Upper Tribunal
(Immigration and Asylum Chamber)

Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd & 8th May 2017	
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Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE JACKSON

Between

ALI RASULI MAHMUD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan and Ms J Blair of Counsel
For the Respondent: Mr M Gullick of Counsel

1. *Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.*

2. *A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.*

3. *In practice, a new matter is a factual matrix which has not 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.

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Hussain promulgated on 2 November 2016, in which his appeal against the Respondent's decision to refuse his asylum and human rights claim dated 19 May 2016 was dismissed. That decision involved, as a preliminary matter, whether the notice of appeal included a 'new matter' such that section 85 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) applied to prevent the First-tier Tribunal from considering evidence on it in the absence of the Respondent giving consent. The evidence concerned the Appellant's relationship with his new partner, Ms P and her son, which was first raised in the notice of appeal[1].

2. The Appellant is a national of Iran, born on 23 November 1994, who arrived in the United Kingdom 23 January 2012 and claimed asylum. That application was refused by the Respondent but the appeal against that refusal was allowed by Judge Pirotta in a decision promulgated on 2 October 2012 on the basis that the Respondent had failed to take into account section 55 of the Borders, Citizenship and Immigration Act 2009 and failed to carry out obligations as to family tracing. The application was referred back to the Respondent to remake the decision in light of that. It is that remade decision of 19 May 2016 which was the subject of the appeal before Judge Hussain.

3. The Appellant's asylum claim was based on a fear of return to Iran from the authorities there because of his brothers' involvement with PJAK, the Kurdistan Free Life Party, which is banned by the state and considered a terrorist organisation.

4. The Respondent refused the application on the basis that the Appellant was not considered to be credible and it was not accepted that his brother was involved with PJAK, that his brother was arrested, nor that the Appellant was wanted by the authorities in Iran.

5. Judge Hussain dismissed the appeal on all grounds on which he considered he had jurisdiction to determine, which was the asylum claim and claims for humanitarian protection and under Articles 2 and 3 of the European Convention on Human rights which arose from the same facts. Judge Hussain did not find the Appellant to be credible and in particular was not satisfied that the Appellant's brother was involved with PJAK, that his brother had been arrested, nor that there was any outstanding arrest warrant for the Appellant who had not come to the adverse

[1] Counsel for the Appellant could not accept in submissions that this was the very first time that there was any mention to the Respondent of this relationship, relying on an assertion that, in the context of the Appellant's NASS application in January 2016 and contact from the Appellant's social worker, this information would have been disclosed to the Respondent at that stage. There was no clear evidence of this before us and we declined to draw any inference from the limited documentation referred to by Mr Chelvan that this was the case. In any event there is no dispute that no detailed evidence as to that relationship was available until immediately prior to the appeal hearing before the First-tier Tribunal.

attention of the Iranian authorities. As such it was not considered that he would face any risk on return to Iran. There were no findings of, nor any express decision on the appeal on Article 8 of the European Convention on Human Rights.

The appeal

6. The Appellant appeals on five grounds as follows:

   (a) that the First-tier Tribunal Judge materially misdirected himself in law when finding that he had no jurisdiction to consider evidence of the Appellant's relationship with his new partner and her son. The Appellant claims that there was no new ground of appeal on this basis, it was simply a matter of new evidence as to private and family life which was already in issue such that section 85(5) of the 2002 Act did not apply;

   (b) that the First-tier Tribunal Judge failed to take into account a material matter by conflating the lack of existence of an arrest warrant for the Appellant before the First-tier Tribunal with a question of whether it was ever issued or served on the Appellant's family;

   (c) that the First-tier Tribunal Judge failed to take into account a material matter, namely that the Appellant's evidence was that his brother was detained and still in detention and made findings that in situations such as that claimed by the Appellant, all family members would be arrested and detained as the Iranian authorities would act strictly according to a set procedure and follow the rule of law;

   (d) that the First-tier Tribunal Judge failed to take into account a material matter by placing weight on a conclusion that an arrest warrant could only be served on the Appellant's family where they have divulged the whereabouts of the Appellant without considering whether the Appellant's family had given a truthful account of his whereabouts and the plausibility of risk this may pose to the family;

   (e) that the First-tier Tribunal failed to take into account a material matter by placing insufficient weight on the fact that the Appellant was a child when he first claimed asylum and was first interviewed and that he had suffered a head injury, with little information available about his short or long-term memory/mental state. It is claimed that there was a failure to give any real effect to the Appellant's mental health or his age when he claimed asylum when considering the evidence and issues of credibility.

7. Permission to appeal was granted by Judge Saffer on 22 November 2016 on all grounds.

8. This appeal first came before Upper Tribunal Judge Bruce for hearing on 17 January 2017, when it was adjourned with directions for the parties to address the following four issues in relation to the Article 8 appeal:

   (i) Having regard to the statutory scheme, was the Tribunal empowered to consider for itself whether the material relating to Ms P was a 'new matter'?

(ii) If so, what were the relevant factors for consideration?

(iii) Was there any identifiable error in the Tribunal's conclusion that the material relating to Ms P was a 'new matter' given that the Appellant had raised Article 8 family life grounds before the Respondent's decision, and in the grounds of appeal, some six months prior to the hearing?

