IN THE UPPER TRIBUNAL

R (on the application of Luma Sh Khairdin) v Secretary of State for the Home Department (NIA 2002: Part 5A) IJR [2014] UKUT 00566 (IAC)

Field House
London

Date of hearing:
13 October 2014

BEFORE

UPPER TRIBUNAL JUDGE PETER LANE

Between

LUMA SH KHAIRDIN

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms K. McCarthy, instructed by Duncan Lewis Solicitors, appeared on behalf of the Applicant.

Mr Z. Malik, instructed by the Treasury Solicitor, appeared on behalf of the Respondent.

(1) Section 117A of the Nationality, Immigration and Asylum Act 2002 requires the Upper Tribunal, in a judicial review involving Article 8(2) ECHR, to have regard to the considerations mentioned in section 117B and, where relevant, section 117C, when considering the question whether an interference with a person's right to respect for private and family life is justified. The nature of the proceedings is such as to require the Tribunal to determine the questions set out in section 117(1)(a) and (b).

(2) Where the Upper Tribunal is considering, pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007, whether there is an error of law in the decision of the First-tier Tribunal involving Article 8 proportionality, the task of the Upper Tribunal is confined (at that point) to deciding if the First-tier Tribunal's assessment of where to strike the balance was unlawful,

according to the error of law principles set out in R (Iran) [2005] EWCA Civ 982. An Article 8(2) decision of the Secretary of State which is susceptible only to judicial review has, by definition, not received such judicial scrutiny; and it is the task of the reviewing court or tribunal to provide it, albeit via a process that remains different from that of an appeal.

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JUDGMENT

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A. Introduction

1. This judicial review, conspicuously well-argued on both sides, concerns challenges brought by Mrs Khairdin, an Iraqi citizen born on 1 July 1942, against decisions of the respondent Secretary of State for the Home Department on 27 November 2012, 8 February 2013 and 13 June 2014, refusing the applicant leave to remain in the United Kingdom. The last of these decisions post-dates the grant of permission; but it was common ground between the parties that it formed part of the respondent's decision-making process and was relevant in deciding whether relief should be granted to the applicant.

2. Permission to bring judicial review proceedings was granted on 10 January 2014 by Upper Tribunal Judge Allen. Dealing with the decisions of 2012 and 2013, he considered it arguable that there was evidence "which needed addressing as to the degree of family life which it was said was being enjoyed by the applicant in the United Kingdom". The decision letters had arguably focused on what the position was when the applicant entered the United Kingdom, rather than considering to what extent matters had changed.

B. The facts

3. The applicant has two daughters and a son. The elder daughter, Dr Asmaa Ali, and her husband are general medical practitioners, living and working in the United Kingdom. They have three daughters, all born in the United Kingdom. The applicant was widowed in Iraq in 1981. Her younger daughter, Aseel Mohamad, was said previously to have provided support for the applicant. She and her husband and children were, however, due to emigrate to Canada.

4. Between 2005 and 2007, the applicant lived in Malaysia with her son and his family. In 2007 the son and family moved to Australia. On 18 March 2007 the applicant entered the United Kingdom as a visitor. In her visa application, she said that she was receiving financial support from Aseel Mohamad, who then was in Abu Dhabi.

5. The applicant's house in Iraq was said to have been taken over by militia in 2007. On 22 August 2007 the applicant's visit visa expired. Seventeen days later, the applicant applied for leave to remain, using application form FLR(O). On the applicant's behalf, it was said that she was living with Dr Asmaa Ali in a seven-bedroomed house and that Dr Ali had "built an annex of two bedrooms and a bathroom to accommodate her mother". The applicant was said to be suffering from diabetes, which required close monitoring. She had no strong ties left with Iraq. By contrast she had formed a close bond with her United Kingdom granddaughters. There was nothing to suggest that, if granted leave, the applicant would have recourse to public funds.

C. The decision-making

6. In the respondent's decision of 27 November 2012, it was stated, first, that the applicant did not meet the requirements of the Immigration Rules, which had come into force in July 2012. The application was also considered outside the Rules. In this regard the decision stated as follows:-

> "Your claim that you are dependent on your daughter Asmaa Ali who resides in the United Kingdom. The evidence in your Visa Application Form signed 21/02/2007 shows that you are financially dependent on your daughter in the United Arab Emirates. It also stated your intention was to return home in 3 to 6 months after you have visited your daughter and grandchildren and that you have a house in Baghdad. Therefore we do not consider your circumstances sufficiently warrant a grant outside the Rules.
>
> An application was made on your behalf on 27 January 2012. However, your leave to remain expired on 22 August 2007. You therefore did not have leave to remain at the time of your application.
>
> Your application for leave to remain in the United Kingdom has been refused and you no longer have any known basis of stay here. There is no right of appeal against this refusal."

