Upper Tribunal
(Immigration and Asylum Chamber)

Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351(IAC)

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision & Reasons Promulgated**
On 6 November 2020	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

EKTA PATEL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini, Counsel, instructed by MTG Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

A. Historic injustice

(1) For the future, the expression "historic injustice", as used in the immigration context, should be reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now (eg Patel and Others v Entry

Clearance Officer (Mumbai) [2010] EWCA Civ 17; AP (India) v Secretary of State for the Home Department [2015] EWCA Civ 89).

(2) The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike cases of what might be described as "historical injustice", the operation of historic injustice will not depend on the particular interaction between the individual member of the class and the Secretary of State. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.

B. Historical injustice

(3) Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category.

C. Part 5A of the Nationality, Immigration and Asylum Act 2002 and the weight to be given to the maintenance of effective immigration controls

(4) In all cases where, for whatever reason, the public interest in the maintenance of effective immigration controls falls to be given less than its ordinary weight, the usual course should be for the judge so to find in terms, when addressing section 117B(1) of the 2002 Act. The same result may be achieved, at least in some situations, by qualifying the consideration in section 117B(4) that little weight should be given to a private life formed when the person concerned is in the United Kingdom unlawfully. Judicial fact-finders should, however, avoid any recourse to double-counting, whereby not only is the weight to be given to effective immigration controls diminished but also, for the same reason, a private life is given more weight than would otherwise be possible by the undiluted application of section 117B(4).

(5) The weight to be given to the public interest in the maintenance of effective immigration controls is unlikely to be reduced because of disappointments or inadequacies encountered by individuals from teaching institutions or employers.

DECISION AND REASONS

A. INTRODUCTION

1. **"Historic ● adj. 1.** Famous or important in history, or potentially so. → *archaic* of the past. **2**. *Grammar* (of a tense) used in the narration of past events, especially Latin and Greek imperfect and pluperfect.

   Historical ● adj. of or concerning history → belonging to or set in the past. → **(**of the study of a subject) based on an analysis of its development over a period.

   …

   Injustice ● n. 1. Lack of justice. **2.** An unjust act or occurrence."

   Concise Oxford English Dictionary (10th edition, revised)

2. The appellant, a citizen of India born in 1988, contends that she has suffered a historic injustice and that this should play a material part in the assessment of whether her removal from the United Kingdom would constitute a disproportionate interference with her Article 8 ECHR rights, consequent upon the refusal by the respondent of her human rights claim. The appellant says that the First-tier Tribunal committed an error of law in failing to identify and give effect to this matter, when it dismissed her appeal against that refusal.

3. The appellant first entered the United Kingdom in October 2010, with entry clearance as a Tier 4 (General) Student. In February 2012, one day before the expiry of her leave in that capacity, the appellant applied for leave to remain as a Tier 1 (Highly Skilled Post-Study) Migrant. Her application was successful. She was granted leave in that capacity until 28 May 2014.

4. On 25 June 2014, the appellant applied for leave to remain outside the Immigration Rules. Her application was refused on 28 August 2014. The appellant challenged that refusal by means of judicial review. On 9 November 2016, a judicial review application was dismissed on the basis that the matter had, by then, become academic. The reason was that the appellant wished to be able to remain in the United Kingdom for the purposes of conducting proceedings against her former employer in the Employment Tribunal. Those proceedings had in fact been concluded in January 2015. We shall have more to say about them in Part G below.

B. THE APPELLANT'S HUMAN RIGHTS CLAIM AND ITS REFUSAL

5. On 18 April 2018, the appellant made a new application for leave to remain, together with a human rights claim. On 31 January 2019, the respondent refused the application/claim. The appellant no longer seeks to rely upon so much of her claim as related to her relationship with a person in the United Kingdom. As a result, the appellant's case rests upon her Article 8 ECHR right to respect for her private life.

6. In determining the private life aspect, the respondent applied paragraph 276ADE of the Immigration Rules. This provides as follows:-

> **"Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 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 at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

7. At the date of decision, the appellant had lived in the United Kingdom for seven years and six months. She therefore could not meet the requirement to have lived continuously in the United Kingdom for at least 20 years. This meant she failed to meet the requirements of paragraph 276ADE(1)(iii).

8. Given that the appellant was over the age of 18, she failed to meet the requirements of paragraph 276ADE(1)(iv). Not being between the ages of 18 and 25, she also failed to meet the requirements of paragraph 276ADE(1)(v).

9. Consideration therefore moved to paragraph 276ADE(1)(vi). The respondent did not accept that there would be very significant obstacles to the appellant's integration into India. The appellant stated in her application that she spoke English, Hindi and Gujarati, all of which were widely spoken in India. The respondent considered that this linguistic ability "will help you to adapt to life in India, socially and culturally".

10. The respondent also noted the appellant had stated in her application form that her parents and siblings remained in India. She had provided no evidence that they would be unable to assist her or accommodate her on her return to that country. She

had lived there up to the age of 21 years and 9 months, which included the appellant's childhood, formative years and a significant portion of her adult life.

11. The respondent considered that the appellant would have retained knowledge of the life, language and culture of India and would not face significant obstacles to reintegrating into life in that country.

12. For those reasons, the respondent concluded that the appellant could not meet paragraph 276ADE(1)(vi). The respondent accordingly turned to consider, pursuant to GEN.3.2 of Appendix FM to the Immigration Rules, whether there were exceptional circumstances in the appellant's case that would render a refusal of leave a breach of Article 8 of the ECHR "because it would result in unjustifiably harsh consequences for you".

13. In determining this issue, the respondent noted that the appellant said she no longer had a family home or any form of support in India, on account of her relationship with a Muslim man (this being the relationship which is no longer relied on); that she would face ill-treatment from the family of this man if she went to his own country; that the appellant and her partner would be "outcasts" if returned to India; that the appellant contributed "to charity in the UK"; and that the appellant had developed a family and private life in the United Kingdom.

14. The respondent concluded that none of this demonstrated that there would be unjustifiably harsh consequences for the appellant, were she to return to India. The respondent noted that the appellant's family and friends were financially supporting her in the United Kingdom. Whilst the current economic situation in India "may be poor, the Secretary of State is satisfied you would not suffer any greater hardship than other people of that nation". As for contribution to charities within the United Kingdom, the respondent considered there was nothing preventing the appellant returning to India and assisting her local community and charities in that country.

15. The appellant contended that she had established a private life in the United Kingdom and would find it difficult to return to India. The respondent observed that the appellant would have been fully aware when developing any such private life that she had no expectation of remaining in the United Kingdom indefinitely.

C. THE APPELLANT'S APPEAL TO THE FIRST-TIER TRIBUNAL

16. The appellant appealed against the refusal of her human rights claim. Her appeal was heard on 13 August 2019 by First-tier Tribunal Judge Bulpitt. The appellant was represented by Counsel (not Mr Saini). In a decision promulgated on 30 August 2019, Judge Bulpitt dismissed the appellant's appeal.

