Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-000902
(HU/50813/2021); IA/03025/2021

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 23 August 2022	**On 27 February 2023**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR MD ALI AHMAD ALIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Ahmed, Counsel instructed by ASM Immigration Services
For the Respondent: Mr C Williams, Home Office Presenting Officer

DECISION AND REASONS

1. Although there has been some delay in the promulgation of this decision, having heard the parties submission at the hearing before me, I informed the parties that in my judgment the decision of the First-tier Tribunal is not vitiated by a material error of law and that I dismiss the appeal. What follows is taken from the ex-tempore decision that I handed down immediately after hearing from the parties at the hearing before me on 23rd August 2022. In my

judgement handed down at the hearing, I set out my reasons for dismissing the appeal before me.

2. The appellant is a national of Bangladesh. He entered the United Kingdom on 5th December 2009 as a student with leave valid until 30th April 2013. On 5th March 2013, he made an in-time application for further leave to remain as a student and was granted leave to remain until 5th May 2015. The respondent claims that on 28th October 2014, the appellant was served with an IS151A, a "Notice to a Person Liable to Removal.". In any event, on 1st May 2015 the appellant applied for leave to remain outside the immigration rules. That application was rejected by the respondent on 10th July 2015. On 20th July 2015, the appellant applied for leave to remain as the spouse of a person present and settled in the UK. That application was refused by the respondent on 12th April 2016 and certified under s94 of the Nationality, Immigration and Asylum Act 2002 as 'clearly unfounded'. The appellant sought to challenge that decision by issuing a claim for judicial review, but was refused permission on 26th October 2016. On 5th January 2018, the appellant again applied for leave to remain. That application was rejected by the respondent on 30th November 2018. On 3rd March 2019, the appellant again applied for leave to remain on the basis of his relationship with Miss Azharun Nessa Habiba. That application was refused by the respondent for reasons set out in a decision dated 8th March 2021.

3. The respondent gave several reasons for refusing the application.

   a. The application fell for refusal on suitability grounds;

   b. The appellant does not meet the eligibility relationship requirement under paragraphs E-LTRP.1.1. to 1.12.

   c. The appellant does not meet the eligibility immigration status requirement because the appellant's "previous leave as a student ended on 05 May 2015" and the appellant had therefore been in the UK without any valid leave for some 3 years and 9 months.

   d. The respondent considered whether the appellant is exempt from meeting certain eligibility requirements under section L-LTRP of Appendix FM because paragraph EX.1. applies. The respondent concluded that even if the appellant is in a genuine and subsisting relationship with his partner, the appellant has failed top establish that there are insurmountable obstacles to family life with that partner continuing outside the UK.

   e. The appellant's 'private life' claim also falls for refusal on grounds of suitability.

   f. The appellant has failed to establish that there would be very significant obstacles to his integration in Bangladesh.

g. There are no exceptional circumstances which would render refusal of leave remain, a breach of Article 8, because such refusal would result in unjustifiably harsh consequences for the applicant, his partner, or another family member whose Article 8 rights would be affected by the decision.

4. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Nixon for reasons set out in a decision dated 28th September 2021.

5. The appellant claims the decision of Judge Nixon is tainted by material errors of law. The appellant advances two grounds of appeal. The first ground is that there was a *'Misdirection in law – Paragraph EX.1 – Insurmountable obstacles"*. The appellant claims Judge Nixon erred in stating that *"there was no recent medical evidence of ongoing IVF treatment"*. The appellant claims the evidence given by the appellant and his partner during the hearing was that they had been unable to undergo further IVF treatment simply because of the Covid-19 pandemic. The appellant claims Judge Nixon also failed to consider that whilst IVF treatment may be available in Bangladesh, the appellant's wife would be unable to access such treatment as the appellant and his wife would not have sufficient funds to access treatment. They would thus be potentially denied an opportunity of starting a family.

