**Upper Tribunal**

**(Immigration and Asylum Chamber)**

R (on the application of Mujahid ) v First-tier Tribunal (Immigration and Asylum Chamber) and the Secretary of State for the Home Department (refusal of human rights claim) [2020] UKUT 00085 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Manchester Civil Justice Centre** **Decision & Reasons Promulgated**

**On 4 December 2019**

.....

**Before**

**THE HON. MR JUSTICE LANE, PRESIDENT**

**Between**

**THE QUEEN**

**(ON THE APPLICATION OF MUHAMMAD MUJAHID)**

Applicant

**and**

**FIRST-TIER TRIBUNAL**

**(IMMIGRATION AND ASYLUM CHAMBER)**

Respondent

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Interested Party

**Representation :**

For the applicant: Mr A Pipe, Counsel, instructed by Latitude Law

For the interested party: Mr S Murray, Counsel, instructed by the Government Legal Department

The respondent did not appear and was not represented.

(1) A person (C) in the United Kingdom who makes a human rights claim is asserting that C (or someone connected with C) has, for whatever reason, a right recognised by the ECHR, which is of such a kind that removing C from, or requiring C to leave, would be a violation of that right.

(2) The refusal of a human rights claim under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 involves the Secretary of State taking the stance that she is not obliged by section 6 of the Human Rights Act 1998 to respond to the claim by granting C leave.

(3) Accordingly, the Secretary of State does not decide to refuse a human rights claim when, in response to it, she grants C limited leave by reference to C's family life with a particular family member, even though C had sought indefinite leave by reference to long residence in the United Kingdom.

**JUDGMENT**

## A. THE QUESTION

1.
Where an individual who is in the United Kingdom makes an application for indefinite leave to remain, in circumstances where the application is treated as a human rights claim, does the Secretary of State refuse the human rights claim – thereby giving rise to a right of appeal to the First-tier Tribunal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 – if the Secretary of State decides not to grant indefinite leave to remain but grants the individual limited leave to remain, by reference to the Secretary of State's obligations under the Human Rights Act 1998?

2.
I have concluded that the answer to this question is no. I have been much assisted by the helpful written and oral submissions of Mr Pipe and Mr Murray.

## B. THE APPLICATION FOR INDEFINITE LEAVE TO REMAIN

3.
The applicant, a citizen of Pakistan, arrived in the United Kingdom in October 2006 as a student. He was granted further leave to remain in that capacity. In 2010 he was granted leave to remain as a Tier 1 (Post-Study) Work Migrant, followed by leave as a Tier 1 (General) Migrant, until 30 August 2016.

4.
On 8 August 2016, the applicant submitted a Tier 1 (General) application for indefinite leave to remain in the United Kingdom. Before the expiry of his extant leave, the applicant varied that application so that it became an application for indefinite leave to remain based on ten years' long residence, by reference to paragraph 276B of the Immigration Rules.

5.
The solicitors' letter which accompanied the application stated that the applicant had a wife, adult son and minor daughter resident with him in the United Kingdom. They also were citizens of Pakistan. The son and daughter had been in the United Kingdom since 8 December 2010. The letter said that since he came to the United Kingdom, the applicant "has developed a vast social network of friends, i.e. a strong private life". He "has always considered this country as his only home". The letter contended as "an irrebuttable fact that he has developed a very strong private and family life during the course of his residence in the UK".

6.
The applicant signed his name after section 6 of the application form, which contained a declaration by him regarding a variety of matters. Two of the paragraphs read as follows:-

"I accept that where I do not qualify for indefinite leave to remain but fall for a grant of limited leave, my application will be treated as an application for limited leave and I may be asked to pay an immigration health surcharge, under the Immigration (Health Charge) Order 2015. I accept that the Secretary of State will treat this application as invalid, retain the application fee and not grant leave, if a requirement to pay a surcharge is not met.

…

I accept that, in the event that I do not meet the requirements for indefinite leave, my application may also be considered as an application for limited leave to remain and understand that the Secretary of State will not grant a period of limited leave unless the requirement to pay an immigration health charge under the Immigration (Health Charge) Order 2015 has been met."