17. Before Judge Bulpitt, the appellant relied upon the matter which Mr Saini, both in the grounds of application for permission to appeal to the Upper Tribunal and in his skeleton argument for the Upper Tribunal hearing, categorised as a "historic injustice". This derives from the experience of the appellant as an employee of Bakkavor Foods Limited.

18. Judge Bulpitt recorded the matter as follows in paragraph 4 of his decision:-

> "4. …
>
> b) On 14 October 2010 the appellant entered the United Kingdom in order to study for a Masters Degree in Food Science having been granted a student visa which was valid until 15 February 2012.
>
> c) On completion of her Masters Degree the appellant gained employment with Bakkavor Foods Limited as a specification technologist. She was granted a highly skilled post study visa, giving her leave to remain in the United Kingdom until 28 May 2014.
>
> d) On 23 May 2014, following a protracted grievance process, Bakkavor Foods finally informed the appellant that they had decided not to sponsor her and support a further extension to her leave to remain in the United Kingdom. They then dismissed the appellant from her employment with effect from 28 May 2014 which was the day her leave to remain in the United Kingdom expired.
>
> e) In June 2014 the appellant commenced an action in the employment tribunal against Bakkavor Foods for wrongful dismissal and discrimination. On 25 June 2014 the appellant made an application for leave to remain in the United Kingdom outside of the immigration rules to enable her to pursue the employment tribunal case. The respondent refused that application on 28 August 2014 with no right of appeal.
>
> f) The appellant sought a judicial review of the respondent's decision and on 10 June 2015 she was granted permission to bring judicial review proceedings by Upper Tribunal Judge Gleeson on the basis that it was arguable that the respondent had failed to engage with the issue being raised by the appellant when making its August 2014 decision i.e. whether discretionary leave should be granted to enable the appellant to fight her Employment Tribunal case.
>
> g) On 13 January 2015 the appellant's Employment Tribunal case was concluded with the appellant being awarded one week's pay on the grounds that Bakkavor Foods were found to have breached their contract with the appellant by not paying her for the agreed notice period. The Tribunal found that the appellant had not been discriminated against.
>
> h) On 9 November 2016 the appellant's judicial review of the respondent's August 2014 decision was dismissed on the basis that it was by that time academic since the employment tribunal proceedings had concluded.
>
> i) On 18 April 2018 the appellant made the application for leave to remain in the United Kingdom on the basis of her private and family life which is the subject of this appeal."

19. At paragraph 5, Judge Bulpitt described the case for the appellant as follows:-

> "The appellant says she has spent the last five years fighting against unfair decisions which have had a detrimental effect on her and her ability to cope, were she to have to return to India. The appellant also says she has a bad relationship with her family in India as a result of a relationship she has had with a Muslim man in the United Kingdom which has recently ended. In all the circumstances, in view of her particular history and particular challenges in India the appellant says the respondent's decision is disproportionate."

20. Judge Bulpitt began his findings at paragraph 11 of his decision. He noted that the appellant had, at the date of hearing, lived in the United Kingdom for nearly nine years and the "appellant says that as a result she feels '*at heart a Londoner*'. In her oral evidence the appellant says she felt she had developed as an adult in the United Kingdom and has developed a sense of freedom and independence". The appellant also told Judge Bulpitt that she "has established a brilliant group of friends one of whom she lives with rent-free". Judge Bulpitt noted, however, that little further evidence of the appellant's private life was adduced.

21. At paragraph 13, Judge Bulpitt found that it was likely that the appellant had established a number of friendships in the United Kingdom over the last nine years; but beyond those there was little evidence of further private life. Accordingly, Judge Bulpitt concluded that the appellant "has established only a limited private life in the United Kingdom".

22. That private life was, furthermore, established at a time when the appellant's status in the United Kingdom "was precarious or unlawful". The appellant told the judge that her intention when coming to the United Kingdom was to obtain a Masters degree and then return to India. It was obtaining the job with Bakkavor Foods Limited shortly after completing her Masters that made her change her mind and gave her hope to build a career and life in the United Kingdom. Whilst noting the appellant's case that she had been poorly treated by her employers "who only communicated the fact that they would not sponsor her to stay in the United Kingdom at the last moment", Judge Bulpitt observed that the appellant had only ever had temporary leave to remain and for the last five years had had no leave to remain at all.

23. At paragraph 15, the judge doubted the appellant's assertion that she had been in a relationship with a Muslim man. A letter said to come from him gave "no real detail of the relationship"; nor was there any further evidence about it. Judge Bulpitt, accordingly, found it "unlikely that the appellant did have a relationship with a Muslim man and consequently I find that it is unlikely that she has fallen out with her parents" (paragraph 15). Even if the judge were wrong about that, he said that any hostility had been directed by the parents towards the relationship and the appellant conceded in cross-examination that it was likely she would be able to reconcile with her parents if she returned to India (paragraph 16).

24. At paragraph 17, the judge found it likely the appellant had retained significant links to India. She had not raised any medical, cultural or financial reason why integration back into life in India would be difficult for her. Although "it may not be the

appellant's preferred option there would be no significant obstacles to her integrating in India" (paragraph 17).

25. Beginning at paragraph 18, Judge Bulpitt addressed in detail the issue of what had happened during the appellant's employment with Bakkavor Foods Limited:-

> "18. I have paid careful attention to the treatment the appellant received from Bakkavor Foods and the appellant's consequent grievance which the employment tribunal judge described as understandable. I recognise that it would have been very disappointing not to have been sponsored in these circumstances and that the appellant will have felt very upset as a result. I do not however consider that this bad treatment and the appellant's consequent grievance means that effective immigration control and the Immigration Rules should be ignored. The fact of the matter is that the appellant has not met the requirements of the Immigration Rules for more than five years now.
>
> 19. In R (on the application of Agyarko and others v Secretary of State for the Home Department (2017) UKSC 11 it was said that when considering a human rights case outside the immigration rules such as this one: "*The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.*"
>
> 20. In this case the public interest in removal of the appellant is to be given considerable weight because she does not meet any of the requirements of the Immigration Rules. Section 1176B Nationality, Immigration and Asylum Act 2002 makes clear that the maintenance of effective immigration control is in the public interest. The same section also states that little weight is to be given to a private life which has been established whilst a person is in the United Kingdom either precariously or unlawfully. I have found that the appellant would face few obstacles to integration back in India which will of course her original intention [sic]. For all these reasons the balance weighs heavily towards removal.
>
> 21. Against those factors in favour of removal are the fact that the appellant was treated poorly by her employer who led her to believe that they would sponsor her to remain in the United Kingdom but then chose not to do so. The appellant has now lived in the United Kingdom for approaching nine years and during that time has established some strong friendships.
>
> 22. Weighing these competing factors I find that the appellant has not established the very strong or compelling claim required to outweigh the public interest in immigration control. The appellant's wish and desire to remain in the United Kingdom are not determinative, neither is her grievance (reasonable as it has been found to be) at the way she was treated by her employer. There is a strong public interest in maintaining effective immigration control and as previously stated the simple fact is that the appellant has not met the requirements of the rules which Parliament has endorsed as reflecting when a person should be granted leave to remain for more than five years. The [sic] are no particular features which make the appellant's claim particularly compelling and in all the circumstances I find that public interest outweighs the appellant's desire to

remain in the United Kingdom and grievance at not being able to find sponsor which would enable her to do so."

