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Upper Tribunal
(Immigration and Asylum Chamber)

Patel (consideration of Sapkota – unfairness) India [2011] UKUT 00484(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 November 2011	

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Before

MR JUSTICE BLAKE, PRESIDENT

UPPER TRIBUNAL JUDGE PERKINS

Between

SANDEEPKUMAR MANHARBHAI PATEL

HIRALBEN HITENPHAI PATEL

MASTER PATEL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z Malik, instructed by Malik Law Chambers

For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

(1) There is no substantive segregation of considerations going to an extension of stay and removal where the appellant seeks leave to remain outside the rules on 395C factors and these are considered on their merits with the consequence that the respondent states removal will follow even if powers under s 47 of the Immigration, Nationality and Asylum Act 2006 are not formally used when the decision is made to refuse to vary leave to remain.

(2) The decision in Sapkota [2011] EWCA Civ 1320 is based on a public law duty to exercise s.47 powers where fairness requires it, having regard to the factors considered in Mirza [2011] EWCA Civ 159 and TE (Eritrea) [2009] EWCA Civ 174. It does not amount to an inflexible rule that the power must always be exercised.

(3) There was no unfairness where the Secretary of State and the judge considered the factors relevant to intended removal in the appeal against the decision to refuse to vary leave.

(4) It would be irrational to afford weight as a compassionate factor to the first appellant's desire to continue to live and work in the United Kingdom when his leave had been as a working holiday-maker and he had obtained that leave by misrepresenting his true intentions.

DETERMINATION AND REASONS

Introduction

1.
The first appellant is an Indian national born in 1984. In July 2006 he married the second appellant. The third appellant is their child born in July 2010 in the United Kingdom.

2.
This an appeal against a decision of the First-tier Tribunal given on 13 July 2011 dismissing the appeal of each of the appellants against a refusal of extension of leave to remain on an application for leave made outside the rules and on the basis of human rights.

3.
In 2007 the first appellant applied for entry clearance as a working holiday-maker and the second appellant applied for one as his dependant. The application was refused in May 2008. They appealed. The Judge who heard the appeal was impressed by the testimony of the appellants' sponsor who was settled in the United Kingdom. Despite the doubts expressed by the Entry Clearance Officer, the judge was satisfied that the appellant genuinely intended entry for a working holiday and intended to return to India at the conclusion of the visit.

4.
In March 2009 the first two appellants entered the United Kingdom with a two year visa as working holiday-makers. On 26 February 2011, they applied for leave to remain on the basis of exceptional circumstances outside the Immigration Rules.

5.
The application was supported by a statement made by the first appellant noting the birth of their son in July 2010 and making the following points:

(i)
The United Kingdom was his only home and he had no connection whatsoever with India.

(ii)
He asked for leave to remain on compassionate grounds outside the Rules and believed he qualified for grant for leave to remain as he had been present in the United Kingdom for two years.

(iii)
Since arrival in the United Kingdom the appellants had established a private life here and rooted themselves here and consider it to be their only home. They have eroded all ties with their country of origin.

(iv)
The appellants have integrated into British culture having lived in the United Kingdom for such a prolonged period.

(v)
Article 8 of the ECHR provides a concession to such individuals who have their private and family life established in the United Kingdom and the appellant and his family deserve to be granted permanent immigration status as they fall within the criteria of Article 8.

(vi)
The first appellant and his family are law-abiding, self-sufficient and not a burden on the State. It would cause them problems if their life were to be interrupted as they have a significant network of friends in the United Kingdom.

(vii)
When he came to the United Kingdom the first appellant severed all connections with India, a poor country. He has no job or home there in India and cannot go back.

(viii)
Each of the factors set out under paragraph 395C of the Immigration Rules HC 395 should be taken into account.

The decision of the Secretary of State

6.
This application was refused in May 2011 and detailed reasons for refusal were given in a letter written earlier dated 30 March 2011. This is a lengthy letter setting out the case law on Article 8 and the author's conclusions that nothing had been put forward in the application to justify exceptional leave to remain. It is sufficient here to note that the decision letter:-

i.
stated that it was intended to remove the appellants to India at the conclusion of the appeal;

ii.
took account of all the factors relied on by the first appellant in his witness statement and representations made and the discretionary factors to be considered in removal cases under paragraph 395 of the Immigration Rules;

iii.
recognised that the best interests of the third appellant child and the duty to promote the welfare of the child under s.55 of the Borders, Citizenship and Immigration Act 2009 were expressly addressed.

7.
Although the decision letter stated that the Secretary of State intended to remove all of the appellants in the event that they did not make a voluntary departure upon the conclusion of their variation of leave appeal, the immigration decision giving rise to the appeal was a refusal to vary leave and not a decision to remove.

8.
There was an appeal against this refusal to Judge Brown on 11 July 2011. The first appellant raised for the first time a claim that he would be at risk if returned to India because of alleged sexual infidelity by his wife. The Judge did not accept this evidence and made adverse findings on the credibility of the first appellant as a witness as he was entitled to for the reasons he gave.

9.

The Judge concluded that the first appellant's intention was to migrate to the United Kingdom, by obtaining a working holiday visa. His declared intention to return to India made at the time of the application was false. Their subsequent life in the United Kingdom has been based on that false representation. He found that there was nothing to prevent a return to India; there was no interference with family life in the intended removal as the family were being removed together; removal would have no effect on the child as he would be in the care of his parents who had resources and education and would be able to look after him.

10.
Permission to appeal to the Upper Tribunal was granted three grounds:

(i)
The Judge erred in dismissing the appeal because the respondent's decision was not in accordance with the law through a failure to give effect to a statutory duty under s. 55 of the Borders, Citizenship and Immigration Act 2009.

(ii)
The judge's decision was inconsistent with the judgement of the Court of Appeal in Mirza and others [2011] EWCA Civ 159.

(iii)
The judge erred in dismissing the appeal under Article 8.

11.
Following the grant of permission to appeal, on 15 November 2011 the Court of Appeal in Sapkota and KA (Pakistan) [2011] EWCA Civ 1320 applying the decision in Mirza concluded that:

(i)
a failure by the Secretary of State to make a removal decision under s. 47 of the Immigration, Asylum and Nationality Act 2006 at the same time or shortly after making a decision to refuse leave to remain was or could be unlawful; and

(ii)
the Tribunal had jurisdiction to consider the legality of the Secretary of State's action by reference to the failure to make a removal decision in the course of its statutory jurisdiction under ss. 82 to 86 of the Nationality, Immigration and Asylum Act 2002.

12.
The decision in Sapkota played an important part in Mr Malik's submissions before us. He submitted that as there was no removal decision taken in this case the Secretary of State's decision refusing leave to remain was unlawful and the First-tier Judge erred in law in failing so to decide as such.

13.
Mr Saunders for the respondent disagreed and resisted this appeal on the basis that in this case the appellant had a right of appeal in which he was able to ventilate every issue that he raised in his grounds of appeal including the compassionate factors said to have arisen from his length of residence and connections here. The Secretary of State intended to make a removal decision and had therefore taken all factors into account that would need to be considered before making such a lawful decision.

14.

We must first decide whether there was an error of law made by the judge below and whether if there was an error it was a material one justifying the re-making of the decision. In considering these matters we must decide whether the decision of the Secretary of State was not in accordance with the law for either of the reasons claimed in the grounds.

15.
We understand that the grounds of appeal before us feature in a number of cases before the First-tier and Upper Tribunal. We hope our analysis of the case law may therefore be of assistance to other judges dealing with similar grounds.

The decision in Sapkota

16.
The principal issue before the Court of Appeal in these combined cases was, jurisdiction. Lord Justice Aikens giving the majority judgment discussed this at [54] and [112] and concluded that an immigration decision can be impugned as not in accordance with the law pursuant to s. 84(4)(e) of the Nationality, Immigration and Asylum Act 2002. He further concluded that it could be irrational or unfair for the Secretary of State not to make a removal decision in response to an application for leave to remain.

17.
He reviewed and followed the decision of the Court of Appeal in Mirza where it concluded that a decision to refuse leave to remain taken in isolation of consideration of whether the person concerned should also be removed from the United Kingdom was capable of being an unlawful decision. Treating the matter in isolation may prevent the applicant obtaining a rounded decision on his whole future status in the United Kingdom and may also prevent the Tribunal being able to deal with every aspect of the case. These included discretionary factors under paragraph 395C of the Immigration Rules.

18.
The second issue dealt with was the merits of the segregation issue in the particular cases in hand. The reasoning is much shorter: [113] to [115] of the judgment. The conclusion that it was unfair not to consider the issues together was not opposed by the Secretary of State in the light of the decision in Mirza . It is clear that as regards unfairness it is the principle in Mirza that is being applied but no indication that it is being extended. At [113] the Court indicates that “segregation” in practice meant the failure to consider paragraph 395C issues. It noted that effect could be given to the one-stop principle by using the powers available since April 2008 under s. 47(1) of the 2006 Act giving the Secretary of State the power to decide that a person whose leave to remain has been extended by s. 3C(2)(b) or 3D(2)(a) of the Immigration Act 1971 “is to be removed from the United Kingdom, in accordance with directions to be given by an immigration officer if and when the leave ends”.

19.
Lord Justice Aikens concluded at [114]:

“In my view the effect of [45] in Mirza is that the burden is on the SSHD to initiate the process of dealing with the two decisions together by an invitation to the applicant, at the time a ‘one stop notice’ is issued with the variation decision, to make submissions as to why removal should not follow a refusal to vary leave. Although the decision on the issue of extending the leave to remain in both the present cases were taken before this court’s decision in Mirza, that cannot alter the result if there are no countervailing factors. After all, the same position obtained in Mirza itself, but the appeals were still allowed”.

20.
The third issue was whether a failure to apply the law correctly was therefore a violation of Article 8. The Court of Appeal rejected the submission that there would always be a violation of Article 8 if a removal decision was not taken at the same time.

The illegality of segregation

21.
Given that the conclusion of illegality was unopposed in Sapkota it is necessary to examine the earlier decisions discussed in the judgement for a deeper understanding of why it is generally unlawful for the Secretary of State to segregate variation of leave and removal decisions.

22.
The starting point is the decision of the Court of Appeal in JM (Liberia) [2010] EWCA Civ 1402; [2007] Imm AR 293. Here the court overruled previous Tribunal learning and concluded that a human rights claim within the meaning of s. 84(1) of the NIAA 2002 can be ventilated on an appeal against a refusal to grant leave to remain.

23.
Lord Justice Laws concluded that a broad reading should be given to s.82(2)(d) NIAA 2002 and that a refusal of leave decision could be an immigration decision "in consequence of which the appellant's removal would be unlawful under the Human Rights Act." He reached that conclusion having regard to the policy of the Act which included one-stop appeals. Another material consideration to the construction that both the appellant and the Secretary of State supported was at [18]:

"It seems to me be wrong in principle that the price of getting before an independent Tribunal, for a judicial decision on a Human Rights claim should be the commission of a criminal offence and other associated legal prohibitions. But that seems to be the immediate effect of the AIT's conclusion."

24.
It was this last observation that was cited with by Sedley LJ in the case of TE (Eritrea) [2009] EWCA Civ 174;[2009] INLR 558. In that case an appellant whose variation for leave appeal had been refused wanted broader considerations taken into account. She challenged the decision of a Senior Immigration Judge sitting in the AIT that she could not rely on paragraph 395C unless or until the Secretary of State took a removal decision. It was conceded on behalf of the Secretary of State that decisions to refuse to vary leave and or remove could be taken in close proximity to each other but that was not the policy then adopted.

25.
When pressed why this was so, counsel for the SSHD suggested the reason was a risk that removal may not be effected speedily after the combined decision and accordingly a fresh decision for opposing removal might arise with the passage of time. To this Lord Justice Sedley said at [18]:

" This seems to me both a counsel of despair and a somewhat eccentric approach to public policy. The state has, or ought to have, an interest in not multiplying administrative proceedings and appeals, especially where the facts and issues overlap and where segregating them creates uncovenanted difficulties for the individual. If, by inviting submissions as to why removal should not follow if the application for variation of leave is refused, a comprehensive decision can be arrived at and if necessary appealed, there can be few cases in which this would not be the right course to take. The

possibility of new grounds for non-removal arising is an ever-present one which a two-stage approach cannot eliminate".

26.
Lord Justice Lloyd considered that it would not always be unlawful and irrational to leave the paragraph 395C exercise until the stage of removal even if it had been asked for earlier but said at [56]:

"On the one hand, it would not have been unlawful, in the sense of irrational, for the Respondent to leave the paragraph 395C exercise until the stage (if it arrived) at which the Appellant is liable to be removed, even if it had been asked for earlier. On the other hand, if the point had been raised at the outset, it would have been a sensible decision to undertake that exercise at that earlier stage, especially in the light of the similarity of the grounds which, it seems, would be relied on under the paragraph to those relevant on the human rights and asylum grounds as such, and given that the Respondent could have taken a decision in principle about removal, to take effect subject to the outcome of the appeal, if she had not been persuaded by the factors relied on under the paragraph."

27.
We note, therefore, that both judges concluded that the AIT had been wrong to conclude that as a matter of law consideration of 395C factors by a judge had to await a removal decision, particularly if there were factors that could only be considered under this paragraph rather than under the concept of private life within the meaning of Article 8 ECHR.

28.
The next case of relevance is AS (Afghanistan) [2009] EWCA Civ 1076; [2010] 2 All ER 21 where the Court of Appeal concluded that the Tribunal was obliged to consider submissions made by the appellant in response to a one-stop notice even if they went beyond matters that had been considered by the SSHD in the immigration decision in question.

29.
The case of Mirza itself was a judicial review of a decision made by the SSHD refusing to consider discretionary 395C factors on consideration of an application for variation of leave. The court approved the decision of the AIT in EO (Turkey) [2007] UKAIT 00062 to the effect that an exercise of discretion under paragraph 395C was a discretion under the Rules and on appeal it was open to a judge to conclude that the discretion should have been exercised differently. Having reviewed evidence filed as to why the policy of the Secretary of State generally preferred to make separate decisions, it concluded that this was unjustified segregation. Where the applicant had not already breached the law by remaining without authority (contrast the case of R (on the application of Daley-Murdock) [2011] EWCA Civ 161), the SSHD should exercise her powers to ensure that removal and extension decisions were taken at the same time or in close proximity. An applicant who had reasonable submissions to advance in support of an application to remain outside the rules should not have to commit a criminal offence in order to have that claim examined by an independent judge.

30.
Our understanding of the public law principles developed in the authorities leading up to Sapkota that must now be applied by judges determining immigration appeals is the following:-

(i)

The legitimacy of segregating decisions on extensions of leave to remain with decisions on removal is a question of the fair exercise of public law powers rather than a matter of statutory construction turning a power to refuse leave at or shortly after a variation decision into an invariable duty to do so.

(ii)
Segregation means a failure to apply the broad discretion in intended removal cases to a situation where a person has no claim to remain under the strict provisions of the Immigration Rules but has a case to make for leave to remain for a limited or indefinite period outside the rules.

(iii)
A refusal by the Secretary of State or the Tribunal judiciary to consider the broader claims at the time when an appeal with leave to remain can be brought is unfair because it requires such a person to overstay and commit a criminal offence and then make representations that raise a human rights claim in order to obtain a pre-removal appeal.

(iv)
In Mirza the Court of Appeal was confronted with a policy of the Secretary of State not to consider the two decisions together in order to encourage voluntary departure, despite the evidence that those who considered they had a claim worth considering would prefer to run the risks of criminality, illegality and irregular status in order to wait for an opportunity to make them. Such a policy was unlawful.

31.
We do not find that Sapkota or Mirza requires us to conclude that whether or not there had been segregation in fact, and irrespective of whether the decision maker has considered 395C factors, it is invariably unlawful in the absence of special justification for the SSHD to exercise powers to authorise the issue of removal directions either under s.10 of the Immigration and Asylum Act 1999 or within the very short time available when it is possible to do under s.47 of the 2006 Act.

32.
Indeed we would be rather concerned if matters had gone that far. For every person whose real claim is one outside the rules, there are many who merely want to a decision in accordance with the Rules and would either voluntarily depart or make a fresh application if that appeal were to be unsuccessful. Further, the developing jurisprudence of the Upper Tribunal has moved beyond the proposition that human rights only arise on removal decisions, to cases where variation of leave applications may need to take into account a wide variety of aspects of private life under Article 8 rights, thereby enabling an independent assessment of this claim to remain without the person concerned running the risk of breaking the law.

Application of the Sapkota principles

33.
However, in our judgment the above principles have no purchase on the procedure adopted by the Secretary of State in this case for the following reasons:-

(i)
The first appellant was able to make his claim to remain outside the Rules in his variation application and draw attention to the provisions of paragraph 395C in doing so. He did not have to run the risk of criminal overstay in order to do so or obtain an appeal against the consequent refusal.

(ii)

The decision maker did not segregate issues relating to refusal of leave to remain from those relating to intended removal and did not refuse to consider factors relating to removal. Indeed, were the decision expressly engaged with paragraph 395C and the representations entirely based on compassionate factors outside the Rules. In substance it is a s. 47 decision even if not stated to be such in form.

(iii)
The fact that no formal s.47 decision has been made has had no impact on the reasoning of the decision maker who explains clearly that if there is no voluntary departure following the determination of the appeal, the family will be removed.

(iv)
For the reasons given below we have no doubt that upon receipt of this decision and the expiry of the time for permission to appeal the Secretary of State will do what she has said she will do and remove this family as a unit, probably now exercising powers under s.10 of the 1999 Act as s.47 would no longer be apposite.

(v)
The Secretary of State was entitled to conclude that nothing had been submitted to suggest that there was any compassionate circumstance to justify leave to remain outside the Rules. The appellants never had any expectation of being allowed to remain in the UK other than for a working holiday for the limited period of two years with a clear duty to return to their country at the end of that time. It was not suggested in the representations that there had been a change of circumstance since arrival that had led to a change of plan as regards future residence.

34.
Mr Malik submitted that the failure to make a formal removal decision in this case was contrary to the one-stop principles of the statutory scheme because despite the terms of the letter delay may accrue between the conclusion of the appeal and the actual making of a decision during which fresh family life or relevant circumstances may accrue. This is a curious echo of the submissions made by the Secretary of State in TE (Eritrea) . For the same reasons given by Sedley LJ we consider this a counsel of despair. Mr Saunders informed us that the Secretary of State is now obliged to await the outcome of this appeal as the s.47 window of opportunity has passed. She has the power to make the decision promptly thereafter and would be able to certify any human rights representations as without foundation in the light of the Tribunal's consideration of the factors. We further note that in the light of the First-tier judge's findings of fact the first appellant could be treated as a person who had obtained leave to enter by deception.

35.
In addition to non-segregation of the extension/removal question, the decision- maker expressly directed himself to the question of the welfare of the third appellant and the best interests of the child. The decision letter states in terms:

"A fundamental feature of any removal decision where it may affect children is the importance and the best interest of the welfare of children. That has been paramount and primary consideration in Article 8 assessment and failure to do so will violate Article 8(2). There is positive duty under s.55 of the Borders, Citizenship and Immigration Act 2009 as to safeguard and promote the welfare of the children and also take the view into account.

These circumstances must surely include in most cases the adequacy of reception and care arrangements for the child in the receiving country. In regards to the above statement the child is well protected in the sense that he is with the biological parents and will be returned to his parent country or origin as a family unit.

When the family is removed the child Master Patel will be removed together the biological parent as a family unit". (grammar uncorrected)

36.
This self-direction was express and comprehensive. It was too generous to the appellants in referring to the interests of the child being paramount. Such interests are not paramount in the immigration context, rather they should be considered as a primary consideration. Otherwise the self-direction was a clear and sensible explanation of why the child's interests required him to be removed with his parents.

The decision of the Immigration Judge

37.
We will now consider the decision of the Immigration Judge. We note that the judge's notes suggest that the appellants' representative instructed by his present solicitors submitted at the outset of the appeal that only Article 8 was concerned in this appeal. However, we also note that the first appellant's evidence suggested that he and/or his wife may be at harm from relatives in India engaging Article 3. The judge rejected the first appellant's evidence of the second appellant's alleged infidelity that was said to be the basis of the fear. It is not suggested that he erred in law in so doing. This was the only evidence relied on as a change of circumstance since coming to the United Kingdom other than the birth of the child.

38.
Having dismissed the Article 3 claim on credibility the judge dealt with Article 8. He was right to conclude that the intended removal of the appellants as a family unit involved no interference with the right to respect for family life. The family were all Indian nationals; none had any leave to remain or basis of claim under the Immigration Rules. They were being removed together. There were two aspects to the private life relied on.

39.
The first is the interests of the third appellant. He was thirteen months old at the time of the hearing before the judge and spent all his short life in the company of his parents. There was nothing in the representations, evidence or submissions deployed before the judge to suggest that removal represented any risk to his welfare, once the allegation of infidelity had been rejected as it was. Like the decision maker before him, the judge fully understood the guidance given in ZH (Tanzania) [2011] UKSC 4, but was entitled to conclude that removal would have no practical effect on him.

40.
Contrary to the representations of the appellants, a two year stay as a working holiday is a short period and wholly insufficient of itself to suggest that strong ties have been laid down by a child of tender years. The UT has recently reviewed the case law in MK (best interests of child) India [2011] UKUT 00475 (IAC) . This review notably includes consideration of the case of AJ (India) [2011] EWCA Civ 1191. This case makes the point that express reference to the s.55 duty is not necessary if the substance of the duty has been considered. Although the judge did not specifically refer to the duty under s.55 (which is indeed not directed to him but the immigration official) as we have noted the

decision maker did, and the substance of the duty was considered both by the judge and the decision-maker.

41.
As to the private life of the appellants by long residence in the United Kingdom, the Immigration Judge was entitled to conclude that any private life established during the course of their residence did not require respect or was not being interfered with by the immigration decision. Again the period of residence is short. It was permitted only on the basis of the first appellant's assurances that he intended a holiday only. The judge found that those assurances were false and if the truth had been known he should never have been permitted to enter the United Kingdom in the first place for the very reasons that led to the ECO's refusal of the application.

42.
A submission that a person who obtained entry and residence on the basis of a false representation that he was seeking an extended holiday should be permitted to stay on the basis that he had an expectation of making his life here is a remarkable one. In any event no evidence of particular friendships, ties or other important links that would be lost if the appellants were to return to India was given to the Secretary of State or the judge and no evidence has been submitted before us. Friendships and relations with distant adult family members can be maintained by correspondence, telephone calls and mutual visits. They do not give rise to a right of entry or residence or a right to respect for this private life by non-removal, save in unusual circumstances of necessary dependency.

43.
It is perhaps of some relevance that despite the assertions of total integration into the British way of life, the first appellant gave evidence through an interpreter. Although his sponsor had given an address in North London, the appellants lived on the south coast. Neither had established any strong links through specialist employment in the United Kingdom. There was simply no case to be made for stay outside the rules on this basis.

44.
On the above basis, there was probably no need for the judge to consider justification of any interference, as the immigration action was insufficiently serious in its context to amount to an interference with private life meriting respect. Nevertheless he did so. The economic order of society is promoted by immigration control in accordance with the Immigration Rules and such other statements of policy and practice as are considered appropriate to regulate admission. The Immigration Rules include the general balance under paragraph 395C that has been considered in this case. It is accordingly appropriate and proportionate to remove those who do not qualify for admission unless there are compelling family or private life considerations that outweigh the public interest. For reasons we have already noted there were none.

Error of law

45.
Before us, Mr Malik advances two grounds to support the contention that the judge made errors of law. It is said that he failed to decide that the variation decision was not in accordance with the law because:-

(i)
It was not based on an assessment of the child's best interests in accordance with s.55;

(ii)
It was a segregated decision because a decision to remove had not been made at the same time as the decision to vary.

46.
We reach two conclusions. First, from the record of proceedings it can be determined that no submissions were made to the Judge that the decision was not in accordance with the law on either head. The concluding submissions were entirely directed to the merits of the case. Where the appellant is legally represented, it is difficult to complain that the decision was wrong in law where the complaint is a failure to address an issue that was never raised when it could have been. The absence of reasoning on the issue is understandable.

47.
Secondly, we have in any event carefully examined the Secretary of State's decision for ourselves, in the light of the submissions we have heard. We conclude that these submissions are wrong in point of fact. The decision-maker did consider removal and the principles relevant to removal as he was asked to by the appellant. The decision maker fully considered s.55 and the best interests of the child principle. The decision was taken with due regard to the two circumstances that must be considered in such cases. In summary measuring the decision against the public law principles established by the Court of Appeal we conclude:-

i.
It was taken in accordance with the statutory scheme.

ii.
It was not unfair in excluding any consideration on which the appellants sought to rely.

iii.
It was based on a decision to remove in the event of no voluntary departure and took express account of the considerations and overall balance set out in rule 395C.

iv.
There was no segregation of extension issues from removal issues.

v.
The decision was rational in substance; it was at least one that a reasonable decision-maker could have reached properly directing him or herself as to the nature of the discretion to be exercised and the factors relevant to the lawful exercise of that discretion.

It was therefore not unlawful by reason of a failure to have regard to relevant circumstances or having regard to irrelevant ones. We are satisfied that the judge at appeal would have reached the same conclusion had he been asked to consider the matter.

48.
We recognise that the judge did not make reference to the exercise of discretion under paragraph 395C even though the decision-maker had done so. For the reasons set out in EO (Turkey) and Mirza, a judge has the statutory jurisdiction to decide that discretion as between compassionate circumstances and the public interest in removal should have been exercised differently.

49.

It is best practice in a case such as the present where the whole context of the application and decision on extension of stay is that the appellant should not be removed because of compassionate factors, for the judge to indicate that he has taken these factors into account even if no submissions expressly citing the paragraph have been made.

50.
However, we do not consider that this was an error of law. The appellant's submissions at the appeal were made in the context of Article 8 private life. The range of circumstances that could be relevant to Article 8 are wide. We recognise that they can include cases where there has been substantial residence for the purposes of obtaining an important recognised educational qualification that has been frustrated by some marginal slip in the application form or data provided: see CDS (PBS "available" Article 8) Brazil [2010] UKUT 305 (IAC) . This case is very far from such a case. Here, the first appellant never qualified for any class of claim for an extension under the rules. We note that in the general run of cases, factors that are relied on as compassionate ones, length of residence, connections with the UK, impact of removal on child and family members are all well within the ambit of Article 8 and a number of judges have remarked on the fact that compassionate factors can be Article 8 ones. It would only be a case where a factor relied on by the appellant fell outside the scope of Article 8 that a failure to refer expressly to paragraph 395C would be material. There were no such factors in this case.

51.
In any event we have considered whether even if it could be said that the failure to refer to a Rule not cited in submissions was an error of law, it could conceivably be said to be material in the present case. We are satisfied it cannot. The judge read the decision letter that explains paragraph 395C has been considered but there were not sufficient compassionate factors to balance against the public interest. We agree with the decision-maker and the judge that nothing had been presented that was either capable of amounting to a compassionate factor that could outweigh the normal course. For reasons already noted the residence of the appellants was both short and an abuse because it was based on the first appellant's misrepresentation of his intentions. To have afforded any weight to such a factor would have been perverse.

52.
In summary we conclude:

(i)
There has been no error of law made by the Secretary of State in the way she made this decision.

(ii)
There has been no error of law made by the judge in his consideration of the matters raised in the appeal from the Secretary of State's decision.

(iii)
Even if, the judge should have referred expressly to paragraph 395C there were no factors capable of carrying weight in the context of that paragraph as the decision maker had notice and every relevant factor had been considered in the context of Article 8.

(iv)
If we had remade the decision for ourselves we would have dismissed it on the basis of our conclusion that none of the matters advanced were capable of carrying any weight.

This appeal is dismissed.

Signed

Mr Justice Blake

President of the Upper Tribunal

Immigration and Asylum Chamber