(iv) Was the failure to address Article 8 at all in the determination an error of law regardless of the answers to (i) to (iii) above?

9. To determine the above questions, it is first necessary to determine what a 'new matter' is for the purposes of section 85(5) and (6) of the 2002 Act and to determine the meaning of 'consent' in section 85(5) of the 2002 Act.

Relevant law and procedure

10. Part V of the 2002 Act makes provision for appeals in respect of protection and human rights claims and so far as relevant to this appeal provides as follows:

82. Right of appeal to the Tribunal

(1) A person "P" may appeal to the Tribunal where –
  (a) the Secretary of State has decided to refuse a protection claim made by P,
  (b) the Secretary of State has decided to refuse the human rights claim made by P, or
  (c) the Secretary of State has decided to revoke P's protection status.

84. Grounds of appeal

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be bought on one or more of the following grounds –
  (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;
  (b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
  (c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

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

85. Matters to be considered

(1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1) … against a decision the Tribunal may consider… any matter which it thinks relevant to the substance of the decision, including… a matter arising after the date of decision.
(5) But the Tribunal must not consider a new matter unless the Secretary of Status has given the Tribunal consent to do so.
(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.

86. Determination of appeal
(1) This section applies on an appeal under section 82(1).
(2) The Tribunal must determine –
  (a) any matter raised as a ground of appeal…, and
  (b) any matter which section 85 requires it to consider.

96. Earlier right of appeal
(1) A person may not appeal under section 82 against the decision ("the new decision") if the Secretary of State or an immigration officer certifies –
  (a) that the person was notified of a right of appeal under that section against another… decision ('the old decision') (whether or not an appeal was brought and whether or not any appeal brought has been determined),
  (b) that the claim or application to which the new decision relates relies on a ground that could have been raised in appeal against the old decision, and
  (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in an appeal against the old decision.

113. Interpretation
(1) In this Part, unless a contrary intention appears –
…
'human rights claim' –
(a) means a claim made by a person that to remove him from or require him to leave the United Kingdom or to refuse him entry to the United Kingdom … would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) …

11. So far as is relevant to this appeal, Rule 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "Procedure Rules") provides as follows:
  (1) Except in appeals in which rule 23 applies, when a respondent is provided with a copy of a notice of appeal, the respondent must provide the Tribunal with –
    (a) the notice of the decision to which the notice of appeal relates and any other document the respondent provided to the appellant giving reasons for that decision;
    (b) any statement of evidence or application form completed by the appellant;
    (c) any record of an interview with the appellant in relation to the decision being appealed;
    (d) any other unpublished document which is referred to in a document mentioned in sub-paragraph (a) or relied upon by the respondent; and

(e) the notice of any other appealable decision made in relation to the appellant.

(2) The respondent must, if the respondent intends to change or add the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a), provide the Tribunal and the other parties with a statement of whether the respondent opposes the appellant's case and the grounds for such opposition.

(3) The documents listed in paragraph (1) and any statement required under paragraph (2) must be provided in writing within 28 days of the date on which the Tribunal sent to the respondent a copy of the notice of appeal and any accompanying documents or information provided under rule 19(6).

Discussion & findings

Appellant's application to adduce further evidence under Rule 15(2A)

12. We deal first with the preliminary matter of the Appellant's application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence which was not available at the date of the First-tier Tribunal hearing. This further material included statements from the Appellant's solicitor and previous Counsel relating to what occurred at the First-tier Tribunal hearing; correspondence to/from the Respondent's solicitors; correspondence with the First-tier Tribunal and Tribunals Rules Committee and minutes/statements held on file by the Appellant's solicitor. We refuse to admit the further material under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the basis that it does not assist in the determination of the issues in the present appeal for the following reasons:

- Part of this material relates to the conduct of the Home Officer Presenting Officer at the First-tier Tribunal hearing, which for the reasons set out below, is not relevant to any of the grounds of appeal nor are the allegations made out on the face of the decision under appeal itself.
- Part of the material is a copy of documents received from a subject access request and appears to be relied upon to support an inference as to when the Respondent was first aware of the new matter raised by the Appellant, which is also not relevant to the issues in this appeal for the reasons given above and below.
- Part of the material relates to correspondence on behalf of the Appellant which is said to show his attempts to engage the Respondent and the Tribunal as to the application of rule 24 of the Procedure Rules and any guidance on its application. For the reasons set out below, the Appellant's reliance on rule 24 for the purposes of statutory construction does not assist and the correspondence on this point is also irrelevant.
- The remaining material as to the knowledge of the Appellant's solicitor may be relevant to any future determination of the new matter but does not assist in the determination of the issues in this appeal.

First ground of appeal - statutory construction of section 85(5) and (6) of the 2002 Act

13. On the facts of the present case, in relation to the first ground of appeal, it was submitted on behalf of the Appellant that he had relied upon private and family life having been established in the United Kingdom under Article 8 of the European Convention on Human Rights and more specifically that the matter considered by the Respondent in this regard was whether his removal from the United Kingdom would be in breach of section 6 of the Human Rights Act 1998 (the "Human Rights Act"). As such, it was submitted that further evidence as to the Appellant's family life with Ms P and her child, which built upon the existing ground of appeal that the Appellant's removal from the United Kingdom would be a disproportionate interference with his right to respect for private and family life and therefore contrary to section 6 of the Human Rights Act, was not therefore a 'new matter'. In the alternative, it was submitted that even if the material constituted a 'new matter', the Respondent is deemed to have consented to the First-tier Tribunal considering it and/or the failure to make a positive decision to consent was in any event procedurally unfair to the Appellant. Two distinct issues of construction therefore arise, first, as to the meaning of 'new matter' in section 85(6) and secondly, as to the requirements and procedures of consent in section 85(5) of the 2002 Act.

14. On behalf of the Appellant, Mr Chelvan's primary submission was that for the purposes of section 85(5) and (6) of the 2002 Act, a new matter meant a new ground of appeal, namely that removal would be contrary to section 6 of the Human Rights Act 1998, although for present purposes he did not need to put the claim this broadly and could confine himself to a new matter being a specific Article of the European Convention on Human Rights which would fall under the umbrella ground that removal would be contrary to section 6 of the Human Rights Act. In this case, reliance was placed on Article 8 which had already been considered by the Respondent in the reasons for refusal letter, albeit based on an alternative factual premise which had been submitted by the Appellant at that time. It was submitted that a 'new matter' could not merely be new facts or evidence relating to an extant ground of appeal but would have to constitute an entirely new ground of appeal.

15. The construction contended for by the Appellant is said to be supported by a variety of sources, including parliamentary material (for which a Pepper v Hart application was made only during the course of the hearing and only in response to questions from the panel and the Respondent's submissions as to whether this material could be relied upon at all); rule 24 of the Procedure Rules and section 96 of the 2002 Act. We deal with each of these matters in turn, together with a number of other more minor submissions made by Counsel for the Appellant which were not of assistance in dealing with the issues of statutory construction in this case.

16. The Respondent contends that 'new matter' in section 85(5) and (6) is something broader than a ground of appeal and includes evidence which could, of itself, form a ground of appeal. This more accurately reflects the wording of section 85(6) which states that a matter is a new matter if (a) it constitutes a ground of appeal of a kind listed in section 84 and not, as proposed on behalf of the Appellant, that a matter is a new matter if it (a) constitutes a new ground of appeal. There is no basis

for reading in a requirement for there to be a new ground of appeal contrary to the clear wording of the statute.

17. At the outset, we find that the interpretation contended for by the Appellant is one which, taken at its highest, would lead to the absurd result that nothing could ever be a new matter in an asylum or human rights appeal within the current statutory framework. Under section 82 of the 2002 Act, a person may appeal to the Tribunal against the decision to refuse a protection claim, to refuse human rights claim or decision to revoke a person's protection status. In accordance with section 84(2) of the same, an appeal against the refusal of the human rights claim can be appealed on the single ground that the decision is unlawful under section 6 of the Human Rights Act. If a new matter in the context of section 85 of the 2002 Act means a new ground of appeal, it would be impossible, where there is only a single ground of appeal, for there ever to be a new matter arising.

18. Similarly, in accordance with section 84(1) of the 2002 Act, an appeal against the refusal of an asylum claim must be bought on one or more of the grounds set out, namely that removal of the appellant from the United Kingdom would breach obligations under the Refugee Convention, removal would breach obligations in relation to persons eligible for grant of humanitarian protection and where removal from the United Kingdom would be unlawful under section 6 of the Human Rights Act. Practically, in any asylum decision made by the Respondent, there is always consideration of the claim on asylum, humanitarian protection and human rights grounds such that for practical purposes it is also the case that on the Appellant's construction, there could never be a new ground of appeal outside of these matters that any appellant could possibly raise which would be considered to be a new matter under section 85 of the 2002 Act.

19. In practice, it is unlikely given the frequency with which reliance is placed on Articles 2, 3 and 8 of the European Convention on Human Rights that for the same reasons a new matter would arise frequently even on Mr Chelvan's secondary contention for construction of a new matter that it could be limited to a particular Article of the European Convention on Human Rights.

20. The absurdity of the outcome of the construction contended for by the Appellant, which would deprive section 85(5) and (6) of all meaning on the wider basis and even on the narrow basis would significantly limit its application to a very small number of cases, is a strong and significant factor as to why we do not agree with the construction contended for. In any event, we go on to set out the reasons why we do not find support for that construction in any of the points further relied upon by the Appellant.

Appellant's reliance on parliamentary material

21. Mr Chelvan sought to rely on parliamentary material support the construction of a new matter for the purposes of section 85 of the 2002 Act and only during the course of proceedings, with no advance notice to the Respondent, made an oral application to do so in accordance with the guidance set out by the House of Lords in Pepper (Inspector of Taxes) v Hart and related appeals [1993] 1 All ER 42. The

courts are usually prohibited from referring to parliamentary material as an aid to construction save when the following three conditions are met. First, the legislation was ambiguous or obscure or the literal meaning leads to an absurdity; secondly, the material relied on consisted of statements by the Minister or other promoter of the Bill which leads to the enactment of the legislation together if necessary with such other parliamentary material as was necessary to understand such statements and their effects; and, thirdly, the statements relied on were clear.

22. In relation to the first requirement, we do not accept that section 85(5) or (6) of the 2002 Act is ambiguous, obscure or that the literal meaning, would lead to an absurdity such that the first test is not met for reliance on this material. We have however considered the passages relied upon by Mr Chelvan, which are set out below.

23. The explanatory notes to the Immigration Bill as introduced in the House of Commons on 10 October 2013, included the following at paragraph 76:

> "*Subsection (5)* substitutes a new section 85(5) of the 2002 Act which provides that the Tribunal may not consider a new matter unless the Secretary of State has given the Tribunal consent to do so. "New matter" is defined in new section 85(6) as being a ground of appeal within section 84, or any reason the appellant has for wishing to enter or remain in the UK, and a matter that the Secretary of State has not previously considered in the context of a decision in section 82(1) or a statement made under section 120 of the 2002 Act. This is to prevent appellants from raising new grounds before the Tribunal before the Secretary of State has a chance to consider them."

24. In response to a proposed amendment to the relevant clause of the bill from Lady Berridge at second reading in the House of lords, Lord Wallace of Tankerness, the sponsor of the bill at that stage, stated on 1 April 2014:

> "My Lords, one of the examples given by my noble friend Lady Berridge was that a matter may suddenly be raised. It is important to make the point that we are not talking about the appellant relying on new evidence to support a ground already before the tribunal. I know that the noble and learned Lord accepts and understand that. For example, if there was an appeal about refusal of the family life settlement, new evidence on family life would obviously be something which could be led. Nor will the clause prevent access to the court, because the individual would still have an appeal against the refusal. If the new matter on which an application was made was refused, then obviously the matter could be appealed to the tribunal.
>
> I note what the noble and learned Lord says, but my noble friend Lady Berridge talked about a new ground of appeal which the Home Office may have found out about only the night before. When people talk about equality of arms, I'm not necessarily persuaded that someone going into the tribunal will find that there is a completely new ground of appeal which they only learnt about within the previous 12 hours. That is an inequality of arms. My noble friend and learned friend Lord Mackay of Clashfern commented on whether or not the Home Office had been answering the telephone. These are practical issues that ought to be addressed, but I do not think they go to the principle we are discussing.
>
> I am always wary – as was the noble Baroness, Lady Smith - of using football analogies, but they were mentioned by my noble friend moving her amendment. If an

FA Cup match went to penalties, it would not be for one party to say, "By the way, we will just go to the referee and say, 'If we are having a penalty shootout, it will do for the other cup tie that we are to play next week. We will just do the two in one' ". If it is a completely new case, it is not reasonable that that should happen. I stress that this is not a situation where person is going to be denied the opportunity to bring a separate case on the new matter. They were still be able to bring it and, if they were dissatisfied with the decision made by the Secretary of State, the appeal would still be open to them.

The proposed measure could create an incentive for an appellant to raise a new matter at that late stage because they could try to persuade the tribunal that the matter should be heard despite the Secretary of State not having considered and decided the issue. The Secretary of State will have to strike that balance, depending on whether or not she wishes to give her consent – if, indeed, the case was adjourned. Documents may suddenly have been produced the veracity of which the Secretary of State will have had no opportunity to examine. If it is a new ground of appeal, the Government argue that the primary decision-maker is the Secretary of State and the proper role of the tribunal is to hear appeals against the decision of the Secretary of State, if the applicant is dissatisfied with the original outcome. As the noble and learned Lord, Lord Hope, said, I do not see that this is the case of being a judge in one's own cause because the cause that is properly before the tribunal is one in which both parties will argue their case.

When a new cause is introduced, the Secretary of State makes a decision on it through his executive function. What in fact is being suggested is that that decision should not be made by those from the executive branch but should be a judicial decision. I think that there is a blurring there. If we are arguing as a matter of fundamental principle that a decision is one for the Executive, the question is whether, indeed, the primary decision should be made by the judiciary. I cannot ignore the force of the comments that have been made. The noble and learned Lord, Lord Hope, helpfully suggested where this might be amended. I should make it very clear that I cannot give any guarantee that the Government will come back at Third Reading with an amendment. However, it is only proper that we reflect on the very important issues that have been raised."

25. In the House of Lords, the Government introduced an amendment to the proposed clause to narrow the definition of 'new matter', as explained in the explanatory notes dated 6 May 2014. At Third Reading in the House of Lords, Lord Wallace of Tankerness explained the amendment, including the following:

> "… Our discussions were helpful and not least identified that the definition of a "new matter" is wider than necessary because it includes reasons for wishing to remain in the United Kingdom which, if refused, would not give rise to a right of appeal. This potentially extends the scope of the power to give consent beyond appealable matters. As the significance of "new matter" is restricted to circumstances in which an appeal would arise as a consequence of the decision, the definition should be similarly restricted – hence this amendment."

26. The material set out above originates from the statements by the promoter of the bill in the House of Lords which satisfies the second criteria in Pepper v Hart but we do not find that the statements relied upon give any clear answer to the issue of statutory construction relevant to this appeal. Much of the debate was not on the

question of whether there was a 'new matter' or the definition of such, but about the issue of consent and the matter of principle as to who the primary decision-maker is on any particular point. In these circumstances, we do not admit the parliamentary material as it does not satisfy the requirements set out in Pepper v Hart to do so.

27. Counsel for the Appellant sought to rely on section 96 of the 2002 Act in support of the statutory construction advanced but during the course of the hearing was unable to identify on what basis a section dealing with the possibility of the Respondent at some point in the future certifying a future of application for leave to remain could assist in interpretation of section 85 of the 2002 Act. We do however accept the implied suggestion that the Appellant was right to raise his new relationship in the notice of appeal to protect himself against certification under section 96 of the 2002 Act of any future application which he would have been at risk of had he not mentioned this information when he did. That of course explains why the information was given and raised when it was, but it is entirely irrelevant to the issue of statutory construction and an assessment of whether the material itself was a new matter for the purposes of section 85 of the 2002 Act.

28. The Respondent's policy at the date of the hearing before the First-tier Tribunal, 'Rights of Appeal' version 3, contains the Respondent's guidance as to what is a 'new matter' and the difference between a new matter and new evidence. It was not suggested by either party that this was a suitable aid to statutory construction, nor were any submissions made on the accuracy of the guidance in accordance with the statutory provision. Although we would express some caution as to whether it is entirely correct, particularly in the section about the difference between a new matter and new evidence, we do not consider this further in detail given that a newer version of the guidance has since been issued and the Respondent will undoubtedly reflect on her own guidance in light of this decision.

Conclusions on the meaning of a 'new matter' in section 8(6)

29. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal. For example, medical evidence of a serious health condition could be a matter which constitutes a ground of appeal on human rights grounds based on Article 3 of the European Convention on Human Rights which if breached, would mean that removal would be contrary to section 6 of the Human Rights Act, a ground of appeal in section 84(2) of the 2002 Act. Similarly, evidence of a relationship with a partner in the United Kingdom could be a matter which constitutes a ground of appeal based on Article 8 and for the same reasons could fall within section 84(2) of the 2002 Act as if made out, removal would be contrary to section 6 of the Human Rights Act.

30. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. In the absence of this restriction, section 85(5) of the 2002 Act could potentially allow the Respondent to give the Tribunal jurisdiction to consider

something which is not a ground of appeal by consent, thereby undermining sections 82 and 84 of the 2002 Act;

31. Practically, a new matter is a factual matrix which has not 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. By way of example, evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential requirements to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to section 6 of the Human Rights Act.

32. In accordance with the construction of section 85(6)(a) of a 'new matter' contended for by Counsel for the Appellant, he submitted that on the facts of this case, the Respondent had considered the matter, (namely whether the Appellant's removal from the United Kingdom would be contrary to section 6 of the Human Rights Act 1998 on the grounds that there would be a disproportionate interference with his right to respect for private and family life protected by Article 8 of the European Convention on Human Rights) so that no further matter raising the same ground could be a 'new matter' within section 85(6)(b). For the reasons set out above, the primary submission fails and therefore so does the submission that in fact, the Respondent had considered the matter. The fact that the Respondent had, in her decision dated 19 May 2016, considered the Appellant's private and family life on the basis of information known to her at that date, was not sufficient to show consideration of the matter now relied upon: the Appellant's relationship with a new partner and her child. Actual consideration in a decision letter of the new factual matrix relied upon is required for a matter to fall outside section 85(6)(b) and therefore not be a 'new matter'.

The Secretary of State's consent to the Tribunal to consider a new matter, section 85(5)

33. The second part of construction with which we have to deal is the meaning of consent in section 85(5) of the 2002 Act. A Tribunal may consider new matters if the Secretary of State has given the Tribunal consent to do so.

34. Mr Chelvan submitted that the procedure to give or withhold consent is contained within rule 24 of the Procedure Rules, which itself acts as a gatekeeper to ensure equality between the parties. Emphasis was placed on rules 24(2) and (3) which are said to contain a mandatory requirement for the Respondent to provide a statement in opposition to all matters, specifically including those raised in box E of the notice of appeal form (the new matters section). This requires a reading of rule 24(2) to include a requirement that if the Respondent takes the view that something raised in the notice of appeal is a new matter governed by section 85(5) and (6) of the 2002

Act, she is obliged to indicate that and to indicate if she intends to withhold consent.

35. It was further submitted that the failure to file such a statement means that by omission, the Respondent does not oppose the new matter being raised in the appeal notice and is deemed by that conduct to have given consent for the new matter to be considered by the First-tier Tribunal. Reliance was placed on the Upper Tribunal's decision in MH (Respondent's bundle: Documents not provided) Pakistan [2010] UKUT 00168 to support the submission by analogy with a situation where the Respondent was found to have been required to submit a document to the Tribunal in accordance with a different requirement in former rules (rule 13 of the Asylum and Immigration Tribunal (Procedure) Rules 2005) which was designed to ensure that an appellant knew the case that he had to meet on appeal. It was held in that case that the tribunal was entitled to conclude that a document not furnished under that rule was not a document on which the Respondent relied.

36. First, we express caution in using procedure rules as an aid to statutory construction generally and specifically for the purpose construing the meaning of 'consent' in section 85(5) of the 2002 Act. The procedure rules govern the procedure to be applied to matters that are before the Tribunal to determine in an appeal, whereas in the present situation, the effect of section 85(5) is that the Tribunal has no jurisdiction to consider a new matter. Procedure rules governing determination of an appeal can therefore offer little if any assistance on the interpretation of statute which determines the jurisdiction of the Tribunal itself. Secondly, we do not consider that rule 24 contains any such mandatory requirement on the Respondent in relation to consent for new matters. Thirdly, in any event, it would be contrary to the clear language in section 85(5) requiring the Secretary of State to have given consent, to find that by means of procedural rules, deemed consent can be inferred by inaction. Section 85(5) of the 2002 Act requires actual consent by the Respondent which cannot be deemed or implied.

37. Rule 24(2) expressly states that the Respondent must, if the Respondent intends to change or add to the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a), provide the Tribunal and the other parties with a statement of whether the Respondent opposes the appellant's case and the grounds for such opposition (emphasis added). The requirement to make a statement is clearly conditional. The condition that the Respondent wishes to change or add to the grounds reasons relied upon, does not include any requirement to make a new decision on a new matter identified in the notice of appeal or in a section 120 notice, nor to indicate if consent is withheld for such a new matter to be considered by the Tribunal. The decision in MH (Pakistan) is not applicable to the present case which significantly differs on its facts as to the type of document or statement in issue. MH (Pakistan) was concerned with a failure to submit a specified document in the old rule 13, such that the document could not be relied upon by the Respondent. Rule 24 does not require the Respondent to make any statement or new decision as to new matters raised by an appellant which is qualitatively different to the failure to submit an existing document used at the time of the decision.

38. Further it appears that if the Respondent had made a statement pursuant to rule 24, the effect would inevitably be that the matter would not be a 'new matter' because it had in fact been considered by the Respondent in the context of the decision under appeal and would therefore not meet the definition in section 85(6)(b)(i) of the 2002 Act. The construction of rule 24 contended for by the Appellant would have the result of rendering section 85(5) of the 2002 Act devoid of any application in practice.

39. Mr Chelvan made further submissions as to whether there was in place an appropriate procedure for the Respondent to give or withhold consent to the First-tier Tribunal to deal with a new matter if rule 24 was not applicable. Relevant to these submissions are the contents of the Respondent's policy 'Rights of Appeal' version 3, which sets out guidance for those acting on behalf of the Respondent as to how to handle 'new matters'. This includes when any 'new matter' should be considered, before the appeal hearing if possible and if not at a CMR or substantive appeal hearing; together with guidance on the process of giving or refusing consent. There was no specific challenge to the contents of this part of the guidance, only to the effect that it had not been complied with by the Respondent in the present appeal.

40. There is no dispute between the parties that the Respondent has not followed the process for refusing consent set out in the guidance in this case as no written reasons have ever been provided for the refusal. However, that is not a matter which assists this Appellant in the context of this statutory appeal and it cannot constitute a ground of appeal which can be pursued in this Tribunal. A failure by the Respondent to follow her own guidance is a public law issue which could potentially be challenged by an application for Judicial Review but that is outside the scope of this appeal. We do not consider that this raises any issues of procedural fairness in the conduct of a statutory appeal and unless and until the Respondent expressly gives consent for the consideration of a new matter by the Tribunal, an appellant must be aware the issues may not be considered. There is no power for the First-tier Tribunal, or the Upper Tribunal to determine whether the Respondent has appropriately for fairly withheld consent: again that is a matter only challengeable in Judicial Review proceedings on public law grounds.

41. In the light of the above, we turn now to answer the specific questions raised initially by Judge Bruce when giving directions for determination of this appeal.

Question (i) Having regard to the statutory scheme was the Tribunal empowered to consider for itself whether the material relating to Ms P was a 'new matter'?

42. The Respondent accepts that her view in any particular case as to whether a matter is a 'new matter' is not determinative of the issue, nor must it be accepted by the First-tier Tribunal. Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.

43. Counsel for the Appellant submitted that the First-tier Tribunal was not empowered to consider for itself whether the material as to the Appellant's new

relationship was a 'new matter' but this was premised on the basis that as a matter of fact in the context of this appeal, the Respondent had already considered the Appellant's private and family life and the new relationship could not therefore as a matter of law be a new matter. The Appellant did not make, and realistically could not make any objection to the proposition that it was a matter for the First-tier Tribunal to determine its jurisdiction to hear, or not to hear, issues raised in the notice of appeal.

44. Section 85(5) and (6) of the 2002 Act place limits on the jurisdiction of the First-tier Tribunal, which is a statutory tribunal: the Tribunal must determine issues of jurisdiction for itself.

Question (ii) – If the Tribunal was empowered to consider for itself whether the material relating to Ms P was a 'new matter', what were the relevant factors for consideration?

45. Counsel for the Respondent submitted that the following provides a structure for a Tribunal to assess whether it has jurisdiction to consider particular material, as follows:

    (1) What is the 'matter' which it is alleged constitutes a 'new matter' for the purpose of section 85(5)? What are its ingredients both in fact and in law?

    (2) Does the 'matter' constitute a ground of appeal of a kind listed under section 84?

    (3) Has the Respondent previously considered the 'matter' in the context of the decision referred to in section 82(1)?

    (4) Has the Respondent previously considered the 'matter' in the context of a statement made by the appellant under section 120?

    (5) If the 'matter' is a 'new matter', has the Respondent given consent for the Tribunal to deal with the 'new matter'?

46. This proposed structure approaches the matter by way of identification of the relevant law and facts and then follows through consideration of the constituent parts of section 85 of the 2002 Act. That is an appropriate and sensible process to adopt as a matter of practice. The issue of whether a 'matter' is a 'new matter' is inevitably a fact sensitive one to be assessed in each appeal, but should be identifiable by something being raised that is distinguishable from and outside of the context of the original claim and decision in response to it, as well as something which constitutes a ground of appeal in section 84 of the 2002 Act.

Question (iii) – Was there any identifiable error in the Tribunal's conclusion that the material relating to Ms P was a 'new matter' given that the Appellant had raised Article 8 family life grounds before the Respondent's decision, and in the grounds of appeal, some six months prior to the hearing?

47. Judge Hussain dealt with the preliminary issue of jurisdiction to consider the material relating to the Appellant's relationship with Ms P and her child in paragraphs 7 to 11 of his decision. Having set out the chronology, including that

the first reference to a different partner was in the notice of appeal and it was not until two or three days prior to the appeal hearing, when the Appellant's bundle was served, that any evidence in connection with claimed relationship was provided. Judge Hussain rejected the submission that this was not a new matter but merely a new circumstance given that the substantive issue of the Appellant being in a relationship had already been raised, albeit a relationship with a different person. Judge Hussain went on to record that the Respondent had not given any consideration to this claimed relationship and had not consented to this new matter being determined by the First-tier Tribunal. As such he found that he had no jurisdiction to consider the material and to have determined otherwise would have made the First-tier Tribunal the decision-maker at first instance.

48. There is no error of law in the consideration of the factual background or application of section 85(5) and (6) of the 2002 Act by the First-tier Tribunal in this case and we therefore dismiss the appeal on the first ground. The Appellant had previously claimed to be in a relationship with a different person and it was on that basis that the Respondent had determined and refused his claim based on family life – particularly as there was no evidence in support of the claimed relationship. In the notice of appeal, the Appellant relied on a different, new relationship and in his bundle in support of his appeal provided evidence of that relationship. A new relationship with a different partner coupled with an entirely new type of relationship of a parent/child type with Ms P's child, is factually distinct from the claim made by the Appellant originally. Although the Respondent had broadly considered the Appellant's right to respect for family life, she had not considered these specific relationships. The new matter consisted of new evidence which itself could support an appeal that the Appellant's removal would be contrary to section 6 of the Human Rights Act and which had not been considered by the Respondent in the context of the original decision nor a section 120 statement (the Appellant has not to date made a statement pursuant to the section 120 notice served by the Respondent). In these circumstances, the Appellant's relationship with Ms P and her child is a new matter within section 85(6) of the 2002 Act and it is accepted that there has been no express consent by the Respondent for this to be considered such that the First-tier Tribunal had no jurisdiction to consider it pursuant to section 85(5).

Question (iv) – Was the failure to address Article 8 at all in the determination an error of law regardless of the answers to (i) to (iii) above?

49. The Appellant raised Article 8 as a ground of appeal against the Respondent's decision, and the First-tier Tribunal was required to determine it. As confirmed in paragraph 11 of the decision under appeal, this ground of appeal was not pursued orally at the hearing by Counsel for the Appellant appearing on that occasion; however the ground of appeal based on the right to respect for private and family life under Article 8 was not formally withdrawn. In these circumstances, it would have been preferable for the First-tier Tribunal to have specifically recorded whether the appeal was allowed or dismissed on this specific ground (rather than a simple dismissal on all grounds): however, in the absence of jurisdiction to consider the new relationship relied upon, there were no remaining aspects of private or family life of substance on which any tribunal could have allowed the appeal.

Further matters raised by the Appellant

50. Outside of the grounds of appeal, Counsel for the Appellant also submitted that there was a material error of law in the First-tier Tribunal's decision in relying on an inaccurate and misleading statement made by the Home Office Presenting Officer during the course of proceedings. That statement was said to be that the Home Office Presenting Officer had submitted that there had been no prior mention of the Appellant's new relationship and no opportunity for the new relationship to be assessed by the Respondent had been given, that submission being recorded in paragraph 8 of the decision. Technically that statement is not entirely accurate given that the new relationship was raised in the notice of appeal form, some six months prior to the hearing of the appeal, which gave the Respondent an opportunity to assess it. Although Counsel appearing for the Appellant at the hearing before the First-tier Tribunal accepted, wrongly, that no prior notice had been given of the relationship; neither submission was in any event relied upon by Judge Hussain, nor was it material to his decision that the Appellant's relationship was a new matter which he did not have jurisdiction to consider. In accordance with section 85 of the 2002 Act, the issue was not whether the Respondent had had an opportunity to consider a new matter put forward but whether, if a new matter was raised, she had actually considered it (if she had, it could not be a 'new matter') or whether she had consented to the First-tier Tribunal dealing with it. There is no error of law and this point has no bearing on the actual grounds of appeal.

51. Linked to this point, was a submission on behalf of the Appellant, that pursuant to rule 24(1)(a) of the Procedure Rules, the Respondent was required, as part of the documentation to be sent to the Tribunal, to send back to it the notice of appeal which was originally sent to her from the Tribunal. The submission seemed to stem from a concern that the Respondent had no procedure in place to consider or deal with matters raised in the grounds of appeal and the deliberate separation of the grounds from the appeal bundle, contrary to rule 24, prevented such consideration. In the present appeal, this was submitted to have arguably led to the Presenting Officer's submission to the Tribunal that there was no prior notice of the relationship.

52. Mr Chelvan submitted that rules 24(1)(a), read together with (2) and (3) require that the notice of appeal is a document which the Respondent must provide to the Tribunal. Specifically, rule 24(1)(a) lists three documents, (i) the notice of the decision; (ii) the notice of appeal; and (iii) any other document the respondent provided to the appellant giving reasons for that decision.

53. On any sensible reading of rule 24(1)(a) this is not one of the documents which the Respondent was obliged to provide to the Tribunal. The phrase "the notice of the decision to which the notice of appeal relates" refers to a single document and cannot be split into two separate requirements. In any event, there is no doubt that the notice of appeal was before the First-tier Tribunal. It is expressly referred to in paragraph 7 of the decision and was obviously available to both parties at the hearing. There is no dispute that as a matter of fact this document raised the Appellant's new relationship. The submission that there was some kind of error by the Respondent in the documents that she provided to the Tribunal is unsustainable

in accordance with the clear words of rule 24(1)(a) and on the facts where it is clear that the document was available to all.

54. Finally, Counsel for the Appellant made broad submissions about the impact of the Respondent's delay in decision-making between the Appellant's first appeal being allowed on 2 October 2012 and the fresh asylum and human rights decision being taken on 19 May 2016 and whether there is or should be a general duty on the Respondent in cases where there is such a delay in a decision being taken, to invite an applicant to provide further submissions and up-to-date information. It was submitted that as a matter of good practice, the Respondent should send out a questionnaire requesting submissions and supporting evidence of new matters as a matter of routine.

55. The issue of the impact, if any, on the lapse of time between the first appeal being allowed and the fresh decision being taken is a matter which would be relevant to the assessment under Article 8 in the context of consideration of the Appellant's claim to have established family life with Ms P and her child. For the reasons set out above, that is not a matter which the First-tier Tribunal had jurisdiction to consider; it remains a point which is a matter for future consideration in a different context and not an issue which we need to determine. Similarly, as to whether there is a general duty on the Respondent to request up to date information in outstanding cases is outside the scope of the present appeal. In any event, there is no doubt that the Appellant was at liberty to present new material to the Respondent at any time he chose to do so.

Grounds of appeal (b) to (d) – asylum

56. We heard argument from both parties as to the remaining grounds of appeal on the substantive asylum decision in this case. It is not necessary to make any findings as to whether there was a material error of law on any of these grounds because in any event, for the separate reason set out below, the decision must be set aside and remitted to the First-tier Tribunal for fresh determination.

57. It became apparent during the course of the oral hearing that the Appellant's bundle submitted to the First-tier Tribunal was missing every other page. Judge Hussain queried with Counsel for the Appellant appearing before him as to whether a particular page was missing in the Appellant's written statement and was told that there was no missing text: the page was intentionally blank and had been the subject of an error in numbering only. That was clearly a further mistake by Counsel: there was a page missing, and it was not blank. No further queries were made as to the other blank pages in the Appellant's bundle despite the fact that it was evident that every other page of the bundle was missing. For example, the Appellant's bundle included documents containing internal pagination including only odd numbered pages.

58. We allow the appeal on asylum grounds on the basis of a procedural irregularity in the hearing of the appeal. In the context of an asylum appeal where there were missing pages from the Appellant's written statement and medical evidence as well as the Respondent's own country information, is not possible for us to find that this

procedural irregularity was immaterial. We therefore set aside the decision on the asylum and humanitarian protection grounds as well as under Articles 2 and 3 of the European Convention on Human Rights and remit the appeal on these grounds to be determined afresh by the First-tier Tribunal in the light of our decision on s 85 and on the article 8 grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of a material error of law. We set it aside. We remit the appeal to the First-tier Tribunal for redetermination by a different judge and we direct that issues other than the protection appeal be determined in accordance with what is set out above.

No anonymity direction is made.

Signed  Date 14th August 2017

Upper Tribunal Judge Jackson