Upper Tribunal

(Immigration and Asylum Chamber)

R (on the application of Mureed Hussain) v Secretary of State for the Home Department FCJR [2013] UKUT 00438 (IAC)

Heard at Field House **Judgment sent**

On 13 June 2013

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

UPPER TRIBUNAL JUDGE JORDAN

THE QUEEN (ON THE APPLICATION OF

MUREED HUSSAIN)

Applicant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the applicant: Ms C. Hulse, instructed by Duncan Moghal, solicitors

For the respondent: Mr Z. Malik, instructed by Treasury Solicitor

JUDGMENT

1.
The applicant challenges as Wednesbury unreasonable the decisions made by the respondent on 7 September 2012 and 2 April 2013 refusing to treat the applicant's submissions of 22 January 2011 and 23 November 2011 as a fresh claim within the meaning of paragraph 353 of the Immigration Rules.

The claim under H1025235

2.
The applicant, born on 1 January 1960, is said to have arrived in the United Kingdom on 21 March 2000 avoiding immigration controls. He claimed asylum on 23 March 2000. This was refused on 21 January 2002. He appealed the respondent's decision on 11 February 2002. Just over a year later, on 25 February 2003, his solicitors withdrew the appeal before it was to be determined by an Immigration Judge. These proceedings were conducted by the Home Office under reference H1025235. For the purposes of this application, the applicant bore the name Qari Murid Hussain.

3.
The decision letter refers to the fact that the basis of the applicant’s application for asylum was fear of persecution from the authorities in Pakistan because the applicant had registered an FIR against persons who had murdered his cousin and because he did not vote for the Pakistan Peoples Party candidate in the 1997 elections.

4.
In refusing the application, the Secretary of State accepted that the applicant may have been arrested by the police as a result of allegations made against him but that the authorities were obliged to investigate those accusations and the applicant had never been charged with any offence, a result which would have occurred had the authorities considered the applicant was of any adverse interest. The respondent claimed that, had this been the case, the applicant would have been tried in a lawful process to determine his guilt. These reasons were provided to support the respondent's reasoning that the applicant was not at risk of serious harm.

5.
On its face, this was a lawful refusal of the asylum claim for reasons which, as a result of the proceedings which were initiated by the applicant as a challenge to it but were withdrawn, have never been successfully set aside.

The claim under H1022661

6.
Had the applicant’s immigration history ended there, it would have been largely uneventful. We can only speculate about why the Home Office created a further file. This bore the Home Office reference number H1022661. For the purposes of this application the applicant bore the name Qari Mardi Hussain. This applicant was born 1 January 1966, not 1 January 1960 as in the other claim. This resulted in the preparation of a second refusal letter dated 25 June 2004. I shall refer to this as the second claim but there is no definitive evidence that this claim post-dated the other.

7.
A synoptic view of the two claims reveals they are the same.

H1025235	H1022661

Fear of persecution from the authorities in Pakistan because the applicant had registered an FIR against persons who had murdered his cousin and because he did not vote for the Pakistan Peoples Party candidate in the 1997 elections. Those seeking revenge against him had used their power to influence the Pakistani police. After the 1997 elections, he had been arrested on 10 or 12 occasions and beaten and threatened. False allegations had been made against him. When he had sought a passport, his application had been refused and he had been told a reward was being offered for his arrest.	The applicant was a member of Jamiat Ul-Maih whose cousin had been killed by four people who were connected with the local political leader but their cases, although taken to court, were dismissed following bribery of court officials. The applicant campaigned against this injustice but those involved attempted to force him to vote for the Pakistan People's party as a result of which regular false complaints were made against him. He was arrested and detained between 10 and 12 times and that, during the course of detention he was threatened but not beaten. When the applicant tried to obtain a passport, he was told there was a reward offered for his arrest.

8.
Had the applicant relied on the second claim as being significantly different in that the material in support of it had not been considered in the first claim, it would have been open to the applicant to argue this was a conventional fresh claim. However, there is no suggestion that the applicant seeks a determination on the substance of this claim in the judicial review proceedings. Not by the widest possible margin can the second claim be construed as a fresh asylum claim on the basis of facts falling within the ambit of paragraph 353.

9.
It was not suggested by either party that the claims were inconsistent with each other. They have striking similarities albeit the details are different. I would not regard these skeletal versions of the two claims as inconsistent or, indeed, significantly different and the differences between the two accounts appear no more than details given in one account but omitted from the other. As the second claim was the same as that advanced under reference H1025235, it was disposed of in the first set of proceedings.

