In the Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of MBT) v Secretary of State for the Home Department (restricted leave; ILR; disability discrimination) [2019] UKUT 414 (IAC)

Heard at Field House
On 13 November 2019

Before

THE HON. MR JUSTICE NICOL
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Queen
(on the application of MBT)
(ANONYMITY DIRECTION MADE)

Applicant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Ms A. Weston, QC, and Stephen Clark, Counsel, instructed by Birnberg Peirce
For the Respondent: Ms J. Anderson, Counsel, instructed by the Government Legal Department

(i) A decision of the Secretary of State not to grant indefinite leave to remain to a person subject to the restricted leave policy ("the RL policy") does not normally engage Article 8 of the European Convention on Human Rights. However, Article 8 may be engaged by a decision to refuse to grant indefinite leave to remain where, for example, the poor state of an

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individual's mental and physical health is such that regular, repeated grants of restricted leave are capable of having a distinct and acute impact on the health of the individual concerned.

(ii) Once Article 8 is engaged by a decision to refuse indefinite leave to remain under the RL policy, the import of Article 8 will be inherently fact-specific, and must be considered in light of the criteria set out in MS (India) and MT (Tunisia) v Secretary of State for the Home Department [2017] EWCA Civ 1190. The views of the Secretary of State attract weight, given her institutional competence on matters relating to the public interest and the United Kingdom's reputation as a guardian of the international rule of law.

(iii) To obtain indefinite leave to remain under the Immigration Rules on the basis of long (partially unlawful) residence in cases involving no suitability concerns, paragraph 276ADE(1)(iii), taken with paragraph 276DE, requires a total of 30 years' residence. A person who satisfies paragraph 276ADE(1)(iii) following 20 years' residence is merely entitled to 30 months' limited leave to remain on the ten year route to settlement.

(iv) Paragraph 16 of Schedule 3 to the Equality Act 2010 disapplies the prohibition against disability discrimination contained in section 29 of the Act in relation to a decision to grant restricted leave that is taken in connection with a decision to refuse an application for a more beneficial category of leave in the circumstances set out in paragraph 16(3).

(v) To the extent that paragraph 16 of Schedule 3 to the Equality Act 2010 disapplies the prohibition against discrimination on grounds of disability, there is a corresponding modification to the public sector equality duty imposed on the Secretary of State by section 149 of the Act.

JUDGMENT

1. This application for judicial review concerns the content and application of the respondent's Restricted Leave policy ("the RL Policy"). The policy makes provision to grant short periods of limited leave to remain, with stringent conditions, to those who are, the policy states, "not welcome" in the United Kingdom and who would otherwise be deported or administratively removed, but due to "barriers" under the European Convention on Human Rights ("the ECHR") they cannot be removed. The policy applies primarily to those excluded from the protection of the Refugee Convention, or otherwise not entitled to its protection, due to their commission of criminal or other reprehensible acts and, who, for similar reasons are debarred from Humanitarian Protection. Grants of so-called restricted leave are typically for 6 months at a time, and attract conditions intended to restrict the individual's ability to establish a private life here, enable the respondent to monitor their presence and achieve a number of other objectives, to which we shall return.

2. The nature of the RL policy means that recipients of restricted leave are subject to regular and renewed grants of short periods of limited leave to

remain, in a process which can continue for many years. The applicant in this case has contended for some time that he should be granted indefinite leave to remain, instead of merely being granted repeated periods of restricted leave. The central issue is whether it was unlawful for the respondent to refuse to grant indefinite leave to remain to him, following his lengthy residence pursuant to many repeated periods of initially discretionary, and then later restricted, limited leave, in light of his health, family life, and the claimed diminishing likelihood of him ever being removed to Tunisia.

3. The RL policy provides that indefinite leave to remain is only appropriate in "exceptional circumstances", which, it states, are likely to be rare. It is the applicant's case that his case is one of those rare, exceptional situations where he is entitled to indefinite leave to remain.

4. There are two decisions under challenge. The first is dated 31 August 2018 ("the 2018 decision"); the second, 22 July 2019 ("the 2019 decision"). Each refused to grant the applicant indefinite leave to remain, but instead conferred limited restricted leave upon him.

5. The 2019 decision was issued by the respondent the night before the substantive hearing concerning the 2018 decision was due to be heard on 23 July 2019. That necessitated an adjournment of that hearing. The Tribunal gave directions to the applicant to serve the additional grounds upon which he sought to challenge the 2019 decision. It was just and convenient to allow the 2019 decision to be challenged within the existing proceedings, rather than require the applicant to make a fresh application, which would potentially have resulted in a future substantive hearing being eclipsed (again) by a further grant of restricted leave, upon the expiry of that conferred by the 2019 decision. It was in those circumstances that the matter came before us sitting as a panel.

Factual background

6. The applicant, MBT, is a citizen of Tunisia, born on 20 December 1966. He was detained and tortured by the Tunisian authorities for the membership of a political party in the late 1980s and early 1990s. The enduring adverse health impact that experience had on the applicant forms a significant part of his case for being granted indefinite leave to remain. It is common ground that the applicant cannot presently be removed to Tunisia due to the risk of further mistreatment at the hands of the authorities, although there is some dispute between the parties as to the prospects of that risk diminishing.

7. Following his release from detention, the applicant fled Tunisia in 1991, intending to claim asylum in Spain. He was unable to reach Spain because, on 19 January 1998 he was convicted in France, along with a number of other Tunisian citizens, of terrorism related offences, following a lengthy period on remand. These offences included the possession and transportation of unauthorised weapons, unlawful entry to France, forgery of an official document, and association with other *malfaiteurs*. For these offences, the

applicant was sentenced to a period of five years' imprisonment, most of which he had already served, with the consequence that he was released shortly after he was sentenced. He was also subject to an expulsion order from France, and a 10 year re-entry ban. The applicant maintains that he did not receive a fair trial in France. He contends that he did not appeal against his conviction, for to have done so could have exposed him to the jeopardy of having his sentence increased retrospectively. His case is that he left France without challenging the conviction on purely pragmatic grounds. We, of course, must proceed on the basis that he was validly convicted of these offences in France.

8. In May 1999, the applicant arrived in this country, clandestinely. He immediately claimed asylum. He declared his convictions in France. In July 2004, the respondent refused his claim for asylum, on the grounds that he was excluded from the Refugee Convention, under Article 1F(b) and (c) (respectively, the commission of a serious non-political crime outside the country of refuge, and being guilty of acts contrary to the purposes and principles of the United Nations). He was instead granted discretionary leave to remain, initially for a period of six months, under the relevant policy then in force. The RL policy was not in force at that stage. The first iteration of the RL policy came into force on 2 September 2011.

9. The applicant also contends that he has been convicted and sentenced *in absentia* in Tunisia of a range of further offences. Although there is no suggestion that those convictions form the basis of the respondent's decision to exclude the applicant from the Refugee Convention, or indeed that they could be categorised as "safe" pursuant to ECHR minimum standards, it is the applicant's case that the mere existence of such convictions provides a further reason why his return to Tunisia is not, and never will be, feasible. The politically motivated convictions are evidence of his persecution at the hands of the Tunisian state, he contends. They will not be overturned. He remains liable to serve lengthy periods of imprisonment in Tunisia, with the corresponding risk of repeated mistreatment in detention.

10. Following his initial grant of discretionary leave to remain, the applicant was granted further, repeated, periods of discretionary leave. However, there was a delay in the respondent's consideration of the application (also for indefinite leave to remain) he submitted on 30 July 2009, which led him to bring judicial review proceedings to challenge the respondent's inaction. That was in 2013. Those proceedings were settled by consent. The respondent took a decision on the application, granting the applicant his first period of restricted leave, for six months, on 21 August 2013.

11. The applicant experiences a range of debilitating medical conditions. He suffers from symptomatic epilepsy, and has around two seizures each week, during which he experiences a lack of muscle tone, falls to the floor, and can lose control of bodily functions. He has severe shoulder and back pain, which he experiences all the time. The shoulder pain is caused by a herniated disc in

his cervical spine which dates to what has been described as a "very violent torture injury". He can support himself when walking, but when doing so he has to hold his left arm very still in order to avoid jarring it and causing sudden pain to his left shoulder and neck. He has sciatic referral to the left leg, making walking and sitting painful and exhausting. He suffers from severe secondary headaches, which stem from numerous historical head injuries. His neck rotation is restricted to the left, even for short periods of time. He has high blood pressure.

12. The applicant has been diagnosed as suffering from severe post-traumatic stress disorder. He displays symptoms of flashbacks, intrusive memories, noise sensitivity, claustrophobia, dramatic nightmares, anxiety attacks, sleeplessness, and panic attacks. These are attributable to the major catastrophic trauma arising from the detention and torture he experienced in Tunisia, and the very severe ongoing stress and uncertainty as to the length of his residence and immigration status in this country. He displays symptoms of depressive disorder, experiencing pervasive feelings of despair, worthlessness, appetite and sleep disturbance, negative thoughts and very severe intrusive preoccupations, melancholic depressive ruminations, beliefs that he has destroyed other people's lives, suicidal ideation, self-harm, and depressive hallucinations. These factors are set out in the report of Dr Bell, Consultant Psychiatrist, dated 18 April 2019, and letters dated 1 August 2017 from Lucy Bracken, a Registered Osteopath with the Helen Bamber Foundation, and 3 November 2017 from Mark Fish, a Senior Psychotherapist, also with the Helen Bamber Foundation.

13. In addition to the currently accepted Article 3 risk the applicant faces from the Tunisian authorities, he contends that his health conditions are such that his removal would be prevented by Article 3 ECHR in any event. He maintains that his private and family life in this country are such that his removal is now, and always will be, disproportionate under Articles 3 and 8 of the ECHR. Since his arrival in this country, he has not engaged in any conduct which suggests that he represents any form of ongoing security risk or threat. While he does not accept that he was fairly convicted in France, he highlights that, in any event, he has led a blameless life in this country. He has integrated. His children are British. He has lived here for 20 years.

Earlier procedural history

14. The applicant has previously challenged earlier decisions of the respondent under the RL policy. In a decision handed down on 4 September 2015, this Tribunal (Dove J. and Upper Tribunal Judge Gill) dismissed an application for judicial review brought by the applicant in relation to an earlier decision of the respondent, dated 21 August 2013, to refuse to grant him indefinite leave to remain, granting him only a further period of restricted leave, with conditions. In the course of that judicial review application, the applicant also challenged the respondent's RL policy itself. See R (on the application of MS) v Secretary of State for the Home Department (excluded persons: Restrictive

Leave policy) IJR [2015] UKUT 00539 (IAC). The Upper Tribunal's decision was considered by the Court of Appeal which, in a judgment dated 31 July 2017, dismissed the appeal, and found the RL policy as it then existed to be lawful: see MS (India) and MT (Tunisia) v Secretary of State for the Home Department [2017] EWCA Civ 1190, [2018] 1 WLR 389. The Court of Appeal made a number of observations about the circumstances when those subject to the RL policy may be entitled to indefinite leave to remain, to which we shall return.

The decisions under challenge

15. The time-limited nature of restricted leave is such that the respondent regularly takes fresh decisions to confer a further period of restricted leave upon the expiry of the previous period.

