Upper Tribunal
(Immigration and Asylum Chamber)

Hydar (s 120 response; s 85 "new matter": Birch) [2021] UKUT 0176 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 March 2021	
Additional written submissions on 9 and 20 April 2021	18 June 2021

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

JAMIL HYDAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr L Youssefian, counsel, instructed by TTS Solicitors
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

Section 120 of the Nationality, Immigration and Asylum Act 2002

(1) Where, in the course of a human rights appeal under section 82(2)(b) of the 2002 Act, P responds to a notice served by the Secretary of State under section 120 of that Act by raising a matter that is of a different origin than P raised as a human rights ground under section 84(2) for resisting removal, section 86(2)(b) requires the Tribunal to determine that "different" matter. Thus, a protection issue or (where it still applies) an EU rights issue will need to be determined by the Tribunal alongside the human rights issue.

Section 85(5): "new matter"

(2) A matter of the kind described in paragraph (1) is a "new matter" which, by reason of section 85(5,) may not be considered by the Tribunal unless the Secretary of State has given the Tribunal consent to do so.

(3) Section 85(5) applies to both the First-tier Tribunal and the Upper Tribunal. The finding to the contrary in Birch (precariousness and mistake; new matters) [2020] UKUT 86 (IAC); [2020] Imm AR 873 was made per incuriam the judgment of the Court of Appeal in Alam & others v SSHD [2012] EWCA Civ 960; [2012] Imm AR 974 and is not to be followed.

DECISION ON PRELIMINARY ISSUE

1. We have both contributed substantively to this decision.

2. The appellant is a British Protected Person, born in Sierra Leone in 1976. He entered the United Kingdom in 1997 and was granted indefinite leave to remain in October 2003. The appellant committed a number of criminal offences, beginning in 1999. In 2007, he was convicted of two counts of robbery and one count of attempted robbery. Following proceedings in the Court of Appeal, the appellant was sentenced to imprisonment for six years. On 23 July 2018, the respondent decided that the appellant should be deported from the United Kingdom.

3. The appellant appealed to the First-tier Tribunal. Before that Tribunal, the appellant did not pursue his protection appeal. Instead, he relied solely on Article 8 of the ECHR, based on his subsisting parental relationship with his daughter, born in 2008, who is a British citizen whom the appellant was supporting. The First-tier Tribunal Judge allowed the appellant's appeal. The respondent obtained permission to appeal against that decision and, on 14 April 2020, the Upper Tribunal (McGowan J and UTJ Blundell) set aside the decision of the First-tier Tribunal, retaining the matter in the Upper Tribunal for the decision in the appeal to be re-made *de novo*. The Upper Tribunal made an anonymity order in respect of the appellant's daughter, with the result that no report of the proceedings shall directly or indirectly indentify her.

4. On 28 September 2020, Upper Tribunal Judge Blundell sat to hear the submissions and evidence on the re-making of the decision in the appeal. At that hearing, the appellant sought to raise, for the first time, his potential entitlement to a derivative right of residence (DRR) under regulation 16 of the Immigration (European

Economic Area) Regulations 2016. Directions were issued for the respondent to file and serve a written notice, stating whether she sought to contend that the appellant's entitlement to DRR was a "new matter", within the meaning of section 85(6) of the Nationality, Immigration and Asylum Act 2002; and, if so, whether the respondent would be prepared to give consent under section 85(5) to the matter being considered by the Upper Tribunal. The appellant was directed to file and serve written submissions in response.

5. Following the filing of these written submissions, the present panel sat on 31 March 2021 to consider them and the parties' oral submissions on the "new matter" issue. At the March hearing, it became evident that, within the "new matter" issue, there is a prior question; namely, whether the Upper Tribunal should follow Birch (Precariousness and mistake; new matters) [2020] UKUT 86 (IAC); [2020] Imm AR 873, where it was held that section 85(5) does not apply to the Upper Tribunal, with the result that it is unnecessary for that Tribunal to have the respondent's consent before it can consider a "new matter". The panel was, however, also addressed on a question that needs to be addressed before one can embark on the "new matter" issue; namely, whether the First-tier Tribunal and the Upper Tribunal have jurisdiction to consider an EEA ground of appeal in a human rights appeal under section 82(1)(b) of the 2002 Act.