7. In 2011 and 2012 the applicant made further submissions and a further application using form FLR(O) (on 27 January 2012). In January 2013 the judicial review proceedings were commenced. On 8 February 2013 the respondent issued a decision to refuse leave to remain.

8. Having noted that the applicant's daughter in the United Kingdom was "a mature adult living independently with a family of her own", the decision of 8 February continued as follows:-

> "We have also considered the additional circumstances you have raised in your application regarding your dependence upon your daughter in the United Kingdom. Our records show that when you entered the United Kingdom you were dependent upon another daughter in the United Arab Emirates, you were living with your son in Malaysia and that the time of your entry clearance application you own property in

Iraq. Your daughter in the United Kingdom can continue to support you financially from abroad. Therefore we do not consider that the grounds you have raised amount to exceptional circumstances as to support a grant of limited leave to remain Outside the Immigration Rules.

...

Your application has been considered exceptionally outside of the immigration rules, with reference to your representations concerning your health. It is claimed that you suffer from diabetes and have been received insulin injections for the past ten years. You were receiving this treatment in Iraq for five years prior to entering the United Kingdom. You were said to have hypertension and high cholesterol. Due to your family's history of heart disease you require regular monitoring. It is not considered that your medical condition reaches the high threshold necessary to engage Article 3 on medical grounds. The possibility that the standard of treatment available to you in Iraq may be inferior to that available in the United Kingdom is not a basis on which to grant leave to remain in the United Kingdom. Your daughter has paid for private consultations for you in the United Kingdom and could finance private treatment in Iraq, if necessary.

You will not be placed in a worse position than other Iraqi nationals. Your circumstances are not considered to be compassionate or compelling. Accordingly, the Secretary of State is not prepared to exercise her discretion in her favour.

With regard to your representations concerning your fear of return to Iraq, as a request for international protection your claim constitutes an asylum application under the terms of paragraph 327(b) of the Immigration Rules. This claim should therefore be made in person at an Asylum Screening Unit.

...

Your application for leave to remain in the United Kingdom has been refused and you no longer have any known basis of stay here. There is no right of appeal against this refusal."

9. Following the grant of permission, the respondent issued a second supplementary decision on 13 June 2014, to be read with the decision of 8 February 2013:-

"**Exceptional Circumstances**

Consideration has been given whether there are any exceptional circumstances to grant leave to remain outside the rules. However, there are no exceptional circumstances in your client's case which would warrant a grant of leave outside the rules. We have taken into consideration the statements submitted by your client's daughters, son, son in law and another family member. We have seen no evidence as proof that your client's home has been taken over by the Militia as claimed by her son after she came to the UK in 2007. In any event, it would be open to your client to contact national authorities in Iraq in relation to her house. It is particular noted that your client had lived in Iraq for 62 years.

Your client's son claimed he could not financially assist his mother if she returned to Iraq and that she was living with him in Malaysia prior to coming to the UK. It is noted that your client informed the entry clearance officer when she applied for her visit visa on 21 February 2007 that her address in Iraq was her permanent home address. The fact that your client's son is unable to financially assist your client is not a compelling reason to grant her leave to remain in the UK.

Your client's daughter, Aseel Mohammed has stated she is in the process of immigrating to Canada from UAE/Abu Dhabi and that she cannot financially support her mother. However, we have seen no evidence to substantiate this claim. Your client's daughter submitted no proof of where she is living or proof of her intentions of relocating to Canada.

Your client's daughter and her son in law whom she resides with in the UK have both confirmed they are willing to support your client financially whilst she is residing in the UK. This arrangement can continue in Iraq. It is also noted that your client's daughter and son in law have assisted your client financially for medical treatment and medical tests in the UK. This arrangement can also continue in Iraq. Your client's daughter and son in law assisted your client financially before coming to the UK, therefore this can continue in Iraq on your client's return.

We have taken into consideration the statement submitted by Mr Basma Larry who states your client will suffer psychologically and emotionally being alone in Iraq. Your client had spent at least 62 years in Iraq before coming to the UK. Your client cannot have severed all ties with Iraq in the short time she has been in the UK. Your client will have other family members in Iraq and friends whom she will have established relationships while residing in her home country for at least 62 years.

Your client has not provided any evidence that she will not be able to support herself whilst in Iraq. Your client informed the entry clearance officer that she was receiving her pension. Your client's pension will still be available and this will assist her financially whilst adapting back to her life in Iraq.

Therefore your client's application for leave to remain is refused.

The Secretary of State accepts that your client may have established a family life with her daughter and her family in the UK. The Secretary of State also accepts that your client's relationship with her grandchildren in the UK may have strengthened in the last few years. It may be the case that your client's grandchildren want her to stay with them in the UK. The Secretary of State has considered the best interests of your client's grandchildren as an integral part of her overall assessment of this case. Having regard to all the evidence, the Secretary of State is not satisfied that there is something more than normal emotional ties between your client and her family members in the UK. Family life aspect of Article 8 is therefore not engaged. In any event, even if family life aspect of Article 8 is engaged, your client has no entitlement to reside in the UK. Your client came to the UK on a visit visa and then overstayed. She had no permission to reside in the UK and she does not qualify for leave under the Immigration Rules. The Secretary of State has considered your client's circumstances along with some general considerations: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective

control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they live here unlawfully; and the need to discourage breaches of the law. The Secretary of State is not satisfied that refusal of leave to remain, taking full account of all considerations and evidence, prejudices the private and family life of your client and that of her family members in the UK in a manner sufficiently serious to amount to a breach Article 8.

Summary

In summary, the Secretary of State has reviewed the decision to refuse your client's application and is satisfied that it is correct and maintains the original refusal decision. The Secretary of State has carefully considered your client's Article 8 rights and is satisfied that her removal from the UK would not be in breach of Article 8 of the European Convention on Human Rights (ECHR). The Secretary of State does not consider your client's return to Iraq to be disproportionate to the permissible aim of maintaining an effective immigration control."

D. Amending the grounds: paragraph 317 of the immigration rules

10. Ms McCarthy applied for permission to amend the grounds of claim. She did so on the basis that the applicant contended there was a complete answer to the judicial review proceedings, in that (irrespective of the strength of the other grounds) the applicant had applied for leave to remain before 9 July 2012. Accordingly, having regard to the relevant transitional provisions in the Immigration Rules, her application fell to be decided by reference to the Rules as in force before 9 July 2012. The relevant Rule was paragraph 317. This provided as follows:

> "**317**. The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:
>
> (i) is related to a person present and settled in the United Kingdom in one of the following ways:
>
> (a) parent or grandparent who is divorced, widowed, single or separated aged 65 years or over; or
>
> (b) parent or grandparents travelling together of whom at least one is aged 65 or over; or
>
> (c) a parent or grandparent aged 65 or over who has entered into a second relationship of marriage or civil partnership but cannot look to the spouse, civil partner or children of that second relationship for financial support; and where the person settled in the United Kingdom is able and willing to maintain the parent or grandparent and any spouse or civil partner or child of the second relationship who would be admissible as a dependant;

(d) a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances...; or

(e) parents or grandparents travelling together who are both under the age of 65 if living in the most exceptional compassionate circumstances; or

(f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances; and

(ii) is joining or accompanying a person who is present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and

(iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and

(iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and

(iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and

(v) has no other close relatives in his own country to whom he could turn for financial support; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974."

11. The submission relying on paragraph 317 was contained in Ms McCarthy's skeleton argument. Mr Malik indicated that he was prepared to deal with it; but he suggested that the issue of whether to grant permission to amend the grounds could be deferred until the Tribunal had heard the parties' respective submissions. In the circumstances, I considered that to be an appropriate course.

12. Ms McCarthy submitted that the evidence placed before the respondent demonstrated that the applicant met the relevant requirements of paragraph 317. She was widowed; related to a person present and settled in the United Kingdom, namely her daughter Dr Asmaa Ali; as a GP (married to another GP) Dr Ali had ample financial means (as evidenced in the documentary material) to provide for the applicant, without the latter having to seek public funds; the applicant was wholly or mainly dependent on Dr Ali, owing to the changes in family circumstances, whereby the applicant's other children were no longer in a position to assist; and there were no other close relatives in Iraq to whom the applicant could turn for financial support.

13. Mr Malik's response was that the application made on 25 January 2012 was made on form FLR(O), and this was not an application made under the Rules but, rather, outside them. The application was, in substance, for limited leave to remain by reference to Article 8 of the ECHR.

14. Although Mr Malik did not specify it, the potential importance of not making an application for leave under the Rules (here, Part 8) lies in the fact that paragraph A280(c) of the rules provides that paragraph 317 continues to apply:-

> "to person who had made an application before 9 July 2012 under Part 8 which has not been decided as at 9 July 2012".

15. In the case of Edgehill [2014] EWCA Civ 40, the Court of Appeal was concerned with the rather different transitional provision contained in HC 194 (the Statement of Changes which brought into force with effect from 9 July 2012 the significantly different Rules regime). That provision stated that:

> "if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8 July 2012".

16. In Edgehill, the Court of Appeal held that it was an error of law for the Upper Tribunal to decide an appeal to which that transitional provision applied by having material regard to the provisions of the Rules which came into force on 9 July 2012 (in that case, specifying a twenty year United Kingdom residence requirement, in place of the previous fourteen year requirement). Mr Malik relied upon this provision from the judgment:-

> "[33]...A mere passing reference to the 20 years' requirement in the new Rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision maker relies upon rule 276ADE(iii) as a consideration materially affecting the decision."

17. Mr Malik submitted that, in the present case, the respondent had not fallen into this error. He also relied upon the judgment of Nicol J in Singh v Secretary of State for the Home Department [2014] EWHC 2330 (Admin). In that case, the judge noted apparent differences in approach by the Court of Appeal in Edgehill and Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558 respectively. At [12] he said:-

> "In my judgment, it is not necessary for me to resolve the difference. I shall adopt the approach most favourable to the claimant, that is the one in Edgehill. Nonetheless, Mr Roe accepts that he cannot succeed if the decision inevitably would have been the same even if the Secretary of State had paid no attention at all to the criteria in the new Rules."

18. At [13] the judge stated that he had "no doubt that would have been the case", citing the fact that the claimant was a fit young man who had grown up in India and who had only been in the United Kingdom for seven years, four of them unlawfully. His relationship with a person apparently settled in the United Kingdom had begun when the claimant was in the country unlawfully. This led him to conclude that:-

> "I am certain the Secretary of State would have decided the refusal of leave would not be disproportionate even if the test and structure of the decision making in the new Rules had not been referred to. ...I conclude that the reliance on the new Rules was not a consideration materially affecting the decision, as the result would have been the same in any case. Similarly in Edgehill the Court of Appeal considered that the Article 8 claim of HB was a weak one and the court concluded that both the Secretary of State and the Tribunal would have made precisely the same decision, whether or not they had regard to the new Rules, see paragraph 38."

19. Mr Malik had a further submission to make regarding what he said was the inapplicability of paragraph 317 of the Rules. This was that paragraph 317(vii) contains the requirement that the application of the person concerned does not "fall for refusal under the general grounds for refusal". Mr Malik pointed in this regard to paragraph 322(1), which provides that refusal of leave to remain etc. must occur where "the fact that variation of leave to enter or remain is being sought for a purpose not covered by these Rules". He also pointed to the fact that, in October 2007, the respondent had refused an earlier application brought by the applicant on the basis that the application fell to be refused by reason of paragraph 322(7), in that the applicant had failed "to honour any declaration or undertaking given orally or in writing as to the intended duration and/or purpose of her stay". This was because the applicant had not complied with paragraph 41 of the Immigration Rules by leaving the United Kingdom at the end of her alleged visit.

E. The original grounds of challenge

20. Ms McCarthy's submissions also dealt with the two original grounds of challenge. Ground 1 contends that the respondent applied the wrong approach in law when considering the applicant's Article 8 rights by conflating consideration of Article 8 with consideration of the amended Immigration Rules introduced by HC 194. The original decision and first supplemental decision, according to Ms McCarthy, plainly failed properly to engage with Article 8. The original decision stated that "the family life that you claim to have with relatives in the United Kingdom does not constitute family life as set out in Appendix FM of the Immigration Rules. Therefore your claim has been considered on the basis of your private life in accordance with paragraph 276ADE of the Immigration Rules".

21. The second decision, whilst acknowledging that a parental relationship existed with Dr Asmaa Ali, said that the latter was "a mature adult living independently with a family of her own. Your application therefore falls for refusal under the eligibility requirements of the Immigration Rules as set out above". The latest supplemental letter was not as bad as the first two letters, according to Ms McCarthy, but still

contained legal error. The respondent had not properly engaged with the issue of whether the applicant enjoyed a protected family life with her adult daughter and her grandchildren, on the basis that the respondent was "not satisfied that there is something more than normal emotional ties" involved. That was contrary to the fact-sensitive, holistic approach set out by the Upper Tribunal in Ghising (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC), which had subsequently found favour in the Court of Appeal (Gurung and others v Secretary of State for the Home Department [2013] EWCA Civ 8 at [46]). There was, in particular, substantial evidence before the respondent, to the effect that the grandchildren were very attached to the applicant, who played a central role in their lives, particularly as regards the youngest grandchild. In deciding whether a family life existed, there was no indication that the respondent had had regard to the evidence regarding dependency on the United Kingdom family, the absence of any alternative means of support, health issues (which Dr Asmaa Ali was in a particularly good position to provide) and the situation in Iraq. Indeed, these failures, according to Ms McCarthy, rendered the respondent's refusal to find a family life irrational.

22. This led to ground 2, which was that, had the correct approach been applied, the respondent would have granted discretionary leave to the applicant under Article 8. Ms McCarthy relied on the judgments of the Supreme Court in Patel & Others v Secretary of State for the Home Department [2012] EWCA Civ 741 as authority for the "supreme test" being one of "reasonableness". The respondent's decision making, according to Ms McCarthy, was unreasonable because the respondent had miscategorised the applicant's Article 8 position as precarious, ignoring the fact that the applicant had come as a visitor, but that her circumstances had changed during her time in the United Kingdom. Furthermore there was less than a three week delay in making an application after leave expired; whereas the delay on the part of the respondent had been more than three years.

23. In Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin), Sales J held at [33] and [34] that the "new Rules" could not cover every conceivable case and that where they did not fully dispose of an Article 8 claim, the respondent would be obliged to consider granting leave to remain outside the Rules. Furthermore, in Patel the Supreme Court had stated that "the most authoritative guidance on the correct approach of the Tribunal to Article 8 remains that of Lord Bingham in *Huang*" [54].

24. Most recently, in MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985, the Court of Appeal had doubted whether the statement in Nagre that a person outwith the Rules "has to demonstrate, as a preliminary to a consideration outside the Rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules" was of much utility and that "if the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker".

25. So far as the best interests of the grandchildren were concerned, Ms McCarthy submitted that, even in the second supplemental letter, there was no indication that the family's letters and other materials had actually been taken into account.

26. Mr Malik's submission on ground 1 was that the respondent's conclusion on whether or not there was family life could be challenged only on the grounds of irrationality. It could not be said that her conclusion on the issue was irrational. In any event, the challenge was immaterial, given that the decision of 13 June 2014 went on to explain why, even if Article 8 was engaged, the respondent took the view that the applicant should not be granted leave.

27. Mr Malik contended that, as regards what he submitted was a "reasons" challenge, all that was needed was for the decision to be intelligible. The authority for this was to be found in the opinions of the House of Lords in South Bucks District Council v Porter [2004] UKHL 33:-

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularly required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. ...Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision." (Lord Brown at [36])

28. Mr Malik pointed out that, in the immigration context, that passage had recently been deployed by the Upper Tribunal in Castro (removals: s47 (as amended)) [2014] UKUT 234 (IAC).

29. Finally, Mr Malik submitted that Part 5A of the Nationality, Immigration and Asylum Act 2002, which came into force on 28 July 2014, required the Upper Tribunal to have regard to the considerations listed in section 117B (Article 8: public interest considerations applicable in all cases). In considering "the public interest question" (namely, the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)), a court or Tribunal must have regard to the fact that the "maintenance of effective immigration control is in the public interest" (117B(1)) and that little weight should be given to a private life "that is established by a person at the time when a person is in the United Kingdom unlawfully" (section 117B(4)).

30. In reply, Ms McCarthy conceded that the application made in January 2012 had not been made under Part 8 of the Immigration Rules but she submitted that what mattered were the "substance and content" of paragraph 317. So far as general grounds of refusal were concerned, Ms McCarthy said it would not have been rational to have applied paragraph 322(7) given that, by January 2012, there plainly had been a change in the applicant's circumstances. Ms McCarthy denied that the applicant's case amounted to a "near-miss" argument of the kind deprecated by the Supreme Court in Patel. On the contrary, the applicant's case was like that of the claimant in Huang, as described by Lord Carnwath at [56] of Patel:-

> "Mrs Huang's case for favourable treatment outside the Rules did not turn on how close she had come to compliance with Rules 317, but on the application of the family values which underlie that Rule and are at the heart also of Article 8. ...".

F. Decision on application to amend

31. In the circumstances of this case, I consider that it is in the interests of the overriding objective in rule 2 of the Tribunal (Procedure) Upper Tribunal Rules 2008 to grant permission to the applicant to amend her grounds, so as to argue the relevance of paragraph 317 of the Immigration Rules. The applicant is elderly and the proceedings have been ongoing for a significant period of time. It is desirable to both parties that some finality should be brought soon to her claim to be entitled to reside in the United Kingdom. The paragraph 317 issue is closely related to the assertion in ground 1 that the respondent erred in law in her approach to Article 8. Finally, as is evident, thanks to Mr Malik the respondent was placed at no procedural disadvantage in engaging with the substance of the amended ground. Accordingly, I grant permission.

G. The correct version of paragraph 317

32. I shall deal first with the significance of paragraph 317(vii). Although both Mr Malik and Ms McCarthy assumed that this deals with "refusal under the general grounds of refusal" that is not in fact so. The relevant wording of sub-paragraph (vii), so far as it concerns the applicant, is as I have set out in paragraph 10 above. The amendment which substituted the reference to general grounds for refusal for the reference to one or more unspent convictions within the meaning of the 1974 Act, took effect only on 13 December 2012. The primary decision in the present case, to which the later decisions are supplemental, was made on 27 November 2012.

33. Accordingly, paragraph 317(vii) does not operate to preclude the applicant from relying on paragraph 317 (Odelola v Secretary of State for the Home Department [2009] UKHL 25). There is no suggestion that the applicant has unspent convictions. I would, in any event, have found myself in agreement with Ms McCarthy, so far as reliance by the respondent upon paragraph 322(vii) is concerned. It would indeed have been irrational in 2012 for the respondent to have relied upon the failure to honour an undertaking impliedly given in 2007, given the subsequent changes in

circumstances. As for paragraph 322(1), that does not apply for two reasons. First, it concerns only a "variation of leave". The applicant has no leave to vary. Secondly, even if that were not so, paragraph 322(1) adds nothing to Mr Malik's argument that the application was not, in reality, an application made under the Rules.

H. The significance of paragraph 317 to an application made outside the Rules before 9 July 2012

34. Accordingly, I turn to that issue. It is, indeed, a puzzling feature of this case that the January 2012 application was not made expressly by reference to paragraph 317, being, instead, made outside the Rules. It is in my view manifest from the material submitted to the respondent that the applicant had a compelling case under paragraph 317.

35. Be that as it may, for the purposes of paragraph A280(c)(i), it is undoubtedly the case that the applicant did not apply "under Part 8" or, indeed, under any other Part of the Rules. But in no sense does that dispose of the issue. On the contrary, it throws into sharp focus the transitional provisions of HC 194, which (to repeat) are as follows:-

> "… if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8 July 2012."

36. The difference in wording between the HC 194 provision and that of paragraph A280(c)(i) is immediately apparent (see paragraph 14 above). HC 194 does not contain the words "under Part 8". In Edgehill, the Court of Appeal roundly rejected the respondent's attempt to restrict the HC 194 transitional provision to applications made under the Rules: see [24] to [33]. Despite the "different approach" in Edgehill and Haleemudeen, as identified by Nicol J in Singh, Mr Malik did not seek to persuade me to depart from the judgment in Edgehill. On the contrary, he relied upon it as authority for the proposition that the respondent's decision-making in the present case was not unlawful, in that it did not rely upon the "new" Rules (with effect from 9 July 2012) as a consideration materially affecting the respondent's decisions.

37. I firmly reject that submission. Both the decision of 27 November 2012 and that of 8 February 2013 commenced with a detailed exegesis of why the applicant failed under the new Rules, before proceeding to analyse whether the applicant should exceptionally be granted leave by reference to Article 8 considerations. By the same token, the latest letter, of 13 June 2014, begins by saying that "consideration has been given whether there are any exceptional circumstances to grant leave to remain outside the Rules. However, there are no exceptional circumstances in your client's case which require a grant of leave outside the Rules".

38. As is plain from Edgehill and Singh, on the basis that the new Rules have no part to play in a case governed by the transitional provision in HC 194, the respondent can succeed in defending a challenge brought on this basis, only if she can demonstrate that the decision would undoubtedly have been the same, had the respondent not adopted the wrong starting-point of the new Rules.

39. I find Ms McCarthy has amply shown why that cannot be the case. Even if one puts paragraph 317 aside, the circumstances of the applicant, including her age, country of origin, state of health, relationship with and dependency on her United Kingdom family and evidence regarding lack of alternative means of support, are such that it is simply not possible rationally to conclude that the decision would have been the same in any event.

40. But, even were I to be wrong about that, paragraph 317 does not cease to be relevant, notwithstanding that paragraph 280(c)(i) cannot assist the applicant because she did not apply under Part 8 of the Rules. The transitional provision in HC 194 required the respondent to decide the application – albeit made on Form FLR (O) – "in accordance with" the Rules in force before 9 July 2012. Just as, now, the respondent routinely (and correctly) begins her consideration of a post-8 July 2012 application, made outside the Rules, by considering, first, whether the applicant meets the requirements of the Rules, before proceeding to consider Article 8, so in the applicant's case the respondent should have considered whether the applicant met the requirements of paragraph 317 on the basis of the evidence put forward because if the applicant did do so, then at the very least that fact would have had a significant bearing on the respondent's decision whether to grant leave to remain.

41. Ms McCarthy was, I find, entitled to rely upon the passage from Patel, cited above at paragraph 27. This is not an instance of a "near-miss". Rather, the fact that the applicant would (at the very least)have been likely to succeed by reference to paragraph 317, had she applied for it, was of extreme significance in the pre-9 July 2012 world, which the transitional provision in HC 194 kept in being. Even if Haleemudeen had been relied on by Mr Malik as authority for the proposition that the new Rules have a part to play in articulating the respondent's position as regards the public interest in enforcing immigration control, this still would not entitle her to disregard the transitional provision that she chose to include in HC 194 (and which is not mentioned in Haleemudeen).

42. For these reasons, on the basis of the arguments so far considered, I would find that the respondent's decision making, as set out in the three decision letters, is unlawful. In the circumstances, it is unnecessary for me to spend much time on grounds 1 and 2. So far as ground 1 is concerned, the respondent's error of approach as regards Article 8 lay in her missing the significance of paragraph 317. I find this led her to have insufficient regard to the material put before her in the application, which was plainly more than capable of demonstrating a protected family life between the applicant and her United Kingdom family members. Ground 1 is therefore made out. Ground 2, which asserts that leave should have been granted under paragraph 317,

perhaps puts matters too high, given that the applicant did not apply for such leave. But, again, the undoubted significance of this ground is that it highlights the inadequacy of the respondent's Article 8 decision-making, which, at the very least, failed to bring into the proportionality balance the relevance of paragraph 317 as negating the State's interest in maintaining immigration controls, since the applicant was a person who met the relevant requirements of those controls.

I. Part 5A of the Nationality, Immigration and Asylum Act 2002

43. Finally, I must deal with Mr Malik's submission regarding the coming into force on 28 July 2014 of Part 5A of the Nationality, Immigration and Asylum Act 2002 (inserted in that Act by section 19 of the Immigration Act 2014). Does Part 5A apply to these judicial review proceedings and, if so, what is its effect?

44. Section 117A of the 2002 Act provides that Part 5A "applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts-

> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998".

45. The duty imposed by Part 5A arises where the court or tribunal is considering "the public interest question" (section 117A(2)). This is defined by section 117A(3) as "the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)".

46. Section 117A(2) provides that:

> "In considering the public interest question, the court or tribunal must (in particular) have regard-
>
> (a) in all cases to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed under Article 8(2)".

47. So far as the present case is concerned, Mr Malik referred specifically to section 117B(4)(a), which states that little weight should be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully. He might also have pointed to section 117B(1), wherein the "maintenance of effective immigration controls is in the public interest".

48. In two cases, the Court of Appeal has, in effect, held that Part 5A has no application in an appeal from a decision of the Upper Tribunal, unless an error of law is found in that decision. In YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292, the Court was concerned with the lawfulness of a decision of the Upper Tribunal taken before 28 July 2014. Aikens LJ said this:

36. By ***section 14(1)*** of the [Tribunals, Courts and Enforcement Act 2007], when the Court of Appeal has to consider an appeal from the Upper Tribunal, its first task is to decide whether "the making of the decision concerned involved the making of an error on a point of law". The Court's task, therefore, must be to consider the law as it had to be applied at the time of the UT's decision. It cannot be to consider the law as it has subsequently developed. Thus, in my view, both the new Part 5A to the 2002 Act and the 2014 Rules are irrelevant to the first task that we are faced with.

37. If, however, this Court considers that the UT's decision did involve "the making of an error on a point of law", there are further decisions to be make. This Court can, but is not obliged to, set aside the decision of the UT: see ***section 14(2)(a)*** of the 2007 Act. If it does so, then the matter can either be remitted to the UT or this Court can re-make the decision itself: see ***section 14(2)(b)(i) and (ii)***. If this court were to set aside the decision of the UT and either remit the matter or re-make the decision itself, then, at that stage I think that both the new statutory provisions and the 2014 Rules would become relevant."

49. In ZZ (Tanzania) v Secretary of State for the Home Department [2014] EWCA Civ 1404, the Court (per Bean LJ) took exactly the same approach:

"20. I remind myself at this stage that an appeal from the UT to this court lies only on a question of law. It is not the function of this court to substitute our view of proportionality for that of the UT unless and until an error of law is shown. The correctness or otherwise in law of the Tribunal's decision is to be judged on the basis of the statutory provisions then applicable.

…

35. … If this court were to accept that there had been an error of law by the UT it would then be appropriate to take the decision ourselves. In that event, as Mr Westgate accepted, section 117C of the Nationality, Immigration and Asylum Act 2002, inserted by the Immigration Act 2014 with effect from 28 July 2014, would apply…"

50. Is the position different in a judicial review of a decision by a public authority involving ECHR article 8 rights? I was not addressed in any detail on this matter; but the thrust of Mr Malik's submission was that Part 5A has relevance to the present case.

51. At first sight, one might think that the position in judicial review cannot be different, compared with an appeal on a point of law, for the obvious reason that the task of a court or tribunal in a judicial review is to determine whether the decision is *legally* flawed. However, there is high authority to the effect that the judicial task in a judicial review concerning human rights is (or, at least, may on occasion be) such as to amount to deciding whether the impugned decision breaches a person's human rights and is thus unlawful under section 6 of the Human Rights Act.

52. In Secretary of State for the Home Department v Nasseri [2009] UKHL 23, a judicial review involving a decision to remove an asylum seeker to Greece pursuant to the Dublin II Regulation, Lord Hoffmann said:

> "12. … It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State's decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. In such a case, the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct approach when the challenge is based upon an alleged infringement of a Convention right…
>
> …
> 14. The other side of the coin is that, when breach of a Convention right is in issue, an impeccable decision-making process by the Secretary of State will be of no avail if she actually gets the answer wrong. This was the basis of the decision of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, in which the question was whether the removal of a migrant would infringe his right to respect for family life under article 8…"

53. In R (Quila) v Secretary of State for the Home Department [2011] UKSC 45, a challenge to the legality of immigration rules concerning entry as a spouse, Lady Hale said that the issue:

> "… is whether the Secretary of State has acted incompatibly with the Convention rights of these particular young people. By reason of section 6(1) of the Human Rights Act 1998, it is unlawful for her to do so. This is subject to section 6(2), where a public authority is acting, to put it loosely, in compliance with primary legislation which cannot be read or given effect in any other way. This is not this case. The Secretary of State has acted in compliance with her own Immigration Rules, which do not even have the status of delegated legislation: see *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230. She does have a choice and it is her duty to act compatibly with the Convention rights of the people with whom she is concerned. Of course, where delicate and difficult judgments are involved in deciding whether or not she has done so, this Court will treat with appropriate respect the views taken by those whose primary responsibility it is to make the judgments in question. But those views cannot be decisive. Ultimately, it is for the court to decide whether or not the Convention rights have been breached: *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420."

54. In other contexts, however, pinning down the nature of review has proved more problematic. Thus, in WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495 Buxton LJ held that, where the Secretary of State in a paragraph 353 "fresh claim" matter, had asked herself the correct question regarding realistic prospect of success before a hypothetical adjudicator and applied "anxious

scrutiny" to an applicant's submissions, the Secretary of State's decision could not be impugned on judicial review, even if the Court's own view might have been different:

> "… for a court to say that it can adopt its own view because it is as good a position, as well qualified, as the original decision-maker is the language of appeal, and not of review … If Parliament had intended that that should be the approach it would have provided for an appeal.. [16]

55. Although in ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6, Lord Phillips had "no reason to disagree" with those observations of Buxton LJ, the House decided that the question of whether a claim could be certified under section 94 of the 2002 Act as clearly unfounded admitted of only one answer. In the light of ZT, other divisions of the Court of Appeal have come to the conclusion that the same is, in fact, true of a fresh claim case: KH (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1354 at [19] and R (YH) v Secretary of State for the Home Department [2010] EWCA Civ 116 at [21].

56. But, importantly, even so the process "remains a process of judicial review, not a *de novo* hearing, and the issue must be judged on the material available to the Secretary of State" (Carnwath LJ at [21] of YH). This point was emphasised in ZT by Lord Hope at [55]: "It must be stressed that the court is not an appellate court. Its function throughout is that of review" and by Lord Carswell in the same case at [65].

57. The upshot of this admittedly brief analysis is that I agree with Mr Malik that the effect of section 117A of the 2002 Act requires the Tribunal in a judicial review, involving Article 8, to have regard to the considerations listed in section 117B and, where relevant, section 117C, when considering the question whether an interference with a person's right to respect for private and family life is justified under Article 8(2). This is because the nature of the proceedings is such as to require the Tribunal to determine the questions set out in section 117A(1)(a) and (b).

58. The apparent anomaly, whereby a form of scrutiny traditionally (and rightly) regarded as less intense than an appeal is subject to Part 5A of the 2002 Act, when appeals under sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 are not (at the "error of law" stage), is explained by the fact that those appeals are "second" appeals. Where a person who is the subject of the Secretary of State's decision under the Immigration Acts is afforded a right of appeal to the First-tier Tribunal, that Tribunal will have decided for itself whether the decision violates Article 8. Accordingly, the primary (and possibly only) task of the Upper Tribunal in a section 11 appeal is properly confined to deciding if the First-tier Tribunal's assessment of where to strike the Article 8 proportionality balance was unlawful according to the error of law principles, set out in R (Iran)[2005] EWCA Civ 982. By contrast, an Article 8(2) decision which is susceptible only to judicial review has by definition not received such judicial scrutiny. It is the task of the reviewing court or

tribunal to provide it, albeit via a process that remains different from that of an appeal.

59. Does Part 5A assist the respondent in the present case? The short answer is, no. The applicant is not a foreign criminal and so only section 117B is of potential relevance. Mr Malik pointed to subsection (4)(a), where we find that little weight is to given to a private life formed by a person at a time when she is in the United Kingdom unlawfully. But the applicant's case is essentially about her family life in the United Kingdom, about which section 117B has nothing express to say in her case. The most that section does is to offer some mild support for the applicant, rather than the respondent, in that the evidence makes plain that the applicant is not and will not be "a burden on taxpayers" (subsection (3)(a)), with the result that the respondent cannot rely upon that as a public interest factor weighing against the applicant.

J. Decision

60. I grant the applicant judicial review and quash the decisions mentioned in paragraph 1 above.