R (on the application of Shabani) v Secretary of State for the Home Department (Legacy – residence – SOS's limited duty) IJR [2015] UKUT 0403 (IAC)

Heard at: Field House
On: 15 May 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

R (ON THE APPLICATION OF SHABAN SHABANI)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Mr H Southey QC and Mr B Lams, instructed by Oaks Solicitors
For the Respondent: Mr Z Malik, instructed by the Government Legal Department

JUDGMENT

In giving effect to Chapter 53.1.2 of her Enforcement Instructions and Guidance, the respondent is not required to refer specifically to the particular period of residence. It is sufficient that the respondent can be seen to have been aware of the period of residence when applying the policy to the facts of the particular case.

JUDGE ALLEN: The applicant seeks judicial review of the respondent's decision of 21 March 2011 refusing to accept that previous material and fresh representations amounted to a fresh claim. At the oral permission hearing in a decision which was promulgated on 21 March 2014, it was accepted that the timeliness of the challenge was not in issue, as the applicant's case was that he had never received the decision letter prior to 14 March 2013. There is in addition a supplementary letter of 27 January 2015 to which reference will also have to be made.

2. There is a helpful chronology in Mr Malik's skeleton argument and I shall set out the highlights from that.

3. The applicant arrived in the United Kingdom on 7 May 2000 and claimed asylum later that month. His claim was refused in September 2001, and a subsequent appeal was dismissed on 17 January 2002. Following an unsuccessful application for permission to appeal to the Immigration Appeal Tribunal his appeal rights were exhausted on 11 September 2003 and on 28 October 2003 he was listed as an absconder, and it is recorded that he was issued with an IS159.

4. Further submissions were made together with a legacy casework programme questionnaire completed on 15 August 2007. The further submissions were acknowledged in a letter of 15 November 2007. Further submissions were made on 24 August 2009 and a PAP letter was sent on 25 November 2010. The respondent replied to that in a letter of 29 November 2010 and subsequently as set out above, rejected the further submissions and refused to treat them as a fresh claim, in a letter dated 21 March 2011. Subsequently, on 18 March 2013, the Secretary of State issued the applicant with an IS96 (as he remained an absconder) and he

was asked to report on 25 March 2013 at Beckett House. The claim was issued on 9 May 2013.

5. The application was made under cover of a brief letter from the applicant to the Legacy Casework Team stating that he had never had any problems with the law, that he feared returning to Kosovo in the current uncertain political climate in Kosovo, and that not having status in the United Kingdom had caused him stress. He wished to have his situation clarified and to be granted status. In the form he did not indicate that he had a current legal representative but gave the address which was the one on the covering letter. In a box on the form devoted to provision of details he said among other things that he had a settled life in the United Kingdom and was skilled in building work and wished to remain in the United Kingdom legally to contribute to society and pay tax, that he was not on any benefits and had not wished to have any and had never been convicted of any criminal matters. He said that he had never had a proper appeal hearing due to problems with not being notified and requested being given leave to remain in the United Kingdom.

6. In her response to that letter the respondent said that the Border and Immigration Agency had begun a programme to deal with legacy cases and his case would have been allocated to one of their new case owners. It was said that at this stage they were unable to give any indication of when his case would be actioned. It was appreciated that this might leave him in some uncertainty, but it was thought that he should know that if he were to write in seeking further clarification of the timescale this could lead to a delay in processing the other cases ahead of him in the queue. It was also said that his immigration status and any entitlements in the United Kingdom would remain unchanged until such time as a decision was made on his case.

7. In the decision letter the respondent noted in summary the further submissions that had been made including the fact that the applicant had

been residing in the United Kingdom for over nine years and that he claimed that he had spent most of his formative years in the United Kingdom and had established a private life in the United Kingdom with a network of friends whom he considered to be his family.