**C. THE SECRETARY OF STATE'S RESPONSE**

7.
On 28 February 2019, the Secretary of State responded to the application. The Secretary of State's letter said that:-

"… you do not qualify for indefinite leave to remain. The reasons for this are set out in Annex A to this letter.

However, we are satisfied that you would fall to be granted limited leave to remain of 30 months on the basis of exceptional circumstances **D-LTRPT1.2** , were you to make a valid application for such leave. The detailed reasons for this are set out in Annex A.

In these circumstances, in accordance with the consent you gave on the application form, we are now treating your application as an application for limited leave to remain. However, under paragraph 6(1)(c)(ii) of the Immigration (Health Charge) Order 2015, we will be obliged to treat your application for limited leave to remain as invalid if you do not comply with a requirement to pay an immigration health surcharge by the date specified. In respect of your application, in order for it to be valid and for you to be granted limited leave to remain, you must pay an immigration health surcharge of £500 within 10 days of the date of this letter.

Annex B to this letter sets out what the surcharge is for, how the amount you must pay has been calculated and how you must pay it.

**What this means for you**

If you do not pay the immigration health surcharge by the specified date, your application for limited leave to remain will be treated as invalid. This means that you will not be granted limited leave to remain and your application fee will not be refunded. You will not be able to appeal this decision and you may liable for removal from the United Kingdom."

8.
Annex A explained that the applicant would not be granted indefinite leave to remain because the Secretary of State considered that the applicant had given discrepant accounts to, respectively, her and to Her Majesty's Revenue and Customs, regarding his earnings in respect of certain tax years. The Secretary of State accordingly took the view that the applicant had either misrepresented his earnings to HMRC in order to reduce his tax liability or else had provided false information about his earnings to the Secretary of State in order to obtain leave to remain, or both. As a result, the Secretary of State considered that the application for indefinite leave fell to be refused by reference to the applicant's character and conduct, having regard to paragraph 322(5) of the Immigration Rules.

9.
The Secretary of State, however, considered the resulting application for limited leave to remain under the Immigration Rules, including Appendix FM and "on the basis of exceptional circumstances". The Secretary of State was satisfied that limited leave to remain for 30 months should be granted to

the applicant, once he had paid the immigration health surcharge. This was “on the basis that your daughter … who arrived in the UK on 8/12/2010, has resided in the UK for over 7 years”.

10.
The applicant paid the surcharge. On 21 March 2019, he was, accordingly, issued by the Secretary of State with the following notice of decision:-

“You applied for indefinite leave to remain on the basis of 10 years lawful residence but your application has been refused. You have been granted leave to remain until 21 September 2021.

…

• You are not entitled to appeal this decision. Section 82 of the Nationality, Immigration and Asylum Act 2002 does not provide a right of appeal where an applicant still has leave to enter or remain in the United Kingdom and so is entitled to stay here.

• You have been granted permission to stay until 21 September 2021. Please ensure that you understand the conditions of your stay.

You are not required to leave the United Kingdom as a result of this decision.”

**D. THE APPLICANT’S NOTICE OF APPEAL**

11.
The applicant filed a notice of appeal with the First-tier Tribunal (Immigration and Asylum Chamber), seeking to challenge the decision of 28 February 2019.

12.
On 26 March 2019, a First-tier Tribunal Judge issued a decision under rule 22(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. This provides that the First-tier Tribunal “may not accept the notice of appeal” where “there is no appealable decision”.

13.
The First-tier Tribunal Judge was satisfied that the applicant “does not have a right of appeal to this Tribunal”. It is, however, common ground that the reason the judge gave for that conclusion was erroneous, insofar as she based it upon a finding that the applicant “did not make an application to remain on human rights grounds”.