10.
I was invited by Ms Hulse to treat the creation of two claims as the fault of the Home Office who muddled a single claim into two and put some evidence into one file and other evidence into another thereby depriving the applicant of having his claim decided on all the evidence rather than on part. This criticism has a hollow ring upon it when the two claims are made under different names (albeit retaining common features) and where the applicants have different dates of birth. I cannot infer that the creation of two files was the respondent’s fault. I am unable to say whether the two files contained different material; for example, different interviews or supporting information.

11.
I would not infer that the withdrawal of the asylum claim in 2003 was an acknowledgment that the application should proceed on the basis of the second file. If the respondent had thought that it was an error to maintain two files on the same application, it would be for the respondent to amalgamate the two, not for the applicant to withdraw his appeal in one without obtaining the approval of the respondent so as to avoid his withdrawal being misconstrued or having relevant material omitted from consideration. Further, had the remaining appeal been the vehicle by which the applicant intended to establish his right to be acknowledged as a refugee, I would have expected the applicant to have

pursued it, all the more so since there remained a lawful decision on the part of the Secretary of State that the applicant had not successfully challenged. If the two claims were, indeed, the same but each file contained different parts of the evidence, the withdrawal of one of the claims without preserving the evidence from it had obvious difficulties for the applicant. If the applicant's representative intended to have both files treated as a single claim, the more obvious course was for the two files to be treated as a single claim (just as the two files are now being dealt with in tandem).

12.
Notwithstanding the meagre basis for doing so, the applicant seeks to assert that he has an outstanding claim for asylum which the respondent has failed to determine, notwithstanding it was made some time between his arrival in March 2000 and June 2004. He relies, however, whether through opportunism or conviction, on a letter dated 14 October 2008 in which the H1022661 Home Office file (the second claim) was treated as a legacy claim being dealt with by the Casework Resolution Directorate (CRD). The letter goes on to ask the applicant to complete a questionnaire.

13.
Ms Hulse portrays the applicant as a genuine asylum seeker who has waited for a decision for over 10 years and who waits to prove he is at risk of persecution. By contrast, the Secretary of State regards him as an individual who has abused the system of immigration control for his own ends.

The nature of the claim and the Tribunal's jurisdiction to deal with it

14.
At this stage, it becomes necessary to take stock of what the applicant's case is or might be. In their letter of 23 November 2011, following up one of 23 January 2011, the applicant's solicitors wrote to the Further Submissions Unit of the Home Office asserting that the applicant had since his arrival on 21 March 2000 established such a strong connection to the United Kingdom that his removal would violate his human rights. Those submissions were answered by the respondent in her letters of 11 November 2011 and 7 September 2012. These submissions were a classic application of paragraph 353 in that the development of the applicant's private life since the appeal was withdrawn in 2003 was different from that originally considered by the respondent. The issue was whether they created a realistic prospect of success before a First-tier Tribunal Judge.

15.
The application was transferred by the Administrative Court to the Upper Tribunal as a fresh claim under paragraph 353 of the Immigration Rules. The Rule provides:

When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. These submissions will only be significantly different if the content:

(i) has not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

16.

The jurisdiction of the Tribunal is limited in scope to that contained in the Lord Chief Justice's direction identifying the class of cases specified for the purposes of s.18 (6) of the Tribunals, Courts and Enforcement Act 2007. Cases so identified are:

Applications calling into question the decision of the Secretary of State not to treat submissions as an asylum claim or human rights within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered.

An application also falls within the class specified if it challenges

(i) a decision or decisions to remove (or direct the removal of) the applicant from the United Kingdom; or

(ii) a failure or failures by the Secretary of State to make a decision on submissions sent to support an asylum or human rights claim;

or both (i) and (ii); but not if it challenges any other decision.

17.
Since there has been an appeal to the Tribunal in the form of the appeal made by the applicant under Home Office reference H1025235 and since that appeal was withdrawn by the applicant before it was determined by the AIT and is no longer pending, the Tribunal has jurisdiction to consider whether submissions amount to a fresh claim.

18.
The Upper Tribunal has jurisdiction if it challenges a failure to make a decision on submissions sent to support an asylum or human rights claim but not ' any other decision '.

19.
In the pre-action protocol letter dated 14 September 2012, the applicant's solicitors whilst repeating the human rights submission, also asserted that, as the applicant was recorded as an absconder from 11 September 2003, and the refusal letter is dated 25 June 2004, 'it is unclear how and where the refusal was served'. This would suggest the applicant's solicitors were asserting that if an overstayer managed to avoid service by moving address and failing to notify the Secretary of State of the change as he is required to do, he might benefit from the rights that would have accrued to him had he received the refusal decision and then appealed against it as well as from the delay that he himself causes. Both propositions only need to be stated to demonstrate their emptiness. Neither of these contentions has any validity.

20.
Although at the outset of the hearing, Mr Malik, acting on behalf of the Secretary of State, conceded that there was no evidence of service of the 2004 asylum decision, having reconsidered the papers over the short adjournment, he withdrew that concession. Mr Malik points out that the requirements of the Immigration (Notices) Regulations 2003 Rules permitted service in a number of ways, including where a document is

7(1)(c) sent by postal service in which delivery or receipt is recorded to:-

(i)
an address provided for correspondence by the person or his representative; or

(ii)
where no address for correspondence has been provided by the person, the last-known or usual place of abode or place of business of the person or his representative

21.
He points out that, at pages 40 to 50 of the applicant's bundle, there are copies of file entries in relation to the second claim (H1022661) which deal with dispatch actions taken on 28 August 2004. At page 42, the applicant is named and an address provided. There is attached to the form a recorded delivery label indicating that documents were sent to the applicant so named at the address provided. This is satisfactory evidence that these documents were served in accordance with reg. 7(1)(c). It seems proper to infer that the envelope was sent to the address given and that this address had been provided by the applicant; at least the fact that the August 2004 documents were sent out is prima facie evidence that this was the address on the file. Whilst it is possible that this was not the correct address or that the person who sent it made a mistake or misdirected it, it seems more likely than not that there was correspondence sent to the applicant in August 2004 which included the IS151A – the notice to a person liable to removal as an illegal entry and the IS151B - the notice of immigration decision. This would tie in with the refusal letter of 25 June 2004. The applicant has not asserted that he had notified the respondent of another address prior to the date of posting.

22.
The grounds of challenge conflate the reasons for refusal letter dated June 2004 and the underlying immigration decision which I have not seen but which is shown to have been served on 28 August 2004 and which is the appealable decision. (The refusal letter itself carries no right of appeal.) Nevertheless, the point is clear. The applicant alleges the respondent had a duty to make a decision and failed to do so and this gives rise to a claim for judicial review. It is not argued that the failure is to be treated as a facet of the Article 8 claim.

23.
It is more likely than not that the respondent served the refusal letter of 25 June 2004 and this disposed of whatever claim was then outstanding. Unless the June letter had been sent, there would not have been the process adopted on 28 August 2004 to take steps requiring the applicant to leave. That said, it is the 28 August 2004 material that is relevant since this included the immigration decision. The evidence persuasively establishes that the applicant has no outstanding decision, notwithstanding the respondent’s letter of 14 October 2008 made under reference H1022661 in which the UK Border Agency spoke of the legacy programme and indicated that the applicant's claim fell within it.

24.
The respondent, with some justification, approaches the case in the alternative. She asserts that, whether or not, the second letter was served on the applicant, a lawful decision had already been made on the same claim and he had no right to receive a second. If the process by which two separate files were created was an administrative error for which the respondent was wholly to blame, that does not entitle the applicant to receive a decision under each of the two files. In essence, the respondent asserts that the applicant had one asylum claim which was the one determined in the proceedings that were withdrawn. That must be correct.

25.
The applicant does not contend he notified the Secretary of State of any change of address sufficient to enable the Secretary of State to effect actual service upon him. As I have set out above, the

overwhelming evidence is that he was properly served. Nevertheless, the applicant repeats in the grounds that, unless the respondent was able to show the decision was served, it remains outstanding. The applicant's skeleton argument contains expanded grounds of challenge which include seeking a mandatory order requiring the respondent ' to serve and issue her decision dated 25 June 2004 with a right of appeal '.

26.
Needless to say, the applicant is indifferent to receiving the contents of this letter which he has had in his possession since it was supplied to him when he sought the contents of the files kept on him by the respondent. Similarly, he already knows what the decision will be. His original purpose on having it served on him was so that the further immigration decision would give rise to a further right of appeal with its concomitant right to remain pending its outcome.

27.
Thus far, the claim for judicial review falls squarely within the type of claim that is capable of transfer to the Upper Tribunal since the judicial review challenges

(ii) a failure…by the Secretary of State to make a decision on submissions sent to support an asylum or human rights claim.;

The emergence of a Hakemi claim

28.
The pre-action protocol letter continues in paragraph 7 with the assertion that the respondent had failed to consider the case of Hakemi & Ors v SSHD [2012] EWHC 1967. This is the first time this point is raised, as far as I am aware. It is set in the context of various allegations amounting to violations of the applicant's human rights and it appears to arise in the context of Article 8 and the contention that there is an outstanding human rights decision, rather than as a free-standing point. The details are sparse and confined to these words:

"The…case…dealt with the length of residence before an applicant was being granted leave under the legacy cases was also considered (sic). The SSHD was applying a policy of 6 years residence before awarding leave. Accordingly we note that the Claimant has been resident in the United Kingdom for a period exceeding 12 years and has established a family life."

29.
The reference to family life might appear to suggest it is advanced as an element of an Article 8 claim. There are two clear errors in this passage. First, the reference to Hakemi principles is a woefully inadequate summary of the relevant principles and is simply wrong. Second, there has never been a viable claim that the applicant's 12 years in the United Kingdom have established a family life, rather than a private life.

30.
The same point is made in the grounds of application, (paragraph 14). Furthermore, in the applicant's skeleton argument at paragraph 5 Ms Hulse puts the Hakemi claim in these terms:

The Claimant challenges the Defendant's failure to grant him leave to remain in accordance with Article 8 and with her own Legacy policy as set out in the Home Office Enforcement Guidance and Instructions regarding cases of overstayers and others subject to administrative removal.

31.

Once again I find it difficult to construe this passage in which Article 8 and Hakemi principles are conjoined as doing anything more than placing Hakemi principles as part and parcel of the Article 8 consideration.

32.
What appears to be an artificial and semantic distinction is, however, of some significance because it goes to the jurisdiction of the Tribunal to deal with applications for judicial review. In its simplest form, the claimant relying on Hakemi principles asserts he has a right to be granted leave to remain under paragraph 395C of the former Immigration Rules if his case falls to be decided as a legacy of unresolved cases, decisions in respect of which have been delayed by the Secretary of State's own inaction. The failure to make a decision (or to make a decision in favour of the claimant) may give rise to a right to leave to remain under paragraph 395C but in circumstances where treatment might well have been more favourable. That is a claim that falls outside the Lord Chief Justice's direction because it alleges a failure by the Secretary of State to make a decision on submissions which are not said to support an asylum or human rights claim but challenges another decision.

33.
If, however, the Hakemi principles are raised simply as part of the proportionality balance, there is no reason why it should not be dealt with by the Upper Tribunal.

34.
Ms Hulse did not advance her case on the basis that the Upper Tribunal lacked jurisdiction to decide the application for judicial review or that the application for judicial review should be transferred back to the Administrative Court as falling outside the scope of the Upper Tribunal's judicial review jurisdiction. Mr Malik did not urge me to do so for the sake of judicial propriety. I therefore construed the applicant's claim as an Article 8 claim in which the public interest in favour of removal was lessened or removed by reason of the applicant's underlying rights to have been entitled to receive leave to remain.

Resolution of the Hakemi point

35.
Thus, I cannot avoid addressing the Hakemi point. In Hakemi & Ors v SSHD , Burton J was considering the fact that by the end of 2006, there was a massive and unmanageable backlog of asylum/human rights applications, by which the Home Office was overwhelmed. 500,000 outstanding applications received prior to 5 March 2007 were transferred to the Casework Resolution Directorate ("CRD") which endeavoured to grant or refuse leave to remain by July 2011. By July 2011 there was a rump of some 116,000 cases, consisting in part of 18,000 still active cases and in a "controlled archive" of some 98,500 cases. The active cases and the controlled archive were transferred, in July 2011, to a new body, who were to resolve them. The legacy process, over its five years of operation, resulted in considerably more grants than refusals but there was no amnesty.

36.
The CRD was to consider the grant of leave outside the Immigration Rules but by reference to paragraph 395C. Chapter 53 of the Enforcement Instructions and Guidance ("EIG") was at all material times the published guidance as to 'relevant factors' in paragraph 395C of the Immigration Rules. The EIG drew a clear distinction between the accrual of time in the United Kingdom which was attributable to the applicant and those periods which were caused by the Secretary of State. In non-family cases where delay by UKBA had contributed to a significant period of residence, a period of residence of 6-8 years normally warranted leave to remain. This developed into practice or policy, " all

things being equal ", that 6 years' residence would result in a grant of leave, and this practice or policy was said to amount to a change or an alteration of a substantive criterion for leave to remain . Burton J found that there was no change in Rule 395C, but simply discussion and guidance in relation to the factors to be taken into account, always subject to a holistic approach. There was no such thing as a legacy policy. Rather, the legacy cases were a process by which guidance was offered to case-owners as to the implementation of the Immigration Rules and, in particular, paragraph 395C.

37.
The difficulty faced by Ms Hulse is that the legacy policy arose in the context of a removal which was itself subject to a consideration of paragraph 395C and the duty to take into account all relevant factors including the Enforcement Instructions. Paragraph 395C, however, was deleted from the respondent's policy by a change in the Immigration Rules introduced on 13 February 2012 by HC 1733. The decision challenged in the proceedings for judicial review is a decision made on 7 September 2012. It is clear that the Secretary of State is entitled to change her policies and apply those changed policies to decisions made after the changes were introduced, notwithstanding the fact that, at the date of application, the applicant met the requirements of the Immigration Rules then in force, Odelola v SSHD [2008] EWCA Civ 308 (10 April 2008).

38.
Further, the Court of Appeal roundly rejected the contention that, in such circumstances, the Secretary of State had a duty to consult with applicants prejudiced by the changes, R (on the application of Rahman, Abbassi and Munir) v SSHD [2011] EWCA Civ 814.The decision of the Court of Appeal was found to be ' plainly correct ' in the words of Lord Dyson in the Supreme Court, a conclusion with which the other Judges of the Supreme Court agreed, (Munir & Anor, R (on the application of) v SSHD [2012] UKSC 32). It is the inevitable consequence of these decisions that the applicant has no claim to be entitled to the benefit of the legacy policy, even if there was an outstanding decision (which there was not).

Recent decisions upon the Hakemi jurisdiction - DM, Re Judicial Review [2013] ScotCS CSOH 114

39.
Since I heard the appeal, further decisions have been made shedding light on Hakemi principles in the context of a claim for judicial review. In DM, Re Judicial Review [2013] ScotCS CSOH 114 (9 July 2013) Lord Doherty considered the case of a petitioner who had come to the United Kingdom in 1998 and claimed asylum. His asylum claim was refused; on 15 December 2000 he became appeal rights exhausted. In the meantime he had married a British citizen in August 1998 and on 12 December 2001 was granted leave to remain for one year on account of his marriage. The marriage collapsed. The petitioner made no further application for leave to remain when his leave expired on 12 December 2002. He became an overstayer. He did not contact the authorities until 29 May 2009 when solicitors wrote applying for discretionary leave on the basis that removing him would breach his Article 8 ECHR right to private life and that he had a right " to have his case considered/reconsidered in light of the policy as announced by the Secretary of State in July 2006 in respect of case resolution ".

40.
The Secretary of State did not reach a decision on the petitioner's representations of 29 May 2009 until 14 November 2011. Having made a decision in accordance with the factors contained in paragraph 395C, the Secretary of State rejected the petitioner's claim for leave to remain and

concluded removal was proportionate. On appeal, the First-tier Tribunal allowed his appeal, resulting in the grant on 31 August 2012 of discretionary (not indefinite) leave to remain in the United Kingdom until 30 August 2015.

41.
It was said that the 29 May 2009 representations should have been answered by 19 July 2011, but were not responded to until 14 November 2011 and the decision to refuse to grant the petitioner Indefinite Leave to Remain was unlawful. It was submitted on the petitioner's behalf that the various statements amounted to a promise that legacy cases such as the petitioner's would be decided within five years of 25 July 2006; that there had been a practice that persons granted leave to remain on paragraph 395C considerations were granted Indefinite Leave to Remain; that the promise had given rise to a legitimate expectation that the petitioner's case would be decided within that period which, had it been, would have resulted in the grant of Indefinite Leave to Remain.

42.
Lord Doherty was not persuaded that any of the statements relied upon by the petitioner constituted a promise that all legacy cases would be dealt with within five years of 25 July 2006. The statements were aspirational only: a clear declaration of an objective, and the expression of determination to achieve it. However, it was not, and was not intended to be, a binding undertaking to those with legacy claims.

43.
The petitioner therefore failed to establish that prior to July 2011 there was a practice of granting Indefinite Leave to Remain in rule 395C cases which was so unambiguous, so widespread, so well-established and so well-recognised as to carry a commitment to legacy claimants that its continuance was assured and that their cases would be determined in accordance with it. From 20 July 2011 the clear policy in rule 395C non-removal cases was to grant discretionary leave to remain for up to three years. But, even if on 24 July 2011 the respondent had decided on rule 395C grounds not to remove the petitioner, he would not have been granted Indefinite Leave to Remain. Further, there was no obligation to decide legacy cases in accordance with the law, policy and practice applied by the CRD when it was operational nor was there a commitment that its continuance was assured and cases would be determined by CRD or the respondent in accordance with it.

44.
There is nothing within the decision in DM that provides the applicant with any purchase in his claim for judicial review. Rather the reverse in that it demonstrates the limitations that exist upon applications for judicial review advanced on the basis that the Secretary of State was required to make a decision and (a) was required to make a decision at a particular time and/or (b) in a manner that was consistent with historic policies that were no longer applicable.

Okonkwo (legacy/Hakemi; health claim) [2013] UKUT 00401 (IAC)

45.
In Okonkwo (legacy/Hakemi; health claim) [2013] UKUT 00401 heard on 23 July 2013, the President and Upper Tribunal Judge Hanson decided that

i) It may be unfair for the Secretary of State to fail to apply the terms of a policy to a case that fell within the terms of the policy when it was in existence: Hakemi and others [2012] EWHC 1967 (Admin), and Mohammed [2012] EWHC 3091 Admin considered.

ii) Chapter 53 of the EIG Instructions as in force December 2011 did not mean that any adult who had lawfully resided in the UK for six years had an expectation of discretionary leave to remain applying former rule 395 C together with the policy then in force.

46.
In August 2011 the appellant and her husband applied for discretionary leave to remain outside the Rules. They relied on the length of lawful residence of Mrs Okonkwo (over five years) and the fact that she had received a kidney transplant in the United Kingdom and the consequences that removal would have upon her health. There was a prompt reply to the application made on 29 September 2011 in which the Secretary of State refused the application for an extension of stay. Her counsel, Mr Medhurst, argued that a consideration of rule 395C would have had to take into account EIG Chapter 53 as in force on 8 December 2011. The decision of the Administrative Court in Mohammed [2012] EWHC 3091 Admin made plain that a failure to apply those instructions to a decision where they should previously have been applied could make a subsequent decision conspicuously unfair, and those instructions required in the normal case that a person who had been resident for six years to be given discretionary leave to remain.

47.
The proper meaning of the instructions in EIG Chapter 53 was central to this submission but the panel concluded Mr Medhurst had misunderstood them. By the time the case came before the Judge, it was clear that that no lawful removal decision had yet been made and despite previous regrettable uncertainty in the law, there was no obligation in law for the Secretary of State to make decisions to remove at the same time as a decision to refuse leave to remain.

48.
Further 53.1.2 of the EIG referred to ‘ Residence accrued as a result of delay by UKBA ’ and that they were created partly in response to the decisions of the higher courts that delay by the Home Office can be a significant factor in the assessment of whether removal is a proportionate interference with human rights. Reliance was placed upon the words, ‘Any other case where delay by UKBA has contributed to a significant period of residence…4-6 years may be significant, but a more usual example would be a period of 6-8 years’. It was argued that the appellant has been here for six years and there had been delay in making a decision on her case between August 2011 and October 2012 thereby entitling her to qualify for exceptional leave on length of residence alone.

49.
The panel disagreed. Mrs Okonkwo’s residence until August 2011 was not because of any delay by the Home Office, but was a consequence of the progress of her studies and the post-study work experience rule. There was no delay by the Home Office in any decision making following the August 2011 application. There was a prompt refusal in September 2011 and following appeal further decisions in March 2012 and October 2012 based on assertions of contentious issues of law. The factual predicate for the operation of the policy did not exist.

50.
The proper meaning of the EIG was that, in the case of adults with no children, residence of between four to eight years may be considered significant but that was residence following an initial assessment of the prospect of removal. Removal was only considered in September 2011 and decisions to remove were made in March 2012 and October 2012 against a background of appeals and the clarification of a complex area of law. Thus, there was no delay of two, three or four years, that were the relevant periods needed under the instructions.

51.
Although it is always a relevant factor, pure length of residence alone has never been a decisive consideration in immigration decision making. Accordingly, the centre piece of the applicant’s claim to unfairness fell away.

R (ex p. Julius Labinda Che) [2013] EWHC 2220

52.
In R (on the application of Julius Labinda Che) v SSHD [2013] EWHC 2220 (Admin) (26 July 2013) Mr C M G Ockelton, Vice President of the Upper Tribunal (sitting as a Deputy High Court Judge) considered the application for judicial review of a person whose asylum claim had been refused in a letter dated 17 October 2006. On 30 March 2007 the Secretary of State made a decision to give directions for his removal as an illegal entrant. On 12 June 2007 his appeal against that decision was heard and dismissed principally because the claimant’s claim was disbelieved. His appeal rights were exhausted on 23 November 2007. He had never had any leave to be in this country, and did not depart after the dismissal of his asylum claim. In 2009 his representative made further submissions enlarged on 19 March 2010 which the defendant answered by a decision of 19 April 2011. The Secretary of State concluded that the further submissions were not significantly different from the material which has previously been considered and did not amount to a fresh claim. The claimant was told he had no basis of stay in the United Kingdom and should make arrangements to leave the United Kingdom without delay.

53.
A letter dated 31 July 2011 was crucial to the claimant's case. In it the Secretary of State told the claimant’s representative that, in March 2011, the UK Border Agency had completed its internal review of all outstanding legacy cases and that the claimant’s case had been reviewed but no final decision had yet been made.

54.
The claim for judicial review alleged a failure both to consider the claimant's case under the legacy policy and a failure to grant the claimant leave to remain. It was said that the defendant unlawfully delayed in making a decision: the letter of 31 July 2011 created a legitimate expectation that a decision would be made shortly and it was unreasonable for the defendant to delay making the decision. Secondly, the delay had a substantial adverse effect. The evidence of the policies and practices of those making legacy decisions in the period soon after 31 July 2011 suggested that if a decision had been made at that time it would have been a grant of leave. (The argument that the decision made on 30 May 2012 was inadequately reasoned and failed to take into account the submissions that have been made about the claimant's situation was roundly rejected).

55.
Mr Ockelton said the creation of the CRD was for the purposes of review, and in order to divide those who were entitled to remain from those who ought to be removed. Further, the policies and practices applied to the decision of individual cases were no different from those which would be applied to any other cases that shared the same facts. In the group of those who waited for a long time for a decision following a claim for asylum, it could properly be said that it was the Secretary of State's own inactivity that had enabled them to develop a personal life in the United Kingdom and to build up relationships here. Even in the case of those whose appeal rights were exhausted, the general lack of enforcement enabled such situations to develop, even if they should not have been allowed to do so. The inclusion of a case within the 'legacy' gave no additional expectation of a grant of leave.

56.
In those cases in which the claimant complained that he had not received a 'legacy decision' granting him leave to remain, it was conventionally argued, amongst other things, that the claimant had not had a 'legacy decision' and was therefore still awaiting one which, with luck, would be a decision granting leave.

57.
Mr Ockelton decided that it was ‘ wholly unarguable ’ in cases in which the claimant has had a notification that he was not to be granted leave but was to be removed, that he had not had a decision in this case. Although he was not a person who has yet actually been removed, his case has been reviewed, he had had his legacy decision, and the removal process, which had to start with such a notification, had begun. Such a person was not therefore awaiting a decision which the judicial review proceedings were said to be seeking: decision-makers had completed their task and only those charged with arranging the mechanics of removal had any further work to do on his case. The claimant had no perceptible entitlement to another decision. He had made no further valid submissions and none was outstanding.

58.
Nor did he have a legitimate expectation derived from the letter of 31 July 2011 since such an expectation arose from a promise which was ‘ clear, unambiguous, and devoid of relevant qualification ’. In order to assess this, it was necessary to look to see what, on a fair reading of what was said, was reasonably to be understood by the person to whom the words were expressed. Reliance on any promise was not essential, but if there has been reliance, that would be relevant in deciding whether it was open to the authority to go back on the promise which would be one of the factors to bear in mind when deciding whether a change of policy or a revocation or abandonment of the promise could be justified in the public interest.

59.
Whist the 31 July 2011 letter on its face did amount to a clear and unequivocal representation that the claim was outstanding, the assessment of any expectation legitimately arising from the letter had to be made in the context of the recipient's knowledge. The claimant and his solicitors knew perfectly well that all the outstanding submissions that had been validly made had been dealt with in the decision of 19 April 2011. They knew that, contrary to what had been said in the letter, the claimant's case was not one in which the Secretary of State had not been able to come to a final decision. The decision had been reached, and communicated; all that was awaited was removal. Mr Ockelton continued:

40. Nothing to which the claimant has pointed indicates that the legacy programme involved any system of repeated review of cases in which no further (valid) submissions had been made. It is thus somewhat difficult to understand what it is said that the claimant's expectation was. It cannot have been that there would be a new decision based on submissions made after 19 April 2011, because no submissions had been validly made after that date.

60.
His claim for judicial review fell to be dismissed.

61.
Having reviewed these decisions, there can therefore be no viable claim that the applicant in the application before me is permitted to advance before the Upper Tribunal that this right should be an element within a fresh claim that removal would violate his human rights.

The respondent’s approach to the fresh Article 8 claim

62.
The basis for the decision made by the respondent on 7 September 2012 that the appeal could not succeed on Article 8 grounds because the applicant did not meet the requirement within the Rules that he had been present in the United Kingdom for 20 years was, no doubt, a lawful decision under paragraph 276ADE (iii) of the Rules but it failed to engage with the ‘pure’ Article 8 claim arising by operation of s.6 of the Human Rights Act, 1998. The two separate claims were identified by the Tribunal in MF (Article 8 – New Rules) Nigeria [2012] UKUT 393 (IAC). Had the respondent’s decision-making process ended there, it may well have been open to the Upper Tribunal to decide that the decision was legally flawed by reason of a failure to apply s.6.

63.
This demonstrates the existence of a principle available in judicial review proceedings which is an extension of principles identified in SSHD v Abdi [1996] Imm AR 148 and more recently considered by the Tribunal in Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC) where a decision is made that is not in accordance with the law. If in the course of judicial review proceedings the decision-making process is found by the Upper Tribunal to be flawed, it must say so and require the respondent to make a fresh and lawful decision. It forms a discrete enquiry in the Upper Tribunal’s judicial review proceedings.

64.
This principle, however, has no application in the present case because the respondent, foreseeing that the original decision did not engage with Article 8 outside the Immigration Rules, supplemented her earlier decision with a decision made on 2 April 2013 which, when taken together, fully engages in Article 8 issues both within and outside the Rules.

The substance of the human rights claim

65.
The fundamental elements of the applicant's submissions in relation to his human rights claim were that, since entry on 21 March 2000, the applicant had established a very strong connection to the United Kingdom and had fully integrated within society, a connection which had become progressively stronger over the years. The claimant asserted he was living a productive and active life within his community and the wider community and, if removed, would find it impossible to reintegrate into Pakistani society and would be unable to lead a life in any way similar to that which he has developed here. This productive and active life, so the applicant said, was a great achievement and its continuation was a right protected under Article 8. The nature of the private life that he had built up consisted of strong and close bonds with individuals and families which went far beyond mere friendship. The applicant regarded himself as part of the fabric of British society and living a life in accordance with Western norms. This arose because of his active membership of the Islamic community to which he contributed significantly in teaching Islam and Arabic to Muslims in the South Wales and Bristol region. He was highly respected within the community and his service was successful and valuable. It included a major role in setting up and ensuring the success of the Quran Academy of Wales. It is said he contributes most of his time teaching the Quran to adults and children on a voluntary basis, greatly benefiting the community. Indeed, his teaching extends beyond Wales and Bristol.

66.

This account of the applicant's activities was not substantially challenged by the respondent in her decision. Indeed, she identified a large number of individuals from the Muslim community who supported the application.

67.
However, in a letter of 2 April 2013, the respondent recorded in paragraph 20 that the applicant had provided no evidence in support of a family life in the United Kingdom. Indeed, the applicant has a wife and children in Pakistan to whom he could return and with whom he could resume his family life. Family ties in Pakistan continue to exist.

68.
Whilst accepting that the applicant’s assertions to have been an active member of the Muslim community and to have contributed significantly to it, the respondent noted that the applicant was an illegal entrant and that his removal would be lawful in principle subject to the issue of proportionality. It was accepted that the applicant had established a private life in the United Kingdom simply because of the length of time he had spent here and his connection with the Muslim community. However, the respondent considered that the skills developed by the applicant in the United Kingdom were readily transferable to Pakistan where he could maintain the same levels of enjoyment amongst the Muslim community there (whilst maintaining his links with the Muslim community in the United Kingdom which would not be wholly lost). This is unarguably correct. In particular, the respondent took into account the public interest in assessing the proportionality of the applicant's removal. The letter continues,

30.
It is considered that your client’s immigration history weighs heavily in favour of his removal from the United Kingdom. Your client arrived in the United Kingdom in March 2000 having used documentary deception in the form of a Pakistan passport in another identity to gain entry into the UK. He failed to co-operate with the asylum decision-making process and additionally failed to comply with reporting restrictions for a significant period of seven years. He made further submissions and filed an application for judicial review in order to frustrate his lawful removal from the United Kingdom. It is considered that he has deliberately breached United Kingdom’s Immigration Law and therefore there are strong policy reasons to insist on his removal.

31.
The Secretary of State is entitled to weigh up the following factors against your client in assessing proportionality:

- his poor immigration history
- his failure to comply with asylum processes, without good reason
- his failure to put forward a compelling case for international protection
- his blatant disregard for the Immigration Rules, having absconded for over seven years

69.

The applicant himself may well disagree with the respondent's assessment of him. However, it was an assessment that the respondent was entitled to make on the material before her. In addition, the respondent considered the applicant's medical condition. On the basis of this, and having herself rejected the applicant's further submissions, the respondent concluded that there was no realistic prospect that those submissions would, when taken together with all the previously considered material, lead a First-tier Tribunal Judge, applying the rule of anxious scrutiny, to decide that the applicant should be allowed to stay in the United Kingdom due to a real risk that his human rights would be breached by a return to Pakistan. It was on this basis that the respondent concluded that the applicant's submissions did not amount to a fresh claim under paragraph 353.

70.
In approaching the application in this way, it is clear that the respondent considered the terms of paragraph 353 and did so in the context of the judicial gloss placed upon them by the decision in WM (DRC) v SSHD [2006] EWCA Civ 1495.

71.
I am satisfied that the Secretary of State adopted the correct legal approach to her task and reached a decision which cannot properly be classified as Wednesbury unreasonable. The respondent's decision to that effect that there is no real prospect of the applicant establishing before a First-tier Tribunal Judge that his human rights claim, assessed today, would result in the grant of leave to remain as removal would violate his human rights, was not perverse or irrational or otherwise unlawful.

DECISION

The application for judicial review is dismissed.

The applicant has 7 days from service of the judgment upon him to file and serve reasons why he should not pay the respondent's costs and the respondent is, within 7 days thereafter, to file and serve her response.

Costs will then be determined on the papers not earlier than 7 days thereafter.

ANDREW JORDAN

UPPER TRIBUNAL JUDGE