D. THE APPELLANT'S APPEAL TO THE UPPER TRIBUNAL

26. In his grounds of permission on behalf of the appellant, Mr Saini submitted that the appellant had been unfairly prevented from applying for a visa by Bakkavor Foods Limited and had been left in the position in which she could not apply for further leave with another Tier 2 sponsor (or in any other PBS category for which she might be eligible) due to the fact that the outcome of her grievance procedure with Bakkavor Foods Limited became known only on the very last day of her extant Tier 2 leave.

27. Ground 1 of Mr Saini's grounds submitted that Judge Bulpitt had failed lawfully to determine "the key issue of whether there has been "Historic Injustice" committed by the respondent and the consequences that flow from that commission in a proportionality assessment. At paragraph 45 of the grounds, Mr Saini set out what he described as "the most crucial element of the appellant's witness statement" on the issue of historic injustice. Here, the appellant said:-

> "**I have been the victim of judicial scuppering for the past five years.** A battle which started out as employment malpractice by a corporate against their employee has snowballed into a series of misjudgements and downfalls against an individual. **The employment tribunal case against the employer was partly successful with the court acknowledging that I have suffered discrimination** however it did not fit within the realms of discrimination as defined by employment law, namely racial and sexual discrimination at the hands of a person from the same race.
>
> **The subsequent Judicial Review case against the Home Office's decision to deny Further Leave to Remain to pursue said employment tribunal also concluded with the Home Office accepting that it had essentially made an error in judgement on the initial applications.**
>
> **However, since I had already been able to stay in the UK to pursue my tribunal claim, whilst the proceedings of the JR took place, I had essentially received the requested leave to remain and considered my claim academic. This to me a major miscarriage of justice in addition to the trivialization of immigration law entirely.**
>
> **My application for FLR(O) was made to establish a legal stay in addition to have a recorded regularised immigration status. By acknowledging its misgivings in making the decision but refusing to grant any relief claiming the case was academic the Home Office raises concerns on the validity of any immigration laws at all. A government organisation deems the process of paying fees and making an application unnecessary by saying that I've already managed to stay on in this country without a clarified immigration status and that fulfils the purpose. This sets out a very dangerous precedent."**
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> (Emphases supplied in grounds)

28. At paragraph 48 of the grounds, we find this:-

> "48. … It is also plain that the FTT has completely failed to consider the Respondent's failure to grant further leave to the Appellant in the light of that unfair treatment, that her further immigration status for the past 5 years is beyond her control and that she has become a victim of the hostile environment and drowned in consequent debt (see § 14 of the Decision), as well as the Respondent's inaction against a Tier 2 Sponsor that had unlawfully discriminated against an employee and frustrated that employee's attempt to obtain further lawful leave to remain which is not in keeping with the General Sponsor Duties that Tier 2 Sponsor's must abide by.
>
> 49. It is also disconcerting that despite the obvious and conclusive historic unfair treatment received by the Appellant the FTT has distilled her complain to a simple statement that it would have been "disappointing" to not be sponsored and that she would have been "very upset"."

29. At paragraph 58 of the grounds, the appellant (through Mr Saini) submitted that the approach of Judge Bulpitt "is inconsistent with binding authority from the higher Courts as to the correct approach that the FTT should have taken under Article 8(2) ECHR towards the doctrine of 'historic injustice' …".

30. On 26 February 2020, Upper Tribunal Judge Norton-Taylor granted permission to appeal. Although he calculated that the application made to the First-tier Tribunal for permission had been late, by one day, he concluded that, in the interests of justice, the application to the Upper Tribunal should be admitted, notwithstanding the non-admission of the late application made to the First-tier Tribunal: see rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

31. Upper Tribunal Judge Norton-Taylor considered that the "central thrust" of the appellant's grounds was that the appellant had been subject to "historic injustice" both by her previous Tier 2 sponsor and, in turn, by the respondent.

32. At paragraph 38, the skeleton argument for the hearing criticises the FTT in the light of that "obvious and inconclusive historic unfair treatment" for categorising the situation as "disappointing" for the appellant who would have been "very upset". Mr Saini says that this "does not grapple with the lawful effect of the historic injustice" that the appellant has suffered.

33. Apart from the issue of historic injustice, Mr Saini criticises Judge Bulpitt for relying upon the Supreme Court judgment in Agyarko for the proposition that "in general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control". By repeating that formulation at paragraph 22 of his decision, Mr Saini says that Judge Bulpitt wrongly elevated the relevant test. Mr Saini submits that the words "very compelling", used by Judge Bulpitt, indicate that he was employing the test of "very compelling circumstances", as set out in section 117C(6) of the 2002 Act. That test applies to foreign criminals who are liable to deportation and who, moreover, have been sentenced to a period of imprisonment of at least four years. It is common ground that the appellant is not liable to deportation.

E. HISTORIC INJUSTICE

34. As we can see from paragraph 1 above, the primary meaning of "historic" is something that is famous or important in history. By contrast "historical" denotes merely something that concerns history; in other words, anything that has happened in the past.

35. The caselaw of the higher courts contains two instances of historic injustice, in the true sense of those words. The first concerns citizens of the United Kingdom and Colonies, whose rights to settle in the United Kingdom were restricted by the Commonwealth Immigration Act 1968. In December 1973, the European Commission on Human Rights decided that the 1968 Act was racially discriminatory. That led the UK government to enter into a "friendly settlement", as a result of which a Special Quota Voucher Scheme was introduced in order to benefit citizens of the United Kingdom and Colonies whose rights have been restricted by the 1968 Act. The scheme, however, did not assist in the case of married women who were not heads of households. However, the scheme discriminated between men and women on the grounds of marital status. It was abolished in 2002. In the same year, section 12 of the 2002 Act amended sections 4 and 14 of the British Nationality Act 1981, so as to entitle certain British overseas citizens to be registered as British citizens from 30 April 2003. On 5 November 2002, the Home Secretary told the House of Commons that "we are talking here about righting an historical [sic] wrong".

36. This outline of the historic wrong (for such it undoubtedly was) perpetrated by the 1968 Act and the subsequent scheme comes from the judgment of Sedley LJ in Patel and Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17. In that case, the appellant sought family reunion in the UK, after more than three decades in which lawful settlement here "was improperly barred". The Court of Appeal held that, provided the individual concerned had a protected Article 8 ECHR right, the effect of the historic injustice was, in effect, to diminish the importance otherwise be given to the maintenance of immigration control. This emerges clearly from paragraphs 13 to 15 of the judgment of Sedley LJ.

37. The other uncontestable incidence of historic injustice in the caselaw of the higher courts involved the less favourable treatment accorded to Gurkha veterans, compared with Foreign and Commonwealth nationals seeking settlement in the United Kingdom on discharge from the British Army. In R (Gurung v Secretary of State for the Home Department [2013] EWCA Civ 8, the Court of Appeal held that this historic injustice was one of the factors to be weighed in the proportionality balancing exercise under Article 8(2), against the need to maintain a firm and fair immigration policy. Lord Dyson MR said:-

> "35. It is accepted on behalf of the SSHD that the historic injustice is a relevant factor to be taken into account when the proportionality balancing exercise is undertaken. The question is what weight should be given to it. Normally, questions of weight are a matter for the decision-maker and the court does not intervene except on well-established public law grounds. But the present appeals raise the point of principle whether the historic injustice suffered by Gurkhas

should be accorded limited or substantial weight in the article 8(2) balancing exercise.

36. The court should be wary in any context of attempting to give prescriptive guidance as to the weight to be given to particular factors when the article 8(2) balancing exercise is performed, and certainly in the context of an immigration decision. In *Huang v Home Secretary* [2007] UKHL 11, [2007] 2 AC 167, the House of Lords was careful not to be overly prescriptive. It said at para 16:

> "The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on."

37. These wise words were carefully chosen. The language of "the authority will wish to consider" and "there will be certain general considerations to bear in mind" is measured and cautious. We also bear in mind the warning sounded by Lord Bingham in *EB (Kosovo) v Home Secretary* [2008] UKHL 41, [2009] 1 AC 1159 at para 12:

> "…there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

38. We accept the submission of Ms McGahey that the historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair immigration policy. It is not necessarily determinative. If it were, the application of every adult child of a UK-settled Gurkha who establishes that he has a family life with his parent would be bound to succeed. Mr Drabble does not contend for this extreme position and it is not supported by the approach adopted in the BOC cases to which we have referred.

39. Ms McGahey submits that the BOC cases should be distinguished from the Gurkha cases for three reasons: (i) the BOC parents who suffered historical injustice were British citizens, whereas Gurkhas are nationals of Nepal (it is a condition of their service that they remain Nepalese citizens throughout their service in the British Army); (ii) the BOC parents had (or should have had) an absolute and indefeasible right, as British citizens, to settle in the UK, whereas Gurkhas are required to apply to settle here; and (iii) the injustice suffered by the BOC parents was particularly grave, involving racially and then sexually discriminatory schemes to their detriment, whereas no equivalent injustice has been suffered by the Gurkhas.

40. We accept that there are differences between the position of Gurkhas and that of BOCs. The first two points made by Ms McGahey amount to the same thing: as British citizens, BOCs have the indefeasible right to settle in the UK, whereas Gurkhas, as citizens of Nepal, will "normally" be allowed to settle here, but not if there is "adverse information of a serious nature" about them. Like Sedley LJ, we recognise the existence of this difference between the two groups. The position of Gurkhas is less secure than that of BOCs. But unless there is some evidence to suggest that there is a real risk that (i) the Gurkha's adult dependant child may not be given leave to enter, for example, because there is adverse information of a serious nature about him, or (ii) leave granted to the Gurkha or his child may be abrogated in the future, the difference between the two groups should be given little weight.

41. We do not consider that a judgment about the egregiousness of the injustice that was suffered by the Gurkhas as compared with that suffered by the BOCs should be a relevant factor in the balancing exercise. As submitted on behalf of NR, Ghising and KR, the crucial point is that there was an historic injustice in both cases, the consequence of which was that members of both groups were prevented from settling in the UK. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependant child of a Gurkha who is settled in the UK has such a strong claim to have his article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in the maintaining of a firm immigration policy. There is no place in the balancing exercise for making fine judgments as to whether one injustice is more immoral or worthy of condemnation than another. Such judgments (which would in any event be difficult to weigh) may be relevant in the political plane. They are not relevant to the making of decisions as to whether it is proportionate to interfere with an individual's article 8(1) rights."

42. It follows that we do not accept the submission of Mr Drabble that the weight to be given to the historic injustice in the Gurkha cases is just as strong as the weight to be given to the injustice caused to the BOCs. The fact that the right to settle enjoyed by Gurkhas is less secure than that enjoyed by the BOCs is a relevant factor. But it also follows that we do not agree with the UT that the weight to be given is generally "substantially less" in the Gurkha cases. If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now. To that extent, the Gurkha and BOC cases are similar. That is why we cannot agree that, as a general rule, the weight accorded to the injustice should be substantially different in the two cases."

38. Despite the observations in Gurung, emphasising the limitations there might be upon any general judicial pronouncement regarding the significance of the part to be played by historic injustice, in AP (India) v Secretary of State for the Home Department [2015] EWCA Civ 89, Elias LJ noted that the Secretary of State had subsequently accepted that, if the only factor weighing on the government's side of

the balance was the importance of maintaining a firm immigration policy, the historic injustice in the BOC and Gurkha cases will, in fact, be decisive. In other words, provided that a protected family or private life exists, the historic injustice robs the government's side of the balance of all weight, thereby effectively guaranteeing success for the individual:-

> "21. In *R (on the application of Gurung) v Secretary of State for the Home Department* [2013] EWCA Civ 8, the Court of Appeal was faced with a similar, if not quite so culpable, historic injustice perpetrated on those who had been veterans of the Gurkha brigade and had served in the British army. The Master of the Rolls, Lord Dyson, referred to Sedley LJ's comments in paragraph 15 of *Patel* to the effect that the historic injustice may perhaps be decisive, but he emphasised the word "perhaps". Consistently with that observation, Lord Dyson added (para.38) that any historic injustice was only one of the factors to be weighed against the need to maintain a firm and fair immigration policy. However, later in his judgment he emphasised the considerable weight which should be afforded to that factor where it is applicable (para.42):
>
> > "… If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now adult) child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now."

He noted that this principle would apply whether the historic injustice was to the Gurkhas or the British citizens from East Africa.