8. It was submitted that his case had been considered using the five stage Razgar test. It was noted that he had been resident in the United Kingdom for over ten years, it having earlier been noted that he claimed to have arrived in the United Kingdom on 7 May 2000 and that he had claimed asylum on 24 May 2000. It was said that he could not succeed under paragraph 276A-D of the Immigration Rules as he could not demonstrate either ten years' lawful residence or fourteen years' lawful and/or unlawful residence. It was considered that he had deliberately sought to evade or circumvent immigration control by going to ground between 2003 and 15 August 2007 when he sent his legacy questionnaire. Consideration had been given to all the circumstances of his particular case and it was concluded that his length of residence was [not] sufficiently compelling and compassionate to warrant him being granted indefinite leave to remain in the United Kingdom. It was concluded that he had not established family life in the United Kingdom. As regards his private life, it was accepted that he might have established a private life in the United Kingdom with his friends but that this had been whilst he had no leave to enter or remain in the United Kingdom, and the respondent was of the view that any interference could be justified in the circumstances of his case. It was considered that his presence in the United Kingdom was not essential for him to enjoy his friendship ties with his friends and such relationships could be continued overseas. It was not accepted that he had spent his formative years in the United Kingdom since he had arrived at the age of 22.

9. It was said that in reaching the decision his rights had been balanced against the wider rights and freedom of others and the general public interest and specifically the respondent had weighed up the extent of the

possible interference with his private/family life against the legitimate need to maintain an effective national immigration policy and with regard to the latter, account had been taken of his failure to observe the immigration regulations. It was considered that in the circumstances of his particular case the actions taken were proportionate to the social need being fulfilled. Having considered all the circumstances of his particular case it had been concluded that his length of residence was [not] sufficiently compelling and compassionate to warrant him being granted indefinite leave to remain in the United Kingdom and in addition it was considered that there were no compassionate circumstances in his case to warrant a grant of leave outside the Rules.

10. His case had been considered in light of the decision of the House of Lords in EB (Kosovo) [2008] UKHL 41 but it was considered that he would not benefit from the findings in that case given his immigration history including the period of absconding between 2003 and 2007. It was noted that he had never been granted any form of leave to enter or remain in the United Kingdom and that the private life he had established during the time when resident in the United Kingdom unlawfully was not significant enough to warrant a grant of leave. It was also considered that any interference with his private life would be legitimate, necessary and proportionate and in accordance with the law and in particular it was not considered that his was a truly exceptional case or that removal would result in a flagrant denial of his right to respect for his private life.

11. The respondent then went on under the heading 'consideration of compassionate circumstances' to consider the application under paragraph 395C of the Immigration Rules, noting the relevant eight factors set out under that (now repealed) provision. Each of these was addressed in turn. In particular, with regard to length of residence in the United Kingdom, it was noted that he had been residing in the United Kingdom since 7 May 2000 but none of that had been with valid leave to enter or remain. It was noted that he had absconded after his appeal rights were

exhausted on 11 September 2003, thus deliberately frustrating the UKBA's intention to remove him. He had then failed to maintain contact until 15 August 2007 when he submitted a legacy questionnaire. It was considered that his length of residence was not sufficiently compelling to justify allowing him to remain in the United Kingdom.

12. Mr Southey QC's grounds focus on essentially two matters, the issue of the length of residence, and the relevance of Article 8 of the European Convention on Human Rights to the matters raised in regard to length of residence. There is also a further issue as to the type of relief appropriate, which I will address separately.

13. At the heart of the former ground is an argument that in essence contends that the respondent failed to attach appropriate significance to the period of time that the applicant has spent in the United Kingdom in assessing the paragraph 395C considerations, and in particular with regard to the respondent's policy regarding rule 395C set out at chapter 53 of the Enforcement Instructions and Guidance (chapter 53).

14. Mr Southey was at pains to emphasise that this was not a case argued on the basis of legacy. He accepted that in light of what had been concluded by the Court of Appeal in SH (Iran) [2014] EWCA Civ 1469 it could not be argued that legacy entitled people to special, separate treatment. Though this had been a legacy case, legacy issues were only relevant for two limited reasons. The first was that it was why paragraph 395C had been applied, as it had been in all legacy cases including this case, and because it provided some evidence as to how paragraph 395C had been applied.

15. I have reproduced the relevant version of chapter 53 as an Annex to this judgment. The particularly relevant section is chapter 53.1.2, which is concerned with relevant factors in paragraph 395C, although Mr Malik also emphasised the wording of the introductory paragraph to the chapter which states as follows:

"It is the policy of the agency to remove those persons found to have entered the United Kingdom unlawfully unless it would be a breach of the Refugee Convention or ECHR or there are compelling reasons, usually of a compassionate nature, for not doing so in an individual case."