6. On 31 March, the Upper Tribunal concluded that it would be assisted by further written submissions on the following:-

   (i) The jurisdictional issue – whether the First-tier Tribunal and the Upper Tribunal have jurisdiction to consider an EEA ground of appeal in a human rights appeal;

   (ii) The "new matter" issue – in the event of an affirmative answer to (i), whether an EEA ground of appeal, in a human rights appeal, constitutes a "new matter" for purposes of section 85 of the 2002 Act;

   (iii) The "Birch" issue – assuming an affirmative answer to (ii), whether section 85 applies to proceedings in the Upper Tribunal and, in particular, whether Birch was decided *per incuriam*; and

   (iv) The "consent" issue – assuming an affirmative answer to (iii), whether the respondent would give consent for the EEA matter to be considered by the Upper Tribunal in re-making the decision in the appeal.

7. We received further submissions on these issues from Ms Cunha and Mr Youssefian. We are very grateful to both of them for these, and their earlier written and oral submissions.

8. Before addressing the issues, it is necessary to set out a significant amount of legislative material, beginning with the 2002 Act.

The Nationality, Immigration and Asylum Act 2002

"PART V

APPEALS IN RESPECT OF PROTECTION AND HUMAN RIGHTS CLAIMS

Meaning of "the Tribunal"

81.

…

In this Part "the Tribunal" means the First-tier Tribunal.

82. Right of appeal to the Tribunal

(1) A person ("P") may appeal to the Tribunal where—

…

(b) the Secretary of State has decided to refuse a human rights claim made by P.

…

84. Grounds of appeal

…

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

…

85. Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84 against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1)... against a decision the Tribunal may consider ... any matter which it thinks relevant to the substance of the decision, including ... a matter arising after the date of the decision.

(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a "new matter" if—

(a) it constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.

86. Determination of appeal

(1) This section applies on an appeal under section 82(1) ...

(2) The Tribunal must determine—

(a) any matter raised as a ground of appeal ..., and

(b) any matter which section 85 requires it to consider.

…

104. Pending appeal

(1) An appeal under section 82(1) is pending during the period—

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while—

(a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

(3) …

(4) …

(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B)).

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection) where the appellant—

(a) …

(b) gives notice, in accordance with Tribunal Procedure Rules, that he wishes to pursue the appeal in so far as it is brought on that ground.

…

109. European Union and European Economic Area

(1) Regulations may provide for, or make provision about, an appeal against an immigration decision taken in respect of a person who has or claims to have a right under any of the EU Treaties.

(2) The regulations may—

(a) apply a provision of this Act or the Special Immigration Appeals Commission Act 1997 (c. 68) with or without modification;

(b) make provision similar to a provision made by or under this Act or that Act;

(c) disapply or modify the effect of a provision of this Act or that Act.

(3) In subsection (1) "immigration decision" means a decision about—

(a) a person's entitlement to enter or remain in the United Kingdom, or

(b) removal of a person from the United Kingdom."

NB. Section 109 was repealed, with savings (SI 2020/1309) by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 with effect from IP completion day, as defined in the European Union (Withdrawal Agreement) Act 2020.

…

113. Interpretation

(1) In this Part, unless a contrary intention appears—

…

"human rights claim" -

(a) means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the

United Kingdom to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention)

…

PART VA

ARTICLE 8 OF THE ECHR; PUBLIC INTEREST CONSIDERATIONS

117A. Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

…

PART VI

IMMIGRATION PROCEDURE

…

120. Requirement to state additional grounds for application

(1) Subsection (2) applies to a person ("P") if—

(a) P has made a protection claim or a human rights claim,

(b) P has made an application to enter or remain in the United Kingdom, or

(c) a decision to deport or remove P has been or may be taken.

(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out—

(a) P's reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which P should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in—

(a) P's protection or human rights claim,

(b) the application mentioned in subsection (1)(b), or

(c) an application to which the decision mentioned in subsection (1)(c) relates.

(4) Subsection (5) applies to a person ("P") if P has previously been served with a notice under subsection (2) and—

(a) P requires leave to enter or remain in the United Kingdom but does not have it, or

(b) P has leave to enter or remain in the United Kingdom only by virtue of section 3C of the Immigration Act 1971 (continuation of leave pending decision or appeal).