14.
The applicant commenced judicial review proceedings against the First-tier Tribunal’s decision to issue the rule 22 notice. On 15 July 2019, Upper Tribunal Judge Martin, acting as a Judge of the First-tier Tribunal, issued a “decision on validity”. Upper Tribunal Judge Martin correctly noted that the passage at the end of the Secretary of State’s letter of 21 March 2019 was incorrect in asserting that section 82 of the 2002 Act “bars out a right of appeal when someone has existing leave to remain. It does not”. She also recognised that the applicant had, in fact made a human rights claim. Nevertheless:-

“…he has succeeded in that on the basis that the Secretary of State has granted him leave to remain until 2021 because of his having a qualifying child. He has not succeeded on the basis he applied but the Secretary of State has granted his human rights application. The decision therefore cannot be said to be a refusal of a human rights claim and thus is not a decision that carries a right of appeal pursuant to s.82.”

15.
Permission to bring judicial review proceedings was refused on the papers on 7 August 2019 but granted following oral renewal on 23 September 2019.

**E. PRIMARY LEGISLATION**

16.
The relevant primary legislation is as follows:-

“ **82. Right of appeal to the Tribunal**

(1) A person (“P”) may appeal to the Tribunal where -

…

(b) the Secretary of State has decided to refuse a human rights claim made by P, …

…

**84. Grounds of appeal**

…

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

…

**113. Interpretation**

(1) In this Part, unless a contrary intention appears—

…

“human rights claim” means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom … would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention).”

**F. HOME OFFICE GUIDANCE**

17.
The Home Office Guidance: Rights of Appeal (Version 7.0) (30 July 2018) explains to the Secretary of State’s caseworkers “what amounts to a human rights claim and how you identify and consider such claims”. For our purposes, the relevant passages are as follows:-

“ **How to identify a human rights claim**

In the UK: application under the Immigration Rules

The applications listed in this section and made under the Immigration Rules are human rights applications and the starting position is that there is a right of appeal against refusal.

…

The relevant applications are those made under:

• Paragraph 276B (long residence)

…”

**G. BALAJIGARI V SECRETARY OF STATE FOR THE HOME DEPARTMENT [2019] EWCA Civ 673**

18.
Paragraphs 2 to 4 of the judgment of Underhill LJ in Balajigari v Secretary of State for the Home Department & Others [2019] EWCA Civ 673 describe the nature of the cases with which the Court of Appeal was there concerned:-

“2. These four appeals have been heard together because they all arise out of the same Home Office practice, which has attracted considerable controversy. The background was set out in a recent Home Office publication, Review of Applications by Tier 1 (General) Migrants Refused under Paragraph 322(5) of the Immigration Rules ("the Review"), and can be sufficiently summarised as follows.

3. At the times relevant to this appeal migrants who had been given leave to enter or remain under the Points-Based System ("PBS") provided for by Part 6A of the Immigration Rules as "Tier 1 (General) Migrants" ("T1GMs") were entitled to apply for indefinite leave to remain ("ILR", otherwise known as "settlement") after five years. It was a condition of any such application that they demonstrate a minimum level of earnings in the previous year. Such an applicant will already have had one or more finite periods of "further" leave to remain, for the purpose of which he or she will also have had to declare earnings at a required minimum level.

4. The Home Office became concerned that there was a widespread practice of applicants for leave to remain as a T1GM claiming falsely inflated earnings, particularly from self-employment, in order to appear to meet the required minimum; and from 2015 it began to make use of its powers under section 40 of the UK Borders and Immigration Act 2007 to obtain information from Her Majesty's Revenue and Customs ("HMRC") about the earnings declared by applicants in their tax returns covering the equivalent period. This information disclosed significant discrepancies in a large number of cases. It also revealed what appeared to be a pattern of taxpayers who had in earlier years submitted tax returns showing earnings that attracted little or no liability to tax subsequently submitting amended returns showing much higher levels of earnings, over the required minimum, in circumstances which suggested that they were aware that the previous under-declaration might jeopardise a pending application for leave to remain. There were also instances of returns being submitted belatedly where none had been submitted at the time and where an application for leave was pending. (A similar pattern was detected in the case of T1GM migrants applying for ILR after ten years under the long-residence provisions of the Rules; but we are not directly concerned with those in these appeals.)”