16. Of particular relevance is the section in chapter 53.1.2 headed "residence accrued as a result of delay by UKBA" and of especial relevance is the final bullet point under that section which states as follows:

- Any other case where delay by UKBA has contributed to a significant period of residence. Following an individual assessment of the prospect of enforcing removal, and where other relevant factors apply, 4 to 6 years may be considered significant, but a more usual example would be a period of residence of 6 to 8 years."

17. In Hakemi [2012] EWHC 1967 (Admin), Burton J noted the provisions of chapter 53 and witness statements of Mr Forshaw, Assistant Director of UKBA and an email from Mr McEvoy, Assistant Director of the CAAU. He said at paragraph 13:

"Rule 395C simply sets out factors which must be considered. Chapter 53 did not affect or fetter such considerations, or change them. It gave guidance by way of a very broad spectrum for residence.... of 4 to 8 years. I say residence, because it is quite apparent that the reference in chapter 53.1.2 in the last bullet point of (iv) to 'delay' is not to a delay for which the Defendant is responsible, e.g. by way of delaying in dealing with the initial consideration, refusal (if such it be) and appeal, but to 'delay' by virtue of passage of time (see further paragraph 36 below)."

18. In paragraph 36, Burton J said that “delay” was simply the same as the passage of time.

19. This point was picked up by Stephen Morris QC sitting as a Deputy High Court Judge in Mohammed [2012] EWHC 3091 (Admin), at paragraph 37, agreeing that the period of years identified in the last bullet point referred simply to the passage of time (and thus the period of residence in question) and not particularly to a period of culpable delay on the part of the UKBA.

20. Some doubt was cast on this view by Ouseley J in Jaku [2014] EWHC 605 (Admin), at paragraph 59 where he said:

> “I did not read it [in the way interpreted by Burton J and Stephen Morris QC] since it seems to me that the heading ‘residence accrued as a result of delay by UKBA’ and the sense of the passage are that they relate to periods of residence which have been contributed to by delays in decision making. The effect of periods of residence on the prospects of leave being granted is left quite open under the heading ‘personal history’. “

21. However, at paragraph 60 he went on to say that he understood Counsel for the Secretary of State to accept that what was said in Hakemi and Mohammed on the point were correct interpretations of the policy and in that light he did not consider it appropriate to reject the earlier judgments.

22. Subsequent to the hearing I received a communication from Mr Malik, as a consequence of a request I made towards the close of the hearing, to the effect that Ouseley J may have misunderstood what was said by Counsel in Jaku and the respondent intended to make no concession in that regard in that case and in any event made no concession in the present case. In a response to this, Mr Southey has argued that Ouseley J did not express a decided view on the interpretation of chapter 53 in Jaku, and that his

concerns need to be set against the decisions in Hakemi and Mohammed and the language of chapter 53, in particular that delay on the part of UKBA need only have "contributed" to residence.

23. For my own part I have sympathy with the doubts of Ouseley J in this regard. It seems a somewhat curious use of language to interpret the phrase "residence accrued as a result of delay by UKBA" as referring simply to the elapsing of time, but the weight of authority and indeed Ouseley J's acceptance of the weight of that authority is against that view and in the circumstances I accept the interpretation of this as set out in Hakemi and Mohammed.

24. Mohammed is a case upon which Mr Southey attaches particular weight since he says that it is the one most on fours with the instant case. To understand the relevance of this it is necessary to consider briefly the period and circumstances of residence of the applicant. It is common ground that he was an absconder between 28 October 2003 and 15 August 2007. Otherwise, Mr Southey argues, he was not an absconder since, prior to 28 October 2003 he was an asylum claimant and after 15 August 2007 he was a person who had made an application for consideration under the legacy arrangements.

25. By contrast Mr Malik argues that the applicant was put on notice in the respondent's letter of 15 November 2007 to the fact that his immigration status in the United Kingdom remained unchanged, and argues that therefore he continued to be an absconder. He argued that in 2003 the applicant had been told to report to a particular address and had not done so and the reporting requirement remained. Mr Malik had been unable to provide the documentation from 2003 but he provided a copy of the letter that had been sent to the applicant in 2013 and submitted that the content would have remained essentially the same. Accordingly, he argued, the applicant as a person who had failed to report remained an absconder as all he had done in 2007 was to write asking for consideration

under the legacy programme but had not reported as he originally had been told to do in 2003.

26. Mr Southey argued that it was necessary to bear in mind the previous paragraph of the letter when it was made clear to the applicant that he should not write in, otherwise there would be delay in dealing with his case.