(5) Where P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them (whether in the application or claim mentioned in subsection (1) or in a statement under subsection (2) or this subsection) so that P has—

(a) additional reasons for wishing to enter or remain in the United Kingdom,

(b) additional grounds on which P should be permitted to enter or remain in the United Kingdom, or

(c) additional grounds on which P should not be removed from or required to leave the United Kingdom, P must, as soon as reasonably practicable, provide a supplementary statement to the Secretary of State or an immigration officer setting out the new circumstances and the additional reasons or grounds.

(6) In this section—

"human rights claim" and "protection claim" have the same meanings as in Part 5; references to "grounds" are to grounds on which an appeal under Part 5 may be brought (see section 84)."

Immigration (European Economic Area) Regulations 2016

"General interpretation

2.— (1) In these Regulations—

…

'EEA decision' means a decision under these Regulations that concerns—

(a) a person's entitlement to be admitted to the United Kingdom;

(b) a person's entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card (but does not include a decision that an application for the above documentation is invalid);

(c) a person's removal from the United Kingdom; or

(d) the cancellation, under regulation 25, of a person's right to reside in the United Kingdom, but does not include a decision to refuse to issue a document under regulation 12(4) (issue of an EEA family permit to an extended family member), 17(5) (issue of a registration certificate to an extended family member) or 18(4) (issue of a residence card to an extended family member), a decision to reject an application under regulation 26(4) (misuse of a right to reside: material change of circumstances), or any decisions under regulation 33 (human rights considerations and interim orders to suspend removal) or 41 (temporary admission to submit case in person).

…

Derivative right to reside

16.— (1) A person has a derivative right to reside during any period in which the person—

(a) is not an exempt person; and

(b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

(2) The criteria in this paragraph are that—

(a) the person is the primary carer of an EEA national; and

(b) the EEA national—

(i) is under the age of 18;

(ii) resides in the United Kingdom as a self-sufficient person; and

(iii) would be unable to remain in the United Kingdom if the person left the United Kingdom for an indefinite period.

(3) The criteria in this paragraph are that—

(a) any of the person's parents ("PP") is an EEA national who resides or has resided in the United Kingdom;

(b) both the person and PP reside or have resided in the United Kingdom at the same time, and during such a period of residence, PP has been a worker in the United Kingdom; and

(c) the person is in education in the United Kingdom.

(4) The criteria in this paragraph are that—

(a) the person is the primary carer of a person satisfying the criteria in paragraph (3) ("PPP"); and

(b) PPP would be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period.

(5) The criteria in this paragraph are that—

(a) the person is the primary carer of a British citizen ("BC");

(b) BC is residing in the United Kingdom; and

(c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

(6) The criteria in this paragraph are that—

(a) the person is under the age of 18;

(b) the person does not have leave to enter, or remain in, the United Kingdom under the 1971 Act;

(c) the person's primary carer is entitled to a derivative right to reside in the United Kingdom under paragraph (2), (4) or (5); and

(d) the primary carer would be prevented from residing in the United Kingdom if the person left the United Kingdom for an indefinite period

….

Appeal rights

36.— (1) The subject of an EEA decision may appeal against that decision under these Regulations.

…

(10) The provisions of, or made under, the 2002 Act referred to in Schedule 2 have effect for the purposes of an appeal under these Regulations to the First-tier Tribunal in accordance with that Schedule.

…

Regulation 36

Schedule 2

Appeals to the First-Tier Tribunal

1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—

section 84 (grounds of appeal), as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");

section 85 (matters to be considered), as though—

(a) the references to a statement under section 120 of the 2002 Act include, but are not limited to, a statement under that section as applied by paragraph 2; and

(b) a "matter" in subsection (2) and a "new matter" in subsection (6) include a ground of appeal of a kind listed in section 84 of the 2002 Act and an EU ground of appeal;

section 86 (determination of appeal);

section 105 and any regulations made under that section; and

section 106 and any rules made pursuant to that section.

2.— (1) Section 92(3) of the 2002 Act has effect as though an additional basis upon which an appeal under section 82(1)(b) of that Act (human rights claim appeal) must be brought from outside the United Kingdom were that—

(a) the claim to which that appeal relates arises from an EEA decision or the consequences of an EEA decision; and

(b) the removal of that person from the United Kingdom has been certified under regulation 33 (human rights considerations and interim orders to suspend removal).

(2) Section 120 of the 2002 Act applies to a person ("P") if an EEA decision has been taken or may be taken in respect of P and, accordingly, the Secretary of State or an immigration officer may by notice require a statement from P under subsection (2) of that section, and that notice has effect for the purpose of section 96(2) of the 2002 Act.

(3) Where section 120 of the 2002 Act so applies, it has effect as though—

(a) subsection (3) also provides that a statement under subsection (2) need not repeat reasons or grounds relating to the EEA decision under challenge previously advanced by P;

(b) subsection (5) also applies where P does not have a right to reside.

(4) For the purposes of an appeal brought under section 82(1) of the 2002 Act, subsections (2) and (6)(a) of section 85 (matters to be considered) have effect as though section 84 included a ground of appeal that the decision appealed against breaches the appellant's right under the EU Treaties in respect of entry into or residence in the United Kingdom.

3. Tribunal Procedure Rules made under section 22 of the Tribunals, Courts and Enforcement Act 2007 have effect in relation to appeals under these Regulations."

NB. *The 2016 Regulations were revoked, with savings (SI 2020/1309) by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 with effect from IP completion day, as defined in the European Union (Withdrawal Agreement) Act 2020.*

Issue (i)

9. Mr Youssefian seeks to rely upon paragraph 2(4) of Schedule 2 to the 2016 Regulations, which provide that, for the purposes of an appeal brought under section 82(1), subsections (2) and (6)(a) of section 85 have effect as though section 84 included a ground of appeal that the decision appealed breaches the appellant's right under the EU Treaties in respect of entry or residence in the United Kingdom. Mr Youssefian points to the distinction between the apparently unlimited scope of paragraph 2(4), and that of paragraph 1 of Schedule 2, which applies various provisions of the 2002 Act (including section 85), but only "in relation to an appeal under these regulations to the First-tier Tribunal".

10. Mr Youssefian's submission requires a close analysis of Schedule 2 and regulation 36(10), which provides for Schedule 2 to have effect. Regulation 36(10) makes it plain that the provisions of the 2002 Act referred to in Schedule 2 are to have effect "for the purposes of an appeal under these Regulations to the First-tier Tribunal …". The words "under these Regulations" suggest that, notwithstanding the difference between paragraphs 1 and 2(4) of Schedule 2, as identified by Mr Youssefian, the entirety of Schedule 2 is intended to apply only to appeals under the 2016 Regulations. Any such appeal has to be brought against an EEA decision. There is no such decision in the present case.

11. A closer reading of Schedule 2, however, indicates that this broad submission cannot be correct. Paragraph 2(2) is concerned with section 120 of the 2002 Act. Section 120 requires a person, in certain circumstances, to provide the Secretary of State with a statement setting out that person's reasons for wishing to enter or remain in the United Kingdom, together with any grounds on which that person should be so permitted, and any grounds on which the person should not be removed or required to leave. The obligation arises where the Secretary of State serves a notice requiring the person concerned to provide such a statement.

12. The basic way in which section 120 works in a human rights appeal under section 82(1) of the 2002 Act is that, where the person has made a statement under section 120, the Tribunal is obliged by section 85(2) to consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84 as capable of being brought in an appeal against the respondent's decision. In a human rights appeal, the sole ground is specified in section 84(2); namely, that the refusal of the human rights claim is unlawful under section 6 of the Human Rights Act 1998. Section 85(2) imposes upon the Tribunal a specific duty of consideration, in addition to the discretion which the Tribunal is given by section 85(4), whereby on an appeal under section 82(1), the Tribunal may consider any matter which it thinks is relevant to the substance of the appealed decision, including a matter arising after the date of that decision.

13. In the light of this description, it is evident that paragraph 2(2) of Schedule 2 to the 2016 Regulations cannot merely apply to appeals against EEA decisions that are specifically brought under those Regulations. Paragraph 2(2) refers to an EEA decision that has been taken "or may be taken in respect of P". Those words in our view make it clear that paragraph 2 of Schedule 2 must have been intended to operate additionally in cases where there has not been an EEA decision, but there could be, and where a human rights (or protection) appeal may be underway. A person who has received a refusal of a human rights claim, and who has a right of appeal against that decision on the sole statutory ground the decision is unlawful under section 6 of the 1998 Act, may be served with a section 120 notice, which requires the person not only to state why (if such be contended) they have a human right not to be removed from the United Kingdom, or to be allowed to enter it, but also that they have a right under the EU Treaties in respect of entry into or residence in the United Kingdom, which would be breached by removing the person from the United Kingdom.

14. If paragraph 2(2) of Schedule 2 were to operate only where an EEA decision had been made by the respondent, it would be anomalous, compared with the way in which section 120 operates in other contexts. There has never been any suggestion, so far as we are aware, that a section 120 notice does not enable a person to respond by raising for the first time matters that constitute a protection claim, where the only decision so far made (and being appealed) is the refusal of a human rights claim (and vice versa). Indeed, one of the purposes of section 120 is to require a tribunal to adjudicate upon the totality of a person's reasons for resisting removal. In the case of human rights and protection appeals, section 85(2) produces that requirement by correlating the

"matter" raised in the response statement with one or more of the grounds of appeal mentioned in section 84(1), which between them cover the entire range of both protection and human rights appeals. Once the relevant "matter" in the statement is raised as a ground of appeal, section 86(2)(b) requires the Tribunal to determine it, irrespective of the fact that there is also other matter of different origin comprising a separate ground of appeal.

15. We can see no reason for reading section 85(2), as modified by paragraph 2(2) of Schedule 2, in any different way. The DRR under EU law exists independently of any decision of the respondent, the documentation provided by her to the individual being merely a recognition of the right, not its conferral. There is, accordingly, in the course of a human rights appeal, no conceptual bar to a section 120 statement raising an EEA reason for resisting removal, in the same way that there is no such bar to raising matters that constitute a protection claim, even though there has been no decision to refuse a protection claim.

16. Just as the protection ground arising from the section 120 notice in a human rights appeal does not have to be decided by the Tribunal through the prism of section 84(2), neither does the EU ground. The Tribunal will approach the EU ground, as it would if there had been an adverse EEA decision, which the appellant was appealing under the 2016 Regulations.

17. Ms Cunha accepts on behalf of the respondent that, where such a section 120 statement has been made, the EU matter falls for adjudication. She submits, however, that it constitutes a "new matter" for the purposes of section 85(6), with the result that the consent of the respondent is required before it may be raised. We shall deal with that submission under issue (iv).

18. It follows that we reject Mr Youssefian's submission that paragraph 2(4) of Schedule 2 has any wider ambit than in relation to section 120 notices and statements. There is, nevertheless, still an argument that may lead to the same conclusion; namely, that in a human rights appeal where no section 120 statement has been made, advancing an EU right, the Tribunal can nevertheless consider the significance for that appeal of the appellant having an EU right to enter or remain. The argument depends upon section 85(4) which, as we have seen, confers on the Tribunal discretion to consider any matter that it thinks relevant to the substance of the decision to refuse the human rights claim. Although the point was touched on in Mr Youssefian's written submissions, it was not explored further at the hearing and we have decided not to express a concluded view on it at this stage.

19. What we have said so far is predicated on the important assumption that regulation 17 of the 2006 Regulations continues to provide a potential right to reside in the United Kingdom, on a derived basis, after the United Kingdom's exit from the EU on 31 December 2020. We have to say that an examination of the EU withdrawal legislation, in particular SI 2020/1309, does not suggest that the appellant can rely on a DRR in the present appeal. Paragraph 5 of Schedule 3 to that SI does not provide that regulation 17 (as opposed to provisions regarding non-derivative rights)

continues to apply after the time and date on which the 2016 Regulations were revoked for all purposes. That is so, even where an appeal under the 2016 Regulations is pending, which, of course, is not the case here. The precise position will need to be considered at the substantive hearing (see below).