6. The second ground of appeal is that Judge Nixon 'misdirected' herself in conducting the proportionality assessment outside the immigration rules. The appellant claims that his 'family life' was established when the appellant was lawfully in the UK. The appellant married his partner on 2nd February 2015 at a time when he had leave to remain until 5th May 2015. The appellant claims Judge Nixon erred in attaching 'little weight' to the appellant's family life. It is said s117B(4) of the 2002 Act only applies where the 'family life' has been established when the person was in the UK unlawfully. Furthermore, the appellant claims Judge Nixon failed to have regard to the 'historic injustice' suffered by the appellant. The appellant refers to the decision of the Upper Tribunal in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 and claims he has suffered a 'historic injustice' because the respondent had made an allegation of deception / dishonesty that was not, in the end, made out by the respondent before the First-tier Tribunal. It is said that should play a material part in the assessment of whether his removal would constitute a disproportionate interference with his Article 8 rights. The appellant claims Judge Nixon failed to properly engage with the relevant public interest considerations set out in s117B of the 2002 Act and failed to have regard to all relevant matters, thereby resulting in a flawed consideration of the required balancing exercise.

7. Permission to appeal was granted by Upper Tribunal Judge Blum on 18th January 2022.

Discussion

8. I take each of the grounds of appeal in turn.

Section EX.1.(b), Appendix FM of the Immigration Rules

9. First, the appellant claims Judge Nixon erred in her assessment as to whether the appellant can rely upon the exceptions to certain eligibility requirements for leave to remain as a partner as set out in Section EX of Appendix FM.

10. At the hearing of the appeal, As Judge Nixon recorded at paragraph [23] of her decision that the respondent did not dispute the fact the appellant is in a genuine relationship with his partner, and that they are living together. Judge Nixon found the appellant has established a family life in the UK. However Judge Nixon found the appellant cannot meet the requirements for leave to remain in the UK under Appendix FM and paragraph 276ADE of the immigration rules. The issue at the heart of the appeal is whether the decision of the respondent to refuse the appellant leave to remain is proportionate. Judge Nixon found the decision is proportionate to the need for effective immigration control and dismissed the appeal.

11. Mr Ahmed submits the appellant's partner has no intention of returning to Bangladesh. He referred to the supplementary statement made by Azharun Nessa Habiba in which she states that she is *"under treatment for IVF"*, that is paid for by them, and that she and her husband have to be present in the UK for that treatment. She said: *"I will not be able to take this treatment if my husband is forced to return to Bangladesh"*. Mr Ahmed accepts that treatment for IVF is available in Bangladesh, but he submits, the appellant and his partner would not be able to access that treatment because of their financial circumstances.

12. In Agyarko –v- SSHD [2017] UKSC 11, the Supreme Court considered the requirement in the Immigration Rules, Appendix FM s.EX.1(b), that there be "insurmountable obstacles" preventing an applicant from continuing their relationships outside the UK. Lord Reed: (with Whom Lady Hale, Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hughes and Lord Hodge agreed) said:

> "44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the

applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.

45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate". Is that situation compatible with article 8 ?

46. In considering that question, it is important to appreciate that the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8 . As was explained at para 10 above, they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The margin of appreciation of national authorities is not unlimited, but it is nevertheless real and important. Immigration control is an intensely political issue, on which differing views are held within the contracting states, and as between those states. The ECHR has therefore to be applied in a manner which is capable of accommodating different approaches, within limits. Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for

> determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.
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> 47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8 . The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in *Hesham Ali* at paras 44-46, 50 and 53.
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> 48. The Secretary of State's view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but exceptional circumstances, sufficiently compelling to outweigh the individual's interest in family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK, is challenged in these proceedings as being too stringent to be compatible with article 8 . It is argued that the Secretary of State has treated "insurmountable obstacles" as a test applicable to persons in the UK in breach of immigration laws, whereas the European court treats it as a relevant factor in relation to non-settled migrants. That is true, but it does not mean that the Secretary of State's test is incompatible with article 8 . As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8 . That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8 : that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case.

13. In paragraph [73], Lord Reed said:

> "73. In relation to this matter, this court has no basis for interfering with the decision of the specialist judge of the Upper Tribunal, affirmed by the Court of Appeal…. Nothing in the discussion of that test in this judgment places in question his conclusion, with which the Court of Appeal agreed, that the test could not possibly be met on the basis put forward on Ms Ikuga's behalf: in summary, that her partner was in full-time employment in the UK, and she was undergoing fertility treatment. *(my emphasis)* So far as leave to remain was sought outside the Rules, there is similarly nothing in this judgment which undermines his conclusion, with which the Court of Appeal agreed, that Ms Ikuga had not put forward anything which might constitute "exceptional circumstances" as defined in the Instructions, that is to say, unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate."