19.
The next passage from the judgment in Balajigari to which I need to refer begins at paragraph 77:-

77. It is the Appellants' case that a decision to refuse leave to remain under paragraph 322(5) on the basis that they have dishonestly misrepresented their earnings, whether to HMRC or to the Home Office, necessarily engages their rights under article 8 of the European Convention on Human Rights: that is, that the first and second stages of "the Razgar test" are satisfied (see R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 , [2004] 2 AC 368 , at para. 17 of the opinion of Lord Bingham (p. 389)).

78. The reason why the issue is significant is not so much because the engagement of article 8 would give the Appellants any greater substantive rights or additional procedural protection: as to this, see para. 92 below. Rather, it goes to the basis on which a T1GM applicant who is refused ILR on paragraph 322(5) grounds can challenge the decision in law. It might also mean that it is open to them to bring a challenge by way of appeal rather than by judicial review. We address these points more fully under head C below.

79. Mr Biggs submitted that a decision to refuse T1GM ILR on paragraph 322(5) grounds engaged article 8 for three distinct reasons.

80. His first reason focused on liability for removal from the UK. A T1GM applicant for ILR would by definition have been in the UK for several years and would almost certainly have developed a sufficient private life for his or her removal to engage article 8. He submitted that although a refusal under paragraph 322(5) was not as such a removal decision it was "functionally" equivalent to such a decision. In the majority of cases, although the application will have been made prior to the expiry of the applicant's existing leave, that leave will have expired by the time that the refusal decision is made and the applicant will be reliant only on leave under section 3C of the Immigration Act 1971: that leave would expire following the refusal – to be precise, at the end of the 14-day period allowed for seeking an administrative review or at the conclusion of the review if sought. The applicant would have, from that moment, no right to be in the UK and would be liable to removal at any time. The decision letter in each of the cases before us attached an "Enforcement Warning", one of the headings in which was "Liability for Removal". This read:

"Persons who require, but no longer have, leave to enter or remain may be liable to removal from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 (as amended by the Immigration Act 2014).

You may be detained or placed on reporting conditions.

You do not have to leave the United Kingdom during the time period in which you may apply for administrative review. If you apply for administrative review you do not need to leave the United Kingdom until we decide your application. If you do not apply for administrative review, or extend your leave to remain on another basis, you will soon be giving [sic] further notice that you must leave the United Kingdom."

Mr Biggs acknowledged that, as the final sentence of that passage makes clear, if the applicant did not leave voluntarily further formal steps would be taken to enforce removal: specifically, current Home Office practice is to notify a person liable to removal of a "removal window" during which enforcement action will be taken. But he submitted that those steps were simply administrative consequences – which it is said would occur "soon" – of the substantive decision to refuse ILR, which is what terminates the applicant's leave to remain.

81. Secondly, Mr Biggs relied on the legal consequences for an applicant who remained in the UK without leave, which have been rendered more severe by the so-called "hostile environment" provisions introduced by the Immigration Act 2014. It is, in the first place, a criminal offence to be in the UK without leave to remain: see section 24 of the Immigration Act 1971. As regards practical consequences, a person without leave faces severe restrictions on their right to work (see section 24B of the 1971 Act), to rent accommodation (section 22 of the 2014 Act), to have a bank account (section 40 of the 2014 Act) and to hold a driving licence (sections 97, 97A and 99 of the Road Traffic Act 1988); nor will they be entitled to free treatment from the NHS (section 175 of the National Health

Service Act 2006). He submitted that those consequences are bound to have a serious impact on a migrant's private life irrespective of any removal action.

82. Thirdly, Mr Biggs submitted that a formal allegation of dishonesty made by an organ of the state is bound to have an adverse impact on the reputation of the person about whom it is made. He submitted that it is well-established that article 8 protects a person's right to their reputation: he referred to the decision of the Supreme Court in In re Guardian News and Media Ltd [2010] UKSC 1 , [2010] 2 AC 697 .”

20.
The court, at paragraphs 83 to 89, accepted the first of the bases advanced by Mr Biggs for concluding that a decision to refuse leave to remain under paragraph 322(5) necessary engaged Article 8 of the ECHR. A person refused leave will, typically, have no other basis for remaining in the United Kingdom and is, accordingly, liable to be removed.

21.
So far as concerned those who, as a result of the paragraph 322(5) decision would not be left without leave to remain, the court held as follows:-

“90. We return to the case where the effect of the refusal of the application for T1GM ILR does not in itself render the applicant liable to removal forthwith (subject to suspension pending administrative review), either because a period of limited leave granted previously has not yet expired or because the applicant is entitled to leave on some other basis. This is less straightforward, but we do not believe that the position is fundamentally different. The Secretary of State's decision that the applicant's case falls within paragraph 322(5) necessarily means that any existing leave can be curtailed under paragraph 323 and that any application for leave to remain on a different basis would fall to be refused: Part 9 applies of course to leave to remain (or enter) on any ground. Indeed logically the Secretary of State ought to curtail any existing leave to remain in such a case, since the basis of ground (5) is that the migrant's presence in the UK is undesirable (and that there are no discretionary grounds why he or she should be granted leave nonetheless). That being so, it seems to us that an applicant in this category is, in substance, equally "liable to removal" with an applicant who at the moment of refusal only enjoyed section 3C leave. Any other result would inevitably lead to cases with arbitrarily different results. In the nature of things any period of unexpired limited leave for T1GM ILR applicants is likely to be short, and it would be unsatisfactory to say that article 8 was engaged in a case where a refusal rendered the applicant liable to removal forthwith but not where he or she still had a few days limited leave to run.”

22.
The final passage to which reference needs to be made begins at paragraph 96:-

“96. The starting-point is that a refusal of ILR is not in itself an appealable decision under section 82 (1) of the Nationality, Immigration and Asylum Act 2002. However, by section 82 (1) (b), a right of appeal is provided in these terms:

"A person ('P') may appeal to the [First-tier] Tribunal where… the Secretary of State has decided to refuse a human rights claim made by P…".

97. For these purposes, "human rights claim" is defined in section 113 (1) of the 2002 Act (as amended by paragraph 53 (2) (a) of Schedule 9 (4) to the Immigration Act 2014) as follows:

"... a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the [ECHR])".

98. The procedural requirements for making such a claim were recently reviewed by this Court in R (Shrestha) v Secretary of State for the Home Department [2018] EWCA Civ 2810 . In short, section 50 of the Immigration, Asylum and Nationality Act 2006 enables the Secretary of State to require a particular procedure to be followed, including the form to be used and the fee to be paid; and paragraph 34 of the Immigration Rules, made under that provision, sets out mandatory requirements for an application for leave to remain (which includes an application made on human rights grounds). Where an application fails to comply with those requirements (including by not referring to a claim for leave on human rights grounds at all), there is no "human rights claim" refusal of which would give rise to a right of appeal. The Secretary of State has, however, conceded that in the context of an imminent removal an appeal will lie to the FTT against a refusal of a human rights claim even if not made in proper form: see paras. 31-33 of the judgment of Hickinbottom LJ in Shrestha . The basis of the concession (which originated in Ahsan : see para. 14 of the judgment of Underhill LJ) is not articulated, but it would appear to be justified on the basis that the Secretary of State can waive the formal requirements in the Rules.

99. Against that background, the most straightforward situation will be where the applicant has included a human rights claim in his or her original T1GM ILR application. The relevant form includes a box in which an applicant can rely on matters other than the relevant Part 6A grounds, and (although this was not a matter on which we were addressed) we can see no reason in principle why an applicant should not complete that box in the alternative so as to raise a human rights claim; the point may also be capable of being raised in the covering letter. If they have done so the refusal of the application will constitute a refusal of that claim and can be appealed as such. Having said that, it is in the nature of things unlikely that an applicant for T1GM ILR will have thought it necessary to make an alternative article 8 claim of this kind: typically they will regard their application as standing or falling on whether they satisfy the requirements of the relevant PBS category. We would thus assume that cases of this kind are uncommon.