Issue (ii)

20. There can be no question that raising the DRR issue during the currency of the human rights appeal proceedings constitutes a "new matter", whereby the respondent's consent is needed before the Tribunal can consider it. So much is plain from paragraph 2(4) of Schedule 2 to the 2016 Regulations. But, quite apart from that provision, it cannot in our view be seriously contended that raising an EU right in a human rights appeal is insufficiently discrete to constitute a new matter, which the Tribunal may not consider unless the respondent has given her consent. The extent of the consideration and decision-making that the respondent requires to undertake in order to deal with the EU rights ground will, plainly, affect the respondent's decision as to consent, including the time taken in order to reach such a decision.

Issue (iii)

21. In Birch, the Upper Tribunal addressed the question of whether the restriction in section 85 on considering a "new matter" applies to the Upper Tribunal:-

> "20. Before the hearing the appellant's representatives had attempted, without success, to persuade the respondent that leave should now be granted for that reason. At the hearing Mr Melvin's position was that the appellant's current position as a person who had spent twenty years in the United Kingdom was a "new matter", which we were not entitled to consider unless he gave us permission to do so. He relied on s 85(4)-(6) of the 2002 Act:
>
> …
>
> 21. Mr Melvin's argument would, we think, have some purchase if this question had arisen before the First-tier Tribunal, or if we were to remit the appeal to the First-tier Tribunal for the decision to be re-made. While the matter remains in this Tribunal, however, the prohibition on the consideration of "a new matter" does not apply.
>
> 22. The reason for that is that in s 81 of the 2002 Act the phrase "the Tribunal" is defined for the purpose of the ensuing Part (including s 85) as meaning the First-tier Tribunal. The phrase specifically does not apply to the Upper Tribunal. No other legislation to which our attention has been drawn suggests that the Upper Tribunal is to be considered as falling within that definition, even when determining an appeal begun under s 82 (which continues in the Upper Tribunal

as an "appeal under s 82", rather than under the appeals provisions of the Tribunals, Courts and Enforcement Act 2007: see LB (Jamaica) v SSHD [2011] EWCA Civ). The provisions of s 8[5](4) are not needed to enable the Upper Tribunal, a superior court of record, to take relevant matters into account, so it cannot be said that without acceding to the restriction in subsection (5) this Tribunal could not take anything into account at all.

23. Furthermore, it is clear that in general procedure before the Upper Tribunal is not identical to that before the First-tier Tribunal: there are two different sets of Procedure Rules; and the Upper Tribunal alone has the powers given by s 25 of the 2007 Act. Although s 12(4)(a) of the 2007 Act provides that on an appeal the Upper Tribunal may make any decision that the First-tier Tribunal could make, there is no suggestion that the route to a decision, or the reasons for the decision, are confined to those that would be open to the First-tier Tribunal; and paragraph (b) of that subsection specifically provides that the Upper Tribunal may make "such findings of fact as it considers appropriate".

24. We therefore reject the argument that we cannot take the new matter into consideration. The passage of time is clearly relevant to the determination of this appeal as it now stands before us. Whatever might have been the substantive merits of the appellant's case before the expiry of twenty years since her arrival in the United Kingdom, the position now is that she meets the substantive requirements of the Rules entitling her to a grant of leave. For that reason, and that reason only, we consider that in her case it would not be proportionate to remove her from the United Kingdom. "

22. In an unreported case (PA/03850/2017 (V)("SMM"), which we give permission to cite, Upper Tribunal Judge Grubb held that, whilst the reasoning in Birch was persuasive, he was bound by the judgment of the Court of Appeal in Alam & Others v Secretary of State for the Home Department [2012] EWCA Civ 960; [2012] Imm AR 974 to hold that section 85(4) and (5) encompass both the First-tier Tribunal and the Upper Tribunal, with the result that the latter is subject to the requirement to obtain the consent of the respondent before it may consider a "new matter" in an appeal. Upper Tribunal Judge Grubb considered that the panel in Birch had not been referred to Alam and that its decision on this issue was, accordingly, arrived *per incuriam*.

23. For the respondent, Ms Cunha urges us to adopt the same approach. Mr Youssefian submits that Upper Tribunal Judge Grubb erred in his analysis of what the *ratio decidendi* of Alam comprises.

24. The issue in Alam was whether section 85A of the 2002 Act applied when a decision is re-made by the Upper Tribunal. Section 85A was repealed by the Immigration Act 2014. It precluded the Tribunal from considering evidence adduced by an appellant, in certain defined circumstances. The Court of Appeal considered the decision of the Upper Tribunal in Shahzad (s 85A: commencement) [2012] UKUT 81 (IAC), where it was held that the effect of the commencement order bringing into force amendments to section 85 of the 2002 Act and the introduction of section 85A of that Act was such that the new provisions applied only in relation to applications made to the Secretary

of State on or after 20 May 2011. For our purposes, the relevant part of the Tribunal's decision in Shahzad is as follows:-

> "Issue D
>
> 48. Next, Mr Malik submits that s85 does not apply to proceedings before the Upper Tribunal at all because it is concerned with appeals brought under s82 of the 2002 Act whereas the appeal before the Upper Tribunal is brought under s11 of the Tribunals, Courts and Enforcement Act 2007. This argument can be disposed of shortly. Section 12(4) of the 2007 Act makes clear that if the Upper Tribunal does set aside the decision of the First-tier Tribunal and re-make it then its power is to:
>
> > "… make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision..."
>
> It is plain, therefore, that s85A does apply equally where the decision is remade by a judge of the Upper Tribunal. Further support for that conclusion, if it were needed, is to be found in the words of Moses LJ recently in LB (Jamaica) v SSHD [2011] EWCA Civ 1420:
>
> "… it seems to me impossible to confine the construction of what is meant by an appeal under section 82(1) to an appeal to the First Tier Tribunal…" "

25. The issue in LB (Jamaica) was whether an appeal from the Upper Tribunal to the Court of Appeal fell to be treated as abandoned, pursuant to section 104(4A) of the 2002 Act, because, after the grant of permission to appeal to that court, the respondent had granted the appellant indefinite leave to remain in the United Kingdom. Relying upon the reference in section 104(4A) to an "appeal under section 82(1)", the appellant submitted that an appeal to the Court of Appeal against a decision of the Upper Tribunal was under section 12 of the Tribunals, Courts and Enforcement Act 2007 and was, therefore, not an appeal under section 82(1). As is evident from paragraph 48 of Shahzad, the court rejected that submission. At paragraph 12, Moses LJ held that the reference to an appeal under section 82(1) in section 104(4A) had to be read with the identification of the period during which an appeal under section 82(1) remains pending, as identified in section 104(1) and (2), since section 104(2) identified the period during which the appeal was not finally determined by specific reference to the period pending final determination of an appeal to the Court of Appeal. It was in those circumstances that Moses LJ concluded, at paragraph 13, that:-

> "… it seems to me impossible to confirm the construction of what is meant by an appeal under section 82(1) to an appeal to the First-tier Tribunal without incorporating within it those circumstances identified in the earlier part of the same section, namely an application for permission to the Court of Appeal that is awaiting determination or permission to appeal and the period until final determination of that appeal."

26. In Alam, the court said:-

> "39. Mr. Malik submitted that the exceptions in section 85A related to appeals under section 82(1) of the 2002 Act. The right to appeal from the Tribunal to the Upper Tribunal was conferred by section 11(1) of the Tribunals, Courts and Enforcement Act 2007, so the Upper Tribunal's power to hear fresh evidence was not constrained by section 85A. This submission was considered by the Upper Tribunal in Shahzad as Issue D: see paragraph 14 of the Upper Tribunal's determination. The Upper Tribunal rejected the submission in paragraph 48 of its determination. On this issue, I agree with the Upper Tribunal."

27. At paragraph 40, the court agreed with the Upper Tribunal that support for its finding could be found in the judgment of Moses LJ in LB (Jamaica). The court held that the approach taken in LB (Jamaica) to the meaning of "an appeal under section 82(1)" applied with equal force to the provisions of section 85A.

28. Against this less than pellucid background, Mr Youssefian submits that the *ratio* in Alam is as follows. Where an appeal originates under section 82(1) of the 2002 Act, it will continue to be an appeal under that provision, including when an appeal to the Upper Tribunal is made pursuant to section 11 of the 2007 Act. Section 82(1) continues to apply to the Upper Tribunal proceedings because those proceedings (even though conducted through section 11) remain "an appeal under section 82(1) of the 2002 Act". It was only to that extent that Sullivan LJ, giving the judgment of the court at paragraph 40, held that "an appeal under section 82(1) applies with equal force to the provisions of section 85A". This is the extent of the *ratio* in Alam. In Mr Youssefian's words: "that is it. Nothing more and nothing less".