16. The 2018 decision granted the applicant six months' restricted leave from 31 August 2018, with conditions in the following terms:

> "a) You must reside at your current address and notify the Secretary of State to any change of address;
>
> b) You must not take up employment, paid or unpaid, or engage in any business or profession without the prior written consent from the Secretary of State;
>
> c) You must not enrol on a study course, either classroom-based or remote, without the prior written consent from the Secretary of State; and
>
> d) You must report to an immigration reporting centre every two months."

The 2018 decision refused the applicant's application for indefinite leave to remain. It considered that, in view of the applicant's exclusion from the Refugee Convention on the grounds of his involvement in terrorism in France, the public interest in his removal remained, and that he should not be allowed to settle here.

17. The applicant was granted limited permission to apply for judicial review on the papers by Upper Tribunal Judge Jackson to challenge the application of the RL policy in the 2018 decision. Permission was granted on two grounds:

    a. Ground 1: the decision breaches article 8 ECHR, in that the respondent failed to undertake a sufficiently individual and particularised assessment of the relevant factors in the applicant's case (in accordance with the guidance given by the Court of Appeal in MS (India)) and the decision is a disproportionate interference with the private and family life of the applicant, his wife and British children in breach of article 8 ECHR and section 6 of the human rights act 1998;

b. Ground 4: the decision is irrational, in that the respondent took into account irrelevant matters and/or failed to take into account relevant matters.

18. Judge Jackson refused permission in relation to the following two grounds. The applicant has applied to renew his application for permission to bring judicial review proceedings on these grounds orally:

    a. Ground 2: the decision breached sections 15 and 29 of the Equality Act 2010 ("the EA 2010") (taken with or without the duty to make reasonable adjustments contained in section 20), and/or Article 14 of the ECHR, taken with Article 8, in that the respondent treated the applicant, his wife and children, less favourably on account of the applicant's disability, or applied the RL policy in such a way as to impact the applicant disproportionately because of his disability;

    b. Ground 3: the RL policy breached the public sector equality duty contained in section 149 of the EA 2010.

19. The 2019 decision was made in response to an application dated 26 February 2019 for indefinite leave to remain and the application was supported by additional written representations submitted in March and April. The applicant's representations placed extensive reliance on the report of Dr Bell. That report considered the matters relating to the applicant's mental health outlined in paragraph 12, above. The representations featured further and more detailed reasons as to why it was contended that the applicant would not be "removable".

20. The 2019 decision refused to grant the applicant indefinite leave to remain, but instead granted him 12 months' restricted leave, with conditions materially identical to those in the 2018 decision, with one distinction. The 2019 decision reduced the reporting requirements from every two months in the 2018 decision to "4 times per year i.e. every three months".

21. The grounds upon which the applicant seeks permission to bring judicial review proceedings against the 2019 decision are based on those initially advanced against the 2018 decision, with two additional grounds. The manner in which the total six additional grounds have been set out in the applicant's statement of facts and grounds and his skeleton argument could have been clearer, as the applicant did not set out separate and fresh grounds of challenge, but merely sought to adopt and apply (presumably with the necessary implied modifications) grounds 1 to 4 in relation to the 2018 decision, with two additional grounds specific to the 2019 decision. For ease of reference, having clarified the grounds with Ms Weston at the hearing, we will set out all six grounds in their entirety:

    a. Ground 5: the respondent irrationally failed to take into account and address by way of adequate reasoning relevant matters, in particular

the representations and material available to the respondent concerning the applicant's removability, and the report of Dr Bell;

b. Ground 6: the respondent breached her duty of inquiry concerning the applicant's risk on return;

c. Ground 7 (original ground 1): the decision breaches article 8 ECHR, in that the respondent failed to undertake a sufficiently individual and particularised assessment of the relevant factors in the applicant's case (in accordance with the guidance given by the Court of Appeal in MS (India)) and the decision is a disproportionate interference with the private and family life of the applicant, his wife and British children in breach of article 8 ECHR and section 6 of the human rights act 1998;

d. Ground 8 (original ground 2): the decision breached sections 15 and 29 of the Equality Act 2010 ("the EA 2010") (taken with or without the duty to make reasonable adjustments contained in section 20), and/or Article 14 of the ECHR, taken with Article 8, in that the respondent treated the applicant, his wife and children, less favourably on account of the applicant's disability, or applied the RL policy in such a way as to impact the applicant disproportionately because of his disability;

e. Ground 9 (original ground 3): the RL policy breached the public sector equality duty contained in section 149 of the EA 2010.

f. Ground 10 (original ground 4): the decision is irrational, in that the respondent took into account irrelevant matters and/or failed to take into account relevant matters.

22. Thus grounds 5 and 6 are new. Grounds 7 to 10 replicate the original grounds 1 to 4, applied to the 2019 decision. The only grounds upon which the applicant has permission to challenge the 2018 decision are grounds 1 and 4. He needs permission to pursue all remaining grounds. He requires permission on all his grounds to challenge the 2019 decision. As such, the hearing before us was a substantive hearing in relation to grounds 1 and 4 of the 2018 decision, combined with a rolled up hearing in relation to the remaining grounds and a rolled up hearing in relation to the 2019 decision.

RELEVANT LAW AND POLICY

Articles 1F and 33 of the Refugee Convention

23. Article 1F(b) and (c) of the Refugee Convention provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> […]

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

24. The focus of Article 1F of the Refugee Convention is the exclusion from its scope of those persons who – like this applicant – engaged in certain conduct *before* seeking refuge in the host state. When engaged, Article 1F prevents the individual concerned from being recognised as a refugee.

25. Article 33 of the Refugee Convention provides:

> **"Prohibition of expulsion or return ('*refoulement*')**
>
> 1. No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

26. By definition, the *non-refoulement* principle is only engaged in relation to those already recognised under the Convention as a refugee. Article 33(2) deprives existing refugees from the benefit of the *non-refoulement* principle in consequence to the presence of grounds to regard the refugee as posing a security risk to the host country, or as a result of criminal convictions which post-date their recognition as a refugee.

27. In practice, a person in relation to whom Article 33(2) is engaged would never be removed in circumstances which would lead to a contravention of the ECHR, even if they had been subject to a decision to revoke their refugee status. Similarly, persons in the United Kingdom who are excluded from the scope of the Refugee Convention under Article 1F would not be removed if to do so would place the United Kingdom in breach of its obligations under the ECHR.

European Convention on Human Rights

28. Article 8 of the ECHR, *Right to respect for private and family life*, provides:

> "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."

29. Article 14 of the ECHR, *Prohibition against discrimination,* provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Domestic legal framework

30. Section 3 of the Immigration Act 1971 ("the 1971 Act") makes provision for the control of the entry and duration of stay of those subject to immigration control. Section 3(1)(b) provides:

> "(1) Except as otherwise provided by or under this Act, where a person is not a British citizen…
>
> > (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period…"

31. Subsection (2) makes provision for the Secretary of State to make rules "as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom…" The Immigration Rules must be laid before, and approved by, Parliament.

32. Subsection (3) enables the Secretary of State to impose conditions on a grant of limited leave to remain.

> "(3) In the case of a limited leave to enter or remain in the United Kingdom,—
>
> > (a) a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and
> >
> > (b) the limitation on and any conditions attached to a person's leave (whether imposed originally or on a variation) shall, if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave."

33. The Secretary of State also has a discretionary power under the 1971 Act to grant leave to enter or remain, even where leave would not be granted under the Immigration Rules. See the summary at <u>Agyarko v Secretary of State for the Home Department</u> [2017] UKSC 11 at [4] per Lord Reed:

> "The manner in which that discretion is exercised may be the subject of a policy, which may be expressed in guidance to the Secretary of State's officials."

34. In relation to cases where Article 8 of the ECHR is engaged, the Immigration Rules and the Secretary of State's policies "are based on the Secretary of State's policy as to how individual rights under Article 8 should be balanced against competing public interests" (Agyarko at [46]).

35. Part 5A of the Nationality, Immigration and Asylum Act 2002 makes statutory provision for certain public interest considerations to be considered when a court or tribunal is concerned with the proportionality of a person's removal under the ECHR. Of most relevance for present purposes is section 117B(6), which provides:

> "(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."

36. Section 117D(1) defines "qualifying child" to include a British citizen child, or a child who has resided continuously in the United Kingdom for seven years.

Equality Act 2010

37. The Equality Act 2010 prohibits discrimination, as defined, in the conduct of certain functions.

38. Section 15 of the Equality Act defines what amounts to discrimination arising from disability, as defined in section 6, in these terms:

> "(1) A person (A) discriminates against a disabled person (B) if—
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> >
> > (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

39. Section 29 of the Act prohibits service providers from engaging in discrimination. Where relevant, it provides:

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
>
> > (a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

[…]

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

(7) A duty to make reasonable adjustments applies to—

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public."

40. Paragraph 16 of Schedule 3 to the Equality Act 2010 disapplies section 29 in relation to certain immigration functions carried out by service providers. Paragraph 16 provides:

"(1) This paragraph applies in relation to disability discrimination.

(2) Section 29 does not apply to—

(a) a decision within sub-paragraph (3);

(b) anything done for the purposes of or in pursuance of a decision within that sub-paragraph.

(3) A decision is within this sub-paragraph if it is a decision (whether or not taken in accordance with immigration rules) to do any of the following on the ground that doing so is necessary for the public good—

(a) to refuse entry clearance;

(b) to refuse leave to enter or remain in the United Kingdom;

(c) to cancel leave to enter or remain in the United Kingdom;

(d) to vary leave to enter or remain in the United Kingdom;

(e) to refuse an application to vary leave to enter or remain in the United Kingdom.

(4) Section 29 does not apply to—

(a) a decision taken, or guidance given, by the Secretary of State in connection with a decision within sub-paragraph (3);

(b) a decision taken in accordance with guidance given by the Secretary of State in connection with a decision within that sub-paragraph."

41. Section 149 of the Act establishes the public sector equality duty, in these terms:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect."

The Restricted Leave policy

42. The RL policy addresses the practical gulf that arises between those excluded from the scope of the Refugee Convention under Article 1F, or refugees who are deprived of the protection of the *non-refoulement* principle, on the one hand, and any applicable ECHR-based restrictions on their removal, on the other. It confers legal – albeit restricted – status on such individuals and seeks to enable the respondent to achieve certain objectives set out in the policy.

43. The version of the RL policy under consideration in these proceedings was published on 25 May 2018. It was still in force at the date of both decisions. It opens in these terms:

> "The government's policy is that foreign nationals who are not welcome in the UK because of their conduct will be deported or administratively removed from the UK, unless there is an [*sic*] European Convention on Human Rights (ECHR) barrier. This includes those whose conduct brings them within Article 1F or Article 33(2) of the Refugee Convention, or paragraph 339D of the Immigration Rules…"

44. The RL policy identifies the following objectives in denying the benefits of protection status and instead conferring a shorter period of restricted leave with specific conditions. The objectives include the public interest in maintaining the integrity of immigration control through the conferral of short periods of leave, accompanied by regular reporting conditions. The policy seeks to enable frequent review by the respondent of those subject to the policy with a view to facilitating their removal, should circumstances change such that the previous barriers to removal no longer apply. This ensures "close contact" is maintained with the individual concerned, and also gives a "clear signal" that the person concerned should not become "established" in this country. The repeated grants of only short periods of leave emphasise the intended impermanence of the residence of a person subject to the RL policy. The policy is intended to make it more difficult for such persons to put down roots here, or build up private or family life which,

if established, may later present difficulties for the removal of the individual, if and when conditions in the destination country change such that removal becomes feasible.