27. In the circumstances I do not think it would be right to characterise the applicant as an absconder after 15 August 2007. It has not been possible to provide documentation from 2003 to show the terms on which he was required to report and I think in the circumstances he would have been entitled in any event to conclude from the terms of the penultimate paragraph of the respondent's letter to him of 15 November 2007 that his application had been acknowledged and no more was asked of him. There was no reference in that letter to an ongoing obligation to report: indeed he was discouraged from keeping in touch, and it is not suggested in the decision letter that he was an absconder after 15 August 2007. I therefore agree with Mr Southey that other than the period of some three years and ten months when he was an absconder he was not in the United Kingdom prior to that period or thereafter in breach of conditions.

28. The significance of this, Mr Southey argues, is that the applicant is a person who on any reckoning has had more than six years in the United Kingdom other than as an absconder, and that that distinguishes him from the applicant in cases such as Jaku and in Hamzeh [2013] EWHC 4113 (Admin), to which I shall have to turn in due course.

29. Returning for the moment to Mohammed however, the claimant in that case had been in the United Kingdom since 19 December 2001, initially on a visa which expired in April 2002, and thereafter as an illegal overstayer, an asylum seeker and an applicant for indefinite leave to remain. The judge noted the evidence of Mr Forshaw which had been considered in

Hakemi, including reference to the fact that "all things being equal" six years' residence would result in a grant of leave. Mr Morris QC at paragraph 74 in Mohammed stated that what was said in the guidance about length of residence had particular relevance in a legacy case. He went on to say at paragraph 75 that in his judgment the effect of paragraph 53.1.2 that *weight* was to be placed on *significant* periods of residence and that guidance was then given as to what periods of residence were to be considered or might be considered to be significant, and in a case such as that of the claimant before him a period of 6 to 8 years was or might be considered to be significant. Clearly such a significant period of residence was to weigh as a factor operating against removal. He considered that the caseworker should have consciously taken that into account. He went on to say at paragraph 76:

> "In my judgment if it were the case, on the facts, that the person responsible for a decision under paragraph 395C had not in fact taken into account the Chapter 53 guidance in general nor, in particular, what is said there about length of residence, then that would amount to a failure to apply relevant policy and a failure to take account of a relevant consideration and would render the decision taken *Wednesbury* unreasonable or otherwise unfair...".

30. He went on to say (at paragraph 78) that there was no express reference in the decision letter to the chapter 53 guidance and that the letter merely enumerated the paragraph 395C factors, said that the defendant had considered *those* factors and then in the ensuing narrative gave the reasons for the decision applying those factors. He noted that it was submitted on behalf of the respondent that there was no requirement for such an express reference, and considered that that might be so, but in the present case there was no reference in the express terms of the letter to *the fact* that residence of between six to eight years was a significant fact or that it weighted in favour of the grant of leave to remain. All there was was the assertion of the bald fact of the claimant's residence of ten

years and one month and there was no indication in the letter that the length of residence section of paragraph 53.1.2 had been consciously considered. He said that for example the letter did not say "it is noted that you resided in the UK for more than six to eight years, but other factors in your case outweigh the length of your residence". He accepted the respondent's submission that the decision ultimately reached might not necessarily be inconsistent with a proper application of the paragraph 395C factors or even the chapter 53 guidance, but he was not satisfied that the respondent had specifically considered the chapter 53 guidance and in particular the provisions addressing length of residence and that there was no evidence that the claimant's residence of more than ten years was weighed in the balance as being a significant factor. He went on to say at paragraph 86 that it was important in a legacy case such as this where a long period of residence is plainly liable to be a factor of weight, and where the defendant's own guidance indicates that it is, that it is considered by the decision maker.

31. Mr Malik attaches significance to what was said by Simler J in Hamzeh. This was again a legacy case and indeed was the lead case unsuccessfully appealed to the Court of Appeal in SH (Iran). At paragraph 35 Simler J noted what had been said by Stephen Morris QC in Mohammed at paragraph 71:

> "I do not consider that it is arguable that there was a policy that leave would be granted on the basis of a sufficient long period of residence alone."

32. Simler J went on to give specific consideration to issues about length of residence at paragraphs 79 to 95 of her judgment. She made the point at paragraph 81 that where an individual had failed to comply with UK immigration law, for example by failing to report or absconding, that this was likely to weigh heavily against them in the chapter 53 consideration. She noted at paragraph 82 that chapter 53 requires a holistic

consideration of the relevant factors and that no single factor is identified as an overriding or determinative factor and that the guidance expressly states that the discretion not to remove on the basis of exceptional circumstances will not be exercised on the basis of one factor alone. At paragraph 88 she commented that courts had repeatedly emphasised that the factors listed in paragraph 395C and chapter 53 were not requirements to be met and nor were they an exhaustive list. She accepted that it was the case that there was no requirement for any express reference to these paragraphs or the guidance in order for a decision to be lawful. She regarded Mohammed as an example of a case in which on its facts the court held that the decision maker had not had sufficient regard to the guidance and said that as long as the guidance was considered and applied there was no requirement to make express reference to it or to each factor listed.

33. She went on to say, at paragraph 89, citing Westech College [2011] EWHC 1484 (Admin) that the court should not intervene to grant judicial review simply because the reasons given may disclose an error of law, unless the perceived deficiency in reasoning denotes that the decision is flawed by error of law. Accordingly, insofar as the reasoning in any of the refusal decisions in those cases was deficient, unless the defective reasoning indicated or demonstrated that there would have been a different outcome (so that the decision was in error of law) the court should not intervene.

34. At paragraph 91 she noted that the sole factor apart from removability in the cases before her was length of residence and that in each case it was submitted that the length of residence between four and ten years would by itself ordinarily justify the grant of leave to remain. She commented that length of residence was considered in the context of compliance with UK immigration laws, and went on to say the following:

> "Where an individual has never had leave to enter, has his asylum claim refused and an appeal dismissed and thereafter fails to comply

with reporting restrictions or absconds, the length of residence resulting from deliberate evasion of the authorities is most unlikely to weigh in that individual's favour of a grant."

35. As regards the issue of the relevance of the period of absconding, she stated at paragraph 93 that the wording and spirit of chapter 53 meant that periods of absconding did not count in an individual's favour as part of any significant period of long residence.

36. Subsequently, in Jaku, Ouseley J referred to the other cases raising issues about the effect of the legacy programme on the respondent's decisions on purported fresh claims made by the claimants. It is relevant to set out in full paragraph 6 of Jaku:

> "6. At the heart of much of the litigation over the years have been eventually largely fruitless and in my judgment misconceived attempts by claimants to show that there was a special and more favourable policy which should be applied to those in the Legacy Programme, derived from a target or aim as to the date by when decisions would be made. This target then was elevated into a legitimate expectation; missing it was said to create unlawful delay such as to create an historic injustice, leading to arguments that particular forms of leave should be granted, that policies should be treated as frozen, that particular periods of residence should be given great weight, all deriving from a misreading of policy and especially of alleged policy documents at a level below the EIG."

37. This passage was specifically approved by the Court of Appeal in RN (Sri Lanka) [2014] EWCA Civ 938 at paragraph 24, and also by the Court of Appeal in SH (Iran), at paragraph 52.

38. Mr Southey argues that this passage and the approval of it have to be seen in the context of the legacy programme which is not, he says, what this case is about. That is no doubt right in a narrower sense, but I consider that the reference in particular to a flawed argument that particular periods of residence should be given great weight is not a matter that is specifically confined to legacy issues any more than other remarks in these cases upon which Mr Southey has relied, are so limited.

39. I have noted above the discussion in Jaku about the meaning of the word "delay" in the final bullet point under the heading "residence accrued as a result of delay by UKBA", paragraph 53.1.2. Of relevance to the particular issue with which I am concerned at this point in the judgment is paragraph 61 of Jaku. This again is worth quoting in full:

> "61. I think that Mr Morris rather overstated the significance in paragraph 78 of Mohammed if he was requiring the SSHD to demonstrate that she had given the period significant weight in her thinking in order to show that she had properly applied her policy. Or at least, what he said has been given significantly greater significance than he intended in relation to how such a period of residence should be approached. There is no requirement for an express reference to the EIG for the SSHD to show that it has been considered; nor is it necessary for her to demonstrate that it had been given significant weight. It is necessary for a decision to show that the period of residence of six years or more has been considered in the round with all the other factors. The significance of that period of residence may be diminished by residence if non-compliant, or discounted by periods of non-compliance; it matters not precisely how that is expressed. But all that is required is that the decision should explain why leave has not been granted after six years' residence. The fact that all or a significant proportion of the period was non-compliant with the law is of itself a perfectly

satisfactory reason for discounting the period, on the basis set out in the EIG."

