IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001408
First-tier Tribunal No: HU/50473/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 May 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SHAUKAT ALI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Decision made on the papers
pursuant to paragraph 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008

DECISION AND REASONS

1. By a decision promulgated on 8 February 2023 ("the Decision"), the Upper Tribunal (UTJ Smith and DUTJ Chapman) found there to be an error of law in the decision of First-tier Tribunal Judge Graves dated 24 November 2021 allowing the Appellant's appeal. The Tribunal's decision is appended hereto for ease of reference.

2. Although we raised some concerns in the Decision regarding the Tribunal's jurisdiction to decide the appeal (as set out at [18] to [26] of the Decision), we concluded at [26] of the Decision that there was a valid appeal before us. We concluded however, for reasons set out at [27] to [39] of the Decision that Judge Graves had made an error in her assessment under Article 8 ECHR. We also concluded at [59] of the Decision that the Judge had made errors in her calculation of the

Appellant's period of lawful residence for the reasons set out at [40] to [58] of the Decision. We then considered whether such errors were material given the period of lawful residence which the Appellant had enjoyed by the time of the hearing before us. We concluded however that the Appellant had not quite reached the ten years' point at that stage.

3. We indicated to the parties however that it might be a waste of judicial resources for there to be a further hearing to re-make the decision given our calculation of the period of the Appellant's lawful residence which fell short of ten years by only a matter of days. We invited submissions in that regard.

4. Neither party made submissions in accordance with the directions given. However, following an email sent by the Tribunal office on 5 May 2023, the Respondent filed written submissions on 12 May 2023. Those submissions read as follows:

> "The SSHD writes further to the UT's error of law decision/directions dated 8/2/23 and the SSHD's application of 9/5/23 to vary the Tribunal's directions so as to allow her to submit written submissions by 4pm 12/5/23.
>
> After careful analysis of the EOL decision, the SSHD acknowledges and agrees with the UT's findings @61 in relation to the Appellant's accrual of continuous lawful residence, which the SSHD now calculates as:
>
> - 26/3/10 – 25/4/17 (leave under the immigration rules until conclusion of administrative review, 7 years and 30 days)
> - 21/12/8 – 3/4/22 (immigration bail and leave under the immigration rules, 3 years and 103 days)
> - 4/4/22 – 12/5/23 (3C leave continuing, 1 year and 38 days)
>
> Total: 11 years and 171 days as of today's date.
>
> The SSHD acknowledges that the singular issue taken in the RFRL (dated 16/9/20), in respect of 276B, was that the 10 years continuous lawful residence requirement was not met. The SSHD now accepts, in the light of the UT's findings, that the Appellant has accrued 10 years continuous lawful residence and as such 276B is met.
>
> Having due regard to TZ [2018] EWCA Civ 1109, the SSHD agrees with the UT's sentiment @63 that '*given our conclusions on the Paragraph 276B issue, it may be thought to be a waste of judicial resources for the decision in this appeal to be re-made'.*
>
> However, in circumstances where the UT have found a material error of law in the FTT determination (@62), the SSHD respectfully invites the Tribunal to remake the decision of the First Tier Tribunal without a further hearing and allow the Appellant's appeal under Article 8."

5. In general, the making of a decision on the papers under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 requires an opportunity to be given to both parties as to that course. However, in circumstances where the Respondent accepts that the Appellant's appeal should now be allowed, I have decided that it is appropriate to make that decision now without awaiting a response from the Appellant. It is in his interests that

the appeal is determined as swiftly as possible and there is little point in him incurring the legal costs of making submissions when the decision is in his favour.

NOTICE OF DECISION

The decision of First-tier Tribunal Judge Graves dated 24 November 2021, having been found by the Tribunal on 17 January 2023 to contain errors of law, is hereby set aside.
The decision is re-made allowing the Appellant's appeal.
The Respondent's decision breaches section 6 Human Rights Act 1998.
The Appellant's appeal is therefore allowed on human rights grounds (Article 8 ECHR).

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 May 2023

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001408

First-tier Tribunal No:
HU/50473/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

.....8 February 2023

Before
UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAUKAT ALI

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr A Rehman, Counsel instructed by Yes UK Immigration Ltd

Heard at Field House on 9 January 2023

DECISION AND DIRECTIONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge H Graves dated 24 November 2021 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 16 September 2020 refusing his human rights claim (Article 8 ECHR). The claim was made in the context of an application for indefinite leave to remain ("ILR") based on the Appellant claiming to have

been in the UK lawfully for a continuous period of ten years. The application was therefore made and refused applying paragraph 276B of the Immigration Rules ("Paragraph 276B"). The Respondent did not accept that the Appellant had been in the UK lawfully for the requisite period due to gaps in his leave.

2. The Appellant is a national of Pakistan. Although the Appellant's immigration history is somewhat complex, it suffices for current purposes to set out a brief account of it. He came to the UK as a student on 26 March 2010. His leave was extended in that category and as a Tier 1 and then Tier 2 migrant to 29 December 2016.

3. The Appellant made an application for further leave in time on 26 December 2016 as a Tier 1 (entrepreneur). That application ("the First Application") was refused on 14 March 2017. That refusal was maintained following an administrative review on 25 April 2017. The Appellant's leave to remain came to an end on that date.

4. The Appellant applied again as a Tier 1 migrant on 10 May 2017 ("the Second Application"). The Appellant was by then an overstayer. However, it appears to be accepted by the parties that he made the application within 14 days from the end of his leave (although by our calculation the period was 15 days). Accordingly, paragraph 39E of the Immigration Rules ("Paragraph 39E") applies. Accordingly, the Judge accepted that under Paragraph 276B, the period of overstaying on that occasion fell to be disregarded. The Second Application was refused on 13 August 2018 and re-served on 30 October 2018. The decision refusing the Second Application was maintained on 7 December 2018 following administrative review. The Appellant was at that time served with an enforcement notice and placed on immigration bail.

5. The Appellant then applied again as a Tier 1 migrant on 21 December 2018 ("the Third Application"). He was interviewed in relation to that application and granted leave valid to 3 April 2022. He applied for ILR on 15 May 2020.

6. The Respondent relied in her refusal on there being a gap in the Appellant's leave between 26 April 2017 and 2 April 2019. The Respondent treated the application as a human rights claim and refused it on the basis that it would not be disproportionate to remove the Appellant and his family (wife and son now aged two years) to Pakistan.

7. At [12] of the Decision, the Judge pointed out that the Appellant was not facing removal as he still had leave to remain as a Tier 1 migrant to 3 April 2022 (the hearing was on 5 November 2021). She there took the view that she should "consider the appeal on the basis of the proportionality of the impact of refusal of ILR rather than the impact of removal". She there records that both parties agreed with that approach.

8. At [25] of the Decision, the Judge considered the difference in treatment between ILR and limited leave to remain no doubt with a view to establishing the nature and extent of the interference with the Appellant's rights and those of his family. She then turned to consider the issue of continuous lawful residence. It was accepted that the Appellant had leave following entry for a period of seven years and one month (more accurately 30 days) ending on 25 April 2017. It was also accepted that the Appellant had leave from 3 April 2019, amounting to a further period of two years and seven months as at the date of the hearing.

9. The Judge thereafter found that the Appellant had lawful residence from 7 December 2018 because he was on that date granted immigration bail. She accepted that there was a period when the Appellant did not have leave between 25 April 2017 and 7 December 2018. However, she took the view that this period was "book-ended" overstaying (according to the terminology in the case-law to which we come below) because the Second Application was made within the period laid down in Paragraph 39E. She also relied on this Tribunal's decision in Muneeb Asif (Paragraph 276B, disregard, previous overstaying) [2021] UKUT 96 ("Asif") which she considered supported her view that this period should be treated as lawful residence. Accordingly, she found that the Appellant met the Immigration Rules ("the Rules") and therefore that the appeal should be allowed.

10. The Judge went on to consider whether there were unjustifiably harsh consequences for the Appellant and his family in case she were wrong in relation to Paragraph 276B. Again, she did so in the context of considering whether a refusal of ILR was a disproportionate interference with the Appellant's rights. In so doing, she also placed weight on her conclusion that the Rules operate in the Appellant's favour.

11. The Appellant also relied on what he termed "historic injustice". He said that his overstaying came about as a result of the Respondent's own inconsistent decision making. He said that his Tier 1 applications were all exactly the same and therefore that the refusal of the First and Second Applications was erroneous. It was said that the errors arose from "the Respondent's misunderstanding about how the funds were held". That was clarified by interview following the Third Application. He said therefore that all the applications were "capable of success". As the Judge pointed out, the Appellant was entitled to and pursued applications for administrative review of those decisions which applications failed. He did not challenge those decisions by way of judicial review. The Judge did not consider that "historic injustice" was an apt description of what had occurred and noted that the First and Second Applications were "refused on multiple grounds". The Respondent had not been satisfied that the Appellant's business was genuine, even after an earlier interview.

She concluded at [52] that this argument was "not sufficiently supported by evidence" to be upheld even if she could consider it. The earlier refusals were not therefore "demonstrably unjustifiable or unfair".

12. The Judge concluded however that the application for ILR should have been granted on the facts and that the decision refusing ILR was a disproportionate interference with the Appellant's Article 8 rights and those of his family.

13. The Respondent's grounds are discursive but can be summarised as follows:

(1) The Judge had wrongly considered the proportionality of refusal of ILR rather than removal. This was a misdirection.
(2) The Judge has erred in treating the gap in leave between April 2017 and April 2019 as lawful residence. Again, this was a misdirection.

14. Permission to appeal was granted by First-tier Tribunal Judge Sills on 6 January 2022 in the following terms so far as relevant:

> "..2. It is arguable that the Judge erred in law in finding that the Appellant's period of overstaying between April 2017 and December 2018 fell to be disregarded under 276B(v)(b). This is because the Appellant's application made in May 2017 was unsuccessful and it was only a subsequent application made in December 2018 that was successful.
> 3. It is arguable that the Judge erred in law in finding that the Appellant's residence between December 2018 and April 2019 was lawful residence under Rule 276A(b)(ii) on the basis that the Appellant was granted immigration bail. Rule 276A(b)(ii) relates to immigration bail under s11 of the Immigration Act 1971. That provision deals with the circumstances in which a person arriving in the UK shall be deemed not to have entered the UK, one of which is where the person is granted immigration bail. It is arguable that this provision does not apply to the Appellant, whose grant of immigration bail came after the expiry of his leave to remain in the UK.
> 4. It is arguable that the Judge erred in finding that ECHR Article 8 was engaged given that the Appellant had leave to remain until April 2022. The Judge's reasoning at para 25 largely concerns the potential rather than actual impact on the Appellant of the difference between limited and indefinite leave to remain."

15. The appeal comes before us to determine whether the Decision contains errors of law. If we conclude that it does, we then have to decide whether to set aside the Decision in consequence of those errors. If we set aside the Decision, we then have to go on to either re-make the decision or remit the appeal to the First-tier Tribunal.

16. We had before us the core documents relevant to the challenge to the Decision as well as the Appellant's bundle before the First-tier Tribunal and the Respondent's bundle before that Tribunal. The facts

are largely undisputed. It is the applicability of the Rules and case-law to those facts which is mainly at issue. We do not therefore need to refer to the documents save as identified below. We also received a skeleton argument from Mr Rehman and various legal authorities from both representatives.

17. Having heard submissions from Mr Clarke and Mr Rehman we indicated that we would reserve our decision and provide that in writing which we now turn to do.

DISCUSSION

Validity of Appeal

18. At the outset of our list, we indicated to the parties in this appeal that we were concerned with whether there could be said to be a valid appeal before us given that the Appellant had leave to remain at the time of the hearing before Judge Graves. Although not directly raised by the Respondent, it had some crossover with the ground relating to the basis of the proportionality assessment conducted by Judge Graves.

19. The representatives were given the opportunity to consider this issue prior to the start of the hearing. The appeal was put to the end of the list so that Mr Rehman could consider it. Mr Clarke was given a short period also to consider it.

20. Our concern arose from section 104(4A) Nationality, Immigration and Asylum Act 2002 ("Section 104(4A)") which provides as follows:

> "(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))."

Sub-section 4B has no application in this case. Our concern was therefore that Section 104(4A) might mean that the appeal should be treated as abandoned as the Appellant has been granted leave albeit prior to the decision under appeal and on a different basis.

21. Mr Rehman helpfully drew our attention to the Respondent's policy entitled "Rights of Appeal" (version 13, published September 2022) ("the Appeal Rights Policy"). We were not greatly assisted by the page to which we were referred but we intend no criticism of either representative in this regard since we raised this point at the hearing with no prior notice.

22. However, upon further consideration of the Appeal Rights Policy, we have come to the view that there is still a valid appeal in this case for the reasons which follow.

23. At page 18 onwards of the Appeal Rights Policy, the Respondent considers whether an application can be said to be a human rights claim or not and therefore whether it attracts a right of appeal. In summary, the Respondent's view is that if an individual already has leave to remain on a human rights basis, another application seeking a different form of leave but on the same human rights basis is not a human rights claim. So for example, if the Appellant in this case had been granted leave based on his private life but then applied for ILR also based on his private life, that would not amount to a human rights claim and refusal would not generate a right of appeal. We observe in passing that this is consistent with the guidance given by this Tribunal in R (oao Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and the Secretary of State for the Home Department (refusal of human rights claim) [2020] UKUT 00085 (IAC) ("Mujahid") on which Mr Clarke relied. In short, if an applicant has extant leave and seeks an "upgrade" of the same leave whilst his leave is still extant and the leave is not due to expire, a refusal of the upgrade leave will not generate a right of appeal.

24. However, importantly for this case, at page 19, the Respondent goes on to accept that if an applicant has leave on a non-human rights basis and seeks to vary that leave to a human rights basis, that will be treated as a human rights claim the refusal of which will generate a right of appeal. Whilst we appreciate that the Appellant here did not seek a variation of leave but rather sought a different type of leave, we consider that it is consistent with the Appeal Rights Policy for the application to be treated as a human rights claim the refusal of which would give rise to a right of appeal. That is indeed what the Respondent did and although Mr Clarke submitted that she had erred in that regard, we do not consider that she did or that Mujahid is on point (for the reasons we have explained).

25. We consider that this is consistent with the overall appeal rights scheme. Parliament has provided that there should be an appeal where a human rights claim or protection claim has been refused, presumably so that the Tribunal can consider for itself whether an applicant's claim breaches either the Human Rights Act 1998 or the Refugee Convention.

26. That there should be a right of appeal (and that therefore the Tribunal has jurisdiction) is not the end of the matter. Abandonment under Section 104(4A) suggests that the right has arisen but is then extinguished. We accept that Section 104(4A) does not say in terms that the leave must be granted subsequent to the bringing of the appeal. However, we accept Mr Rehman's submission that it must be intended to be sequential as otherwise it would lead to the absurd situation that an appeal could be brought but would then be immediately extinguished because of the existence of leave. We do not consider that this can be right. We therefore conclude that there

remains a valid appeal before us. That appeal is not treated as abandoned by operation of statute.

The Appeal Issue(s)

27. We do however find an error in the way in which the Judge approached the appeal based on the existence of the Appellant's extant leave. At [12] of the Decision, the Judge said this:

> "In discussion about the issues, I asked if it was right the Article 8 appeal before me was being pursued on a limited basis, as the appellant had leave and was not facing removal. The Tribunal must therefore consider the appeal on the basis of the proportionality of the impact of refusal of ILR, rather than the impact of removal. Both representatives agreed that was the correct approach."

28. Although we accept that the ground of appeal under section 84 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") is whether "the decision under appeal is unlawful as contrary to section 6 Human Rights Act 1998" that has to be read in the context of what is the decision of the Respondent. The only decision which can be appealed is not that ILR should be refused but that the human rights claim falls to be refused. That then brings into play the definition of a "human rights claim" under section 113 of the 2002 Act which can be only whether removal or refusal of entry breaches section 6 Human Rights Act 1998 ("Section 6").

29. Although neither party took us to it, and although the point arises in a slightly different context, we rely in this regard on the Tribunal's guidance in Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) ("Charles"). At (i) and (ii) of the headnote, the following points are made:

> "(i) A human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") can be determined only through the provisions of the ECHR; usually Article 8.
> (ii) A person whose human rights claim turns on Article 8 will not be able to advance any criticism of the Secretary of State's decision making under the Immigration Acts, including the immigration rules, unless the circumstances engage Article 8(2)…."

Those points are developed at [47] to [48] and [68] to [71] as follows:

> "47. The definition of 'human rights claim' in section 113(1) of the 2002 Act involves the making of a claim by a person that to remove him or her from or to require him or her to leave the United Kingdom would be unlawful under section 6.
> 48. The task, therefore, for the Tribunal, in a human rights appeal is to decide whether such removal or requirement would violate any of the provisions of the ECHR. In many such cases, including the present, the issue is whether the hypothetical removal or requirement to leave would be contrary to Article 8 (private and family life).
> …

> 68. That conclusion must, with respect, be correct. The basic limitation of a human rights appeal is that it can be determined only through the provisions of the ECHR; usually Article 8. A person whose human rights claim turns on Article 8 will not be able to advance any criticism of the Secretary of State's decision-making under the Immigration Acts, including the immigration rules, unless that person's circumstances are such as to engage Article 8(2).
>
> 69. Although section 85 of the 2002 Act makes provision for certain matters to be considered on an appeal under section 82(1)(b), we do not see how section 85 can expand the scope of a human rights appeal of the kind with which we are concerned, so as to require the separate judicial adjudication - outside section 6 of the 1998 Act - of matters such as whether the claimant had or had not, breached the immigration rules. On the contrary, the wording of section 85(1) makes it clear that the appeal can include only 'an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1)', which is limited to refusal of a protection claim or of a human rights claim and revocation of protection status. Likewise, section 85(2), which concerns section 120 statements, is tied to the grounds of appeal under section 84.
>
> 70. Section 85(4) permits the Tribunal to consider 'any matter which it thinks is relevant to the substance of the decision'. In a human rights appeal, therefore, a matter will be relevant if and only if it goes to the question of whether the decision is unlawful under section 6 of the 1998 Act.
>
> 71. In our view, therefore, Ahsan underscores the concern we have with paragraphs 21 and 23 of Greenwood (No. 2). Insofar as those paragraphs suggest that judicial fact-finders can treat human rights appeals as vehicles for deciding freestanding challenges to decisions of the Secretary of State under the Immigration Acts, they are not to be followed."

30. We accept that the context of Charles is somewhat different from the present case. We also accept that it was open to the Judge to decide whether the Appellant met Paragraph 276B as that was relevant to the Article 8 ground of appeal, in particular when carrying out a proportionality assessment outside the Rules. However, we consider that Charles is authority for the proposition that what the Judge had to consider was not whether the refusal of ILR was disproportionate but whether the human rights claim, that is to say the claim that removal would breach Section 6, was wrongly refused. At [12] of the Decision, therefore, the Judge asked herself the wrong question.

31. We accept that it might be argued that if the Judge found that refusal of ILR was disproportionate, she would have found the more so that removal would be disproportionate. It matters not in this context that removal for the time being could not actually be enforced. A Judge is always considering a hypothetical removal since removal cannot take place whilst an appeal is pending. However, that analysis does not withstand scrutiny. That is because the first question the Judge had to ask herself is whether Article 8 is engaged at all. In circumstances where the decision under appeal is

only refusing ILR, the answer to that question might well be no or at least not at the present time.

32. Even if we are wrong in what we say above, we find force in the reason given by Judge Sills for granting permission in this regard at [4]. Judge Graves dealt with what she said was the interference at [25] of the Decision as follows:

> "I firstly consider that while the appellant and his wife and child are not facing removal that a decision to refuse settlement to him, as opposed to limited leave, does still have an impact on protected rights. There can be a significant difference for an individual's private life, between settlement and temporary status, particular where that temporary status contains restrictions on economic matters. Those with settlement may be able to access resources such as financial borrowing to support a business, a mortgage, benefits in times such as a pandemic when the business is under strain, and of course the appellant would also have no restrictions on the nature of work, or type of business he wishes to pursue. There is also the emotional impact, of having temporary, as opposed to settled status, which could be seen at hearing, in that the appellant became overwhelmed when asked if he wished to say anything. He described the impact of the uncertainty, and loss of income and accommodation, and how the precarious nature of his status here had meant he had been unable to visit close relatives. It should also not be ignored that while the appellant has status here currently, if his business fails, or he is unable to meet the prescriptive requirements of future leave, or convince the respondent that he is able to do so, he may once again find himself faced with returning to Pakistan, or becoming an overstayer. Security, in terms of status, is therefore of great importance to the appellant and his family."

33. The Judge was not required to embark on a speculative or general assessment about what might happen in the future or what are the general obstacles to limited leave as opposed to indefinite leave. If she was entitled to consider proportionality under Article 8 on the basis of a refusal of ILR at all, she had to do so on some evidence before reaching a conclusion about whether Article 8 was engaged at all on the facts of this case.

34. Whilst we accept that the Judge does record at [11] of the Decision that the Appellant became emotional when giving evidence and referred to the uncertainty of his position, that was in the context of the earlier refusals of leave to remain. That paragraph reads as follows:

> "The appellant attended remotely and could clearly be seen and heard. After discussion about the law, evidence and issues, set out in more detail below, it was agreed that there were no questions for him, and the hearing could proceed predominantly on the basis of submissions. The appellant adopted his statement and said he did not need an interpreter. When I asked if he had anything he wished to stay before submissions, he became upset and cried. The hearing was put back briefly for him to compose himself. He then said the proceedings

> and the uncertainty about his immigration status had taken a huge toll on his emotional health. He said when the respondent refused his Tier 1 applications, he had been unable to work or pursue his business. He had been without any income and had lost his accommodation and was homeless. He had been very depressed. His mother was unwell during that time, but he could not travel to see her until his immigration status was resolved. She had died, without him being able to go to see her or attend her funeral, and he felt his life was in limbo. There was nothing further he wished to say and there were no questions for him."

35. We begin by observing that none of what is there recorded is to be found in the Appellant's witness statement dated 3 November 2021 which appears at pages 1-5 of the Appellant's bundle. The focus of that statement is the chronology of his case and why he says that his earlier applications were unjustly refused. Some of what is recorded at [11] of the Decision is inconsistent with the witness statement (for example that the Appellant had been working in the UK for the past 11 years and had contributed significantly to the UK via his business). As is also clear from what is recorded at [11] of the Decision (by the use of the past tense), most of that evidence relates to the problems which the Appellant faced in the past.

36. It is to be noted that the hearing took place in November 2021 some two and a half years after the Appellant was granted leave under Tier 1. The Judge had to consider Article 8 as at the date of hearing. When what is said at [25] of the Decision is compared with the evidence on which those findings are apparently made as recorded at [11] of the Decision, the Judge has not conducted that exercise. For example, she says at [25] that due to his status, the Appellant could not travel to see relatives abroad. Whilst that is undoubtedly true of the period when he had no leave as his application would have lapsed, that is not the case in relation to any period when he has limited leave. Similarly, the Judge found when considering Paragraph 276B, that the Appellant remained lawfully resident under Tier 1 at the time of the hearing. It follows that he was at that time able to conduct a business. There is no evidence that we can see that his business struggled during the pandemic (and such would appear to be inconsistent with his evidence that he had worked for the past eleven years). It is speculative to suggest that he might need to change the nature of his business at some point in the future. We can see no evidence that this was the Appellant's case.

37. The failure by the Judge to assess Article 8 as at date of hearing on the evidence before her is sufficient to undermine her conclusion at [26] that Article 8 is engaged on the facts of this case, even if, contrary to our primary view, she was entitled to consider Article 8 on the narrow basis of a distinction between ILR and limited leave at all. We observe that Article 8 would not generally absent cogent evidence be engaged by the grant of limited leave rather than ILR. We note in that regard the Tribunal's guidance in R (oao MBT) v Secretary of State for the Home Department (restricted leave; ILR;

disability discrimination) [2019] UKUT 414 (IAC)). Whilst we recognise that this was a judicial review on quite different facts, the legal position is analogous.

38. Whilst we appreciate that some of the foregoing goes beyond the grounds as put forward by the Respondent, that is because of the point we raised of our own volition concerning the existence and extent of the right of appeal. It arises also from the comments of Judge Sills when granting permission.

39. For those reasons, we conclude that there is an error in the Judge's assessment of Article 8. Since that is the only ground of appeal available to the Appellant, it follows that this is material. Strictly, therefore, we do not need to go on to consider the Judge's analysis of Paragraph 276B. However, since that lies at the heart of the Judge's conclusion as to proportionality assuming that Article 8 is engaged at all and in light of the conclusion which we have reached in that regard below, we have gone on to consider that issue also.

Paragraph 276B

40. The relevant parts of Paragraph 276B are set out at [24] of the Decision and we do not need to repeat them.

41. We turn then to consider the case-law on which the Judge relied to reach her conclusions.

42. At [13] of the Decision, the Judge records that the representatives agreed that the facts in the cases of R (oao Kalsi & others) v Secretary of State for the Home Department [2021] EWCA Civ 184 and Secretary of State for the Home Department v Ali [2021] EWCA Civ 1357 were the same as in the instant case. We accept as did the Judge that whilst those cases are instructive on the operation of Paragraph 39E, they differ not simply on the basis that they are judicial reviews rather than appeals but also because the appellants in those cases were refused further leave as overstayers and Paragraph 276B had no application.

43. The Judge referred to those judgments also at [41] of the Decision and made findings about their application to this case. She did so in the following terms:

> "The respondent argues that cases such as Kalsi and Ali, are authority for the proposition that 39E does not apply to 'application three', but when that review response was drafted, the respondent had presumably not appreciated that she had granted the appellant immigration bail when 'application two' was finally decided. I find Kalsi and Ali are both authority for the finding that 'application two', pursued from May 2017 to December 2018, was an application to which 39E applies. Mr Nath at hearing, rightly, did not seek to persuade me otherwise. I also find that the period of overstaying, between April 2017 to December 2018, is a period 'between periods of leave', since

> the appellant had leave before this period, and subsequently was granted leave in April 2019, and for the purposes of this application, the respondent's Rules and guidance, provide that the period between December 2018 to April 2019 should be treated as 'lawful residence'."

Subject to the point whether the application made on 10 May 2017 was made within 14 days or 15 days, we do not disagree with the Judge's reasoning that Paragraph 39E applies to the period when that application was outstanding (to 7 December 2018). We will need to come back to the period thereafter when looking at the impact of the grant of immigration bail.

44. At [42] of the Decision, the Judge said this:

> "I find it would defeat the purpose of that deliberate concession, contained in Rules which do have the approval of Parliament, to treat the December 2018 to April 2019 as lawful residence, if the appellant were not able to rely on that provision. It is reasonable to find that these provisions were deliberately inserted to allow those who were genuinely pursuing unmeritorious applications, who were not making frivolous or vexatious applications, and who perhaps found themselves overstaying in the meantime, to still pursue settlement here. I find that it is likely compatible with the public interest in the maintenance of immigration control, to reward those who comply with the Rules, by making timely and valid applications to regularise their status and submit themselves to immigration control. Whereas those who have no legitimate right to remain here, and seek to subvert or avoid immigration control, are unable to rely on periods of overstaying to regularise their status."

We remind ourselves in that regard that, by December 2018, the Appellant had two applications made under Tier 1 refused and that both decisions were upheld following administrative review. We also note that the Appellant had been an overstayer, even applying Paragraph 39E, since April 2017. We will need to return to that point below.

45. The Judge at [43] of the Decision considered the case of Hoque and others v Secretary of State for the Home Department [2020] EWCA Civ 1357 ("Hoque"). She correctly identified that the Court of Appeal had distinguished between "open-ended" and "book-ended" overstaying. She then said this:

> "…Following the respondent's acceptance that there is ambiguity in Paragraph 276B(v) and that 'some of the reasoning in Masum Ahmed is erroneous', the Court of Appeal held that this concession was fair and correctly made. Underhill LJ accepted the submission of the respondent that the second disregard provision in 276B(v) (book-ended overstaying) resulted in such periods of overstaying being counted as lawful residence for the purposes of 276B(i)(a)…."

46. The Judge thereafter relied on the Tribunal's decision in Asif (to which we have referred at [9] above) and said this:

> "44. In Muneeb Asif (Paragraph 276B, disregard, previous overstaying) [2021] UKUT 96 UTJ Blum was required to determine whether 'any "previous period of overstaying" that has been "disregarded" should be taken into account when determining whether an applicant has fulfilled the requirements for "10 years continuous lawful residence". UTJ Blum considered the respondent's policy guidance, which provides two examples where there is a 'break' in continuity, or a period of overstaying, as a consequence of submitting an application that falls within Paragraph 39E, and says in such circumstances, leave should be granted. He comments that the critical point is that while 276B(v) cannot actually convert periods of overstaying into lawful residence, it can provide for periods that should be 'disregarded' when it comes to assessing whether ten years' lawful residence has been completed, and therefore allows the decision maker to treat or deem them as lawful residence. Importantly, the following was decided:
>
> > *'42. On the proper construction of paragraph 276B any period of overstaying that has been disregarded in accordance with sub-paragraph (v)(a) or (b) is treated as lawful residence for the purpose of sub-paragraph (i)'"*

47. In her conclusion, at [45] of the Decision, in express reliance on Hoque and Asif, the Judge found that the whole of the period of overstaying between April 2017 and December 2018 "falls to be disregarded and treated as lawful residence". Coupled with her conclusion about the impact of the grant of immigration bail in December 2018 (as we have set out above), the Judge therefore concluded that the Appellant had "completed a period well in excess of ten years' continuous residence". Accordingly, he met Paragraph 276B and his appeal was allowed under Article 8 ECHR on the basis that the Appellant met the Rules which were designed to set out the circumstances when an individual should be granted leave to remain (in this case ILR).

48. Mr Rehman very fairly drew to our attention the Court of Appeal's judgments in R (oao Afzal) v Secretary of State for the Home Department [2021] EWCA Civ 1909 ("Afzal") and R (oao Iyieke) v Secretary of State for the Home Department [2022] EWCA Civ 1147 ("Iyieke").

49. Whilst we accept that, for different reasons, both cases are not on all fours with the facts of this case, Afzal in particular identifies an error in the Judge's reasoning. In that case, the Court of Appeal disagreed with the judgments in Hoque and Asif saying this:

> "66. I do not disagree that it would not have been irrational for the Secretary of State to have allowed the gaps in book-ended periods of overstaying to count. But nor is it irrational for the Secretary of State to take the view that they should not count and that it would not be appropriate to allow periods of overstaying in breach of the immigration rules to be treated for all purposes as if they were periods of lawful residence with the same status as section 3C periods. Underhill LJ appears to have made an assumption that the only way in

> which the second sentence of para.276B(v) could qualify the concept of continuous lawful residence was by permitting the period of overstaying to count. He does not appear to have considered the alternative possibility that the intended impact on the calculation of ten years' residence is simply to preclude para.39E periods of overstaying from breaking continuity which, but for para.39E, they would do.
> 67. The approach of the majority is inconsistent with each of the three preliminary observations which I suggested above should guide the construction of these provisions. First, it significantly distorts the natural meaning of a period being 'disregarded' to allow it to count; far from disregarding it, this involves positively having regard to the period of overstaying and treating it for all the world as if it were a period of lawful residence.
> 68. Second, as Underhill LJ recognised, it is giving the concept of 'disregarded' in the context of book-ended periods of overstaying a wholly different meaning from that adopted with respect to open-ended periods of overstaying. If this were a necessary implication, that would be justified. But in my view it is not: the concept of disregard can be given the same meaning in both cases, namely that the period of overstaying is ignored. The significance of this in an open-ended period of overstaying is that the applicant is not to be treated as being resident in breach of the immigration laws. The significance of it in the case of book-ended periods is different because of the focus on past rather than present periods of overstaying; its effect is that when calculating whether there is a continuous period of ten years, a gap resulting from a para.39E period of overstaying will not break continuity. In both cases the period of overstaying is being ignored, but the implications are different in the two situations. This approach, giving the concept of disregard its natural meaning, still allows for a purpose in linking sub-paras. (i)(a) and (v) but it also means that there is no justification for treating the period of overstaying as counting towards the period of continuous residence.
> 69. Third, this approach re-writes the meaning of lawful residence to include periods not granted pursuant to leave in circumstances where in my view the extension of the definition is not a necessary implication arising out of the linking of the two provisions, as Underhill LJ seemed to assume.
> 70. We are not bound by the view of the court in Hoque on this point, and for the reasons I have given, I would respectfully not follow it. Whilst I accept that para.39E periods of overstaying do impact upon the question of continuous lawful residence, as the majority in Hoque thought, they do so because they ensure that such periods do not break continuity of residence. But for this provision, continuity would be broken. But it is not expressly stated that they should actively count towards the period of lawful residence, and in my view this is not a necessary implication. The concept of 'disregard' in para.276B can be given a perfectly cogent meaning which in my view accords with its natural meaning and does not require the term being deemed to have two different meanings in the same paragraph."

50. The Court of Appeal in Afzal could not of course overrule Hoque. However, it did decline to follow it. Moreover, it concluded that Asif was wrongly decided. Whilst Mr Rehman again very fairly drew to our attention that permission to appeal has been granted by the Supreme Court in Afzal, that is no doubt due to the divergence of

opinion in the Court of Appeal as to the proper interpretation of this part of the Rules. The Judge relied not only on Hoque but also Asif. To that extent, at the very least, there is an error in the Decision in relation to the application of Paragraph 276B.

51. We also observe that the Court of Appeal in Iyieke reached the same conclusion. Iyieke is potentially distinguishable from the present case as it was accepted that Paragraph 39E was of no application. It is though instructive in relation to the impact of the grant of temporary admission or immigration bail. Although we consider that the Judge fell into error when concluding that the period covered by the Second Application counted towards lawful residence for the purposes of Paragraph 276B, that may not be material if the Appellant would otherwise have accrued ten years' lawful residence. That is because the Court of Appeal in Afzal and Hoque accepted that the gap in leave where there is an application to which Paragraph 39E applies does not break the continuity of lawful residence.

52. We turn then to the issue of the grant of immigration bail and what impact that had on the Appellant's leave. We begin with Paragraph 276A(b)(ii) which defines "lawful residence" as being:

> "residence which is continuous residence pursuant to:
> (i) existing leave to enter or remain; or
> (ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or
> (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."

53. We are of course here concerned with sub-paragraph (ii) of that definition. We have already set out the Judge's conclusion at [41] of the Decision as to why she considered that to apply to the Appellant's position from December 2018.

54. Mr Rehman set out at [14] to [21] of his skeleton argument why he said that the Judge was right so to conclude. With respect to his reasoning, we did not find it of assistance. The point is not what section 11 Immigration Act 1971 is designed to deal with or whether it deals with the position on entry or thereafter. The issue is why a period covered by that section, whether by the grant of temporary admission or immigration bail, should be considered to be lawful residence and therefore when that should "count" as being lawful.

55. It is in this regard that we are assisted by the Court of Appeal's judgment in Iyieke. Whilst we accept that Paragraph 39E was held not to have any application to that case (the application during a period of overstaying fell within a different "disregard" provision in Paragraph 276B), the Court of Appeal said this about the impact of the grant of temporary admission in that case:

> "**Mr Iyieke did not have 10 years continuous lawful residence**
> 21. Mr Iyieke had post study leave to remain which expired on 9 August 2014. He then made an application for leave to remain on 2 September 2014. The application on 2 September 2014 was made within 24 days of the expiry of his post study leave.
> 22. The application made on 2 September 2014 was refused on 29 October 2014. The refusal was challenged, and Mr Iyieke was then granted temporary admission on 28 November 2014 but the application made on 2 September 2014 was not successful.
> 23. Although it is common ground that, with the subsequent grant of leave to remain on human rights grounds, Mr Iyieke's temporary admission as from 28 November 2014 counts towards his period of 10 years continuous lawful residence, there is still the period from 9 August 2014 when Mr Iyieke's leave to remain expired, until 28 November 2014, from which his temporary admission counted towards leave...."

56. We accept that Paragraph 276A(b)(ii) does not expressly say that subsequent leave to remain has to be linked to the temporary admission or immigration bail granted but we consider that it is implicit in the purpose of this provision. On the Judge's analysis any grant of temporary admission or bail followed by a grant of leave to remain in response to any application made potentially many years later would mean that an individual was entitled to treat the period whilst on temporary admission or immigration bail with no (later successful) application pending as lawful residence. That cannot be what Paragraph 276A(b)(ii) is intended to cover, particularly when read in the context of the other sub-paragraphs. Temporary admission and now immigration bail are, as identified in Mr Rehman's skeleton argument, granted to a person who is liable to removal and detention. That is why the Appellant was granted immigration bail on 7 December 2018. It was part of an enforcement notice informing him that he was subject to removal and was liable to be detained but was granted immigration bail in lieu of detention. He had at that time no application pending. He was therefore a person who required leave and did not have it.

57. It seems to us that it can only be where temporary admission or immigration bail is granted whilst an application is being considered which application subsequently leads to the grant of leave (in other words where there is a connection between the two) that Paragraph 276A(b)(ii) can have any application. That is consistent with what is said by the Court of Appeal in Iyieke.

58. The Judge relied not only on the wording of the rule in support of her conclusion but also on the Respondent's guidance in this regard. That is set out at [34] of the Decision. That does not alter our view that it is only where temporary admission or immigration bail is followed directly by a grant of leave to remain that this period counts towards the ten years' period. Our view is not affected by the fact of which the Judge took judicial notice at [35] of the

Decision. Even if the Judge was entitled to take judicial notice of what happens in naturalisation cases of those previously recognised as refugees, the likelihood is that such persons will have been granted temporary admission at the time when asylum is claimed, and which claim subsequently leads to the conferral of status following recognition as a refugee. That is again consistent with the way in which the Court of Appeal considered that this provision operates in Iyieke.

59. On our analysis, therefore, the Judge erred, first by counting as lawful residence the period during which the Second Application was under consideration (from May 2017 to 7 December 2018) but also by counting as lawful residence the period from 7 December 2018 to 3 April 2019 when the Appellant was granted leave to remain in response to the Third Application.

60. We have carefully considered whether it could be said that the errors in the Judge's conclusions in this regard are immaterial which they might be if the Appellant had, by the time of the hearing before Judge Graves, completed ten years' lawful residence even when the errors are left out of account.

61. On our analysis, the Appellant had leave to remain from 26 March 2010 to 25 April 2017 when on any view he had extant leave. That is a period of 7 years and 30 days. The Appellant made the Third Application on 21 December 2018 in response to which leave to remain was later granted. We accept that he was entitled to rely on the grant of immigration bail as from that date but not earlier. It follows that he is considered to have had lawful residence from 21 December 2018 to the date of the hearing on 5 November 2021. That is a period of 2 years and 329 days. The total therefore falls short of the required 10 years' period, but we accept only by a few days.

62. However, based on our conclusion that the Judge erred in any event by deciding the appeal on the wrong legal basis, we determine that there is a material error of law.

63. We have given careful consideration to what should follow. Although we are satisfied that it was not open to the Judge to conclude the appeal as she did, not least because she was not entitled to consider Article 8 on the limited basis she did, the Respondent will no doubt wish to give consideration to whether it is appropriate for this appeal to be pursued further. Even if the Appellant has not sought further Tier 1 leave after the expiry of that leave in April 2022, we assume that it would be accepted that he has continuing section 3C leave arising from the making of the ILR application. If that is so, given our conclusions on the Paragraph 276B issue, it may be thought to be a waste of judicial resources for the decision in this appeal to be re-made. We have therefore made directions below for both parties to make written submissions in relation to what should happen next

following which the Tribunal will make a further decision in that regard or will list the appeal for a CMR to discuss the way forward.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Graves dated 24 November 2021 involves the making of errors of law. We make the following directions in order to determine the way forward consequent on our conclusions.

DIRECTIONS

1. **Within 28 days from the date when this decision is sent, the Respondent shall file with the Tribunal and serve on the Appellant her submissions in writing setting out her position whether the errors identified are material and what action should follow (including suggested directions for re-making if that is considered to be the appropriate course).**
2. **Within 28 days from the service of the Respondent's submissions, the Appellant shall file with the Tribunal and serve on the Respondent his submissions in writing in reply.**
3. **The Tribunal will thereafter either list the appeal for a CMR or will issue a written decision as to the future conduct of this appeal.**

Signed: L K Smith Dated: 17 January 2023
Upper Tribunal Judge Smith