45. The policy also states that it is for the purposes of public protection, adding that it is legitimate to impose conditions designed to ensure that the respondent is able to monitor where a person lives and works. In turn, this enables the respondent to prevent access by the individual to positions of influence or trust.

46. Finally, a further stated policy objective of the policy is to prevent the United Kingdom becoming a "safe haven" for those whose conduct merits their exclusion from refugee status. This supports the principle that war criminals and persons with a reprehensible past cannot establish a new life in this country. The policy is also said to support the United Kingdom's broader international obligations and commitment to supporting the rule of law at the international level. The RL policy contends that it reinforces the message that the United Kingdom's intention is to remove such individuals from the country as soon as possible. The target audience of this "message" is the international community of States as a whole.

Indefinite leave to remain under the RL Policy

47. The RL policy addresses indefinite leave to remain in similar terms. The policy is that there will "almost always be public interest reasons not to grant ILR" (page 33). It notes, at page 6, that granting those subject to the policy indefinite leave to remain would "send a message" that there is no longer any public interest in deporting or removing them from the United Kingdom. That would be "wholly contrary" to the RL policy, as set out above.

48. The policy provides, at page 32, that there is no limit on how many times a person can be granted restricted leave, as long as they continue to fall within the scope of the policy. The policy states at page 33, with emphasis added:

> "Where a person falls within this policy because of behaviour described in Article 1F or Article 33(2) of the Refugee Convention or paragraph 339D of the Immigration Rules (whether or not the person is made a protection claim) *there will almost always be public interest reasons not to grant ILR*. This is because the government's view is that such persons are not welcome in the UK, even if the adverse behaviour was committed a long time ago and the person has not committed any crimes in the UK. In most cases, a decision to grant ILR would undermine the intention of the restricted leave policy…"

49. It continues in these terms, on the same page:

> "Where a person applies for ILR outside the Immigration Rules, consideration must be given to all relevant factors, including all representations that have been submitted, to determine whether the application should be granted or refused. It will only be in exceptional circumstances that those within the scope of the restricted leave policy will ever be able to qualify for indefinite leave to remain outside the rules, and

> such exceptional circumstances are likely to be rare. Usually, given our international obligations to prevent the UK from becoming a safe haven for those who have committed very serious crimes, the conduct will mean that the application should be refused, but decisions must be taken on a case-by-case basis applying the principles set out above and the general grounds for refusal in part 9 of the Immigration Rules, alongside the section 55 duty…"

50. The conditions imposed on those subject to restricted leave is one of the means by which the policy objectives of the RL policy are said to be achieved. Once a person is granted indefinite leave to remain, the policy notes, the imposition of conditions is no longer possible. As such, granting indefinite leave to remain could lead to individuals obtaining employment or accessing positions of trust which are unsuitable, given the reasons they were initially subject to the restricted leave policy in the first place. The imposition of reporting conditions would no longer be possible, making it much harder for the respondent to keep track of those who would, circumstances permitting, otherwise be considered for removal.

51. Finally, indefinite leave to remain would be contrary to the United Kingdom's international obligations and the need to support the international rule of law. The policy considers that granting ILR to such excluded persons would damage the United Kingdom's international reputation and would be contrary to the expected and accepted approach of the international community as a whole to such persons. Thus, at page 32, the RL policy notes that there is no period of time which is likely automatically to be regarded as too long as being subject to the RL policy, although it notes that all such applications must be considered on a case-by-case basis. Even long periods of expiation, remorse and good behaviour are "neutrally balanced." Compliance with the criminal law domestically is not a positive factor, but rather a minimum standard of behaviour expected of anyone present in the United Kingdom. The policy concludes on this point at page 33 stating that,

> "it will only be in exceptional circumstances that those within the scope of the restricted leave policy will ever be able to qualify for indefinite leave to remain… And such exceptional circumstances are likely to be rare."

There is no provision in the Immigration Rules to grant indefinite leave to remain to those subject to the RL policy; the policy envisages that any such grants will take place outside the rules.

DISCUSSION

The 2018 decision

52. We can deal briefly with the 2018 decision. The challenge to it is academic. The decision conferred a period of restricted leave to remain which has since expired. Before us, Ms Weston was unable to identify any operative reasons why it was necessary, within the confines of the discretionary nature of judicial review, for us to consider the 2018 decision. She submitted that the 2019 decision repeats and thereby compounds the errors which contaminated

the 2018 decision, but realistically accepted that, to the extent she sought to establish that the 2019 decision was unlawful or disproportionate, it would be possible to make the appropriate submissions by reference to that decision alone, without the need for substantive consideration of the 2018 decision in its own capacity.

53. We see no reason to entertain consideration of the 2018 decision in any further depth. The grounds in relation to which permission has been granted are now otiose, as the decision is no longer in force.

54. We refuse the application in relation to grounds 1 and 4. For the same reason, we refuse permission on grounds 2 and 3, in respect of which permission has not already been granted.

The 2019 decision

55. The focus of Ms Weston's challenge to the 2019 decision was not the proportionality of the conditions it imposed on the applicant's restricted leave, such as the frequency of his reporting requirements, or even the length of the grant of restricted leave. Rather, the challenge was to the decision to not to grant indefinite leave to remain and to continue to subject the applicant to the terms of the RL policy.

56. The 2019 decision was in response to an application to the respondent submitted online on 26 February 2019, initial accompanying written representations dated 14 March 2019, and further representations and medical evidence dated 26 April 2019, including Dr Bell's report. Collectively, the representations featured three elements.

57. Current barriers to removal: The 2019 application provided reasons why the applicant cannot – at the present time – be removed to Tunisia, on grounds of Article 3, 5 and 8 ECHR. The Article 3 grounds related to the risk of further detention and torture at the hands of the state, and the applicant's present health conditions. The Article 5 risk (right to liberty and security) was connected to the applicant's *in absentia* convictions in Tunisia.

58. Through her grant of restricted leave to the applicant, the respondent accepts that the applicant cannot presently be removed to Tunisia. Although the decision states that "all your client's submissions and the evidence provided on his behalf have been considered…", it does not state what, in the Secretary of State's view, the operative factors were that led to the grant of restricted leave, rather than a removal decision. There is no indication, for example, that the respondent accepts that Article 8 provides a barrier to removal. The respondent has previously proceeded on the basis that the applicant is "irremovable" due to the Article 3 risk of further torture in Tunisia and has not indicated that she accepts the other claimed barriers to removal.

59. Duration of leave: The application contended that the requirements of Articles 3 and 8 of the ECHR were such that MBT was entitled to indefinite leave to

remain. In reliance upon the report of Dr Bell and the letters from Mr Fish and Ms Bracken, the applicant stated that the mental anguish arising from his precarious immigration status and previous experiences was such that only indefinite leave to remain would be appropriate. Anything less, said the application, would continue to exacerbate MBT's conditions.

60. The representations contended that Article 3 ECHR imposed a positive obligation on the United Kingdom to grant indefinite leave to remain, based on pursuant to Pretty v United Kingdom (2002) 35 EHRR 1. At [52], the Strasbourg Court held that naturally occurring physical or mental illnesses may give rise to certain obligations:

> "The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, **expulsion or other measures**, for which the authorities can be held responsible…" (emphasis added)

The applicant contended that the term "expulsion or other measures" encompasses the duration of a grant of leave. Not granting indefinite leave to remain would be one of the "other measures" which exacerbates the pre-existing mental health conditions of the applicant, he contended.

61. Ms Weston did not pursue the representations that Article 3 conferred a right to ILR.

62. The applicant also contended that his right to "psychological integrity", encompassed within Article 8 ECHR, required him to be granted indefinite leave to remain, relying on Bensaid v United Kingdom [2001] INLR 325 at [47].

63. The application pointed out that MBT had resided in the United Kingdom for 20 years continuously, with leave for 15 years. He was now a 52 year old father of four. His ability to demonstrate positive rehabilitation was significantly limited, however, by his medical conditions, which largely prevented him from leaving his house due to the fear of seizures and other mobility issues.

64. MS (India) criteria: Finally concerning the duration of leave, the applicant contended that the criteria enunciated by the Court of Appeal in MS (India) and MT (Tunisia) meant that, under the common law, he was entitled to indefinite leave to remain. We will return to the Court of Appeal's criteria in further depth shortly; in summary, they are the length of residence in the United Kingdom, the gravity of the conduct that led to expulsion, and the extent to which the applicant had changed following exclusion, plus other case-specific factors.

65. In the alternative, the letter contended that the applicant should be granted more than the standard period of six months' leave, and that the reporting conditions should be relaxed, if not removed. The application made

additional representations going to the conditions of restricted leave, if granted; given Ms Weston confined her submissions to the proportionality of the decision not to grant indefinite leave to remain, rather than the conditions attached to the current grant of restricted leave, it is not necessary to say any more about the representations as to conditions.

Ground 7 – Article 8 ECHR – insufficiently particularised assessment

66. Ground 7 contends that the 2019 decision failed to comply with the requirements of Article 8 ECHR in that it did not feature a sufficiently individual, particularised and structured assessment of the factors applicable to that issue, in accordance with the guidance given by the Court of Appeal in MS (India).

67. We must first determine whether Article 8 was engaged in relation to the decision not to grant indefinite leave to remain. The point is significant because, in the case of rights under the European Convention on Human Rights, our task would not be limited to a conventional public law rationality review of the respondent's decision, but rather it would entail considering for ourselves what the requirements of the Convention are.

68. Plainly, the application of the RL policy is liable to interfere with the Article 8 rights of the individual concerned. The objectives of the policy are designed to prevent those subject to it from forming or developing private and/or family life. At the very least, the conditions imposed under the RL policy have the very real potential to have a significant impact on the fabric of the individual's private life. So much was clear from [102] of the Court of Appeal's judgment in MS (India).

69. However, the question as to whether Article 8 – or other Convention rights – are engaged by the decision as to the form and duration of leave granted is a different matter. The Court of Appeal considered this issue at [124] of MS (India), noting that the question was "not entirely straightforward." Underhill LJ said that he did not believe "that the refusal of ILR *as such* engages Article 8 at all" (emphasis added). He drew an analogy between those – such as MBT – who have accrued long periods of residence while subject to the RL policy, and those who present the immigration authorities of a host state with a *fait accompli* following a long period of "tolerated" residence, as considered by the Grand Chamber of the European Court of Human Rights in Jeunesse v Netherlands (2014) 60 EHRR 17.