> "22. More recently the Upper Tribunal in *R (Ghising) v Secretary of State for the Home Department* [2013] UKUT 00567 has interpreted these decisions as saying that where the only justification for refusing entry is in order to maintain firm immigration policy, the historic injustice should always outweigh that consideration. Accordingly, entry should be granted as a matter of course in such cases. It is only if there is some other factor weighing in favour of refusal, such as the commission of criminal offences or a bad immigration record, that it will not be decisive.
>
> 23. Ms McGahey very properly informed us that on 5 January this year the Immigration Directorate issued instructions which have accepted the analysis in *Ghising* for Gurkha cases; and the Secretary of State further accepts that no different rule can be applied to BOC cases. Accordingly, Ms McGahey accepts that if the appellant had been able to demonstrate that but for the historic injustice, his father would have settled in the UK earlier, with the consequence that the appellant would have sought entry as a minor rather than as an adult, his appeal ought to have succeeded. Her case is that he failed to establish the causal connection which was critical to this part of his application."

39. What characterises the BOC and Gurkha cases is that they involve the belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with relevant applications made now. The injustice does

not mean that the clock is somehow turned back. The person concerned still needs to bring themselves within the ambit of Article 8 ECHR, so as to require the Secretary of State to justify her interference with that right. However, once that point is reached, and the proportionality scales are set, the historic injustice operates so as to preclude the Secretary of State from requiring that any material weight be given to the importance of maintaining firm immigration controls.

40. The BOC and Gurkha cases are the only examples from the higher courts so far encountered in the immigration field of what may properly be described as "historic injustice". The category of historic injustice is, however, not fixed. We may in due course see other cases, such as those concerned with "*Windrush*" issues.

41. We consider that, for the future, the expression "historic injustice" should be reserved for the types of case just described. It has particular characteristics. The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike the classes of case to which we next turn, the operation of historic injustice in the immigration field will not depend upon the particular interaction between the individual member of the class and the Secretary of State. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.

F. HISTORICAL INJUSTICE

42. By contrast, there are cases that may be described as involving "historical injustice". These are where the individual has suffered as the result of the wrongful operation (or non-operation) by the respondent of her immigration functions.

43. One instance of this is where the respondent has failed to give an individual the benefit of a relevant immigration policy. A good overview of the cases concerning this particular category can be found in SL (Vietnam) v Secretary of State for the Home Department [2010] EWCA Civ 225. Jackson LJ (with whom Ward LJ agreed) held that the failure of the respondent to apply the then existing "Minors Policy" to the appellant, bringing with it the possible entitlement to exceptional leave to remain, was a factor that the respondent should have taken into account in deciding whether to exercise discretion under section 3(5)(a) of the Immigration Act 1971, and paragraph 364 of the Immigration Rules, to deport the appellant.

44. In so finding, the Court of Appeal looked at the following cases, from the first decade of the present century:-

> "28. Before addressing the grounds of appeal, I must first review the relevant law.
>
> Part 4. The Law
>
> 29. In *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12 the adjudicator hearing an appeal from the Secretary of State's decision overlooked AA's entitlement to ELR as an unaccompanied minor. The Secretary

of State contended that no prejudice had been caused, because AA was aged 17 years and 2 months. So ELR, if given, would have expired ten months later and AA had no entitlement to any extension of leave to remain. The Court of Appeal, allowing AA's appeal, rejected the Secretary of State's contentions. Keene LJ, giving the leading judgment, said this:

> "22. I recognize the importance to be attached to the loss of the potential right to an in-country appeal against any refusal of variation of leave to remain. It is true that the chances of such an appeal eventually meeting with success may have been slim: on this I see the force of the points made by Mr Waite about the substantive merits of such an appeal. Nonetheless, it is to be borne in mind that such an appeal process would have afforded the applicant the advantage of an independent judicial consideration of those merits as they stood at the time. That is a significant advantage when compared with the arguments which could be put forward on a judicial review of a decision by the Secretary of State that no new asylum or human rights claim had been advanced. The appellant has lost that advantage because of the errors of law by the adjudicator and the AIT.
>
> 23. He cannot, of course, now be restored to the position he would have been in, had he been granted discretionary leave to remain until his 18th birthday. Mr Waite is right to emphasise that. But the loss which the appellant has suffered is a consideration which the Secretary of State should consider in the exercise of his discretion as to whether the appellant should now be granted any further leave to remain and, if so, for how long.
>
> 24. The same seems to me to be true of another disbenefit suffered by the appellant as a result of the errors of law. In written submissions accepted by the court after the close of oral argument, the intervener has made the point that if the appellant had enjoyed discretionary leave to remain until his 18th birthday, any application by him made before that leave expired to extend it would have resulted in an automatic extension of leave until the application (and any consequential appeal) had been decided or withdrawn. That is the consequence of section 3(c) of the Immigration Act 1971. Moreover, while lawfully in this country because of such an automatic extension of leave, he would have been entitled to work and to obtain various forms of assistance under the Children Act 1989. Neither of those benefits is available to an overstayer.
>
> 25. Legally the propositions seem to me to be sound. Once again, the appellant cannot now obtain these benefits as of right: as is said on behalf of the Secretary of State, this court cannot put the appellant into the position in which he would have been, had discretionary leave been granted. But, again, there can be no doubt that he has suffered a disbenefit as a result of the legal errors made in this case, and that is something which the Secretary of State ought now to take into account."

30. In *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 AC 1159 the House of Lords had to consider the effect of excessive delay in dealing with the asylum claim of a young Kosovar. Lord Bingham identified three ways in which the delay was relevant. At paragraph 16 he dealt with the third way in which delay might be relevant. He said:

> "Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields, unpredictable, inconsistent and unfair outcomes."

31. In *R (S, H, Q) v Secretary of State for the Home Department* [2009] EWCA Civ 334 the Court of Appeal held that when the Secretary of State was exercising her discretion as to whether to grant ILR, she ought to have regard to past failures to apply a relevant policy. In particular, she should have regard to "the correction of injustice caused by the previous unlawful failure to apply the policy".

32. In *HH(Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 727 the Secretary of State made a decision to deport HH following his conviction for three sexual offences. In making that decision the Secretary of State overlooked his policy that persons should not be deported to war zones. By the time the case reached the AIT that policy had been withdrawn. Nevertheless, the AIT held that such withdrawal could not retrospectively validate the Secretary of State's decision. The matter should be remitted to the Secretary of State for a fresh decision. The Court of Appeal upheld that decision of the AIT.

33. A number of propositions may be derived from those authorities, including the following:

    i) A decision may be unlawful if it is reached in disregard of a relevant policy.

    ii) Past prejudice suffered in consequence of such a decision may be a relevant factor to take into account, even when that policy has ceased to be applicable."

45. It is important to point out that, in some of these cases, including SL (Vietnam) itself, the court was not directly concerned with the effect of the respondent's failure on the Article 8 proportionality exercise. The general point made in the cases is nevertheless relevant to that exercise. Furthermore, EB (Kosovo) is a case that expressly concerned proportionality, as the quotation from paragraph 16 of Lord Bingham's opinion makes plain.

46. Apart from failure to give the benefit of a policy and delay in reaching a decision, another form of what might be called historical injustice may be said to arise, where the respondent forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where the respondent's view turns out to be factually mistaken. The Court of Appeal examined cases of this kind in Ahsan

v Secretary of State for the Home Department [2017] EWCA Civ 2009, where Underhill LJ had this to say:-

> "120. The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I accept that how to exercise such a discretion would not always be easy, since it is not always possible to reconstruct the world as it would have been; but that problem would arise even if the decision were quashed on judicial review.) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the section 10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from (apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot alas be remedied by either kind of proceeding.)
>
> 121. So far so good, but the law in this area is very complicated and I am not confident that all its ramifications were fully explored before us. I do not feel in a position to say definitively that the Secretary of State will always be able to exercise her discretion, in the aftermath of a successful human rights appeal, so as to achieve the same substantive result as the formal quashing of the section 10 decision. There may, for example, be legislation (i.e. primary or secondary legislation rather than simply the Rules) which would result in the appellant having to be differently treated depending on whether he or she had leave to remain during a particular period. If there were any real doubt about whether in a given case a successful human rights appeal would be as effective as the formal quashing of the section 10 decision the applicant should have the benefit of that doubt and be permitted to pursue judicial review proceedings."

47. Although not immediately apparent, one way in which this kind of erroneous treatment of an individual can have a bearing on Article 8 proportionality is in an ensuing human rights appeal, as was envisaged by Underhill LJ. In such an appeal, the individual would be able to argue that, if the respondent had not formed the mistaken view of their conduct, he or she would have been given leave to remain; and that this should be given weight in the balancing exercise, comparably with how the Court of Appeal, in AA (Afghanistan) etc, spoke of the respondent taking

account of past mistakes in deciding whether to exercise discretion in the individual's favour.

48. Finally, we reiterate the point about terminology made in paragraph 41 above. Although labels can sometimes be helpful, they can also obscure the true issues in play. There is nothing inherently "historic" about the respondent's failure to give an individual the benefit of a particular immigration policy, however important that failure may be to the individual concerned. The same is true of gross delay in reaching a decision and in making an assessment about an individual's conduct that turns out to be incorrect. Each of these failings may have an effect on the individual's Article 8 case. But, as can be seen, the ways in which this may happen differ from the true "historic injustice" category.

G. THE EMPLOYMENT TRIBUNAL PROCEEDINGS

49. With this in mind, we turn to the details of the appellant's claim to have suffered a historic injustice at the hands of Bakkavor Foods Limited and/or the respondent. The judgment of the Employment Tribunal of 13 January 2015 begins by setting out the Tribunal's conclusions. The appellant's claims of sex and race discrimination "fail and are dismissed". The claim for breach of contract "succeeds. She is entitled to one week's net pay of £357". The appellant was also "entitled to her fees of £1,200".

50. The Tribunal's reasons for those conclusions record that at a preliminary hearing in September 2014, a number of the appellant's discrimination complaints were dismissed as being both out-of-time and as having no reasonable prospects of success. The remaining complaint was of direct discrimination under the heading of sex and race discrimination. This involved the allegation that the company failed to sponsor the renewal of the appellant's visa when it expired. However, the appellant told the Tribunal that she was not in fact alleging that her dismissal was discriminatory or, indeed, that the failure to sponsor her was discriminatory "but rather that she had been promised sponsorship and that promise had not been kept because she was a woman of Indian origin".

51. At paragraph 12 of the judgment, the Tribunal recorded the appellant's evidence, which was that she had been told by Mr Brar (who was to become her line manager) at her initial interview in January 2014 that "sponsorship following the expiry of her visa 'shouldn't be a problem for the right candidate'". That utterance was, apparently, disputed by Mr Brar, although he did not give evidence to the Tribunal.

52. At paragraph 14, the Tribunal was satisfied that the appellant "believed that she would have a case for sponsorship subject to her satisfactory performance in the role". After being offered the position, the appellant chased Mr Brar for a review at the end of her six month probationary period, but this did not take place.

53. In January 2014, the appellant said Mr Brar had asked her about her visa expiry and the possibility of an extension. She said she understood that, following what she believed she had been told at her interview, sponsorship should not be a problem.

Although it was said Mr Brar was going to investigate the matter further, there was no evidence before the Tribunal as to whether or not he did so. What was clear to the Tribunal, however, was that by this stage (January 2014) the appellant was aware that there was a potential problem with her sponsorship by the company. On 20 January 2014, the appellant submitted a written grievance. The appellant apparently felt she had been cheated and deceived into accepting the role with the company when she could have been actively seeking a role elsewhere with greater sponsorship prospects.

54. A grievance hearing took place on 31 January 2014. It appears that on this occasion it was stated incorrectly that the company did not sponsor anyone. It further appears that at this point the company advised the appellant that responsibility for securing her work visa lay with her and not with the company.

55. On 16 February 2014, the appellant wrote to an MP to complain about the matter and on 17 February 2014 she appealed the grievance decision. Her main contention was that she had been misled at interview. It was not suggested this was because of her nationality and/or sex. A grievance appeal meeting was held on 19 February with Mr Brar's line manager. There was no evidence of any investigation into the allegations. The appellant was "merely referenced to the number of training opportunities for managers". The MP wrote to the company in March 2014 and this letter was passed to the company's group HR director.

56. Nothing then happened until 6 May 2014, when the company replied to the MP. For the first time, the appellant learned there was a third stage to the grievance procedure. The letter to the MP of May 2014 acknowledged that the company could and did sponsor persons but that they would not do so in the case of the appellant. This information was communicated less than three weeks before the appellant's visa was due to expire.

57. On 9 May, the appellant was offered a third stage grievance meeting, which took place on 16 May. It was chaired by the new factory manager. At this point the company's attention was on finding whether there was any way to sponsor the appellant following the expiry of her visa. The representatives at the third stage grievance meeting did not re-open the other aspects of the appellant's grievance.

58. Having researched the possibility of sponsorship, it was ascertained that the company would need to establish that the employee was doing the job at the relevant level for a Tier 2 sponsorship. This was equivalent to an NQF level 6 job and also classified as one of the SOC2010 occupations as set out in the UK Visa and Immigration Code of Practice for Skilled Workers. The role of food technologist was listed in Code 2129.

59. At paragraph 38 of the judgment, the Tribunal noted that the minimum salary required for sponsorship was set at a level of £24,300. From the commencement of her employment, the appellant had been earning £22,000 "albeit [she] had been

under the impression that she would receive a pay review at the same time as her probationary review, which had not happened".

60. The Tribunal understood that the company had sponsored another technologist but this person had been earning £32,000 and therefore met the eligibility requirements. That employee was an Indian female.

61. Conversely, at paragraph 44, the Tribunal heard that the company had refused to sponsor an employee, who, like the appellant, was initially employed when on a Tier 1 (Post-Study) visa. This person had been earning £23,000 and, like the appellant, was told he did not meet the minimum salary level. This led the Tribunal to say:-

> "This suggests that the claimant's beliefs about the potential influence of Mr Brar or the likelihood of the company giving a pay rise simply to ensure the criteria were met were likely to be unfounded."

62. At paragraph 45, the Tribunal noted the appellant's evidence that she had initially been advised by the UK Border Agency that the minimum salary requirement was £20,500 but she accepted subsequently that she had been wrongly informed. The Tribunal concluded that the only way the company could sponsor the appellant would have been to have given her a pay rise of a little over 10%; but the company was not willing to do so. There was at least some evidence that the appellant had been given some assurance and there were clearly failures with regard to her probationary review, in the Tribunal's view. The same was true of the early stages of the grievance process. The Tribunal considered that this might have led some employers to make an exception and to support the appellant, who was "understandably aggrieved". There was, however, no evidence that a pay rise would have been given to anyone not showing the same protected characteristics as the appellant.

63. After the outcome of the grievance procedure, the appellant sought to complain to the chief executive officer of the company but her complaint was rejected at about 3pm on 28 May 2014, "the last day of the claimant's working visa" (paragraph 53). On 29 May she was advised that the company would be ending her employment. This was communicated by a letter dated 30 May 2014. The appellant said she did not appeal against that decision because she did not receive the letter.

64. The Tribunal concluded that the appellant had been entitled to one week's notice, which she did not receive.

65. At paragraph 67, the Tribunal found that the appellant's claim "was that she had been misled at interview with regard to the likelihood of sponsorship" but she "expressly confirmed that she was not alleging that the dismissal nor the failure to sponsor her was an act of discrimination".

66. At paragraph 69, the Tribunal found that the appellant may not have been aware that she had been misled until shortly before 7 January, when she stated in an email that

while she had been told that sponsorship should not be a problem, she now understood that this was not the case.

67. At paragraph 74, the Tribunal noted the appellant's main argument was that her manager, an Indian man, treated Indian women less favourably but not Indians or women generally. At paragraph 75, the Tribunal was "not satisfied that [the appellant] was able to establish facts from which we could have concluded that discrimination had occurred notwithstanding the absence of Mr Brar giving evidence".

68. At paragraph 76, the Tribunal noted the appellant's case that she considered the reason Mr Brar gave her a false hope "was because of the difficulties the [company] was having recruiting. This would appear to suggest that it was a non-discriminatory reason and Mr Brar would have done the same whether she was Indian or not and whether she was female or not".

69. At paragraph 77, the Tribunal recorded the appellant as having "accepted that Mr Brar had no authority to either award her a pay rise or to sponsor her". At paragraph 80, the Tribunal said:-

> "80. Accordingly, notwithstanding the [appellant's] feeling understandably aggrieved by any assurances she believed she had been given not being kept and further aggrieved by the handling of her grievances and the misinformation provided therein, unreasonable treatment cannot of itself lead to an inference of discrimination and there was no evidence before us that could.
>
> 81. Accordingly, the [appellant's] claims of discrimination, the underlying circumstances of which may have disadvantaged her in seeking work and sponsorship opportunities elsewhere, must nonetheless fail."

70. The judgment concluded by noting that the claim for notice pay was upheld, which meant that she was awarded the full fees for the hearing and bringing the claim.

H. DISCUSSION

71. It is, in our view, manifest that the appellant cannot successfully contend that she had suffered "historic injustice". She is not a person of a class that has been affected by what is now recognised by the United Kingdom government as unfair or unjust treatment, such as that suffered by the families of those denied citizenship in the late 1960s; or by the families of ex-Gurkha servicemen. Nor can the appellant show she has been subjected to "historical injustice", in any of the ways we have described. The appellant cannot point to any beneficial policy of the respondent, which has been wrongly withheld in her case; nor has the respondent reached an erroneous decision that the appellant is no longer entitled to leave because of some misbehaviour on her part. The appellant has been without leave to remain for several years.

72. The circumstances in which the appellant came to find herself without leave were considered in detail by the Employment Tribunal. It is regrettable that the appellant has seen fit to describe herself as "the victim of judicial scuppering for the past five

years" and that this found its way into the grounds of application for permission to appeal. There is no suggestion of any erroneous judicial behaviour of any kind.

73. It is also plainly untrue that the Employment Tribunal found the appellant had suffered discrimination. The Tribunal expressly held to the contrary. The most that can be inferred in the appellant's favour from the Employment Tribunal's judgment, is that Mr Brar – an individual whom she acknowledges had no authority to award her a pay rise or to sponsor her - may, at the beginning of her employment, have given the appellant a misleading impression about whether she might be sponsored by the company at the end of the initial period of her working visa.

74. The real issue in this case, which Mr Saini acknowledged in oral submissions, is whether – even though the matter is not one of historic or historical injustice - the First-tier Tribunal Judge was nevertheless required to reduce the importance that would otherwise be given to immigration control, because of the appellant's experiences with Bakkavor Foods Limited. As we have seen, Judge Bulpitt had express regard to the appellant's employment history and what had transpired when she was with the company. Judge Bulpitt concluded, however, that the fact the appellant "was treated poorly by her employer" did not diminish the public interest in immigration control.

75. Mr Saini has been unable to point to any authority or principle that shows Judge Bulpitt erred in law in refusing to reduce the weight to be given to immigration control, notwithstanding the appellant's employment history. This is unsurprising. Those who come to the United Kingdom for the purpose of study or employment may – like anyone else – experience difficulties and disappointment of various kinds. Not every teaching institution will be of the highest standard. Not every employer will be ideal. In the present case, Mr Brar may have "talked up" the appellant's prospect of being able to proceed to further sponsorship, when she was taken on by the company. However, from January 2014, the appellant was, by her own admission, aware that there were problems with what Mr Brar is said to have told her. The appellant decided to engage in protracted grievance procedures. That was her choice. So too was her decision to bring proceedings against the company in the Employment Tribunal, where all that she succeeded in obtaining was one week's pay in lieu of notice and the costs of the claim. She failed in respect of her claims based on discrimination including, importantly, that involving direct discrimination on grounds of race/gender.

76. Our attention has not been drawn to any evidence to show that the appellant sought to obtain sponsorship from another employer, from the point in January 2014 when she realised there were difficulties with the company keeping her on, following the expiry of her visa. Nor has our attention been drawn to any evidence that the appellant sought at that time to bring her difficulties to the attention of the respondent.

77. As a result, there is no merit in the submission that the appellant found herself without leave to remain, solely as a result of the misfeasance of Bakkavor Foods

Limited. But, even if the position were otherwise, the appellant still faces the difficulty of showing that Judge Bulpitt was simply not entitled, in making his own assessment of how the proportionality balance should be struck under Article 8(2), to conclude that the appellant's experiences did not demand a material reduction to be made in the weight to be given to the importance of immigration control.

78. The appellant's case includes the proposition that the respondent has some responsibility for what happened to the appellant at Bakkavor Foods Limited. The company was a Tier 2 sponsor. As such, it owed duties to the respondent. Mr Saini provided us with the Home Office Tier 2 and 5 Policy Guidance for Sponsors (1 October 2013). This describes the circumstances in which the respondent may revoke a sponsor licence. Such a consequence may ensue if the company is "dishonest in any dealings with us", such as by making false statements. It also includes failing to pay the sponsor migrant "at least the appropriate rate for the job they had been sponsored to do". There is also reference to the sponsor being required to follow "good practice guidance set out by us or a relevant sector or body". Paragraph 658 provides that if the respondent believes that the company is breaching its duties and/or poses a threat to immigration control, the company's licence may be suspended.

79. The appellant's stance on this issue runs up against the serious obstacle that, as we have observed, it does not appear she informed the respondent at any material time of the difficulties she was experiencing with Bakkavor Foods Limited. More fundamentally, however, it is difficult to see how the respondent can be expected to have intervened in any meaningful way. The appellant's stance assumes the respondent must engage in a form of micro-management of the affairs of sponsor companies, which is wholly unwarranted. Even if the respondent had investigated and concluded that Mr Brar had made a comment about the appellant's future sponsorship prospects that turned out to be false, the appellant is silent as to what, if anything the respondent was supposed to have done. We understood Mr Saini to suggest at one point that the respondent should have revoked the company's sponsorship licence. However, given what the Employment Tribunal said about Mr Brar's lack of authority, any such reaction would have been draconian. It would have put at risk the position of others sponsored by the company.

80. Mr Saini sought to rely upon the Upper Tribunal judgment in Mansur (immigration advisors failings: Article 8) Bangladesh [2018] UKUT 274. In that case, the Upper Tribunal held that the importance to be given to immigration control fell to be reduced where an immigration adviser had acted contrary to an individual's express instructions regarding the withdrawal of an appeal, in circumstances that led to an application for leave being held to be invalid. The adviser had been found by the relevant regulator to be at fault in this regard.

81. The important point about Mansur, however, is that the Upper Tribunal was at pains to point out that the result was exceptional and that "it will be only in a rare case that an adviser's failings will constitute" a reason to reduce the weight to be placed on the relevant public interest. The Upper Tribunal emphasised that such weight cannot be

reduced "just because there happen to be immigration advisers who offer poor advice and other services". By the same token, just because there are employers whose staff sometimes behave in sub-optimal ways does not mean that the weight to be given to immigration control should be reduced.

82. So far, our analysis has proceeded without regard to Part 5A of the 2002 Act. It is, however, necessary to address the submissions that Mr Saini made on these provisions, as they might bear on the present appeal.

83. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. That statement cannot be overridden by a judicial decision. However, as we have seen in the cases of true "historic injustice", the weight to be given to the public interest can be so diminished that any private life which engages Article 8(1) will outweigh the diminished public interest.

84. We consider that in all cases in which, for whatever reason, the public interest falls to be given less than its ordinary weight, the usual course should be for the judge to so find in terms, when addressing section 117B(1). We accept, however, that the same result may be achieved, at least in some situations, by qualifying the consideration in section 117B(4) that little weight should be given to a private life formed when the person concerned is in the United Kingdom unlawfully. If, say, the respondent should for some reason have given an individual leave to remain, then one could perhaps give effect to that factor by ascribing more weight to his or her private life than would otherwise be mandated by section 117B(4). The important point, however, is that judicial fact-finders should avoid any recourse to double-counting, whereby not only is the weight to be given to effective immigration controls diminished but also, for the same reason, a private life is given more weight than would otherwise be possible by an undiluted application of section 117B(4).

85. Before us, there was discussion over the application of section 117B(5), whereby little weight should be given to a private life established by a person at a time when that person's immigration status is precarious. Regardless of how Bakkavor Foods Limited should have behaved towards the appellant, it remains the case that her status has at all times been precarious, in that she has at all times lacked indefinite leave to remain: Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58. In the Court of Appeal judgments in Rhuppiah [2016] EWCA Civ 803, Sales LJ said:-

> "54. … considerable weight should be given to Parliament's statement in section 117B(5) regarding the approach which should normally be adopted. In order to identify an exceptional case in which a departure from that approach would be justified, compelling reasons would have to be shown why it was not appropriate. …"

86. If then, one looks at the appellant's primary case through the lens of section 117B(5), "compelling reasons" would be needed to dilute the effect of that subsection. It would be illogical if an examination of that same case through the lens of section 117B(1) were not to require the same "compelling reasons".

87. Accordingly, however one approaches the appellant's primary case in section 117B, it remains the fact that the public interest in the maintenance of effective immigration control cannot lightly be diminished. The appellant's primary case does not contain anything which required Judge Bulpitt to regard the public interest as diminished.

88. This leads directly to the remaining ground of challenge to Judge Bulpitt's decision; namely that in paragraph 22 he adopted too high a threshold in finding that the appellant "has not established a very strong or compelling claim required to outweigh the public interest in immigration control". Mr Saini submitted that, notwithstanding that this language is taken directly from paragraph 57 of Lord Reed's judgment in Agyarko, part of which was actually cited by Judge Bulpitt at paragraph 19 of his decision, the language is indicative of section 117C(6) which, as we have already seen, applies only to foreign criminals sentenced to four or more years' imprisonment. The appellant is not such a person.

89. We are not persuaded by this ground of challenge. It is difficult to see how Judge Bulpitt could have erred in directly following Lord Reed's judgment in a directly analogous situation. Although the vocabulary of the English language is very large, there is a limit to the kinds of expressions that may be employed in this area. The fact that section 117C(6) speaks of "very compelling circumstances" is no reason to ignore or qualify paragraph 57 of Agyarko. Section 117C(6) is referring to "very compelling circumstances, over and above those described in Exceptions 1 and 2"; that is to say the exceptions set out in section 117C(4) and (5). The context is, accordingly, quite different.

90. There is no suggestion at all that, in saying what he did at paragraph 22 of his decision, Judge Bulpitt was treating the appellant as a person who needed to satisfy section 117C(6).

I. DECISION

91. The decision of the First-tier Tribunal does not include the making of an error on a point of law. The appellant's appeal is accordingly dismissed.

No anonymity direction is made.

Signed *Mr Justice Lane* Date: 20 November 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber