IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: **UI-2024-001742**

First-tier Tribunal No: **HU/56913/2023**
LP/00935/2024

THE IMMIGRATION ACTS

Decided without a hearing under rule 34
Decision & Reasons Issued:

On 5 August 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NDLOVU SHADRACK
(NO ANONYMITY ORDER MADE)

Respondent

DECISION AND REASONS

1. The Secretary of State appeals with the permission of Upper Tribunal Judge Pickup against the decision of First-tier Tribunal Judge Parkes. By his decision of 7 March 2024, Judge Parkes ("the judge") allowed Mr Shadrack's appeal against the Secretary of State's refusal of his human rights claim.

2. The parties have considered their respective positions since the Upper Tribunal granted permission to appeal and I have today been presented with a draft consent order which is signed by both parties. A copy of that draft order is appended to this decision. Rather than simply endorsing it, I considered it to be necessary to issue this short decision without a hearing, under rule 34, which is a course to which both parties have impliedly agreed.

3. I agree with the parties that the judge erred in law in finding that Mr Shadrack was able to meet the Immigration Rules. As observed at [4] of the draft order, he was unable to do so because he had not lived in the United Kingdom for more than 20 years *at the date of application*, as required by the relevant rule. The parties accept that the judge's decision to allow the appeal on that basis must therefore be set aside. I agree, and I shall so order.

4. There is, however, no dispute between the parties as to the sustainability of the judge's finding that Mr Shadrack has indeed been in the United Kingdom for more than 20 years. The Secretary of State is evidently content, on the facts of this case, for that finding to carry the day in the necessary assessment under Article 8 ECHR, and for the Upper Tribunal to substitute a decision to allow his appeal on that basis.

5. Given that the Secretary of State does not seek to submit that there are any countervailing proportionality considerations in this case, I am satisfied that the appropriate course is as suggested jointly by the parties. I will therefore remake the decision on the appeal without a further hearing, by allowing it on Article 8 ECHR grounds.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and is hereby set aside. The decision on the appeal is remade without a further hearing. The appeal is allowed on the basis that the appellant's removal would be unlawful under section 6 of the Human Rights Act 1998, as being in breach of Article 8 ECHR.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 July 2024

APPENDIX – DRAFT CONSENT ORDER SIGNED BY BOTH PARTIES

IN THE UPPER TRIBUNAL (IAC) **UI-2024-001742**
HU/56913/2023

In the matter of

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NDLOVU SHADRACK
(ANONYMITY DIRECTION NOT MADE)

Respondent

CONSENT ORDER UNDER RULE 39 (1)

Pursuant to Rule 39(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, the parties consent to the disposal of the above appeal on the following agreed basis:

1. On review of the grounds of appeal dated 9 April 2024, the Secretary of State accepts the grounds of appeal are not sustainable due to the issue of 276ADE (iii) being raised and addressed within the RFRL dated 18 May 2023. Therefore, it cannot be deemed to be a new matter as set out in **s.85 (6) Nationality, Immigration and Asylum Act 2002** which states:

   s.85 (6) A matter is a "new matter" if-
   (a) it constitutes a ground of appeal of a kind listed in section 84, and
   (b) the Secretary of State has not previously considered the matter in the context of-
   (i) the decision mentioned in section 82(1), or
   (ii) a statement made by the appellant under section 120.

2. At the point of refusal, the appellant (FTT) had not resided in the United Kingdom for 20 years as set out at paragraph 41 of the RFRL. However, by date of application, the appellant (FTT) had resided in the UK for 20 years and the FTTJ at [20] accepted the evidence regarding the period 2017 and 2019 and at [21] accepted that the appellant (FTT) had been present in the UK continuously since his arrival in 2003. As per ***Mahmud (S.85 NIAA 2002- 'new matters')*** **[2017] UKUT 00488 (IAC) headnote (3):**

   (3) In practice, a new matter is a factual matrix which has not been previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously

raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.

3. When considering ***Mahmud*** (as set out above), it cannot be reasonably argued that the fact the appellant (FTT) has now reached 20 years is a new matter which is factually distinct from a fact previously raised by the appellant (FTT).

4. However, the Secretary of State respectfully submits that the FTTJ has materially erred in law by finding the appellant (FTT) meets the Immigration Rules [21] and allows the appeal on that basis [22]. The appellant (FTT) could not satisfy the requirements of 276ADE (iii) as at date of application the appellant (FTT) had not resided in the United Kingdom for 20 years continuously.

276ADE (1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that <u>at the date of application</u>, the applicant:

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

5. The Secretary of State acknowledges the findings made by the FTT regarding the appellant's (FTT) residence and acceptance the appellant (FTT) has now satisfied the 20-year requirement. In light of those findings, the FTTJ should have allowed the appeal on an article 8 basis.

6. The parties therefore respectfully invite the Upper Tribunal to grant permission to the Respondent (FTT) in his application to amend his Grounds of Appeal dated 15 March 2024 so as to encompass an additional challenge that the FTTJ material misdirected himself in law by finding that the Appellant (FTT) met Immigration Rule 276ADE(iii) at the date of application, see §4, *supra*.

7. The parties further invite the Upper Tribunal to find a material error of law on the basis set out above, set the Determination of the FTT aside, but remake the decision (considering the findings at [20] & [21]) allowing the appeal on Article 8 ECHR grounds.

Signed (electronically)

	Zoe Young	**G. T-Chapwanya**
	Specialist Appeals Team	**CB Solicitors**
	For the Appellant	**For the Respondent**
Date	**24 May 2024**	**04 June 2024**