70. In Jeunesse, the Grand Chamber considered the Article 8 impact of a host state tolerating the presence of unlawful migrants pending a decision on an application for a residence permit, an appeal, or while awaiting some other procedural event. It considered whether the family life and private life roots that such migrants will inevitably have formed while awaiting progress on their case could ever be such that the host state would be obliged by Article 8 to enable the migrants to settle. The Court held that there was no such

automatic right. It said at [103] that the fact that such persons would have formed integrating links of that sort:

> "…does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country. In a similar vein, confronting the authorities of the host country with family life as a *fait accompli* does not entail that those authorities are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the applicant to settle in the country. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them…"

71. Underhill LJ considered that those residing in this country pursuant to the RL policy were in an analogous position to the applicant in Jeunesse presenting a *fait accompli*; those under the RL policy were likely to have accrued residence in defiance of the wishes (if not the international obligations under Article 3 ECHR) of the United Kingdom. Their presence was being tolerated until removal would be possible. While awaiting the possibility of lawful removal to arise, it would not be open for such persons to rely on Article 8 of the Convention for an automatic right to settle in the United Kingdom, based upon the length of residence that had elapsed while their presence was being reluctantly tolerated.

72. Underhill LJ added, again at [124], that it was clear that decisions under the RL policy did not consist solely in the territory of the binary issue of whether indefinite leave to remain would be granted, or not. The impact of the conditions imposed by the RL policy had the potential to interfere with, and thereby engage, the Article 8 family and private life rights of those subject to the policy, and their families. He noted that any such interferences would necessarily be of a "limited character", given that those subject to the RL policy were still able to form relationships, work, live, and engage in life in other material respects.

73. Against that background, the question arises as to what Underhill LJ meant at [124] when he said that the refusal of ILR "*as such*" does not engage Article 8?

74. In the course of addressing the potential impact of Article 8 on a decision to grant indefinite leave to remain, Underhill LJ recalled that he had already quoted extensively from the decision of the Upper Tribunal under consideration in that appeal, at [108] to [109]. At [129] of the Upper Tribunal's judgment (quoted as [130] by the Court of Appeal), the panel said:

> "…the decision to grant… six months leave to remain does not interfere with the development of family life *in principle*. At its height, it may have an impact on the quality of family life bearing in mind the potential insecurity which being granted successive periods of time limited leave may create. However, bearing in mind the objective of retaining the opportunity to remove someone excluded from the refugee Convention by virtue of Article 1F at the earliest opportunity, the provision of such time limited leave is not

> in and of itself disproportionate insofar as it may interfere with the quality of the development of article 8 rights and insofar as it is *subject to the overall governing consideration that there may come a point in time when the failure to grant ILR will be unreasonable bearing in mind the particular circumstances of the case*." (Emphasis added)

At [109], Underhill LJ said, "I have quoted that passage in full because I entirely agree with it."

75. In our judgment, by using the term "as such" Underhill LJ meant that the refusal of ILR cannot *automatically*, and is usually unlikely to, engage Article 8. Read as a whole, the Court of Appeal's judgment did not rule out the possibility that Article 8 is capable of being engaged by a decision to refuse indefinite leave to remain. So much was clear from the extensive quotation with approval of this Tribunal's judgment in MS (India), at [108], which said that the proportionality of the extent of, and conditions attached to, restricted leave is subject to the "*overall governing consideration*" that there may come a point in time when it is "unreasonable" bearing in mind the particular circumstances of the case to refuse to grant indefinite leave to remain

76. In adopting that approach, Underhill LJ was entirely consistent with that of Richards LJ in Kardi v Secretary of State for the Home Department [2014] EWCA Civ 934, which held that a case-specific time will come when those subject to the RL policy are entitled to indefinite leave to remain. Mr Kardi was subject to an earlier version of the RL policy and had resided in the United Kingdom for a considerable period. In the context of discussing the proportionality of any interferences with Mr Kardi's Article 8 rights, including the impact of the conditions imposed and the length of his residence (see [30]), Richards LJ said at [32]:

> "There may of course come a point where the appellant has been in the United Kingdom for so long and/or the prospect of his removal to Tunisia is so remote, that the only course reasonably open to the Secretary of State is to grant him indefinite leave to remain. That point had not been reached, however, at the date of the March 2012 decision under challenge in these proceedings…"

77. In Babar v Secretary of State for the Home Department [2018] EWCA Civ 329, the Court of Appeal considered an appeal against a decision of the Secretary of State to refuse to grant indefinite leave to remain under paragraph 276B of the Immigration Rules, which governs entitlement to indefinite leave to remain on the basis of ten years' lawful residence. Mr Babar had been an officer in the Pakistani police. He and those under his command had beaten and threatened those they had detained in order to extract information from them. The US State Department had reported that the police in Pakistan were highly politicised and routinely and systematically used brutal investigation procedures, including torture, and engaged in extrajudicial killing; Mr Babar had been part of that apparatus. He applied for indefinite leave to remain in this country, following 14 years' residence under the RL policy (and its

predecessors), to which he was subject after the Secretary of State decided that his crimes against humanity in Pakistan excluded him from the scope of the Refugee Convention, but that he was not removeable. The Secretary of State subsequently took a decision to return Mr Babar to Pakistan, on the basis that he had been able to return on at least five occasions without difficulty and without experiencing the harm or mistreatment which had previously merited him being dealt with under the RL policy. The refusal of Mr Babar's human rights claim generated a statutory right of appeal before the First-tier Tribunal ("the FTT") in which a central issue was whether Mr Babar was entitled to ILR under rule 276B. The appellant was successful before the FTT and the Upper Tribunal. On the Secretary of State's appeal to the Court of Appeal, at [32], Sir Patrick Elias held:

> "I do not accept that the commission of these offences against humanity necessarily and inevitably meant that Mr Babar could in no circumstances be granted ILR.… Paragraph 276B [of the Immigration Rules] envisages the possibility that even where such very serious offences have been committed in the past, all the relevant factors should be considered and the circumstances may be sufficiently compelling to justify granting ILR."

Mr Babar's appeal was ultimately dismissed, pursuant to the Court of Appeal's assessment that it would be proportionate, for the purposes of Article 8(2) of the Convention, for him to be returned to Pakistan. At no stage did the Court of Appeal hold that there was no statutory jurisdiction in a human rights appeal in relation to those elements of his case which concerned indefinite leave to remain, or that Article 8 was not engaged by the underlying decision of the Secretary of State.

78. We also recall that the Court of Appeal held at [124] of MS (India) that decisions under the RL policy do engage Article 8, principally in relation to the impact the conditions of restricted leave will have on the private and family life of the person concerned. We see no basis for there to be a "cap" on the issues that may be considered pursuant to an Article 8 analysis; we find no support for the proposition that certain, lesser considerations (e.g. conditions of leave) are capable of engaging Article 8, whereas far more fundamental questions, such as the availability of indefinite leave to remain, are *never* capable of engaging Article 8, in appropriate cases. That approach would not make sense, given the Court of Appeal in Kardi, Babar and MS (India) held, in the context of addressing proportionality under Article 8, that there would come a point when indefinite leave to remain would be the only reasonable option.

79. It is likely that, in most cases, a decision as to whether a person under the RL policy is entitled to indefinite leave to remain does not engage Article 8. Any interferences arising from the refusal of indefinite leave to remain would be likely to be minimal, and thus not engage Article 8. But that is not to say that there will not be case-specific scenarios where, due to the particular circumstances of the individual concerned, Article 8 is engaged by the

decision to refuse to grant indefinite leave to remain, and to maintain the application of the RL policy.

80. We do not consider Jeunesse to be authority to the contrary, nor that the Court of Appeal in MS (India) precluded the possibility of us taking this approach. The Grand Chamber was not stipulating a principle that tolerated migrants would *never* be able to settle, in any circumstances. The Strasbourg Court, of course, noted in the extract from Jeunesse quoted by the Court of Appeal, that the substantive requirements of Article 8 did not "*automatically*" entail a corresponding entitlement to settlement for a tolerated but irregular migrant. It did not rule out the possibility that some migrants would be eventually be entitled to settle in cases where that was the only proportionate outcome. Nor did the Court of Appeal in MS (India).

81. For these reasons, while the decision to grant indefinite leave to remain does not "*as such*" engage Article 8 of the ECHR, it is capable of doing so in an appropriate case.

The import of Article 8

82. Having found that Article 8 is, in principle, capable of being engaged in relation to a decision to refuse to grant indefinite leave to remain, we return to the questions of whether (i) Article 8 is engaged in relation to the 2019 decision's refusal to grant the applicant indefinite leave to remain; and (ii) if so, whether the decision to refuse to grant indefinite leave to remain was proportionate under Article 8(2)?

83. Cases such as the present are always likely to be inherently fact specific matters. We see little merit in attempting to articulate general propositions which could potentially go to the issue of whether Article 8 is engaged in all cases across the board. Rather, we shall focus on the facts of the present matter. We consider that the poor state of MBT's mental and physical health, and the distinct and acute impact that the regular and repeated grants of restricted leave are having upon him, has the effect of engaging Article 8 in relation to the decision to refuse to grant him indefinite leave to remain. Dr Bell's report suggests that the psychological impact of not having security of tenure in the United Kingdom exacerbates the long term and enduring impact of the applicant's detention and torture experiences in Tunisia: see page 9 of the report, which highlights the impact of the ongoing stress and uncertainty experienced by the applicant on the underlying conditions triggered by the major catastrophic dramatic events which have taken place in his history. MBT's health was not an issue before the Upper Tribunal previously, or the Court of Appeal in MS (India). It is a new issue, with new implications.

84. The health dimension to this case must be considered in the context of the total length of the applicant's residence, which is now over 20 years. On any view, this is a lengthy period. Combined with the applicant's significant health problems, we consider that the length of the applicant's residence are

factors which lead to Article 8 being engaged in relation to the question of whether or not he is entitled to indefinite leave to remain.

85. Given we accept that Article 8 is engaged, the intensity of our review is greater. We must decide for ourselves what the requirements of the Convention are, in order to assess whether the Secretary of State reached a lawful decision to refuse to grant the applicant indefinite leave to remain.

86. We will analyse the applicant's case through the prism of Lord Bingham's five stage test in Razgar [2004] UKHL 27 at [17]:

> (1) Will the proposed [refusal of indefinite leave to remain] 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?

87. Modified to fit the facts of this case, we have already answered the first and second Razgar questions in the affirmative. The interference with the applicant's Article 8 rights will be of such gravity so as potentially to engage the operation of Article 8 (Razgar 2).

88. The interference is in accordance with the law, in the sense that it is conducted pursuant to the framework set out in section 3 of the Immigration Act 1971 for the imposition of conditions on the grant of limited leave to remain (Razgar 3). The Secretary of State has published policy setting out the principles she will apply when imposing conditions in matters such as the present.

89. As to the fourth Razgar question, the RL policy is, in principle, capable of achieving one of the goals set out in the derogations contained in Article 8(2) of the Convention. At [29] of Kardi, Richards LJ held that the stated aims of the policy were all, in principle, legitimate aims. He said:

> "The various elements of the stated rationale are all in principle legitimate aims, though it will be necessary to consider the extent to which they are specifically engaged in the appellant's case. More needs to be said, however, about the stated wish to give a clear signal that the person should not become established in the United Kingdom. The rationale of the previous discretionary leave policy was described by Cranston J in *R (Mayaya) v Secretary of State for the Home Department* [2011] EWHC 3088 (Admin), [2012] 1

> All ER 1491, at paragraph 57, as being "not simply to ensure regular reviews so that foreign national prisoners [the specific category of persons in issue in that case] can be removed from the United Kingdom when the opportunity arises", but also "to plant road blocks in the way of foreign national prisoners settling here", though settlement might in practice still occur. In other words, the grant of short periods of leave emphasised the intended impermanence of the individual's stay in this country and made it more difficult to put down roots here and to build up a private life, thus reducing the prospect of removal being prevented on Article 8 grounds when the opportunity otherwise arose. The current restricted discretionary leave policy, by providing for the imposition of specific conditions on the grant of leave, is intended to reduce further the opportunity to put down roots and thereby to reinforce the roadblocks planted in the way of settlement here. It does not prevent the establishing of a private life but makes it more difficult and so increases the chance that the delay before removal can be effected does not operate to prevent removal altogether. That is a legitimate aspect of immigration control."

90. In MS (India), Underhill LJ held at [107] that:

> "The language of 'placing obstacles' and 'creating Road-blocks' may have, out of context, a pejorative ring. But the context is all-important. The category of migrants with whom we are concerned have, by definition, committed serious crimes (in the sense identified above), typically of a terrorist character. They have no right to be in this country and are only permitted to stay because, having come here unlawfully, it has proved impossible to remove them. I see nothing even arguably illegitimate in seeking to prevent them putting down roots, for the reasons clearly stated in the policy itself."

91. Addressing the derogations under Article 8(2) directly, it is trite law that the maintenance of effective immigration controls is an accepted subset of the need to establish national security, public safety and economic well-being based derogations, when combined with the prevention of disorder or crime, protection of health or morals, and the protection of the rights and freedoms of others. The reasons given by the Secretary of State for restricting the grant of leave to MBT to a further period of restricted leave are all, in principle, capable of being regarded as a permitted derogation within the parameters of Article 8(2).

Proportionality of decision to refuse indefinite leave to remain

92. We turn to the fifth Razgar question: whether the decision not to grant indefinite leave to remain to the applicant was proportionate. This question requires consideration of the reasons given by the respondent for refusing to grant indefinite leave to remain, in the context of the reasons and objectives for, and given in, the RL policy itself, set against the representations and submissions made by the applicant.

93. It is important to recall the wider context within which our assessment is to sit; as Underhill LJ noted at [116] of MS (India), "the starting point must be the terms of the policy." The effect of the policy is that ILR should only be

granted in exceptional circumstances: see [40] and [41] of MS. Only where there are "compelling reasons for a departure from the general rule" will it be appropriate for an individual to be granted ILR. The "essential question" concerning the ILR issue is, "whether in the case in question the Secretary of State should have found that such compelling reasons were present" (per Underhill LJ, also at [116]).

94. In MS (India) the Court of Appeal outlined three indicative criteria which were likely to be relevant to the "compelling reasons" issue, in addition to any case-specific factors raised on behalf of an applicant. We will address these considerations in light of the applicant's submissions. We emphasise that we have considered all the relevant factors, in the round, before reaching our decision.

Length of residence

95. The first relevant consideration is the length of residence in the United Kingdom (see [120]). The Court of Appeal held that, "in an appropriate case", the length of residence may bring a case into the exceptional category. The court noted that paragraph 276ADE(1)(iii) of the Immigration Rules, which governs the length of unlawful but tolerated residence needed to secure leave to remain on Article 8 grounds, was 20 years, commenting that that provided "some context". The Court of Appeal proceeded on the basis that paragraph 276ADE(1)(iii) confers a right to *indefinite* leave to remain after 20 years' unlawful residence. The Court of Appeal appeared not to have had the benefit of full argument or accurate submissions on the interpretation and application of paragraph 276ADE(1)(iii). Rather than leading to a grant of indefinite leave to remain, as the Court of Appeal must have been led to believe, the import of paragraph 276ADE(1)(iii) is that, upon 20 years' residence, it entitles an applicant to limited leave to remain, which will usually be for a period of 30 months. Twenty years of unlawful residence merely places the migrant at the start of the so-called "ten year route" to settlement.

96. Paragraph 276ADE(1) provides, where relevant:

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> > (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
> >
> > (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
> >
> > (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment)…"

We note that the introductory wording to the root paragraph uses the term "leave to remain", rather than "indefinite leave to remain". Paragraph

276BE(1) makes provision concerning the practical outcome of successful applications under paragraph 276ADE(1), in these terms, with emphasis added:

> "276BE(1). **Limited leave to remain on the grounds of private life in the UK may be granted for a period not exceeding 30 months** provided that the Secretary of State is satisfied that the requirements in paragraph 276ADE(1) are met or, in respect of the requirements in paragraph 276ADE(1)(iv) and (v), were met in a previous application which led to a grant of limited leave to remain under this sub-paragraph. Such leave shall be given subject to a condition of no recourse to public funds unless the Secretary of State considers that the person should not be subject to such a condition."

As emphasised above, successful applications under 276ADE(1) lead to limited leave to remain, for 30 months, rather than indefinite leave to remain.

97. Paragraph 276DE makes provision for indefinite leave to remain on private life grounds. The central length-based criterion features in paragraph 276DE(a). It is that the applicant "has been in the UK with continuous leave on the grounds of private life for a period of at least 120 months…" Such leave would be that granted pursuant to a successful application under paragraph 276ADE(1).

98. Taken together, paragraphs 276ADE(1)(iii), BE(1) and DE mean that a person seeking indefinite leave to remain on the basis of long (initially unlawful) residence will need a total of 30 years' residence; the first 20 years lead to a grant of leave under paragraph 276ADE(1)(iii) for a duration of 30 months. Four successive grants of leave in that capacity, giving a total of 120 months, or ten years, are required before a person becomes eligible for indefinite leave to remain.

99. It follows, therefore, that the temporal comparator under the rules for a "normal" migrant with long, initially unlawful, residence is 30 years residence for the acquisition of ILR. There are, of course, key distinctions between a person in a paragraph 276ADE(1)(iii) situation and those under the RL policy. Those to whom paragraph 276ADE(1)(iii) applies would not necessarily have had Article 3-based barriers to their return to their state of origin, meaning they had an element of choice about whether to have remain here during that time. By contrast, those subject to the RL policy do not have that choice, provided their purported inability to return to their state of origin has not been overstated (as had been the case in Babar). On the other hand, those eligible for limited leave under 276ADE(1)(iii), or ILR under 276DE, will not present suitability concerns of the sort presented by this applicant, and instead must demonstrate positive good character, providing an additional facet to the comparison. As Underhill LJ noted, "I do not say that the two situations are analogous, but simply that that rule provides some context."

100. We consider that the context provided by the comparison with paragraph 276ADE(1)(iii) does provide a degree of assistance. We take account of the

fact that the applicant has accrued his residence in circumstances when he effectively had no choice but to live here. Nevertheless, the total length of the applicant's residence has only just reached the threshold in relation to which someone with no suitability concerns would be entitled to only 30 months' limited leave to remain. On any view, it is difficult to see how the length of the applicant's residence, in isolation, could amount to exceptional or compelling circumstances necessitating a grant of indefinite leave to remain, given it falls short of the "normal" threshold by a significant margin.

101. The 2019 decision appeared to base its analysis of the "20 year" point on the Court of Appeal's approach to the operation of the rule in MS (India), assuming that after 20 years a "normal" migrant would be entitled to ILR. That was an incorrect comparison, although it was an incorrect comparison in the applicant's favour. It meant that the decision assumed that the applicant had accrued residence of such a length that, under the Immigration Rules, would pave the way for ILR. The large disparity which, in fact, exists between the applicant's length of residence and the criteria for ILR pursuant to 276ADE(1)(iii) taken with 276DE is stark: the applicant is ten years short of the length of residence required for indefinite leave to remain for a "normal" migrant under the rules. The 2019 decision's assessment could have been adverse to the applicant to a greater extent but was not. Bearing in mind that the comparison with the approach taken by the Immigration Rules is capable of providing "some context", we entirely agree with the spirit of the following extract of the refusal letter:

> "…a period considerably in excess of 20 years is likely to be required as compelling settlement in the case of a foreign criminal guilty of conduct of the type that falls within Article 1F of the Refugee Convention."

102. We agree that, taken in isolation, the length of the applicant's residence is incapable of amounting to a "compelling reason" to depart from the normal rule. It is necessary, of course, to view the reasons advanced on behalf of the applicant in the round, before reaching a considered view. A considerably longer period would be required, in light of the public interest, public protection and safe haven objectives of the RL policy.

Gravity of conduct

103. The second consideration is the gravity of the conduct which led the applicant to be excluded from humanitarian protection: see [121] of MS (India).

104. At page 5 of the decision, the respondent stated:

> "Your client is aware of the circumstances that surround his conviction in France on 19 January 1998, so they are not reiterated. The Secretary of State notes that your client has never provided a detailed account of those circumstances nor any object of evidence as to the intended or actual use to which the arms provided were put. It is a matter of record that this conviction for possession and transportation of arms connected to terrorist activities led to a sentence of 5 years' imprisonment and your client was excluded from

France. Your client entered the UK illegally so there is no objective record of your client's entry to the UK. Your client has claimed no prior connection to the UK."

105. The decision continued (see page 9):

> "The Court of Appeal indicated in *MS (India)…* at [121] that some forms of misconduct were so serious as to exclude an individual from ILR at any time. That could not be assumed in all cases since Article 1F covered the 'ordinary' criminal offending in addition to international crimes, so some offences may not be as serious in nature as others. Considering your client's case, it is noted that this is not a case of 'ordinary' criminal offending of a less serious kind. Rather, your client's conviction relates to involvement in international terrorism, which the Secretary of State regards as falling the higher end of the spectrum of seriousness of offending covered by the RLR policy. Your client's case directly engages the public interest reflected in the 'no safe haven' policy. Therefore, your client's offending is a factor that weighs heavily against the grant of ILR in all the circumstances."

106. In our view, the applicant has engaged in extremely serious criminal offending in France. The offences involved weapons and a large conspiracy. The conduct had a cross-border element, in that the applicant committed the offences in a country other than that of his nationality, with 29 other Tunisian citizens, having entered France illegally. The applicant has never expressed remorse for his actions and has at every stage sought to deny or minimalise his involvement in the offences, refusing to take responsibility for the convictions. Although he has written in a statement prepared for these proceedings that he experienced difficulties with the lawyer appointed to represent him and was convicted on what we paraphrase as a "guilt by association" basis, he did not appeal against his conviction. We note his explanation for not having sought to appeal but note also that he has not provided any expert evidence to support his suggestion that he was at risk of his sentence being increased retrospectively. The conviction was imposed pursuant to a judicial procedure in a Member State of the European Union and a Contracting Party to the European Convention on Human Rights. There was no evidence before the respondent, and there is no evidence before us, which suggests that the proceedings were unfair, or that the applicant was prejudiced in anyway by the process adopted. The applicant has not said that he did not speak French, or that he was unable to understand the process taking place around him. Put simply, the applicant committed serious offences, in respect of which he continues to deny responsibility.

107. We reject the submissions of Ms Weston that the conduct was at the less serious end of the spectrum, thus demanding more lenient treatment by the respondent – and by us. Of course, it is possible to envisage more serious offending. It often is. We accept that this is not necessarily a case where it is "self-evident" that there could *never* be circumstances meriting a departure from the general rule that ILR is not granted: MS (India) at [117]. The

applicant does not fall into the "obvious example" category outlined by Underhill LJ in these terms:

> "An obvious example would be where the migrant continues to pose a risk to national security or has been guilty of serious criminal conduct since their admission. Another is likely to be where there is good reason to believe that the barriers to removability may soon be lifted, as a result of political changes in the migrant's country of origin or otherwise. It is also important to bear in mind that if ILR is granted the Secretary of State loses the power to impose conditions, so that if there is a continuing need for such conditions because of the nature of the offending, ILR will not be appropriate."

We have not been informed, for example, that there is a current national security threat assessment in relation to the applicant. He is not recorded as having committed any criminal offences in this country. By contrast, the applicant is the father to four children and appears to have led a blemish-free life since his arrival here.

108. However, the applicant's sentence of five years' imprisonment, taken with the nature of his offences, is by no means at the lowest end of the spectrum of severity. Five years is a significant period. By way of comparative example, in section 72(2) of the Nationality, Immigration and Asylum Act 2002, Parliament has legislated to provide for a rebuttable presumption that those who have been convicted in this country of an offence of at least 2 years' imprisonment are to be presumed to have been convicted of a "*particularly* serious" crime, for the purposes of Article 33(2) of the Refugee Convention. The term "*particularly* serious" contrasts with the description of offences leading to exclusion in Article 1F(b), which omits any suggestion of "particularly", merely providing that the commission of "serious non-political" offences outside the country of refuge is sufficient to exclude persons from the scope of the Refugee Convention altogether. Given Parliament has deemed it appropriate to categorise "*particularly* serious" offences as those resulting in the comparatively lesser sentence of two years, we consider the imposition of a sentence of five years to be more serious, by a considerable degree, taking account of Parliament's approach when calibrating our own assessment. We ascribe limited weight to this comparison, as direct comparisons between different jurisdictions can be difficult, but nevertheless we do consider there to be some limited relevance in approaching matters in this way.

109. We also reject Ms Weston's submission that the 2019 decision refused to engage in an analysis of the relative seriousness of the applicant's criminal offences. In the extract from the 2019 decision we have quoted at paragraph 104, above, the respondent clearly states that the conduct was not "of a less serious kind", and that the Secretary of State regarded it as "falling at the higher end of the spectrum of seriousness…"

110. Recalling, in particular, the public interest and safe haven objectives of the RL policy, we consider that it is entirely appropriate to withhold ILR when the nature of the applicant's offending is taken into consideration.

Positive conduct after offending

111. The third potentially relevant consideration is the extent to which the migrant has "changed" since the conduct in question: see MS (India) at [122]. Underhill LJ said:

> "…good evidence that the migrant [has] repudiated his or her past conduct and turned their lives round so as to become valuable members of society (to the extent that the restrictions on their leave may have allowed) should weigh in the necessary assessment, particularly where there has been some very positive contribution to society."

112. The 2019 decision highlighted the approach of Babar to such positive factors not merely amounting to an absence of negative conduct. In a passage that is a little difficult to follow, the decision said that Babar:

> "reflects ordinary administrative law principles that relevant factors ought to be considered and does not constitute a 'benefit' that is afforded routinely in all or any cases save were the individual circumstances, exceptionally, demonstrate such conduct."

It seems to us that what the above extract is seeking to establish is the fact that the mere absence of poor or criminal behaviour during the period of residence in the United Kingdom does not amount to a sufficiently positive contribution such that it will be a weighty factor in the proportionality assessment. That must be right.

113. On the issue of rehabilitation, the decision letter said:

> "It is noted that your client has not taken any steps to demonstrate genuine rehabilitation. Throughout your client's residence in the UK there has been no evidence of genuine remorse on his part for his criminal conduct provided to the Secretary of State. Your client has not provided any statement that unequivocally condemns his criminal conduct, terrorism, extremism or the use of violence to achieve desired ends in this context. No cogent evidence has been provided of any intention by your client to rehabilitate, with no commitment as to why and how that would be achieved by him. The mere effluxion of time does not demonstrate any positive change or belief."

114. The applicant's representations, in reliance upon the report of Dr Bell and the other medical evidence, stated that it was not reasonable to expect him to engage in such positive conduct. His physical and mental disabilities prevented him from doing so. Ms Weston submitted that to the extent that the respondent failed to make sufficient reasonable adjustments to her expectations of his rehabilitation, she discriminated against him on grounds

of disability, contravening the Equality Act 2010, and Article 14 of the ECHR, taken with Article 8.

115. We accept that the applicant's medical conditions mean that it is unreasonable to expect substantial evidence of outward activities or reform, for example, in the form of a high profile role in which the applicant is widely regarded for having renounced terrorism and encouraged others to do the same. We do not hold the applicant to the standards which, for example, were accepted by the FTT in Ruhumuliza v Secretary of State for the Home Department [2018] EWCA Civ 117 as amounting to meriting the conclusion that, "[w]e find it hard to believe that the respondent now considers the appellant to be an undesirable alien…" In that case, the appellant had been a senior church leader who acquiesced in the Rwandan genocide, although was not an active participant. He had since engaged in extensive post-genocide reconciliation and accountability initiatives. He was accepted and trusted by the regime of President Kagame in that capacity during return visits. He had been a member of the Rwandan delegation at a Commonwealth reception at Buckingham Palace. Those were all factors that the FTT considered to be important when considering his appeal against the Secretary of State's refusal of his human rights claim. The decision was upheld by the Upper Tribunal, which was in turn upheld by the Court of Appeal (Singh LJ dissenting). The decision was upheld principally because there had been no error of law in the assessment of the FTT, and Underhill LJ held that it must be respected.

116. We consider it would be wholly unreasonable, and therefore irrational, to expect a *Ruhumuliza* level of positive contribution from this applicant. We do not consider the 2019 decision falls into error on this issue; the respondent did not expect such standards. The key factor relied upon by the 2019 decision is one with which we entirely agree; the applicant has demonstrated no remorse, nor has he taken responsibility for his offending in France. At every stage, including before these proceedings, he has sought to minimise his responsibility for the offences of which he was convicted. Although in a statement prepared for these proceedings the applicant seeks to renounce terrorism and underline his commitment to achieving political change through peaceful and democratic means, those are, with respect, empty words in light of his denial of responsibility for his offences. There is no suggestion in the medical evidence that the applicant's reasoning is impaired to such an extent that he lacks the capacity to demonstrate such reform. It was entirely appropriate for the respondent to deal with this issue in the terms outlined above. In any event, as we understand the 2019 decision, the respondent was saying that the absence of evidence of rehabilitative conduct meant that this was not a factor which counted in the applicant's favour. The respondent was not saying that this counted against him. It was the applicant's French conviction which counted against him.

Other relevant factors

117. At [123] of MS (India), the Court of Appeal said that there may be a variety of individual circumstances which, either in isolation or taken with other factors, bring the case into the exceptional category. The additional factors in the present matter include the applicant's physical and mental health conditions, and the claimed wider impact of the grant of restricted leave on his family, in particular his minor children.

Best interests of the children

118. It is clear that life on restricted leave has had an impact on the applicant's family, mainly by virtue of the collateral impact his health conditions will have had on them. From the materials we have seen, the impact is of a limited nature. The applicant has been able to establish family life in this country through marrying and having four children. His wife enjoys ILR and his children are all British citizens. Three of his children are still minors; they are aged 17, 15 and 13. The applicant does not presently face removal.

119. In his statement prepared for these proceedings, the applicant writes:

> "It is a hard feeling to be in a country for 20 years, starting with so much hope for the future, and gradually realising that in the opinion of the place which is your home you are a hated foreigner and there is nothing you can do to improve your situation. I feel guilty that this hatred from the state affects my children and their futures…"

At page 8 of Dr Bell's report, the applicant is recorded as having said, "*I feel like I have destroyed their life*" when speaking of the impact of his difficulties upon his children.

120. Other than the applicant's assertions that his immigration status affects his children, there is no evidence to suggest that the conferral of ILR is necessary in their best interests. The applicant himself has said that he does not know if being granted ILR would alleviate his feelings of helplessness (see paragraph 128). Despite the thrust of Dr Bell's report being that the applicant requires ILR on, in effect, medical grounds, he writes at page 12 that a grant of ILR would be unlikely to have an immediate effect, due to the severity of his psychological state.

121. The leading authorities concerning the assessment of the best interest interests of children in the immigration context require analysis of the "real world context" in which the migrant and their family find themselves. Perhaps revealingly, they are addressing removal scenarios, rather than situations where, as here, removal is not currently within scope. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, Lord Carnwath endorsed what was said in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 concerning this issue, at [58]:

> "In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real

world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus, the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

122. The "real world" context of this matter is distinct from the cases before the Supreme Court in KO (Nigeria); there is no question of the applicant being removed at the present time. He *does* have the right to remain. His children are British. By definition, it would not be reasonable to expect the children to accompany their father to a country where he would be at real risk of serious harm (and there is no suggestion that he will be removed while such a risk persists).

123. We accept that, to the extent there is an element of precariousness to the applicant's immigration status, that may lead to feelings of uncertainty for his children, and that it may be said to be in the best interests of the applicant's children for him to be granted ILR, although that is only marginally so. We accept that most children would feel a sense of unease and concern if they knew and understood the precarious nature of their parent's immigration status. To that limited extent, the best interests of the applicant's children are for him to be granted ILR. But in the main, their best interests are reflected in the applicant remaining in the United Kingdom, for the time being.

124. Ms Weston submitted that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 is dispositive of the ILR issue in the applicant's favour. It is not. We put aside whether the applicant could properly be regarded as a person "not liable to deportation", as we did not hear full argument on the statutory construction of the provision. However, at its highest, it confers protection from removal while the applicant enjoys a genuine and subsisting relationship with a "qualifying child", which would include each of his minor British children. Section 117B(6) says nothing concerning entitlement to ILR. It sits in the context of section 117B(1) emphasising the public interest in the maintenance of immigration controls. Taken at its highest, section 117B(6) would confer upon the applicant protection from removal until his youngest child was an adult (approximately five years away), provided the applicant maintained a genuine and subsisting parental relationship with his youngest child during that period. It is irrelevant to the question of ILR.

Applicant's health

125. Turning specifically to the applicant's health, we have already outlined some of his health conditions: see paragraphs 11, 12 and 83, above. In diagnosing the applicant with post-traumatic stress disorder, Dr Bell wrote at page 9:

> "…there have been a series of major catastrophic traumatic events. I refer here to the originating cause of the symptoms, i.e. the experiences of detention and torture, and the very severe ongoing stress and uncertainty as

> to his safety in the UK and his future, which serve, to perpetuate the symptoms and cause further deterioration… A more appropriate diagnosis in this case would be severe chronic traumatised state."

Dr Bell continues at page 10 in these terms:

> "Psychiatric disorders such as these are highly sensitive to the external environmental context. It is not uncommon for those who have been subjected to torture and other degradations to sustain in themselves a belief in the goodness of the world, often believed to reside in the country where they are seeking asylum. The sudden loss of this hope can cause a sudden deterioration into severe depression – I think this is likely to be the case here – *that is the fact that he has not been given indefinite leave to remain* and is subject to what he experiences as surveillance and state animosity towards him (*through the deployment of 'restricted leave' against him*) resulted in this loss of hope." (Emphasis added)

126. Continuing his analysis of the impact of the applicant's immigration status on his mental health, Dr Bell writes at page 11:

> "… disorders such as this are highly sensitive to the external context. It is clear to me that the continuous stress of being subject to a formalised measure of hostility by the state, feeling insecure, subject to restrictions on his freedom to function as any other autonomous human being and not knowing his future is safe as he is only ever given short periods of leave to remain in the UK, all act as major continuous external stressors causing him to deteriorate and preventing recovery from his condition."

127. Also, on page 11, under the heading "*Treatment*", Dr Bell writes that the applicant should be under the care of the appropriate psychiatric team. Although the applicant takes prescribed medication for his psychiatric disorder, it does not "seem to be effective", Dr Bell continues. This is not surprising, he writes, as pharmacological treatment can only have a very limited role to play in such disorders. Dr Bell continues that the existence of a "major external stressor" is what acts to prevent recovery and cause deterioration. He concludes the penultimate paragraph on that page stating, "I refer here to the ongoing uncertainty as to whether and when he will be granted permission to remain in the UK permanently."

128. The applicant's own views on the impact of ILR are less clear. On page 4, Dr Bell writes, having summarised the feelings of hopelessness and despair that characterise the applicant's thinking:

> "I asked him at this point if he thought all this would change if you were granted indefinite leave to remain in his answer was quite revealing. He said he didn't know. He feels like this all the time.

129. Ms Weston places significant reliance on what she contends is the decision letter's failure to have regard to the medical representations, particularly those made in light of the report of Dr Bell concerning the medical need for ILR to be granted, as well as the letters from Mr Fish and Ms Bracken. She

contends that the 2019 decision failed to take sufficient account of the Bell report when considering whether the applicant was entitled to ILR, and that it is flawed on that basis.

130. There is modest superficial force to this submission, in so far as it focusses on the respondent's consideration of the Bell report when addressing the issue of ILR. In this section of the 2019 decision, the respondent did not expressly address "other factors", pursuant to MS (India) at [123].

131. However, this submission cannot withstand scrutiny, for the following reasons.

132. First, the second paragraph of the 2019 decision stated that each aspect of the applicant's circumstances and submissions had been given specific and individual consideration.

133. Secondly, it is clear from the 2019 decision that the respondent had the contents of the Bell report, and the other medical representations, in mind when assessing the three primary considerations enunciated by Underhill LJ in MS (India). So much is clear from the respondent's acceptance, under the heading "*Positive conduct after the offending*" on pages 9 and 10. There the respondent accepted that the applicant's ability to contribute to society would feature limitations on account of his mental and physical health conditions. The respondent was clearly mindful of the impact of the applicant's physical and mental health conditions when addressing the issue of ILR.

134. Thirdly, having decided that there were no exceptional or compelling circumstances meriting a departure from the "general run of case to which the normal approach properly applies", the respondent addressed the issue of limited leave to remain. It was at that stage in her analysis that she considered the impact of the applicant's health conditions. At page 11 the decision states, with emphasis added:

> "…set against the factors that indicate the normal approach should be taken, the Secretary of State has given full weight to the considerations in your client's circumstances that weigh in favour of departure from the standard approach of granting 6 months' [restricted leave to remain]. In particular, **due regard has been given to the medical evidence that your client has provided in support his claim that the duration of leave granted may have a future adverse effect on his mental health**, Also, consideration has been given to the extent that there is evidence that the period of leave granted may affect your client's family and family life (taking account of the findings of the Upper Tribunal and the Court of Appeal on the inherent limitations on this where a family can continue to live together as a family unit for the duration of the leave and the grant does not affect the childrens' [*sic*] immigration status in the United Kingdom."

135. The letter continued:

> "In light of the specific evidence in your client's case and in his particular circumstances, it has been decided to depart from the normal period of 6

> months' leave to remain to grant 12 months' leave to remain with reduced reporting. This balances your client's private interests against the public interest and takes a proportionate and reasonable approach bearing in mind that there is no evidence capable of directly calibrating the period of leave with any particular inevitable effect on your client's mental or physical health…"

136. It is plainly the case that the respondent considered the medical materials and adjusted her normal approach to granting restricted leave accordingly. The standard length of leave was doubled, and the reporting requirements were relaxed to four times annually, down from every other month. It is clear that the respondent paid full regard to the contents of the Bell report when addressing the length of restricted leave.

137. It is necessary to read the decision as a whole. Ms Weston's submission is essentially one of disagreement with the weight ascribed by the respondent to the medical evidence. Rather than it being relevant to the length of restricted leave, or the conditions attached to it, Ms Weston's submission is that the medical evidence was such that it was disproportionate for the respondent not to grant ILR. Put another way, greater weight should have been ascribed to the medical evidence, she contends.

138. The respondent's views as to where the public interest lies in the proportionality or otherwise of whether the applicant is entitled to ILR attract great weight. See MS (India) at [124]:

> "The [Secretary of State's] assessment is also likely to involve aspects on which particular respect must be paid to the judgement of the Secretary of State. In all cases involving terrorist offences full weight must be accorded to her view that it is not in the public interest to allow this country to become a safe haven for terrorists and to any other, more specific, aspects of the case requiring a judgement on matters of national security or foreign relations. Particular respect should likewise be paid to any view she may express as to the public acceptability of the grant of ILR to migrants who have committed certain kinds of offending."

139. In light of these considerations, we must consider for ourselves whether the respondent's analysis of the best interests of the children, and the medical evidence was proportionate.

140. While this is a human rights decision, necessitating us deciding for ourselves where we consider the proportionality balance to lie, it is nevertheless important for us to take into account the respondent's views. That is not to say – as the Court of Appeal rejected in MS (India) at [119] – that the Secretary of State's views are "unchallengeable". Rather it is to ascribe the weight that is appropriate to the Secretary of State's views concerning the public interest reflected in the objectives of the RL policy. Taking into consideration the institutional competence of the Secretary of State to make finely balanced judgements about the public interest and the United Kingdom's reputation as a guardian of the international rule of law, we consider that the approach of

the 2019 decision to the medical evidence is lawful, for the following reasons. There is necessarily a degree of overlap with our reasoning in relation to the other MS (India) criteria.

141. The applicant stands convicted of very serious offences in France. The objectives pursued by the RL policy are legitimate, as we have set out above. The best interests of the children only marginally favour the applicant being granted ILR; their interests are reflected primarily in the non-removal, for the time being, of the applicant. Considered alongside the factors we have dealt with under our analysis of the first three MS (India) criteria, we conclude that the interferences with the applicant's private and family life are proportionate.

142. Although the Bell report contends that the applicant should receive ILR to pave his way to recovery, Dr Bell candidly accepts at page 12 that that would not lead to immediate results. It would, writes Dr Bell, "create the preconditions for him to be able to *begin to improve*…" (emphasis added), but other "protective factors" would be required. Such factors, he states, could include the ability for the applicant "actively to parent his children", to support them financially, and to be a good example as the head of his family. As we have already stated, the applicant is able to parent his children at the moment (indeed, Ms Weston's reliance on section 117B(6) of the Nationality, Immigration and Asylum Act 2002 must be predicated on the existence of a genuine and subsisting parental relationship between the applicant and his children). He can work, with the permission of the Secretary of State (although we note that the Department for Work and Pensions has assessed him to be unfit to work, there is no suggestion that that assessment is founded upon health conditions said to be attributable to the ILR issue). He enjoys recourse to public funds. It is not clear, therefore, why Dr Bell writes that "none of this [being a parent, working to support his family, being a good example as head of the family] is currently within his reach…" when the conditions of the applicant's restricted leave permit all such activities, and the applicant's own case under section 117B(6) is predicated on the existence of a genuine and subsisting parental relationship with his children. Although we accept that a grant of ILR would provide the applicant with the certainty he seeks, it is difficult to see how the absence of ILR stands in the way of the applicant engaging in some of the very activities which he is currently able to undertake.

143. As Ms Anderson points out, the Bell report pre-dates the 2019 decision, and had been drafted following many years of repeated 6 month grants of leave, where there had never been any prospect of a longer period of limited leave. We do not have "Bell II", as Ms Anderson puts it, analysing whether there has been any qualitative change in the applicant's mental health conditions following the conferral of 12 months' restricted leave and the relaxation of reporting requirements. The applicant's reliance on the Bell report to support the contention that the exceptional (in the sense of being an exception to the

normal rule) grant of 12 months' limited leave to remain was at odds with the requirements of Article 8 features, therefore, an element of speculation.

144. Ms Weston also submits that the statement in the 2019 decision that "there is no evidence capable of directly calibrating the period of leave with any particular inevitable effect…" is plainly wrong, in light of Dr Bell's opinion that only indefinite leave to remain would pave the way for the applicant to engage with his mental health. With respect, that submission misreads this part of the letter. The above statement features in the context of discussing lengths of *limited* leave to remain ("the *period* of leave…"), rather than the binary issue of whether ILR should be granted or not. The quoted extract from the decision highlighted the absence of medical evidence concerning *specific periods* of limited leave, for example concerning the impact of six months, or twelve months, or some other period being granted. The decision was correct to say that there was no medical evidence going to specific periods of limited leave to remain; the thrust of the evidence was that ILR should be granted, on medical grounds, rather than a period of limited, restricted leave.

145. In our judgment, therefore, the Bell report viewed as a whole provides at best only muted support for the contention that ILR is the only means by which the applicant is able to recover.

Conclusion on Article 8

146. In light of the above analysis, having considered the materials that were before the respondent for ourselves, and with anxious scrutiny, we find that that was an approach entirely consistent with the requirements of Article 8, for the reasons given. The Secretary of State was entitled, on the basis of the materials before her, to conclude that the time had not yet come when the only proportionate or reasonable response to the applicant's mental health conditions, length of residence, and the other factors set out above, was to grant ILR.

147. We grant permission on ground 7 but refuse the application for judicial review on this ground.

Grounds 5 and 10 – irrationality

148. In light of our conclusions concerning Article 8, we can deal with grounds 5 and 10, irrationality, in brief terms. As we have set out, she took extensive account of Dr Bell's report, and the remaining representations, and reached a decision which – having considered the matter for ourselves – was entirely consistent with the approach we would have taken. The respondent was entitled to ascribe great significance to the fact of, and known circumstances relating to, the applicant's conviction. She did not fetter her discretion, as Ms Weston submits, but engaged in an assessment of the evidence and submissions she had received that was open to her on the facts.

149. Contrary to the submissions of Ms Weston, the applicant has had every opportunity to evidence change on his part. The 2019 decision makes clear that the Secretary of State does not expect from the applicant progress that would not be possible to evidence or demonstrate, given the health constraints to which he is subject. It remains the case that the applicant has never expressed remorse for his offences, or demonstrated any understanding of how serious they were, or their potential consequences. His general renouncement of terrorism attracts little weight given his failure to take responsibility for the very serious terrorist convictions he received in France. The applicant has had many years to demonstrate that he has begun to rehabilitate, but defiantly refuses to even contemplate doing so.

150. Nor can it be said that the absence of a current national security threat posed by the applicant renders the respondent's decision irrational. Although the Court of Appeal observed in MS (India) at [118] that the applicant was not said to pose a current national security threat, it did not consider that to be a determinative factor in maintaining the decision not to grant him ILR. Indeed, it was precisely because the applicant did *not* pose a current threat to national security that the Court of Appeal set out the three considerations relevant to the question of ILR. Were it the case that the applicant *did* pose a national security threat, then the observations at [117] of MS would have applied, namely:

> "…there will be some classes of case where it is self-evident that there are no compelling circumstances justifying a departure from the general rule. An obvious example would be where the migrant continues to pose a risk to national security…"

The applicant was not in that category, thus the analysis conducted by the respondent was required.

151. The absence of a contemporary national security threat merely means that a case-specific assessment is needed to ascertain whether there are exceptional or compelling circumstances meriting a departure from the normal approach. It does not, as is the logical consequence of Ms Weston's submissions, mean that the only rational outcome would be for ILR to be granted. If there were a contemporary national security threat, it would not be necessary to engage in any of the MS (India) analysis at [120] to [123]. By definition, the criteria at [120] to [123] are only engaged where there is *not* a national security threat. The respondent engaged in precisely the correct assessment, as we have demonstrated in our analysis of the Article 8 issue.

152. Ms Weston submitted that the applicant had been caught by surprise by the reference at page 11 of the 2019 decision to there being, "good reason to consider that the evolving position on Article 3 ECHR claims and removability to Tunisia requires ongoing review." The applicant had had no advance warning that the Secretary of State was in the process of forming the view that conditions pertaining to his removability were improving, she

contends. She further submits that the respondent has not particularised what she meant by her assertions.

153. We do not consider that the respondent has a duty to put the applicant on notice of her evolving assessment of the likelihood of change in Tunisia, given this is a decision which concerns not the applicant's removal, but a further – and longer – period of him being placed on restricted leave. His removal is not presently envisaged. When the applicant's removal becomes a realistic prospect, we expect the respondent to engage with him to that end, giving him the opportunity to make representations ahead of a decision being taken. But that is not an issue in these proceedings. We accept that the 2019 decision could have been clearer, by explaining what the "good reason" was, but in isolation, that does not render the decision unlawful, primarily because removal is not within scope.

154. The respondent took account of all relevant factors, within the broad margin of appreciation she enjoys. In doing so, she reached an outcome consistent with her policy, which she properly applied, reaching a conclusion that was open to her on the facts.

155. There is no merit to these grounds for judicial review and we refuse permission on those grounds.

GROUNDS 8 AND 9 – EQUALITY ACT 2010

156. Ms Weston submits that the application of the RL policy to MBT amounts to disability discrimination. The impact of restricted leave, its conditions, and the non-conferral of ILR amounts to disability discrimination, which is, she submits, prohibited by section 29 of the Equality Act 2010 ("the 2010 Act"). The Secretary of State does not enjoy the protection of paragraph 16 of Schedule 3 to the 2010 Act, she submits, because the decision under consideration was to *grant* leave, rather than to refuse it.

157. We consider this submission to be without merit. The application to the Secretary of State was for the applicant to be granted ILR. That application was refused. The refusal of ILR is the primary decision under challenge in this application, and we have considered the lawfulness of that refusal at length in this decision. We have accepted that the refusal was necessary for the "public good", pursuant to the now well-established objectives of the RL policy's approach to applications for ILR. Paragraph 16(3)(b) of Schedule 3 is engaged in relation to such a decision "to refuse leave to enter or remain in the United Kingdom".

158. Having refused to grant the applicant ILR, in light of the present barriers to his removability, it was necessary for some form of status to be conferred upon him, and for the respondent to adopt a range of conditions to achieve the objectives of the RL policy. As Ms Weston recognised at the hearing, it would not be lawful for the respondent simply to have allowed the applicant to languish in legal limbo, irremovable, but unwelcome. Some form of status

had to be granted: see S and Others v Secretary of State for the Home Department [2006] EWCA Civ 1157 at, for example, [46].

159. Parliament can be presumed to have legislated in light of the applicable requirements of the common law. In doing so, when enacting the 2010 Act, it must have known that, by its inclusion of a decision "to refuse leave… to remain in the United Kingdom" in paragraph 16(3)(b) of Schedule 3 to the 2010 Act, it would be necessary for the Secretary of State to grant some form of lesser status to those subject to such a decision. By definition, such persons would be within the United Kingdom. The construction for which Ms Weston contends would, if correct, deprive paragraph 16(3)(b) of its utility, to the extent a public good decision concerned a refusal of leave to remain.

160. As such, the decision to grant 12 months' restricted leave to the applicant, pursuant to the RL policy falls squarely within sub-paragraph (4)(b) of paragraph 16 to the Schedule. It was "a decision taken in accordance with guidance given by the Secretary of State in connection with a decision within that sub-paragraph…" Put another way, the decision to grant restricted leave was one taken "in connection" with the primary decision to refuse to grant ILR. It was an ancillary decision taken pursuant to the primary refusal decision.

161. That being so, the import of paragraph 16 of Schedule 3 is that the section 29 duty on providers of services is not engaged in relation to the applicant. As Ms Weston accepted at the hearing, section 15 of the 2010 Act merely defines disability discrimination. It is not engaged in the absence of the criteria in section 29 being applied. It does not impose a free-standing duty.

162. It is not, therefore, necessary to consider whether the 2019 decision was discriminatory towards the applicant, as the respondent's section 29 duty was disapplied by paragraph 16 of Schedule 3.

Public sector equality duty

163. In our judgment, the operative requirements of the public sector equality duty contained in section 149(1)(a) of the 2010 Act are only engaged to the extent that the underlying conduct at which the duty is aimed at is prohibited by the Act. Its engagement stands or falls with the engagement – or otherwise – of the prohibition against discrimination contained in the Act. So much is clear from the obligation in section 149(1)(a) to eliminate "discrimination… *that is prohibited by or under this Act*." As we have set out, the discrimination of which the applicant complains is not prohibited so far as the respondent's decision to refuse to grant him ILR, and grant restricted leave instead, was concerned. That is not, of course, to say that the applicant's disabilities are irrelevant: we have set out at length our analysis on the impact of his health conditions. It is simply to say that, in the course of establishing the statutory regime contained in the 2010 Act, there is certain conduct which is not subject to the obligations of the Act.

164. The disapplication of section 29 goes only to section 149(1)(a), as it has effect only in relation to prohibited conduct under the Act. The broader duties contained in subsection (1)(b) and (c), namely to advance equality of opportunity between persons sharing a relevant protected characteristic and those who do not, and the need to foster good relations between such persons, are wider free-standing duties. Ms Weston was unable to articulate what steps the respondent should have taken in order to further these objectives pursuant to the public sector equality duty in relation to the RL policy. Given the context of the RL policy, we struggle to see how it could be used as a vehicle specifically to advance equality of opportunity or to foster good relations. To an extent, of course, those objectives are subsumed within the wider public interest, public safety and no safe haven objectives of the policy. A policy which endorses the conduct which those excluded from the Refugee Convention, or deprived of the benefit of Article 33(2), will have engaged in cannot be said to advance equality of opportunity, or foster good relations. The objectives of the policy encompass wider societal goals which reflect the objectives of the duties contained in section 149(1)(b) and (c).

165. To the extent that the RL policy needs specifically to engage in positive steps in order to comply with the duties contained in paragraphs (b) and (c), we consider that the policy itself features sufficient inherent flexibility to enable the Secretary of State to adapt its application tailored to the circumstances of the particular individual.

166. The 2019 decision's approach to this applicant demonstrates this principle applying in practice. In relation to the duration of restricted leave, at page 14, the policy states that there is a discretion to grant periods longer than the standard six months, "if justified by the particular circumstances of the case." A non-exhaustive list of indicative considerations is set out on the same page, the first of which is "the individual's circumstances". This permits the respondent to take into account the protected characteristics of the individual concerned, and to the extent that individual has made representations that the circumstances of their restricted leave should take into account their protected characteristics, it is possible for the respondent to do so. We see nothing more that the respondent could reasonably be expected to do in furtherance of the duties imposed by paragraphs (b) and (c).

Article 14 of the ECHR

167. Article 14 of the ECHR imposes anti-discrimination obligations on contracting parties in relation to conduct which is within the ambit of a substantive Convention rights. It is common ground that the final two words of the article, "other status" can encompass disability status. That means that, although the 2010 Act is not engaged for the reasons we have already given, the applicant may, in principle, rely directly on the convention for redress.

168. We do not consider that the applicant has been treated less favourably on account of his disabilities. We accept that if he were treated in identical terms

to those without the physical and mental impairments from which he suffers, there may be grounds to conclude that some form of discrimination has taken place, such that it falls upon the Secretary of State to provide the necessary justification.

169. The applicant has been treated differently, in a manner beneficial to him, from those who do not experience the mental and physical health problems set out above. The respondent took into account his representations and granted a length of restricted leave which was double the normal length, and reduced his reporting requirements to four times annually, as against every other month. It is simply not the case that he has been treated in a manner identical to those who do not suffer the problems which he experiences. He has been treated differently, precisely because the respondent adapted the way the policy applied to him, in light of his representations concerning his disabilities.

170. We reject the submission on behalf of the applicant that the placement of "roadblocks" in the way of his private life developing has had a disproportionately adverse impact upon him, in light of his disabilities. We have set out above how the respondent did not impose wholly unreasonable expectations upon the applicant. She did not expect him to make positive contributions to society, precisely on account of the health-based representations he made to her. The applicant has not been required to demonstrate rehabilitation going over and above that which he is physically or mentally able to provide. Taken at its highest, the Secretary of State has sought evidence of genuine remorse. For the reasons we have already set out, the applicant has refused to engage his responsibility for the terrorist offences he committed in France. There is no medical evidence that the applicant was prevented from doing so on account of his disabilities, or, for example, capacity issues.

171. We do not consider, therefore, that the applicant's situation amounts to one of being the victim of discrimination for the purposes of Article 14 ECHR. The question of justification does not arise.

172. We refuse permission to bring judicial review proceedings on grounds 8 and 9.

Ground 6 – duty of enquiry concerning risk on return

173. Ms Weston's skeleton argument did not feature any argument concerning this ground, and she did not pursue the submission at the hearing. We see no merit in the suggestion that there is any duty upon the respondent to make enquiries concerning the applicant's risk on return given that his return is not currently envisaged.

174. We refuse permission on this ground.

CONCLUSION

175. In conclusion, our decision on the individual grounds is as follows:

Grounds 1, 4	Application in relation to the 2018 decision is dismissed. In relation to the 2019 decision, permission is refused.
Grounds 2, 3, 5, 6, 8, 9, 10	Permission refused so far as both decisions are concerned.
Ground 7	(In relation to both decisions) Permission is granted, the application in relation to both decisions is dismissed

Signed *Stephen H Smith* 13 December 2019

Upper Tribunal Judge Stephen Smith