40. I take Mr Southey's point that none of these cases other than Mohammed were concerned with persons who had six years or more compliant residence. I also take his point that, noting the specific wording of the policy, it is a matter of delay by UKBA, as interpreted in Hakemi and Mohammed contributing to a significant period of residence.

41. It is however important to bear in mind that both Hamzeh and Jaku were specifically approved by the Court of Appeal in SH (Iran) and Jaku was also specifically approved in RN (Sri Lanka). Neither of those authorities contains any reference to Mohammed. Both Hamzeh and Jaku have the clear support of higher authority and I consider that significant weight must be attached to the passages that I have set out above from those two judgments. Length of residence is only one of the factors to be taken into account, there is no obligation to refer expressly to chapter 53 (a matter of common ground, I think,) and where a person has never had leave to enter, has had his asylum claim refused and whose appeal has been dismissed and who thereafter fails to comply with reporting conditions or absconds, it is most unlikely that the length of residence resulting from a deliberate evasion of the authorities will weigh in his favour. I accept that that is not directly applicable to the facts of this case in its entirety, but the thinking behind it is nevertheless relevant.

42. I also attach weight to what was said in Jaku at paragraph 61, a passage upon which both parties relied, in my assessment of the decision in this case. I do not read the statement by Ouseley J that it is necessary for a decision to show that the period of residence of six years or more has been considered in the round with all the other factors and the requirement that the decision should explain why leave has not been granted after six years' residence, as requiring an express reference as for example in the terms set out in the final sentence of paragraph 78 of

Mohammed, to that particular period of time. The policy says no more than that where other relevant factors apply, four to six years may be considered significant but a more usual example would be a period of residence of six to eight years. It is not appropriate to elevate this to a mandatory requirement. The policy is guidance for the respondent's caseworkers and contains suggested periods of time that might be considered significant without any obligation for them to be so considered. It is very clear from a reading of the decision letter in this case that the respondent was well aware of the period of time during which the applicant had been in the United Kingdom, and was also well aware of the period of time of absconding.

43. I agree with Mr Malik that the entire chapter must to an extent take its colour from the first paragraph, speaking in terms of compelling reasons usually of a compassionate nature, as being the umbrella under which the policy operates. Certainly though, as Mr Southey says, that does not mean the detail within the policy can be ignored. It is important also to bear in mind the opening paragraph to paragraph 53.1.2 which emphasises the need to take the consideration of relevant factors as a whole rather than individually, noting for example that the length of residence may not of itself be a factor but it might when combined with age and strength of connections with the United Kingdom.

44. In my judgment the respondent properly evaluated the claim before her in the context of a proper application of the policy. Mr Southey accepts that there was no need to refer to the policy itself, but takes issue with the use of the compelling compassionate circumstances criterion but for the reasons set out above I consider that that argument is misplaced. That was the context in which the chapter 53 evaluation would require to be made, and although there is no express reference to the policy, it is to my mind sufficiently clear from the detail in the decision letter that the decision maker was aware of the period of residence in the United Kingdom and took that into account together with the other factors that

were of relevance. Accordingly I do not consider that there is any public law error in the evaluation of the fresh claim in this case as regards the issue of length of residence or otherwise.

45. As regards the Article 8 evaluation, Mr Southey argues among other things that the failure to give proper weight to length of residence means that there has been a failure to apply policy and as a consequence the decision is not in accordance with the law. This must further entail that it is not proportionate either. He argues that the respondent has failed to ask the correct question and has failed to adopt anxious scrutiny.

46. To a large extent what I have to say about this issue follows on from my decision on the first ground. I consider that the evaluation of Article 8 took into proper consideration the period of time the appellant has spent in the United Kingdom as part not only of the evaluation of the fresh claim in the context of paragraph 395C but also in the context of Article 8 where as set out above there is a detailed consideration of this issue in line with the Razgar guidance. Again I find no error of law in the respondent's approach to this matter.

47. The final issue raised by Mr Southey was that of the form of relief, bearing in mind that paragraph 395C was repealed in 2012. In my view this argument is academic since I am not with Mr Southey on the first two points and therefore this is not a matter on which I need to say anything.

48. In conclusion therefore the application is refused. I will consider submissions on costs issues and any other matters when the decision is handed down. ~~~~*0*~~~~

Signed: Dated:

Upper Tribunal Judge Allen