100. In the usual case where the applicant has not included a human rights claim in their original ILR application it follows from Shrestha that if they wish to generate a right to an appeal on human rights grounds following its refusal they will need to make a fresh application, using the proper form (again, we were not addressed on which that would be), the gist of which will be that they have been rendered liable to removal, in breach of their article 8 rights and in circumstances where they were otherwise entitled to ILR, on the basis only of a wrong and/or unfair finding of dishonesty. Such an application might be prompted by the Secretary of State serving a "one-stop" notice under section 120 of the 2002 Act. If, as presumably would be the case except in rare circumstances, the Secretary of State maintained his original decision and refused the application, the applicant would then be entitled to an in-country appeal, subject to the possibility of it being certified as "clearly unfounded" under section 94 (1) of the 2002 Act.

101. The alternative course to secure an appeal would be for the applicant to wait until steps are taken to enforce removal. It appears from the concession referred to at para. 98 above that if at that stage he or she makes a human rights claim in order to resist removal the Secretary of State will not insist on a formal application being made and will proceed to a decision against which they can appeal (subject, again, to certification under section 94 (1)).

102. Neither of those routes to an appeal is very satisfactory. The first requires the applicant to go through the formality of making, and paying for, a further application in order to decide substantially the same question, with no certainty as to how soon the decision will be made. The second requires him or her to wait for an indefinite and possibly lengthy period before being able to obtain an appealable decision. It would be open to the Secretary of State to waive the formal requirements, treat the initial claim as including a human rights claim which he had refused and thus, subject to the applicant having an appropriate opportunity to put that human rights claim in order, afford the applicant a right of appeal to the FTT. Ms Anderson made it clear, however, that the Secretary of State was not minded to waive the formal requirements generally so as to facilitate appeals (as opposed to applications for judicial review) in all cases. As the legislation now stands, that appears to be a stance that he is entitled to take."

**H. DISCUSSION**

23.
Although the parties were in agreement that the applicant had, on 16 June 2017, made an application that fell to be treated as a human rights claim, it is necessary to consider why this is so. As we have seen, the solicitor's accompanying letter specifically raised the applicant's private and family life under Article 8 of the ECHR. Even if it had not done so, however, the Secretary of State's Guidance, as we have also seen, meant the Secretary of State's caseworker was required by her to treat the application as a "human rights application".

24.
In Baihinga (r.22; human rights appeal: requirements) [2018] UKUT 00090, the Upper Tribunal held that an application for leave or entry clearance may constitute a human rights claim, even if the applicant does not, in terms, raise human rights. It is not, of course, for the Secretary of State in her Guidance to seek to re-write the provisions of primary legislation. Accordingly, the mere fact that the Secretary of State requires her caseworkers to treat an application under paragraph 276B (long residence) as a human rights claim cannot itself make that application fall within the definition of "human rights claim" in section 113 of the 2002 Act, if it would not otherwise do so.

25.
That is not, however, the effect of the Guidance. Rather, the Guidance illuminates the point that paragraph 276B of the Immigration Rules is intended to enable the Secretary of State, in the discharge of her immigration functions, to act compatibly with Article 8 of the ECHR and, thus, section 6 of the Human Rights Act 1998, which makes it unlawful for a public authority to act in a way that is incompatible with a Convention right. A person who has spent at least ten years continuously lawfully resident in the United Kingdom is, as a general matter, very likely to have established a private life of a kind that would, in the absence of countervailing considerations, make it disproportionate for the Secretary of State to remove or require that person to leave the United Kingdom. A long residence application under paragraph 276B is, therefore, properly to be regarded as a human rights claim.

26.
The essence of Mr Pipe's submissions on behalf of the applicant is that, in her decision of 28 February 2019, the Secretary of State refused the application under paragraph 276B for indefinite leave to remain on the grounds of long residence. She therefore refused the human rights claim made by the applicant. Mr Pipe submits that the fact the Secretary of State's decision goes on to indicate that the applicant qualifies for limited leave to remain, on the basis that his daughter has resided here for over

7 years, does not alter the position that the refusal of ILR under paragraph 276B constitutes a refusal of the human rights claim.

27.
The emphasis placed by Underhill LJ, at paragraph 98 of the judgment in Balajigari , on the procedural requirements for making a human rights claim is important. Citing Shrestha , the court noted that section 50 of the Immigration, Asylum and Nationality Act 2006 enables the Secretary of State to require a particular procedure to be followed; and that paragraph 34 of the Immigration Rules sets out mandatory requirements for an application for leave to remain, which includes an application made on human rights grounds. Where an application fails to comply with those requirements, there is "no 'human rights claim' refusal of which will give rise to a right of appeal". The only circumstances in which that would not be so are those recorded by Higginbottom LJ in paragraphs 31 to 32 of Shrestha ; namely, where actual removal of the person concerned from the United Kingdom is close or imminent.

28.
The Secretary of State's ability to regulate the way in which a human rights claim can be made was recognised by the Supreme Court in Robinson v Secretary of State for the Home Department [2019] UKSC 11. Although dealing with paragraph 353 of the Immigration Rules, which concerns how and when new submissions can constitute a human rights claim, following an earlier unsuccessful human rights/protection claim, the Supreme Court's judgment is a recognition of the Secretary of State's ability to regulate the gateway to the appellate system.

29.
With these observations in mind, the significance of the declaration signed by the applicant in his paragraph 276B application becomes apparent. Although it is unclear why the declaration in section 6 of the application form contains both of the paragraphs I have cited at paragraph 6 above, their significance is plain. Once the Secretary of State determined that the applicant did not qualify for indefinite leave to remain, the application of 16 June 2017 became, with the applicant's express acceptance, an application for limited leave, which the decision of 28 February 2019 stated would result in the applicant being granted limited leave to remain, on what were on any view Article 8 grounds, subject to the payment of the immigration health surcharge.

30.
It is not possible to construe the decision of 28 February 2019 as comprising, as Mr Pipe submitted, two discrete decisions; namely, a decision to refuse the applicant's human rights claim by reference to paragraph 276B and a decision to grant a separate application, which he had been deemed to have made, for limited leave to remain. Although some support can be derived for that submission from the use of the word "also" in the second of the cited passages of the Declaration, the first of those passages unequivocally states that the application "will be treated as an application for limited leave". That is precisely how the decision of 28 February 2019 proceeds:-

"In accordance with the consent you gave on the application form, we are now treating your application as an application for limited leave to remain."

31.
Importantly, Mr Pipe's submission is fundamentally incompatible with the scheme of the primary legislation governing an appeal under section 82(1)(b). It is clear from the definition of "human rights claim" in section 113(1) of the 2002 Act that the presumed removal of an individual from, or the presumed requirement on that individual to leave, the United Kingdom is an essential element in

order for there to be an appeal. A person who makes a human rights claim is asserting that they (or someone connected with them) have, for whatever reason, a right recognised by the ECHR, which is of such a kind that removing that person or requiring them to leave would be a violation of that right. In the case of a qualified right, such as Article 8, a violation may result from the fact that it would be disproportionate to remove or to require the person to leave.

32.
Accordingly, the refusal of a human rights claim made by a person who is in the United Kingdom can occur only where the Secretary of State's case, in response to the claim, is that she does not consider her obligations under section 6 of the 1998 Act require her to respond to the claim by recognising the human right to remain in the United Kingdom and so granting the individual leave to remain.

33.
The upshot of the Secretary of State's letters of 28 February and 21 March 2019 was that the Secretary of State did respond positively to the applicant's human rights claim. Although she did so on only one of the bases advanced in the application and the solicitor's letter – namely, family life with one particular family member (the daughter) – the Secretary of State, in granting limited leave to remain, was acknowledging that their Article 8 rights were such as to preclude her from removing the applicant or requiring him to leave the United Kingdom. Indeed, as we have seen, the notice of decision of 21 March 2019 ends with the express statement of the Secretary of State that the applicant is "not required to leave the United Kingdom as a result of this decision".

34.
I do not consider that there is anything in Underhill LJ's judgment in Balajigari that casts doubt on these findings. Balajigari , as can be seen from paragraphs 2 to 4 of the judgment, was concerned with applications for indefinite leave to remain by persons as Tier 1 (General) Migrants under the points-based system. Although T1GM migrants applying for ILR after ten years under the long residence provisions of the Rules were mentioned in paragraph 4 of the judgment, the court said that it was not "directly concerned with those in these appeals".

35.
More particularly, Balajigari did not involve applicants who had been granted limited leave to remain, in response to their ILR applications. It is the case that, at paragraph 90, Underhill LJ considered the hypothetical position of a T1GM ILR applicant, who would not be required to leave, in reality, as a result of the refusal "either because a period of limited leave granted previously has not yet expired or because the applicant is entitled to leave on some other basis". Underhill LJ considered that this scenario although "less straightforward" was nevertheless not "fundamentally different" from the others described. This was because the Secretary of State's decision that the applicant fell within paragraph 322(5) "necessarily means that any existing leave can be curtailed under paragraph 323 and that any application for leave to remain on a different basis would fall to be refused". The paragraph continues by noting that logically the Secretary of State ought to curtail any existing leave:

"since the basis of ground (5) is that the migrant's presence in the UK is undesirable … That being so, it seeks to us that an applicant in this category is, in substance, equally 'liable to removal' with an applicant who at the moment a refusal only enjoyed section 3C leave".

36.
In the present case, the Secretary of State has done what the Court of Appeal considered logically ought not to have happened. In reality, however, I find that the Secretary of State's position is

perfectly defensible. Paragraph 276B(ii) of the Immigration Rules means that an applicant will not be granted indefinite leave to remain, if the Secretary of State identifies:-

“(ii) … reasons why it would be undesirable for him to be given indefinite to remain on the grounds of long residence, taking into account his:-

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person’s behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.”

…”

37.
The Secretary of State could, and perhaps in retrospect should, have taken into account the issues regarding the discrepancies in the applicant’s earnings, when considering paragraph 276B(ii)(c), instead of having recourse to paragraph 322(5). Nevertheless, the result is not illogical. The Secretary of State’s decision is that, notwithstanding the problematic behaviour she considers she has identified, the applicant’s family life case, centred around the position of the daughter, is such that it would still be disproportionate in Article 8 terms for the applicant to be removed or required to leave the United Kingdom.

38.
In this regard, it is noteworthy that section 117B(6) of the 2002 Act provides that, in the case of a person who is not liable to deportation (which the applicant is not), the public interest does not require the person’s removal where:-

“(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.”

39.
Mr Murray drew attention to the following provision of the Secretary of State’s Rights of Appeal Guidance:-

“There will be applicants who have immigration leave on human rights grounds, who make a new and different human rights claim which if refused will have a right of appeal. For example, an applicant who has extant leave as a partner, which they no longer qualify for, seeks a variation of that leave on the basis that they are the parent of a child. That constitutes a new human rights claim. The refusal of such a claim will give rise to a right of appeal.”

40.
It is significant that this passage does not suggest the right of appeal would arise only if the Secretary of State not only refused the variation of leave but also decided to cancel the extant leave. The reality is that, rather like the scenario discussed in paragraph 35 above, the Secretary of State could curtail

leave, as the requirements of that leave are no longer satisfied. But what matters is that the application is for leave to be granted by reference to the human rights position of the applicant, as it now is. This serves to underscore the point, made above, that the refusal of a human rights claim involves the Secretary of State taking the stance that she is not obliged by section 6 of the 1998 Act to respond to the claim by granting leave.

41.
This application is dismissed. I invite submissions as to the form of the order and any incidental matters.

Signed Date

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber