In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/05767/2019

In the matter of an application for Judicial Review

The Queen on the application of
BALHAV SINGH

Applicant

versus

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ORDER

BEFORE MR JUSTICE FORDHAM

HAVING considered all documents lodged and having heard Billal Malik of counsel, instructed by ABK Solicitors, for the Applicant and Matthew Fraser of counsel, instructed by GLD, for the Respondent at a hearing on 16th December 2020

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached judgment.

(2) The Applicant shall pay the Respondent's costs to be taxed if not agreed.

Signed:

Mr Justice Fordham

Dated: **27th January 2021**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date):

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR/05767/2019

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

27 January 2021

Before:
MR JUSTICE FORDHAM

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Between:
THE QUEEN
on the application of
BALHAV SINGH

Applicant

- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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BILLAL MALIK (instructed by ABK Solicitors) for the Applicant
MATTHEW FRASER (instructed by GLD) for the Respondent
Hearing date: 16th December 2020

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J U D G M E N T
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MR JUSTICE FORDHAM:

Introduction

1. This is an application for judicial review. It is brought with the permission of UTJ Allen, granted on 10 February 2020 after an oral hearing. The mode of hearing involved me being physically present in the hearing room at Field House together with the usher. The Tribunal building and hearing room were open to the public. Counsel and their team members attended the hearing remotely by Skype. That eliminated any risk to any of them from having to travel to Field House, or be present in the hearing room. Both Counsel were satisfied, as was I, that that mode of hearing involved no prejudice to the interests of their clients. The hearing and its start time were listed on the Tribunal's hearings list at Field House. Any person – whether a member of the press or public – who wished to observe the hearing but

was or felt unable to be present in the hearing room would have been able to contact the Tribunal to seek permission to observe the hearing remotely by Skype. The hearing was recorded through the Tribunal's recording system. This ruling will be available in the public domain. I am satisfied that the open justice principle was secured, and that the mode of hearing was necessary, justified and appropriate.

The Claim

2. The Applicant seeks to impugn the Respondent (the Secretary of State)'s decision dated 16 August 2019 by which the Secretary of State granted the Applicant limited leave to remain for 30 months and declined to grant him indefinite leave to remain (ILR). The Applicant says that to refuse to grant ILR "outside the immigration rules" was unreasonable and so unlawful, and asks the Tribunal to make a declaration to that effect. The essential argument, as I see it, can be encapsulated as follows:

   a. The Applicant's Premise is that (a) it was and is unreasonable for the Secretary of State to seek to maintain that a notice of removal decision (Form IS151A) was served on the Applicant on 2 October 2008 and (b) no issue estoppel ought to preclude the Applicant from so arguing in these proceedings.

   b. The Applicant's Analysis, based on that premise, is then as follows. Previous decisions in which ILR was not granted, on (i) 13 February 2012 and/or (ii) 15 April 2014 and/or (iii) 6 January 2015, constituted an 'historic injustice'. That is because, but for reliance on 2 October 2008 service of Form IS151A, ILR should and would have been granted. That makes it unreasonable and an abuse of power for the Secretary of State not now to grant ILR, outside the immigration rules but pursuant to the Secretary of State's statutory power under section 3 of the Immigration Act 1971. The Tribunal should so declare.

Six Issues

3. As can be seen, the Applicant's essential argument embodies a number of elements. Mr Malik identified six issues which he and Mr Fraser addressed. They were as follows. Issue [1]: the reasonableness of the Secretary of State maintaining that IS151A was served on the Applicant on 2 October 2008. Issue [2]: whether issue estoppel precludes the Applicant from contesting issue [1]. Issue [3]: whether the decision 13 February 2012 constituted an 'historic injustice'. Issue [4]: whether the decisions 15 April 2014 and/or 6 January 2015 constituted an 'historic injustice'. Issue [5]: whether it is unreasonable and an abuse of power not now to grant ILR outside the immigration rules. Issue [6]: whether, if so, the Tribunal should grant a declaration to that effect. As can be seen: issues [1] and [2] relate to the Applicant's Premise; issues [3] to [6] relate to the Applicant's Analysis (based on that premise).

What Happened In This Case: The Immigration Rules

4. In order to understand this case it is necessary to appreciate the sequence of key events, both as they concern the relevant and applicable immigration rules, and as

they concern the Applicant's position. I will start with the relevant and applicable immigration rules, as authoritatively analysed by the appellate Courts.

5. At all material times prior to 9 July 2012, paragraph 276B of the immigration rules (so far as material to this case) provided that:

The requirements to be met by an Applicant for [ILR] on the ground of long residence in the United Kingdom are that … he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of a [relevant] notice…

It is common ground that Form IS151A was a relevant notice for the purposes of paragraph 276B; and that service by the Secretary of State on the Applicant of Form IS151A on 2 October 2008 would have triggered the exclusion described in paragraph 276B, in relation to the subsequent period. This explains the significance of the Applicant's Premise.

6. By HC 194 (made on 13 June 2012) the old paragraph 276B was replaced, with effect from 9 July 2012, with new paragraphs 276ADE and 276BE. These new rules (so far as material to this case) had the following effect. Paragraph 276ADE now provided that:

The requirements to be met by an Applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the Applicant … has lived continuously in the UK for at least 20 years …

Paragraph 276BE provided that, where these requirements are satisfied:

… limited leave to remain on the grounds of private life in the UK may be granted for a period not exceeding 30 months …

Paragraph 276BE was later amended with effect from 28 April 2014 but neither Counsel suggested that those amendments were significant to the analysis.

7. The basic principle as to "simple fairness" and considerations of "retrospectivity" of immigration rule changes was described by Lord Brown in Odelola [2009] UKHL 25 at paragraphs 33-39. In particular (at paragraph 39):

… the changes in the immigration rules, unless they specify to the contrary, take effect whenever they say they take effect with regard to all … applications, those pending no less than those yet to be made.

8. HC 194 (made on 13 June 2012) contained express transitional provisions, and further transitional provisions were introduced by HC 565 (made on 5 September 2012, with effect from 6 September 2012). The effect of those provisions, on their correct interpretation, was identified in two later judgments of the Court of Appeal:

    a. The transitional provisions contained within HC 194, correctly interpreted, had this consequence. An application made prior to 9 July 2012 was to be decided in accordance with the old paragraph 276B. That was decided by a judgment of the Court of Appeal in Edgehill [2014] EWCA Civ 402, handed down on 2 April 2014.

b. However, the provisions contained within HC 565, correctly interpreted, had this consequence. The 'window of time' within which an application made prior to 9 July 2012 was to be decided in accordance with the old paragraph 276B (as explained in Edgehill) was 9 July 2012 to 6 September 2012. From 7 September 2012, the new paragraph 276ADE and 276BE applied to a decision on any application, including one made prior to 9 July 2012. That was decided by judgment of the Court of Appeal in Singh [2015] EWCA Civ 74, handed down on 12 February 2015.