29. As can be seen from the above, however, LB (Jamaica) was invoked by the Upper Tribunal in Shahzad merely in support of its substantive finding that section 85 applies to the Upper Tribunal because section 12(4) of the 2007 Act makes it clear that the Upper Tribunal's power, on re-making a decision, is to "make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision". It is with that finding that the court in Alam agreed with the Upper Tribunal and on which it founded its own decision (see paragraph 39 of its judgment). Just as the Upper Tribunal had done in Shahzad, the argument based on LB (Jamaica) was merely used by the court in support of that conclusion.

30. Accordingly, we consider that the *ratio* of Alam is that the Upper Tribunal's powers, on re-making, are circumscribed by section 12(4) of the 2007 Act.

31. It will be noted that at paragraph 23 of Birch, the Upper Tribunal believed that "there is no suggestion that the route to a decision, or the reasons for the decision, are confined to those that would be open to the First-tier Tribunal", as opposed to the actual decision. Whilst it was open to the Upper Tribunal in Birch to decline to follow the reasoning in Shahzad, the fact that it is this reasoning which formed the *ratio* of the Court of Appeal's decision on ground 2 in Alam means that the conclusion in Birch was *per incuriam*. It may be that Alam was itself decided *per incuriam*, in that the court appears not to have been directed to section 81 of the 2002 Act, which specifically defines "the Tribunal" as "the First-tier Tribunal" for the purposes of Part V of the 2002 Act. But this does not mean that the Upper Tribunal is

free to depart from Alam. As Upper Tribunal Judge Grubb held at paragraph 85 of SMM:-

> "The doctrine of precedent does not entitle a court or tribunal lower in the judicial hierarchy to depart from an otherwise binding decision of a court or tribunal higher in the judicial hierarchy on the basis that the latter decision was reached *per incuriam* (see Cassell & Co Ltd v Broome and Another [1972] AC 1027)."

Issue (iv)

32. This means that, assuming the appellant has made a statement under section 120 that raises the EU rights issue, the Upper Tribunal requires the consent of the respondent to consider the "new matter" comprising the ground that it would be a disproportionate interference with the appellant's Article 8 rights because the appellant has (or, at least, had) a DRR under the 2016 Regulations. Ms Cunha has, in her post-hearing written submissions, confirmed that the respondent consents to the consideration of this matter.

33. In Jaff (s 120 notice; statement of additional grounds) [2012] UKUT 396, the Upper Tribunal held that a statement in response to a section 120 notice may be made at any time, including up to (and perhaps at the time of) the hearing of the appeal. In Jaff, the appellant had not made anything that could be categorised as a statement but had simply included evidence of his relationship with an EEA partner in his appeal bundle. In the present case, by contrast, the appellant had been served with a section 120 notice in 2013, the significance of which was drawn to his attention at paragraphs 93 and 94 of the respondent's decision of 23 July 2018. The appellant filed and served written submissions, in advance of the appeal hearing, setting out in detail why he said he had a DRR. We find that this constituted a statement for the purposes of section 120.

34. The conclusions on the preliminary issues are, accordingly, as follows:-

    (i) The jurisdictional issue: The Upper Tribunal has jurisdiction to consider the EU rights ground, as the ground was raised in accordance with section 120 of the 2002 Act;

    (ii) The "new matter" issue: In a human rights or protection appeal, the raising of a ground by means of a section 120 statement that an appellant has a right to remain in the United Kingdom, by reference to an EU right, is a "new matter" within the meaning of section 85 of the 2002 Act;

    (iii) The "Birch" issue: Birch was decided *per incuriam* the Court of Appeal's binding judgment in Alam, with the result that the Upper Tribunal requires the respondent's consent to consider a "new matter" when re-making a decision under section 12(2)(b)(ii) of the 2007 Act;

(iv) The "consent" issue: The Secretary of State has given consent for the "new matter" to be considered.

35. The appeal will now be listed for a substantive hearing.

No anonymity direction is made.

Mr Justice Lane

14 June 2021

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber