Court of Appeal refused permission to challenge this decision. However on the other hand, I can see the force in the argument that such a course would not have been necessary if the respondent had provided the appellant with a remedy she was arguably entitled to following the decision of Judge Lal.

79. Mr Gajjar relies upon the grant of permission to the Court of Appeal made by Males LJ. The tribunal is of course not bound by that view, and I observe that the decision related to the argubility of the claim which was eventually settled. Nonetheless in my judgement it is a view worthy of weight and due consideration. It encapsulates the historical injustice in a short succinct paragraph and points out that it was not "unfortunate" and that it would be surprising if the court or tribunal was powerless to provide her with a remedy.

80. When undertaking the proportionality assessment and in accordance with the public interest considerations under section 117B, I take into account that the

appellant cannot meet the immigration rules concerning private life under paragraph 276ADE given the length of residence and that there are no very significant obstacles to her integration in light of the cultural, language and familial links to India.

81. The appellant has been financially independent and has been supported through the assistance of friends when she has not been able to work. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers and are better able to integrate into society. As to this factor, the appellant is able to speak English as evidenced by her acting as a litigant in person during the proceedings at certain stages. Whilst the appellant does not obtain a positive right for these factors, they are essentially neutral and do not count against the appellant in the balancing exercise.

82. As to section 117B(4) and (5), the appellant was lawfully present from 2007 until December 2011 and thereafter for a period in 2013. However the requirement to apply little weight to her private life needs to be considered in the context of the factual background and that her later unlawful status was as a result of the wrongful curtailment of her leave. However whilst some of her leave has been lawful her immigration status throughout has been precarious. Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. In Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 the Supreme Court held that any leave other than indefinite leave is "precarious". It follows that the periods of leave held by the appellant as a student and then under the Points Based System constituted precarious leave. However the requirement to apply little weight to her private life needs to be considered in the context of the factual background and that her unlawful status was as a result of the wrongful curtailment of her leave and therefore I attach some weight to the private life established in the UK.

83. In my judgement and when viewed holistically by having regard to the appellant's circumstances and to what has been described as the "historical injustice", constitutes a factor deserving of very significant weight in the balancing exercise. In the alternative, the particular facts of this appellant's appeal demonstrates very compelling circumstances in favour of her article 8 claim. In attributing the weight under the S117B public interest considerations, I treat as reducing the importance ordinarily placed in the public interest with reference to section 117B(1) of the 2002 Act the historical injustice demonstrated by the chronology of events set out above and which has not been in dispute.

84. I do not place it in the context of section 117B (5) as to do so would be double counting the effect of that factor (see decision in Patel at paragraph [84]).

85. Having undertaken the balancing exercise and placing on the side of the respondent the matters I have identified which include the appellant's inability to meet the immigration rules as to private life and that her stay in the UK has been precarious, I am satisfied that on the fact specific nature of the proportionality assessment that I required to carry out, that this is one of those cases where the weight of the historical injustice is such that the public interest identified under section 117B(1) is significantly undermined. I accept the submission made on behalf of the appellant that the respondent, in the circumstances is obliged to deal with the appellant as far as possible as if the errors had not been made. In essence the effect of that obligation diminishes the significance of the public interest attaching to the removal of this appellant when viewed against the particular factual circumstances in play.

86. For those reasons I am satisfied that the proportionality balance weighs in favour of the appellant on the particular facts of this appeal and I find that it would lead to unjustifiably harsh consequences if she were to be removed from the United Kingdom.

87. As Mr Gajjar has set out in his submissions, it will be a matter for the Secretary of State as to what leave should be granted.

88. I am therefore satisfied that the decision would be in breach of the U.K.'s obligations under section 6 of the Human Rights Act 1998, and therefore the appeal is allowed on article 8 grounds.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision of the FtT shall be set aside. The decision is remade as follows: The appeal is allowed on Article 8 grounds.

Signed *Upper Tribunal Judge Reeds*

Dated 1/11/ 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.