14. Judge Nixon summarised the appellant's case at paragraphs [10] to [13] of her decision. At paragraphs [11] and [12], she noted in particular the claim advanced by the appellant that his wife could not live in Bangladesh and the reasons for that claim. She noted, at [22], that it is no longer in issue that the appellant has a genuine and subsisting relationship with a partner who is in the UK and a British citizen. She referred to the decision of the Court of Appeal in CL v SSHD [2019] EWCA Civ 1925, and the logical approach referred to in the application of the 'insurmountable obstacles' test. At paragraph [18] (*in the conclusions section of the decision)*, Judge Nixon referred to the appellant's reliance upon the IVF treatment his wife was undergoing and the limited documentary evidence before the Tribunal in that regard. She referred to the wish to continue fertility treatment in the UK, but found that the appellant's partner would not be prevented from continuing with such treatment in Bangladesh. She said that; "*it is clear that IVF is indeed available as is counselling and other mental health treatment to assist with her depression.".* Judge Nixon went on to address the claim made by the appellant's partner that she would not be able to find work.

15. There is in my judgement no merit to the first grounds of appeal. Judge Nixon plainly considered the evidence before the Tribunal and the matters relied upon by the appellant. As Mr Williams submits, the appellant's claim, based as it was on a similar factual basis as set out in paragraph [73] of Lord Reed's judgement in Agyarko, could not succeed. The findings made by Judge Nixon were findings that were properly open to her on the evidence before the Tribunal. The findings cannot be said to be perverse, irrational or findings that were not supported by the evidence. The first grounds of appeal, is, in truth, no more than a disagreement with the findings and conclusions reached. The appellant's claim that Judge Nixon's approach to the analysis of the evidence and the claim that she failed to have sufficient regard to various factors is mere disagreement with the reasoning of Judge Nixon.

Article 8 (Outside the Immigration Rules)

16. The appellant claims Judge Nixon erred in attaching little weight to the family and private life established by the appellant in the UK. She said, at [24], the appellant has been in the UK without leave since 2015. However, the evidence before the Tribunal was that the appellant married Azharun Nessa Habiba on 2nd February 2015, at a time when the appellant had valid leave to remain in the UK. He had leave to remain until 5th May 2015 and there was no evidence that an IS151A, a "Notice to a Person Liable to Removal" was served upon the appellant, as the respondent claims, on 28th October 2014.

17. I note that in his witness statement dated 7th September 2021 that was before the First-tier Tribunal, the appellant does not claim that he had not received the IS151A Notice in or about October 2014, despite the reference to that in the immigration history set out in the respondent's decision of 8th March 2021. However, for the purposes of the hearing before me, Mr Williams accepts that there was no evidence that the IS151A was served upon the appellant on 28th October 2014. It is common ground that prior to the service of the IS151A, the appellant enjoyed leave to remain in the UK until 5th May 2015. At paragraph [24], Judge Nixon said, *"I note that [the appellant] has been in the UK without leave since 2015"*. That is true, even on the appellant's account of events. His leave to remain, as he accepts expired on 5th May 2015. On the appellant's account, it is true that he made an in-time application for further leave to remain on 1st May 2015, but that application was rejected by the respondent on 10th July 2015. Neither the appellant nor the respondent appears to have provided Judge Nixon with a copy of that decision. Before me, Mr Williams confirmed, without opposition or any disagreement from Mr Ahmed, the application made on 1st May 2015 was rejected as invalid by the respondent on 10th July 2015 because there was no ID document accompanying the application. The decision to reject that application was not challenged by the appellant. On any view, the appellant therefore became an overstayer as at 5th May 2015, when his previous leave to remain came to an end.

18. I accept however there is some force to the submission made by Mr Ahmed that Judge Nixon erred in attaching 'little weight' to the family established by the appellant. Judge Nixon was required to attach little weight to the private life established by the appellant when his immigration status was precarious in accordance with s117B(5) of the 2002 Act. However s117B(4) did not require Judge Nixon to attach little weight to the relationship formed by the appellant with Azharun Nessa Habiba, a qualifying partner, because that relationship was not formed when the appellant was in the UK unlawfully. When the appellant and Azharun Nessa Habiba married on 2nd February 2015, if it is correct that the IS151A was not served upon the appellant on 28th October 2014, as he claims, the appellant had the benefit of leave to remain valid 5th May 2015.

19. Judge Nixon cannot be criticised because as I have said, in his witness statement dated 7th September 2021, the appellant does not claim that he had not received the IS151A Notice in or about October 2014. However, the appellant did claim in the skeleton argument that was before the First-tier Tribunal that *"the appellant's immigration history summarised in the refusal letter is contested by the A with reference to the SSHD's allegation that IS151 Notice was served on 28.10.14."*. It may be that paragraph [24] of the decision is simply not clearly expressed by Judge Nixon, but accepting there is an error, I have carefully considered whether that error is material to the outcome of the appeal. The ultimate issue is whether a fair balance has been struck between the individual and public interest; GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630. Section 117A(2)(a) of the 2002 Act requires a Court or Tribunal to have regard to the considerations listed in section 117B in considering the public interest question. The public interest question is, in turn, defined in section 117A(3) as being the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). There is, however, an element of flexibility within this provision. In Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, at [49], Lord Wilson observed that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under Article 8 inconsistently with the article itself.

20. Judge Nixon noted at paragraph [23] of her decision that it is not disputed by the respondent that the appellant is in a genuine relationship with his partner and that they are living together. She found the appellant has established a family life in the UK. The issue was whether the decision to refuse leave to remain is proportionate.

21. In Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, Lord Reed emphasised that the failure to meet the requirements of the Immigration Rules is a relevant and important consideration in an Article 8 assessment because the Immigration Rules reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control. Judge Nixon properly noted at paragraph [24] that the appellant cannot meet the requirements of the immigration rules.

22. Judge Nixon identifies a number of additional factors that plainly weigh against the appellant. She found the appellant's relationship with his partner can continue either in Bangladesh or via modern means of communication. She noted there was no medical evidence to show the appellant suffers from sleep apnoea which requires him to wear a mask. In any event, she rejected the appellant's claim that there is no electricity in the appellant's village and there is no reason why the appellant could not relocate to another area where electricity is available. Looking at all the evidence in the round, Judge Nixon found the decision is proportionate to the need for effective immigration control. In my judgement, the reference by Judge Nixon to her attaching "little weight" to the appellant's family life is immaterial where she carefully considered the impact of the decision to refuse the application upon the appellant's relationship with his partner.

23. I have also considered the claim that in reaching her decision Judge Nixon failed to have regard to the appellant's immigration history and the *historic injustice* suffered by those such as the appellant against whom an allegation of deception/dishonesty involving TOEIC was made, but which have later been found not to have been made out. Mr Ahmed submits the respondent's failure to establish that the appellant's application for leave to remain falls for refusal on suitability grounds is relevant to the assessment of proportionality, having regard to the approach taken to historic injustice in the cases of Ahsan v SSHD [2017] EWCA Civ 2009, Khan and Ors v SSHD [2018] EWCA Civ 1684 and Patel (historic injustice; NIAA Part 5A) India [2020] UKUT 351 (IAC).

24. Judge Nixon found, at [21], that the respondent had failed to discharge the burden upon her to establish that the appellant had been involved in deception in a previous application. She referred, at [21] to the *"usual statements regarding the ETS test being deemed invalid"* relied upon by the respondent, and states she heard credible evidence from the appellant as to the taking of multiple tests at Elizabeth College. She found the respondent had failed to discharge the burden upon her.

25. In Ahsan v SSHD [2017] EWCA Civ 2009, Underhill LJ said, at [120]:

> "120. The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I

> accept that how to exercise such a discretion would not always be easy, since it is not always possible to reconstruct the world as it would have been; but that problem would arise even if the decision were quashed on judicial review.) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the section 10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from (apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot be remedied by either kind of proceeding.)"