Until Singh was decided on 12 February 2015 a prevalent view had been, after Edgehill, that old paragraph 276B continued to be applicable to a decision made after 6 September 2012, on an application made prior to 9 July 2012. Singh corrected that view as wrong in law, on the correct interpretation of HC 565.

What Happened In This Case: The Applicant

9. I turn to the Applicant and events concerning him. He entered the United Kingdom on 1 October 1997 and claimed asylum using his correct name ("Balhav Singh") and correct date of birth ("1 May 1975"). Asylum was refused on 2 February 1998 but he was given leave to remain until 15 April 1998. His UK entry date of 1 October 1997 means that 14 years (based on continuous qualifying residence and no relevant notice having been served) would have been 1 October 2011 for the purposes of the old paragraph 276B. It means that 20 years (based on continuous qualifying residence) would have been 1 October 2017 for the purposes of new paragraph 276ADE.

10. On 2 October 2008, the Applicant was apprehended working illegally and was interviewed by immigration officials. At this stage he gave (what he later came to acknowledge had been) a false name ("Ravinder Singh") and a false date of birth ("5 March 1975"), and he now told immigration officials that he had entered the United Kingdom in 2006. It is common ground that he was served on 2 October 2008 with a Form IS96 (notification of temporary admission) which told him that he must 'report on 7 October 2008 and thereafter as advised'. It is common ground that he reported on 7 October 2008, but that he subsequently absconded. The Secretary of State has maintained, and the Applicant has denied, that alongside Form IS96 the Applicant was also served with Form IS151A on 2 October 2008. An IS151A had two parts: Part 1 (Notice to a Person Liable to Removal) and Part 2 (Notice of Immigration Decision).

11. On 12 January 2011 a firm of solicitors (N Sharma & Co) wrote a letter, insisting on behalf of the Applicant that his correct name was "Ravinder Singh" and his "correct date of birth" 5 March 1975. The letter described him as having arrived in the UK in October 1997 and claimed that the details of name ("Balhav Singh") and date of birth ("1 May 1975") given by him when he claimed asylum in October 1997 had been incorrect because he was "very scared". The letter insisted that the Applicant had given his "correct name and date of birth' to the immigration officer in October 2008. The 12 January 2011 letter asked the Secretary of State to confirm that the Applicant's case would fall into the category of "legacy" asylum cases (a programme later described by the Court of Appeal in SH (Iran) [2014] EWCA Civ

1469 at paragraphs 50-55). The letter referred to the Applicant as having been resident in the UK since 1997 and requested that he should be given ILR.

12. By a letter dated 13 February 2012 the Secretary of State explained that the Case Resolution Directorate had been dealing with "unresolved asylum applications, such as yours" so as to deal with "leave to remain in accordance with the existing law and policy" and that having "fully reviewed" the case "the outcome" was that the Applicant had "no basis of stay in the UK".

13. On 11 May 2012 new solicitors (Haris Ali & Co) wrote on the Applicant's behalf submitting that: "Given our client's length of stay in the UK, he is now entitled to be granted indefinite leave to remain under the 14 year policy". After the making of HC 194 on 13 June 2012 the Applicant's solicitors commenced judicial review proceedings in the High Court claiming unlawful delay in decision-making by the Secretary of State ("the 2012 Judicial Review"). On 10 October 2012 HHJ Langan QC refused permission for judicial review, endorsing the Secretary of State's summary grounds of defence as accurately analysing the case, and certified the claim as totally without merit. Those summary grounds of resistance had taken the point against the Applicant that he had been served with Form IS151A on 2 October 2008 excluding him from 14 year residence eligibility under the old paragraph 276B. On 15 January 2014 HHJ Vosper QC refused permission for judicial review in a second set of judicial review proceedings, where unlawful delay was also claimed. Like HHJ Langan QC, HHJ Vosper QC certified the claim as totally without merit.

14. On 14 February 2014 the Applicant's solicitors (Haris Ali & Co) made further representations in support of ILR. On 15 April 2014 the Secretary of State refused ILR, again taking the point against the Applicant that he had been served with Form IS151A on 2 October 2008, which excluded him from 14 year residence eligibility under paragraph 276B. By now, the Court of Appeal had handed down its judgment in Edgehill on 2 April 2014. The Applicant launched an appeal on 7 May 2014 ("the 2014 Appeal") against the refusal dated 15 April 2014. After an oral hearing on 24 September 2014, FTTJ Blake allowed the 2014 Appeal as follows: "Appeal allowed to the limited extent that Secretary of State's decision in respect of article 8 was not in accordance with the authority of Edgehill. Further [since] there is to be a fresh decision, the Secretary of State should obtain and serve evidence of the alleged service of the IS151A in respect of the appellant's application under the long residence rules".

15. On 6 January 2015 the Secretary of State served a new decision refusing ILR. That refusal was maintained on 30 April 2015, relying on the fact of service on 2 October 2008 of the Form IS151A as serving to exclude the Applicant for the purposes of the old paragraph 276B. By now, the Court of Appeal had handed down its judgment in Singh on 12 February 2015. A third set of judicial review proceedings was then issued on 28 May 2015 ("the 2015 Judicial Review"), this time in the Upper Tribunal. An acknowledgement of service with summary grounds of resistance and supporting documents was filed by the Secretary of State, some time in or after June 2015. On 7 March 2016 UTJ Jacobs refused permission for judicial review and certified the claim as totally without merit. In his reasons UTJ Jacobs recorded that the Secretary of State had concluded that the Applicant had been issued with Form

IS151A, describing this as "a conclusion reached by a rational process of reasoning". UTJ Jacobs also referred to "the limited temporal effect of the Edgehill decision following the decision in Singh". Permission to appeal to the Court of Appeal was pursued on the Applicant's behalf but refused by Sir Kenneth Parker, sitting as a Judge of the Court of Appeal, on 18 December 2017.

16. On 28 April 2018 the Applicant applied again for ILR. By decision 7 March 2019 the Secretary of State refused that application and issued an enforcement notice. The Applicant's current solicitors (ABK Solicitors) then lodged an appeal in the context of which they filed an expert report dated 17 June 2019 of Ms Briggs. The Secretary of State gave notice of the wish to withdraw the decision of 7 March 2019, a decision to which an entry on 6 August 2019 in the GCID (the name given to a 'case record sheet') refers. On reconsideration, and by a decision letter dated 16 August 2019 the Secretary of State granted the 30 month limited leave to remain based on paragraph 276ADE and paragraph 276BE, but refused ILR. As I said at the outset, these judicial review proceedings impugn as unreasonable and so unlawful that decision dated 16 August 2019 not to grant ILR outside the rules.

The Impugned 2019 Decision: Application of the Rules

17. Before embarking on a consideration of the six issues [1] to [6], it is right to recognise that the impugned decision of 16 August 2019 is an unimpeachable application of the current immigration rules to the Applicant's case, in line with the principle in Odelola. The current rules, applicable since 9 July 2012 (and applicable to any decision made after 6 September 2012, even on an application made before 9 July 2012), allow the Applicant to obtain a maximum 30-month limited leave to remain based on the 20 years' continuous residence in the United Kingdom, the milestone which he passed on 1 October 2017. That is what the Secretary of State has granted.

18. Mr Malik submitted that it is "implicit" in the decision of 16 August 2019 that an "operative reason" for that decision included the Secretary of State's continued reliance on the position which she has previously maintained, namely that Form IS151A had been served on the Applicant on 2 October 2008. I cannot accept that submission. The decision of 16 August 2019 is squarely based on the application of the current and applicable immigration rules. The question of the previous exclusion based on service of a relevant notice on 2 October 2008 plays no part in it. The GCID notes of 6 August 2019, on which Mr Malik relied, far from supporting his contention, record that the serving of a relevant notice "no longer 'stops the clock'". That reflects the fact that past service of a relevant notice is no longer an exclusion under the current rules. It is true that in defending this judicial review challenge to the impugned decision, the Secretary of State maintains the position that the Form IS151A was served on 2 October 2008. But that does not mean that this is an inferred operative reason for the impugned decision. It is not. The Secretary of State has discharged her Odelola duty and has decided the application of 28 April 2018 for leave to remain on the basis of the applicable immigration rules.

19. Having said that, discharge of the Odelola duty, in faithfully applying the relevant immigration rules, is not the end of the case. It is common ground that the Secretary

of State had power, under section 3 of the 1971 Act, to grant ILR and to do so "outside the immigration rules". I encapsulated the Applicant's case at the start of this judgment. As Mr Malik put it in his skeleton argument:

In making the instant decision to refuse ILR on 16 August 2019, the [Secretary of State] ought to have taken [the] 'historic injustice' into account. The omission to do so was Wednesbury unreasonable. Had the [Secretary of State] taken the 'historic injustice' into account, the only just and reasonable (in the Wednesbury sense) decision available to the [Secretary of State] would have been an award of ILR.

The question is whether that analysis is correct in law.

Issues [3]-[6]: The Applicant's Analysis (Assuming the Applicant's Premise)

20. I am going to begin my analysis of this case by testing the position, on the assumption that Mr Malik is right as to the Applicant's Premise, to see whether the Applicant's Analysis – on that premise – is sound in law. In considering issues [3] to [6], I am therefore going to assume in the Applicant's favour that he is right about issues [1] and [2]. I will assume that at all material times (including now) it has been unreasonable for the Secretary of State to maintain that the Applicant was served with Form IS151A on 2 October 2008, and that it is open to the Applicant so to submit in these proceedings.

The Decision of 13 February 2012

21. I will start with issue [3], and the consequence under issues [5] and [6] which is said by the Applicant to flow from issue [3]. Mr Malik says the refusal of 13 February 2012 to grant ILR stands as an 'historic injustice'. He so submits for the following reasons. The solicitors' letter of 12 January 2011 had asked, not only for inclusion in the 'legacy' arrangements for asylum cases, but specifically also for ILR based on continuous residence, referring to entry into the UK in October 1997. It is true that the 14-year mark, for the then applicable paragraph 276B, had not passed when the solicitors' letter of 12 January 2011 was written. But it had passed on 1 October 2011, prior to the Secretary of State's letter of 13 February 2012. That letter, moreover, was written four months before the rule change in HC 194. The 13 February 2012 letter itself concluded, by reference to "leave to remain in accordance with the existing law and policy", that the Applicant had "no basis of stay in the UK". That was wrong and 'unjust'. Once it is recognised that it was (and is) unreasonable for the Secretary of State to assert that Form IS151A was served on the Applicant on 2 October 2008, it follows that the Applicant should and would have been granted ILR on 13 February 2012, under the then applicable old paragraph 276B. The fact that ILR was not granted stands as an 'historic injustice', from which a present unreasonableness or abuse of power flows.

22. I cannot accept these submissions. In my judgment, it is impossible to characterise the failure or refusal to grant ILR on 13 February 2012 as an 'historic injustice' (issue [3]), still less one capable of giving rise to a present unreasonableness or abuse of power (issue [5]) and thus a declaration (issue [6]). I reach that conclusion for the following reasons.

a. The solicitors' letter of 12 January 2011 did not in my judgment constitute an application for ILR, nor a contingent application for ILR once the 14 years in paragraph 276B had elapsed. Moreover, the focus and import of the Secretary of State's letter of 13 February 2012 was that the Secretary of State was concluding the Applicant's unresolved asylum matter under the legacy scheme. Mr Malik says that the Secretary of State was also "refusing ILR", and that it is "implicit" that the Secretary of State considered the question of service of the Form IS151A on 2 October 2008. I do not accept that. Nothing in the documents in the case, in my judgment, show this to have been the case.

b. But even if the letter of 12 January 2011 were treated as an application for ILR, and/or even if the letter of 13 February 2012 were treated as a consideration of paragraph 276B and ILR, there is no basis for characterising the failure to grant ILR as 'unjust'. The January 2011 letter – written on his behalf by his then solicitors – was maintaining what is now accepted to have been a false name and address. Moreover, although it was being asserted that the Applicant had been present since 1997, the fact is that he had told immigration officials at interview in October 2008 that he had entered the UK in 2006, in the same interview in which it was being said in January 2011 that he had been truthful with immigration officials. It is quite impossible in these circumstances to characterise a refusal of ILR, on the application of the then-applicable paragraph 276B, as unreasonable or unlawful. It cannot possibly found a claim of 'historic injustice', to support a contention of present unreasonableness or abuse of power.

I therefore find against the Applicant on issue [3], and issues [5] and [6] so far as they arise out of issue [3].

The Decisions of 15 April 2014 and/or 6 January 2015

23. I turn to issue [4] , and the consequence under issues [5] and [6] which is said by the Applicant to flow from issue [4]. Mr Malik submits, in essence as I see it, as follows. But for the Secretary of State's reliance on the 2 October 2008 service of the Form IS151A as triggering the exclusion under the old paragraph 276B, ILR would in fact have been granted on 15 April 2014 and again on 6 January 2015. Once the Applicant's Premise is accepted, it follows therefore that there was an 'historic injustice'. Edgehill had been decided by the Court of Appeal on 2 April 2014. Singh was not decided by the Court of Appeal until 12 February 2015. In practice – and in fact – the position at 15 April 2014 and 6 January 2015 was that Edgehill was understood to govern. That was FTTJ Blake's understanding in giving his decision in the 2014 Appeal. Although Singh subsequently corrected a misappreciation as to the true meaning of the immigration rules, a grant of ILR based on the understanding that Edgehill governed the position in April 2014 and January 2015 would have been lawful, albeit as a 'generous' interpretation of the immigration rules, and in any event within the vires of section 3 of the 1971 Act. That can be tested by considering the cases of those who were granted ILR at that time, based on that approach. The Court of Appeal in Singh (at paragraph 56(2) and (3)) said that the Secretary of State was "entitled" to take into account the new immigration rules when dealing with a pre-9 July 2012 application but doing so after 6

September 2012. The 'historic injustice' needs to be approached on the basis of what would in fact have happened.

24. I cannot accept these submissions. In my judgment, it is impossible to characterise the decisions not to grant ILR on 15 April 2014 and/or 6 January 2015 as an 'historic injustice' (issue [4]), still less one capable of giving rise to a present unreasonableness or abuse of power (issue [5]) and thus a declaration (issue [6]). I reach that conclusion for the following reasons.

a. The fatal problem with this analysis is this. It asks the Tribunal to look back on the 'justice' of a decision from 2014 and 2015, which was arrived at in the application of the immigration rules. It asks the Tribunal to do so, after the event, by both: (a) correcting what the Applicant says was a factual misapprehension; but (b) perpetuating what the Applicant has to accept was a legal misapprehension. The position in law is this. If the Secretary of State had got the facts right (assuming the Applicant's Premise) and had got the law right (understanding the immigration rules correctly: as explained in Singh), ILR would have been refused on 15 April 2014 and again on 6 January 2015. In my judgment, decisions in the application of the immigration rules cannot be characterised after the event as an 'historic injustice' when it is clear, at the time of the characterisation, that the correct decision in law in the application of the immigration rules would have been the same adverse decision as was made. When the Court of Appeal on 12 February 2015 gave judgment in Singh they were authoritatively explaining the correct legal position under the rules for decisions made after the window 9 July 2012 to 6 September 2012. So far as concerns issue [4], that is this case.

b. As I have explained, by 15 April 2014 and 6 January 2015, HC 194 and HC 565 had introduced provisions which – in combination – served to render legally irrelevant the service of Form IS151A on 2 October 2008, and which meant the Applicant could do no more under the rules than secure 30 months limited leave to remain after he crossed the 20-year line on 1 October 2017. Any factual error as to whether Form IS151A had been served on 2 October 2008 could not be material in the lawful application of the immigration rules on 15 April 2014 and 6 January 2015. In my judgment, it is impossible to build an 'historic injustice', leading to subsequent abuse of power and/or unreasonableness argument, by reconstructing decisions to grant an entitlement which did not arise under the relevant rules at the relevant time.

c.It is revealing that Mr Malik has to resort to his suggested characterisation of the Secretary of State adopting a 'generous interpretation' of the rules. The Applicant's legal entitlement in 2014 and 2015 was to a correct interpretation – and reasonable application – of the applicable immigration rules. He asks for a characterisation which reconstitutes reasonable factual application, but avoids correct interpretation. Mr Malik has no foundation for the argument that the Secretary of State was – or is now to be characterised as having been – adopting a 'generous interpretation', with or without the resort to section 3 of the 1971 Act. The decisions were, straightforwardly, decisions under the immigration rules. When the Court of Appeal said that the Secretary of State

was "entitled" to apply the new rules, that was a conclusion based on giving the rules their correct interpretation. It was a description of the Secretary of State discharging her decision-making function in accordance with the Odelola principle. Nothing in the documents in 2014 or 2015 committed the Secretary of State, or evinced any intention, to do other than apply the relevant immigration rules. It is also revealing that, in his determination in the 2014 Appeal, FTTJ Blake had concluded that the decision of 15 April 2014 was "not in accordance with the law on the basis of the authority of Edgehill". What was being required by FTTJ Blake was a decision which was "in accordance with the law", and which correctly understood the position under the rules and by reference to Edgehill. The Court of Appeal in Singh then articulated what "in accordance with the law" post-6 September 2012 meant. It meant the application of the new paragraph 276ADE and paragraph 276BE. Under those provisions the Applicant could not on 6 January 2015 obtain ILR, nor could he do so on 15 April 2014, even if no reliance was placed on service of any notice on 2 October 2008.

d. In considering the logic and implications of the argument, it is helpful to consider the judgment of the Court of Appeal in Rashid [2005] EWCA Civ 744. That was an asylum case where the claimant was able to demonstrate in judicial review proceedings that: (a) adverse historic decisions had been taken which could now be shown to have been vitiated; (b) under the applicable decision-making criteria at the time of those adverse decisions the Secretary of State would have granted the claimant asylum status; (c) although the claimant would not now be granted such a status, on the basis of the currently applicable criteria, the Secretary of State does have a broad power under section 3 of the 1971 Act to grant ILR. That combination of circumstances led the Court of Appeal to uphold the claim and order the Secretary of State to grant ILR, based on 'historic injustice'. For the reasons which I have explained, the analysis in the present case is like Rashid, except that constituent element (b) is missing.

e. Even if that problem were put to one side, there would then be another. In TN (Afghanistan) [2015] UKSC 40 Lord Toulson (for the Supreme Court) explained at paragraph 72 that Rashid "should no longer be followed", on the basis that:

... it is not proper for a court to require the [Secretary of State] to grant unconditional leave to an appellant who would not be entitled to such relief under current policy (or have a current right to remain in the UK on other grounds, such as article 8), as a form of relief for an earlier error or breach of obligation.

Mr Malik submitted that that principle is or should be treated as confined to the 'asylum' or 'protection' context, being concerned with situations where protection is no longer 'needed'. He sought to distinguish Article 8 cases, notwithstanding Lord Toulson's reference to rights to remain on grounds "such as article 8". Mr Malik further sought to distinguish the present case as being one in which the Applicant had at the relevant time in the past "crossed the line" and become eligible, at a time when an adverse decision was made, thus "crystallising" the position. I cannot accept those submissions, even leaving aside the missing constituent element from Rashid. I can think of no principled basis on which protection or asylum claim should be treated differently, and more

unfavourably, in the application of the principled approach identified by Lord Toulson. The rules in play in this case are, moreover, closely linked to Article 8. What Lord Toulson was saying in TN (Afghanistan) was this. It is not sufficient to constitute an unlawfulness, which a court or tribunal should after the event require the Secretary of State to 'remedy' through the grant now of discretionary leave to remain, that a decision was reached in the past which involved a vitiating error or breach of duty in the application of criteria which – had they been correctly applied at that time – would have been favourable, but which was in fact adverse, and where the individual cannot now meet the current, relevant criteria. That was the approach that Rashid took, and which TN Afghanistan disapproved. Be that as it may, I repeat: that is not this case, because of the missing constituent element which I have identified.

> f. Under the applicable rules at the relevant time and even on the Applicant's Premise of non-service of a relevant notice (Form IS151A) in October 2008, the Applicant would have failed to meet the applicable eligibility requirements under the rules. 'Historic injustice' cannot, in my judgment, be premised on reconstructing a 'generous' discretionary decision in the historical past, departing from the correct meaning of the applicable rules, in substitution for an historic decision which was and intended to be an application of the rules. Nor, in my judgment, can it be based on reconstructing a decision, correcting what is now said to have been a factual misappreciation, but perpetuating what is now known to have been a legal misappreciation.

It follows that there was no 'historic injustice', to support a contention of present unreasonableness or abuse of power. I find against the Applicant on issue [4] and issues [5] and [6] so far as they arise out of issue [4].

Conclusion on Issues [3] to [6]

25. It follows, for these reasons, that I cannot accept the Applicant's Analysis (issues [3] to [6]), on the assumption that he is right about the Applicant's Premise. That means the claim must fail. But I want to add two footnotes on this part of the case.

    a. First, I have addressed unreasonableness and abuse of power in the context of the 'historic injustices' (issues [3] and [4]) which were the basis for the claimed unreasonableness or abuse of power (issue [5]). Issue [5] does not get off the ground in this case: there is no 'historic injustice'. I have discussed TN (Afghanistan). I add this. Mr Fraser accepted, by reference to Talpada [2018] EWCA Civ 841 at paragraphs 65-66 that in an "extreme case" there can be "unfairness amounting to an abuse of power". Mr Malik reminded me of the observations in the Supreme Court in Gallaher [2018] UKSC 25. Those observations commend the retention in public law of a 'reasonableness' doctrine to govern species of 'substantive unfairness' (leaving aside 'substantive legitimate expectation'). They emphasise the public authority's built-in latitude and the high threshold of 'substantive unfairness' which avoids the judicial review Court or Tribunal intervening simply by concluding that the decision 'was unfair'. They also express disfavour of the language of 'conspicuous unfairness', and perhaps also 'abuse of power'. These are deep waters and I do not need, in the circumstances, to navigate

them further. Mr Malik's ultimate submission was that present unreasonableness or abuse of power can be found in this case, by reason of the impact and legal relevance of the 'historic injustice or injustices' to which he points. In my judgment, there is no 'historic injustice' which could render the 16 August 2019 refusal of ILR unreasonable or an abuse of power, for the reasons which I have given.

b. Secondly, in the light of my conclusions on issues [3] to [5], issue [6] has to be resolved against the Applicant. However, in my judgment issue [6] adds nothing to issue [5]. Had I been satisfied that the Secretary of State had acted unlawfully and/or unreasonably in refusing to grant ILR outside the rules, I would have seen no impediment to the granting of a declaration to that effect and would have granted one.

Issues [1] and [2]: The Applicant's Premise

26. In the light of my conclusions on the Applicant's Analysis (issues [3] to [6]), this application for judicial review cannot succeed. But I will now turn to address issues [1] and [2]. Until now, I have been assuming the answer to these two issues in the Applicant's favour. I will now address them, independently of my analysis on the other issues.

Unreasonable to Maintain that IS151A was Served on 2.10.08?

27. I turn to issue [1]. As I have explained, Mr Malik submits that this Tribunal should conclude that it is unreasonable for the Secretary of State to maintain that Form IS151A was served on the Applicant on 2 October 2008. He relies on an expert report dated 17 June 2019 of Ms Briggs who conducted a forensic document examination of two versions of the Form IS151A. The Briggs Report, as I have explained, was first filed in the appeal against the 7 March 2019 decision. It was then relied on in these judicial review proceedings. The two versions of Form IS151A examined by Ms Briggs were these.

a. The 2012-Disclosed Version. This version of Form IS151A was disclosed by the Secretary of State in the 2012 Judicial Review proceedings. It bears no manuscript contents. It bears typed contents within the body of the text: (a) on both pages, stating the Applicant's name and case reference number; (b) on the second page, stating that the Applicant was "served with form IS151A on 02 October 2008". It also bears two typewritten dates "06 October 2008" at the foot of each of the two pages.

b. The 2015-Disclosed Version. This version of Form IS151A was disclosed by the Secretary of State in the 2015 Judicial Review proceedings. It bears the same typewritten content in the body of the text, and at the foot of each page, as the 2012-Disclosed Version. But is has a 'manuscript overlay' of contents written in handwriting. That manuscript overlay comprises: (a) the manuscript date "2/10/08" (given as the "date of service"); (b) one of two alternative boxes (which appear as alternative bases for removal) having been

ticked; and (c) two manuscript 'squiggles' written within a signature box on both pages.

28. So far as is material and was relied on before me, the Briggs report concluded as follows. First, that the two documents "are not copies taken at the same time of the same complete original document, due to the presence of different copying marks, pagination and differences between page 2 in each item". Secondly, that there are differences which "cannot be as a result of changes caused by the reproduction process" so that the 'manuscript overlay' on page 2 of the 2015-Disclosed Version "is therefore not a subsequent, signed copy of" page 2 of the 2012-Disclosed Version.

29. As I have said above, Mr Malik's skeleton argument characterises the Secretary of State as having relied on "demonstrably false documents". In his oral submissions Mr Malik argued that the two versions of Form IS151A contain "obvious discrepancies to the untrained eye". He went on to say that they contain further discrepancies, observed only on closed examination by the expert trained eye of Ms Briggs. He submitted: that the Secretary of State has conspicuously failed to adduce any proper evidence to explain what actually happened; that the IS151A documents and other documents disclosed in the 2015 Judicial Review provide no demonstrably reliable and no fully contemporaneous document recording service on 2 October 2008; that no document before the Tribunal proves such service; that Counsel for the Secretary of State has been left to "speculate" as to why the typed date of 6 October 2008 appears on the 2012- and 2015-Disclosed Versions of the form; that it is striking that the Secretary of State through Counsel is also constrained to submit that the typed date of 6 October 2008 is "an error" on both versions of the form. Mr Malik invited the conclusion that the documentary evidence is "unreliable at best" as to whether service took place on 2 October 2008 and, at worst, is "false, in the sense of the document 'telling a lie about itself'".

30. In the 2015-Disclosed Version of IS151A, on other documents disclosed in the 2015 Judicial Review, names and signatures of immigration officials had been redacted. Although I was told that the Applicant's 2015 legal representatives, and present legal representatives, had never written asking for the redactions to be lifted, I was keen that they should be. At my instigation, Mr Malik received during the hearing before me, versions of the documents disclosed in the 2015 Judicial Review proceedings in which the previously redacted names and signatures were unredacted. I also suggested that we take a break in the hearing, to give Mr Malik an opportunity to consider those unredacted documents with his instructing solicitor. Having done so, Mr Malik submitted as follows. He said that there has been a relevant and concerning course of conduct in 2012, then 2015 and then in these proceedings which constitutes a failure to approach the disclosure of documentation with appropriate candour. He submitted that the name contained on the face of the documentation as the relevant immigration officer (C Wilde/ Caroline Wilde), with an accompanying signature, did not correspond with the 'squiggles' appearing on the manuscript overlay in the 2015-Disclosed Version of Form IS151A.

31. In the light of these materials, and in the light of the submissions made about them, I have asked myself the following question: whether the Secretary of State is, and would be, acting reasonably in maintaining that Form IS151A was served on the Applicant on 2 October 2008. I have asked that question afresh, on all the materials before me, forming my own view. I have asked the question: (i) by reference to the materials that are before me in these proceedings, including the 2012- and 2015-Disclosed Versions of the Form IS151A, and including the Briggs report; but also (ii) by reference to any limitations and gaps in what the Secretary of State has said or produced or explained. What follows is my analysis of that question.

    a. There is, and always has been, a question-mark about the typed date of "06 October 2008" appearing at the bottom of both pages of the Form IS151A – both in the 2012-Disclosed Version and again in the 2015-Disclosed Version – when this is put alongside the typewritten text in the main body of both versions of the document on page 2 which states: "To: Ravinder Singh. You were served with form IS151A on 02 October 2008 informing you of your immigration status and your liability to detention and removal". However, in my judgment, what is stated in the main body text about "served with form IS151A on 02 October 2008" is not necessarily contradicted by the appearance at the foot of each page of the typewritten date '6 October 2008'. That date, appearing on the foot of each page, could have appeared 4 days after service had taken place. That would be consistent – for example – with a version of the document having been generated – retrieved from the system, and perhaps printed up – on 6 October 2008. The Briggs Report does not address this, but this is consistent with what is said in the Briggs Report. Moreover, 6 October 2008 was a date of relevant activity on the file: according to Form IS126(E), 6 October 2008 was the date on which a senior immigration officer (CIO) (now unredacted: "D Plant") gave an approval to the 'authority to remove' decision made by an immigration officer (IO), on what IS126(E) says was "02/10/2008". That is not to speculate. It is, rather, to explain why there is not necessarily a contradiction between the printed date on the foot of the pages and the date given for service in the main body text. The position of the Secretary of State, adopted in summary grounds of resistance in the 2015 Judicial Review, was this:

The Respondent acknowledges the printed date on Form IS151 is in fact 6 October 2008. The discrepancy between these dates is likely to arise from the difference between the actual date of service and the date when copy forms were generated from the template held in the case information database.

Whether or not those summary grounds were accompanied by a statement of truth, that was the explanation put forward in 2015. Ms Briggs was not asked about this. It is not implausible that a document retrieved from a computer system – and perhaps printed up – may bear the retrieval date.

    b. So far as concerns the points made in the Briggs report, as I have explained, they come to this. First, that the 2012-disclosed and 2015-Disclosed Versions of the Form IS151A are not copies taken at the same time of the same complete original document. Secondly, that the 2015-Disclosed Version of page 2 of the Form IS151A with its manuscript overlay is not a subsequent signed copy of the second page of the 2012-Disclosed Version of the form.

However, in my judgment, the fact that the two versions were not generated at the same time, and the fact that the manuscript overlay 2015-Disclosed Version was not a subsequent signed copy of the 2012-Disclosed Version, are not points which combine to mean that the 2015-Disclosed Version is unreliable, let alone false.

c. There are undoubtedly concerns, which arise straightforwardly from the 2015-Disclosed Version of Form IS151A. How could a document which bears a footer date of "06 October 2008" – even if that is a 'retrieval' or 'print-up' date – then bear a 'manuscript overlay' of handwritten content written 4 days before 6 October 2008? If the 'manuscript overlay' was written on or after 6 October 2008 – for example by CIO D Plant (who other documents state on 6 October 2008 approved 'authority to remove' the Applicant) – then the manuscript overlay was not contemporaneously recording service on 2 October 2008. That would mean the 2015-Disclosed Version cannot be, as Mr Fraser's skeleton argument for the hearing before me characterised it: "the version actually served on the Applicant". It was striking that he was constrained to characterise the footer "06 October 2008" as "an error". Then there is this. Form IS96, which it is accepted was served on the Applicant on 2 October 2008, bears at the foot of the page the typewritten date "02 October 2008". That means one of the forms said to have been served on 2 October 2008 has been preserved and produced with the footer date corresponding to that date; but the other has not. These are straightforward concerns. They arise out of the documents disclosed in 2015, and what appears on the face of those documents. They are not expert points. The Briggs report does not touch on them.

d. I am not ruling on a disputed question of fact, still less deciding by what process to be in a position to do so. I am being asked to consider the reasonableness of the Secretary of State's position in maintaining that the Form IS151A was served on 2 October 2008. I am not persuaded by Mr Malik that there has been a failure to discharge the duty of candour. There has been no suggestion that this is a judicial review case requiring 'further information' to be answered or supplied; still less, live evidence or cross-examination. The evidence is what it is; including its limitations.

e. Alongside the concerns which I have expressed about the 'manuscript overlay, and its timing, there are then these points:

(1) The 'main body' typewritten text in both 2012- and 2015-Disclosed Versions refers to service on the Applicant on 02 October 2008.

(2) It is common ground that the Form IS96 was served on 2 October 2008.

(3) There is a case history form (ISP300H). In my judgment, that is a significant document. It records the date and time at which the "forms" were "served": as "02 October 2008 at 12.50". It gives the name of the immigration officer (Caroline Wilde) and also the name of the officer authorising "papers" (Alex Legg). It records in the typewritten text

"Alex Legg authorised service of papers and he was given temporary release and issued with IS96 to report… on 7 October. C Wilde". There are then manuscript entries which have been added to a print up of that form. They include an entry on 6 October 2008 at 08.15 by Caroline Wilde referring to the processing which was to take place on 7 October 2008. Mr Malik accepts, rightly in my judgment, that the typewritten contents of that document must have been generated prior to 08.15 on 6 October 2008. This document tells us that it was Alex Legg and not "D Plant" who authorised the service of the "papers" on 2 October 2008. The date is given, as is a specific time, for service of IS151A.

(4) There is the Form IS126(E) document. This gives details of the interview with the Applicant on 2 October 2008 at 10.46 at the foot of the same page that document records "forms served: IS151" (referring to parts 1 and 2) and then records who served the forms (Caroline Wilde) who authorised service (Alex Legg) and the date of service of those forms 02/10/2008 at 12.250". That is the document which goes on to record in a subsequent section that the authority to remove the Applicant signed by Caroline Wilde on 02/10/08 was approved by the signature of D Plant on 6/10/08.

(5) Finally, there is the form ICD 2599 (Immigration Factual Summary) records 02/10/08 "Encountered working illegally and served with IS151A and 96".

f. In my judgment, and notwithstanding the concerns that straightforwardly arise on the face of the 2015-Disclosed Version of Form IS151A, it is nevertheless reasonable for the Secretary of State to have maintained and still maintain that Form IS151A was served on 2 October 2008. Mr Malik is quite right to characterise a document like the Immigration Factual Summary as a 'derivative' document whose contents may have been recording and been parasitic on what had elsewhere been said to have taken place. He can make all the same compelling points that could have been made in 2015 as to whether the Form IS151A itself can be said to evidence service on 2 October 2008, so far as the 'manuscript overlay' to that document is concerned. He can make the point that if the box was ticked after the event that calls into serious question what happened on the Form on 2 October 2008 if it was served, why it was not retained and why it has not been produced. However, taking the position at its highest in the Applicant's favour, the fact remains that prior to 08.15 on 6 October 2008 it had been recorded that Caroline Wilde had served the forms on 2 October 2008. That action of serving papers is recorded as having been approved by Alex Legg on 2 October 2008; not by D Plant on 6 October 2008 after the event. A very specific time for service of the forms is given as 12.50 or 12.250. That followed after the relevant interview. That date and time is specifically recorded, together with the names of Caroline Wilde and Alex Legg, and specifically by reference to IS151A. The two forms are designed and intended to be served together. (Indeed, the correspondence before the Tribunal described IS151A as necessary for the service of IS91.) The thesis in favour of the Applicant would, I think, have to be this. Something

> important and elementary was overlooked, inaccurately recorded as having taken place, when the twin and equally important and elementary step was taken, by the very same personnel, and accurately recorded. I repeat: the prism through which this issue is being examined, as Mr Malik accepts, is the reasonableness of the Secretary of State's position in the light of the evidence. Notwithstanding the concerns that arise straightforwardly on the documents, based on all the materials before the Tribunal, my conclusion is that the Secretary of State's position in relation to service of the Form IS151A is a reasonable one.

It follows that I resolve issue [1] against the Applicant.

Issue Estoppel?

32. I turn finally to issue [2]. I put to one side what I have made of the submissions on issue [1]. The question is whether it is open to the Applicant to impugn that position in these proceedings.

33. Mr Malik accepted that the judgment of Lord Carnwath in DN (Rwanda) [2020] UKSC 7 at paragraphs 44 to 64 contains a relevant and recent analysis of finality, res judicata and issue estoppel in judicial review proceedings. He rightly points out that even in that concurring single judgment the discussion was obiter: see paragraph 44 and 65. However, he accepts that at paragraph 45 to 48 Lord Carnwath was discussing pre-existing relevant authority in the public law or "quasi-public" law field, namely the cases of Thrasyvoulou [1990] 2 AC 273, the citation in that case of Thoday v Thoday [1964] P 81, Watt v Ahsan [2007] UKHL 51 and the citation in that case of Arnold [1991] 2 AC 93. In my judgment, the commentary of Lord Carnwath in DN (Rwanda) persuasively gathers together relevant passages from relevant authorities, accompanied by observations which constitute a reliable guide for the purposes of the present case. Mr Malik identified no reasoned basis for departing from that analysis, and cited no authority supporting taking such a course. The two essential points for the purposes of the present case, in my judgment come to this. (1) There is a strong role of public policy which establishes that the issue of a determination relating to the legal right of a public authority to take action should be given finality. (2) A court or tribunal in subsequent proceedings in the public law arena may disapply that rule of public policy in the interests of justice, as where material relevant to the correct determination of a point involved in earlier proceedings has become available to a party and could not by reasonable diligence have been adduced in the earlier proceedings.

34. Applying that approach, it is, in my judgment, clear that it would be contrary to public policy and unjustified having regard to the interests of justice for the Applicant to be able to re-litigate the question of the reasonableness of the Secretary of State maintaining that the Form IS151A was served on 2 October 2008. My reasons are as follows.

    a. As I have explained, the key concerns that arise in relation to the IS151A document arise squarely from the 2015-Disclosed Version, and the other

documents disclosed in the 2015 Judicial Review. They do not arise from the 2012-Disclosed Version. They do not arise from the Briggs report.

b. Even had they arisen from the documents disclosed in the 2015 Judicial Review when put alongside the documents disclosed in the 2012 Judicial Review, or even if they had arisen from the Briggs Report comparative analysis of the 2012- and 2015-Disclosed Versions, that is not material which was unavailable in 2015 or could not by reasonable diligence have been adduced in the 2015 Judicial Review. Indeed, the same solicitors had acted for the Applicant in 2012 and in 2015.

c.The backcloth to the 2015 Judicial Review was that FTTJ Blake had allowed the 2014 Appeal on 24 September 2014 in which he described (paragraph 6 of the determination) the Form IS151A with its 6 October 2008 date which had been produced by the Secretary of State. That was a clear reference to the document produced in the 2012 Judicial Review proceedings. FTTJ Blake had referred to the Secretary of State, in the context of any fresh decision, obtaining and serving evidence of the alleged service of the IS151A. The Applicant's then solicitors had written a letter before claim on 21 January 2015. It referred to the IS151A bearing the date 6 October 2008 and gave as one of the reasons for challenging the Secretary of State's decision the failure to "provide evidence of service of the IS151A on our client in 2008". A further letter before claim dated 11 May 2015 had at its heart that the Secretary of State had not produced "cogent evidence that IS151A was actually served". So, at the heart of the claim for judicial review issued on 28 May 2015 was the question of evidenced service of IS151A. The first remedy claimed in the 2015 Judicial Review was: "mandatory order for the [Secretary of State] to produce and serve IS151A". The grounds for judicial review stated: "No evidence that IS151A was ever served or ever existed was produced to us". It was in that context that an acknowledgement of service and summary grounds of resistance disclosed the 2015-Disclosed Version and the other documents to which I have referred in my analysis. It is true that the redacted names remained at that stage and thereafter redacted, but I have been shown no request at any stage which challenged the redaction or invited disclosure of the named immigration officials.

d. The issue whether it was reasonable for the Secretary of State to maintain that the Form IS151A had been served on 2 October 2008 was thus right at the centre of the 2015 Judicial Review. That claim failed. On 7 March 2016 UTJ Jacobs refused permission for judicial review and certified the claim as totally without merit. In his reasons UTJ Jacobs stated:

... the Secretary of State has reasoned by inference from your behaviour and the practice of issue of IS151A and IS96 that on the balance of probabilities you were issued with the former. This is not, as your solicitors allege, a mere assertion. It is a conclusion reached by a rational process of reasoning.

Permission to appeal to the Court of Appeal was sought from the Upper Tribunal and from the Court of Appeal, unsuccessfully, on 31 May 2016 and 9 March 2017 respectively.

e. In my judgment, to reopen the reasonableness of the Secretary of State's position maintaining that Form IS151A was served on 2 October, by reference to the concerns which I have described arising out of the documents disclosed in those 2015 Judicial Review proceedings, would be a clear case of the Applicant seeking by reference to the documents available to the Applicant and points which could with appropriate diligence have been raised in those proceedings to reopen exactly the same point.

f. In my judgment, it is particularly unjust and inappropriate to allow such a course, when it is remembered that the present case is a case which alleges 'historic' injustice. The point that is made is that decisions made in the past were 'unjust' on the premise that the Form IS151A was not in fact served. As I have explained, the Secretary of State's presently impugned decision of 16 August 2019 involved application of the present rules. Service or non-service of the notice in 2008 does not feature in that analysis, as is explained in the GCID note of 6 August 2019. It is only by exercise of a reconstruction of past decisions that the thesis of 'historic injustice' arises. In those circumstances, in my judgment, it is particularly compelling that 'historic' opportunities arose, and were taken, to litigate the very same issue which is now sought to be reopened. Issue [1] is, in essence, a straight re-run – through a 'historic injustice' prism – of the very same central point as was at the heart of the 2015 Judicial Review, being run five years later. Neither the interests of justice nor public policy support allowing that course; they clearly point against it.

It follows that I find against the Applicant on issue [2].

Conclusion on the Applicant's Premise

35. For the reasons which I have given, I find against the Applicant on each of the necessary steps in the Applicant's Premise, either of which would be fatal to the claim succeeding.

Conclusion and Consequential Matters

36. For the reasons I have given, this application for judicial review fails, both as to the Applicant's Analysis, and in any event as to the Applicant's Premise. As always, having circulated this judgment in draft (on 11 January 2021), I am able to deal here at the end with any consequential matter raised by the parties and the terms of the Order.
    a. The first matter raised was this. Mr Fraser (15 January 2021) supplied me with a judgment of the Tribunal (decided on 20 November 2020) in Patel (historic injustice) [2020] UKUT 00351 (IAC). That case was not cited to me at the hearing (16 December 2020) nor drawn to my attention in the period between then and circulation of the draft judgment (11 January 2021). Mr Fraser submitted as follows, that: (a) Patel had no bearing on the substantive reasoning in the present judgment; and (b) the Applicant's claim in the present case would fall to be characterised as "historical" rather than "historic" injustice using the terminology in Patel. Mr Malik responded, agreeing with point (b) and not contesting point (a). In those circumstances I

am satisfied that it is not necessary or proportionate to invite submissions on Patel and how further reference to it might be woven into, and with what consequences for the reasoning expressed in, this judgment; nor to embark on that exercise for myself without the assistance of submissions from the parties. That leaves the issue of costs.

b. The other matter raised concerned costs. The Respondent (18 January 2021) asked me summarily to assess the costs, and to do so in the sum of £7,698.00. The Applicant (18 January 2021) resisted summary assessment but, beyond saying that the costs claimed were not agreed, did not make any points on what the correct assessment should be if the Tribunal decided to assess the costs summarily. I have decided, in the particular circumstances of the present case, not to direct further submissions; nor to assess the costs without them. In my judgment, a party who resists summary assessment on the papers should go on to assist the Tribunal by identifying disputed points of substance in relation to the quantum of the sums claimed (or a good reason for not doing so). Absent that, it may be that the Tribunal will proceed to assess the costs without submissions on quantum, because the party resisting summary assessment has had – but did not take – the opportunity open to it. However, in the present case the Order I make (excluding recitals) is: (1) the application for judicial review be dismissed; (2) the Applicant shall pay the Respondent's costs to be assessed if not agreed.