26. The appellant's skeleton argument before the First-tier Tribunal dated 13th September 2021 makes no reference to the decisions of the Court of Appeal in Khan v Others v Secretary of State for the Home Department [2018] EWCA Civ 1684 and Ahsan v SSHD [2017] EWCA Civ 2009.

27. It is unfortunate that appellant did not provide the First-tier Tribunal or the Upper Tribunal with copies of the respondent's decisions of 10th July 2015 *(rejecting the application made on 1st May 2015)*, or the respondent's subsequent decisions of 12th April 2016 *(refusing the application for leave to remain made on 20th July 2015)* and 30th November 2018 *(refusing the application for leave to remain made on 5th January 2018).*

28. In order to consider, as far as is possible, the position the appellant would have been in, if the respondent had not served an IS151A, a "Notice to a Person Liable to Removal" upon the appellant on 28th October 2014, one has to turn to the respondent's decision upon what would have been an 'in-time' application made by the appellant on 1st May 2015. As I have already said, Mr Williams confirmed that that application was rejected as invalid on 10th July 2015. It was rejected on the basis that there was no ID document accompanying the application. The appellant therefore became an overstayer as at 5th May 2015, when his previous leave to remain came to an end. Therefore, the in-time application made by the appellant in ignorance of any IS151A, was rejected as invalid, rather than being refused on suitability grounds.

29. It is common ground that the appellant made a further application for leave to remain on 20th July 2015. That application was refused on 12th April 2016. Mr Williams accepts that one of the reasons given by the respondent for refusing that application was that the application

fell for refusal on grounds of suitability under Section S-LTR of Appendix FM. The respondent claimed the appellant had made false representations for the purpose of obtaining leave to remain because in an application dated 5th March 2013 he used an ETS certificate dated 21st August 2012, which upon checking, ETS confirmed was invalid. However, by the time the appellant made his application on 20th July 2015, his leave to remain had expired, and he had remained in the UK without any valid leave since 5th May 2015.

30. In any subsequent application, the appellant was therefore also required to meet the eligibility immigration status requirement. If he could not do so, he had to rely upon paragraph Section EX.1. of Appendix FM.

31. Unravelling the appellant's immigration history, I accept the submission made by Mr Williams that in the respondent's decision of 12th April 2016, as the allegation that the appellant's application fell for refusal on suitability grounds was not the sole reason for refusing the application made on 20th July 2015, the appellant gains nothing from the subsequent finding by Judge Nixon that the respondent has failed to establish that the appellant had made false representations for the purpose of obtaining leave to remain in an application dated 5th March 2013. The application would have failed in any event because the 'eligibility immigration status requirement' was not met. The respondent had certified the decision dated 12th April 2016 as clearly unfounded under s94 of the 2002 Act. The appellant sought to challenge the decision of 12th April 2016 but permission to claim Judicial Review appears to have been refused on 26th October 2016. Again, the appellant failed to disclose the grounds for review and the order made refusing permission to the First-tier Tribunal, so the Tribunal is none-the-wiser as to the claims that were being made by the appellant. There can be no question of the appellant being put back into a position more favourable than if the erroneous allegation had never been made. By 5th May 2015, the appellant was an overstayer and it cannot be said that he would have, or that it was even likely that he would have been granted leave to remain on some other basis if he could not meet the requirements of the immigration rules.

32. Upon my reading of the decision as a whole, it is quite clear that the conclusions of Judge Nixon as to the Article 8 appeal, were supported by reasons open to the judge on the evidence before the Tribunal, and the findings made. Although the decision could have been better expressed, it is not a counsel of perfection. In the final analysis, Judge Nixon concluded, after considering a wide range of factors including matters that weigh in favor of, and against the appellant, that there are no compelling circumstances which might warrant a grant of leave to the appellant under Article 8, when weighed against the public interest. It was in my judgement open to Judge Nixon to conclude that

the decision to refuse the appellant leave to remain is proportionate to the need for effective immigration control and to dismiss the appeal.

33. It follows that in my judgment there is no material error of law in the decision of First-tier Tribunal Judge Nixon and I dismiss the appeal.

Notice of Decision

34. The appeal is dismissed.

35. No anonymity direction is made.

Signed **V. Mandalia** Date 13 February 2023

Upper Tribunal Judge Mandalia