Neutral Citation Number: [2016] EWCA Civ 416

Case No: C2/2014/0468

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
JR14872013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2016

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE BEATSON
and
LORD JUSTICE RYDER

- -

Between :

The Queen on the application of Mohammad Shahzad Khan	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Sharaz Ahmed and Darryl Balroop (instructed by **Law Lane Solicitors**) for the **Appellant**
Gwion Lewis (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 14 April 2016
Further submissions: 18 and 20 April 2016

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Approved Judgment

Lord Justice Beatson:

I. Introduction

1. The appellant is Mohammad Shahzad Khan, a citizen of Pakistan born on 20 May 1974, and thus now aged 41. In proceedings filed on 11 June 2013, he sought permission to challenge the decision of the respondent, the Secretary of State for the Home Department, on 12 March 2013 refusing his application made on 2 July 2012 for leave to remain in the United Kingdom on the basis of 14 years long continuous residence pursuant to Rule 276B(i)(b) of the Immigration Rules and Article 8 of the European Convention on Human Rights. Permission was refused on the papers by Mr Fordham QC on 22 October 2013, and, following a hearing on 10 January 2014, by Upper Tribunal Judge Peter Lane. Permission to appeal to this court was refused on the papers by Sir Stanley Burnton on 20 June 2014 but, following a hearing on 25 February 2015, was granted by Sullivan LJ.

2. The principal issue in the substantive appeal concerns the nature of the evidence required to support an application for leave on the basis of long continuous residence. In particular, do only "official" documents suffice, and what is the status of non-official but "independent" documents and letters and of letters from neighbours and friends? This is an issue that arose in two other cases which were listed to be heard with Mr Khan's case, but in which consent orders withdrawing the decision were filed very shortly before the hearing. In both cases the Secretary of State withdrew the decision challenged and agreed to reconsider the application. In Mr Khan's case, it is also submitted on his behalf that the Secretary of State erred in considering his human rights claim under immigration rules which only came into force on 9 July 2012, after he had made his application, and that her assessment of Article 8 of the European Convention on Human Rights was materially flawed in law.

3. As a result of recent applications and submissions, there were three other matters before the court. Two arise from applications on behalf of the Secretary of State. The first, filed on 9 March 2016, is for permission to adduce further evidence, a witness statement dated 29 February 2016 of Ms Noshaba Khan, a Home Office Litigation Caseworker, which was relied on in support of the second application. The matters dealt with in that statement had been drawn to the attention of Mr Khan's representatives some four months earlier, in a letter dated 23 October 2015. The Secretary of State's second application, filed on 5 April 2016, is for an order pursuant to CPR 52.9(1)(b) setting aside the grant of permission to appeal. It is submitted that the appellant and/or his representatives are in serious breach of their duty of candour in judicial review proceedings and permission to appeal was granted without Sullivan LJ being given the full picture as to the evidence in the bundle.

4. The third matter is a submission on behalf of Mr Khan foreshadowed in a witness statement of Hina Kargar, a trainee solicitor with Law Lane Solicitors, dated 12 April 2016 that the Secretary of State should be debarred from defending the appeal because she is in breach of the rules which (see CPR PD 52C and Timetable, Part 1) require a skeleton argument to be filed within 42 days.

5. At the hearing, the court first heard submissions on these matters. It admitted the evidence sought by the Secretary of State. It reserved its decision on the application to set aside permission, but indicated it was minded to refuse it, and it rejected the

application that the Secretary of State be debarred. I now give my reasons for the decisions that were made, and my conclusions on the application to set aside permission and the substantive points in the appeal. . Before doing so, I summarise the factual and procedural background and the decision below in sections II and III of this judgment. My reasons for admitting the evidence are at [31] below and those for rejecting the application that the Secretary of State be debarred are at [52]. I deal with the application to set aside permission in section IV(iv) of this judgment. Notwithstanding the indication given at the hearing, for the reasons I give at and [47] – [52] below, I have concluded that in the circumstances of this case the requirements of CPR 52.9(2) are satisfied, that there is a "compelling reason" for setting aside permission, and that in this case permission to appeal should be set aside. If my Lords agree, there is therefore is no need to decide the substantive appeal. However, since we heard full argument on that, and in the light of the wider importance of the question of what documents qualify for consideration by the Secretary of State, I deal briefly with that at [57] – [63] and with the other grounds at [64] - [67].

II. The factual and procedural background

6. Mr Khan's case is that he entered the United Kingdom illegally on 1 January 1998 with the assistance of an agent, and has remained here ever since. His case is that, because of his mode of entry, he has no travel documents to confirm his date of entry. It will be seen that over the years he has been represented by four firms of solicitors; J M. Amin & Co of Wembley, Rahman & Co of West Green Road, Khans of Ilford, and Law Lane of Stratford.

7. In September 2002, an application was made by a Mr Dad of Farnoak Ltd, t/a Sky Fries, a fast food takeaway, for a work permit for Mr Khan to work at Sky Fries. Mr Dad also appears to have been Mr Khan's landlord at the time. The representative appointed by the employer in connection with the application was J M Amin & Co, Solicitors, of Wembley. An immigration consultant from the firm signed the application.

8. The answer given to question 14 in the application for a work permit is of crucial importance to Mr Khan's case that he is entitled to leave to remain on the basis of long continuous residence and to the respondent's application that permission to appeal be set aside. Question 14 is a request for relevant details of the applicant's employment covering at least the last three years. The answer stated that from 5 February 1998 to 27 June 2001 Mr Khan was a Tandoori chef at the Hotel Sarban, Abbottabad, Pakistan. If that answer is correct, on 2 July 2012 when Mr Khan's application for leave pursuant to Rule 276B was made, it was fundamentally flawed. In the words of Mr Gwion Lewis, on behalf of the Secretary of State, it was fatally doomed because of the four year gap in residence.

9. On 29 November 2002, the Home Office wrote to J M Amin & Co stating that Mr Khan was granted a work permit for five years. The letter stated that the Work Permits (UK) In-Country Decision Team would consider whether Mr Khan's leave to remain could be extended and he would be notified of the decision in writing. He was instructed to cease employment immediately if leave to remain was refused. In a letter dated 20 December 2002, J M Amin & Co wrote to the Home Office on this occasion on behalf of Mr Khan. They enclosed his passport for endorsement, and asking for it to be returned. The letter described Mr Khan as "our client".

10. Mr Khan's passport was apparently returned to J.M Amin & Co. but it did not reach Mr Khan. In November 2004 a different firm of solicitors, Rahman & Co., contacted the Secretary of State on Mr Khan's behalf asking for an update on his application and for his passport. In a letter dated 24 November 2004, the Secretary of State stated that officials had worked on Mr Khan's case on 20 November 2003 and the database suggested that, on that date, the decision letter and Mr Khan's passport were sent by recorded delivery to "the former reps" J.M. Amin & Co.

11. In a letter dated 13 December 2004 responding to further inquiries, the Secretary of State stated she was unable to provide a number for the recorded delivery letter enclosing the passport or a copy of the refusal notice. The letter also informed Rahman & Co. that, in short, the notices stated:

> "On the 2nd December 2002 J.M. Amin & Co applied for leave to remain in the United Kingdom as a work permit holder. This application has been refused".

The reasons given ([114]) were that Mr Khan had not provided any evidence of lawful entry into the United Kingdom and the Secretary of State was not satisfied that he had entered the United Kingdom with a valid work permit or in a category that allows a switch into a work permit.

12. The next development was the application ten years later, dated 2 July 2012, by Khans of Ilford on Mr Khan's behalf for leave to remain on the basis of long continuous residence pursuant to the then existing 14 year rule in paragraph 276B(i)(b) of the Immigration Rules. The application letter stated that because Mr Khan entered the United Kingdom with an agent he was unable to provide the original passport and that a copy was enclosed. It listed the following documents as enclosed: ESOL Certificate, passport sized photographs, College certificates, NHS card and letters, reference letters, payslips, utility bills, P60s, tax papers, employment contract, P45, bank statements, phone bills, DVLA papers, and "work permit letter". It was assumed at the hearing that this was the September 2002 application, although it might have been the November 2002 letter (referred to at [9] above) stating the application had been granted. There was also a letter from the Vice-President of the Pakistan Welfare Association dated 15 December 2011 stating the writer had known Mr Khan for four years. The reference letters were from people who stated they had known Mr Khan since either March or November 1998.

13. Mr Sharaz Ahmed, who appeared before us on behalf of Mr Khan, stated that it was reasonable to suppose that two letters dated 10 December 2011 signed by Mr Dad, the sponsoring employer in the 2002 work permit application, were submitted with the July 2012 application. The first letter, on the notepaper of Sky Accommodation Services, stated that Mr Khan was a tenant at a specified property belonging to Mr Dad and that he resided there between 1998 and May 2005.The second letter, on the notepaper of Sky Superstore, stated that Mr Khan "was employed by Sky Fries from December 2002 to May 2005 with the benefit of a work permit".

14. The first communication from the Secretary of State about the July 2012 application appears to be a letter dated 23 February 2013. This asked Mr Khan to provide documentary evidence of ownership of his home or a rent book/tenancy agreement, a letter from the landlord or local authority confirming who resided at the premises,

wage slips covering the last six months or, if self-employed, the last completed tax return and tax statement, detailed bank statements covering the last six months, and the most recent council tax bill. The letter also requested further documentary evidence from 1 January 1998 to December (no year is stated, but it probably was intended to be 2001) to show that he has been continuously resident in the United Kingdom since his claimed date of arrival on 1 January 1998.

15. The letter then stated "Please see attached Guidance Note for information on the type of evidence required. The Guidance Note appears primarily concerned with documentary evidence of cohabitation. It states: "You must provide documentary evidence of cohabitation in the form of official letters or documents addressed to yourself and your spouse". The examples of acceptable types of letters and documents listed are those from government departments and agencies, GPs, a hospital or local health service, bank and building society statements and letters, mortgage statements and agreements, tenancy agreements, and council tax, water rates, and utility and telephone bills or statements.

16. The solicitors responded to the Secretary of State's request for documentary evidence in a letter dated 7 March 2013. They stated that because Mr Khan did odd jobs to support himself on a "cash in hand" basis, he was unable to provide wage slips or a letter from an employer. They enclosed six letters stated to be "from respectable neighbours or friends to confirm Mr Khan's resident (sic) in the UK since he arrived in 1998". The letters were similarly worded. They stated that the signatory had known Mr Khan "in a variety of capacities for many years", had a good character, was honest, extremely competent, and "has an excellent rapport with people of all ages". Most stated they had known him since January 1998, but one stated he had known him since 1999.

17. The Secretary of State refused Mr Khan's application in the letter dated 12 March 2013, which is challenged in these proceedings. The letter stated that the Mr Khan had only provided "word of mouth evidence from neighbours and friends (not official sources) from 1998 to 2001" in response to the letter dated 23 February, "you have not only provided acceptable evidence from 2001" and "you have provided no evidence at all of residence in the UK from 1998 to 2001, a complete gap of 4 years". It had stated earlier that the provision of word of mouth evidence meant that "you have therefore provided no acceptable evidence of residence in the UK from 1998 to 2001" and that the Secretary of State was therefore not satisfied that Mr Khan met the requirements of paragraph 276B(i)(b) of the Immigration Rules in force before 9 July 2012. The decision letter also considered Mr Khan's private life under Article 8, which it stated fell to be considered under paragraph 276ADE of the Immigration Rules from 9 July 2012, when that provision came into force.

18. As I have stated, these proceedings were filed on 11 June 2013. The statement of truth in the form N461 judicial review claim form was signed by Sikandar Ali Jatoi of Khans Solicitors. It is not supported by a witness statement by Mr Khan. The 2002 application for a work permit was one of the documents in the judicial review bundle. Paragraphs 9 - 11 of the grounds of judicial review appended to it state that "[i]n February 1997 the Claimant entered the United Kingdom and has continuously remained in the United Kingdom since then", "[i]n September 2002, the Claimant applied for a work permit sponsored by Farnoak ltd T/A Sky Fries" and "[o]n 29 November 2002 the Home Office granted work permit to the Claimant for 60 months

period. This letter also stated that '*Mr Khan now has permission to work*". There is no comment about the contents of the 2002 application in it. At the time these proceedings were filed, the fact that Mr Khan did not provide a witness statement was not unusual or necessarily open to criticism: see *R (Bilal Mahmood) v Secretary of State for the Home Department* [2014] UKUT 00439 at [19]. In view of what has subsequently emerged, however, this may well be a case, like *Bilal Mahmood*, in which the individual seeking judicial review should have filed a comprehensive witness statement at the permission stage: see the discussion at [47] below. For the reasons I give at [49] – [50] below, I consider that he should certainly have done so after he had notice of the material relied on by the Secretary of State in her application to set aside permission to appeal.

19. Mr Khan's application sought three declarations; (1) that the Secretary of State's decision to refuse Mr Khan's application is unlawful and an abuse of power, (2) that he is entitled to indefinite leave to remain on the basis of his long residence in the United Kingdom, and (3) that the circumstances of his case justify a grant of leave to remain. A mandatory order directing the Secretary of State to reconsider his case within 14 days of the decision of the court was also sought.

III The decisions in the Administrative Court and Upper Tribunal

20. Mr Fordham's reason for refusing permission on the papers was that the Secretary of State was entitled to rely on the failure to provide the type of evidence called for. He saw no arguable material error of law in the Secretary of State having exclusively applied the paragraph 276ADE prism and stated that no comparative illustrative cases involving similar features had been identified to support the suggested viability of a free-standing application of Article 8.

21. At the renewal hearing, Upper Tribunal Judge Peter Lane was of the same view. On Rule 276B(i)(b), there was (see [11]) nothing irrational in the Secretary of State's stance regarding the need for official documentation as broadly described in the Guidance". The letters from friends were (see [15]) also problematical because none refer to Mr Khan being known to the writer by reason of his residence in the United Kingdom.

22. The Upper Tribunal's decision also referred to the 2002 work permit application. It recorded (at [4]) the submission on behalf of Mr Khan that the Secretary of State erred in refusing to place weight on the materials concerning the period 1998 to 2001 in particular because Mr Dad was "evidently regarded by the Secretary of State as a person of sufficient probity to support an application on behalf of [Mr Khan] for him to be granted a work permit in 2002". It also stated (at [14]) that Mr Dad's successful support of the 2002 work permit application would not arguably compel the Secretary of State to place greater weight than she did on the letter written by Mr Dad on 10 December 2011" (see [13] above) stating that Mr Khan had been a tenant of his between 1998 and May 2005. I observe that the reference to "support" is not entirely accurate: Mr Dad was the sponsor and it was he not Mr Khan who made the application.

23. On Mr Khan's reliance on Article 8 and his private life, the judge stated (at [16]) that it was appropriate for the Secretary of State to consider this issue by reference to the relevant provisions of the Immigration Rules in force from 9 July 2012. He referred to

the approach set out by this court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 and stated (at [17]) that, while the fact Mr Khan has worked in the United Kingdom and knows people here has given him a degree of social interaction that he otherwise would have lacked, on the material before the Upper Tribunal there was nothing in his case that demonstrated what might be regarded in Article 8 terms as exceptional.

IV The recent applications

24. *(i) Introduction:* I state at the outset that I accept that the significance of the answer to question 14 in the 2002 application for a work permit was missed by those within and advising the Secretary of State until Mr Lewis was instructed in August 2015 and reviewed the merits of the appeal and the documents that were before the court. I also accept Mr Ahmed's statement that it was also missed by him and those instructing him when making the application for permission to appeal against the decision of Upper Tribunal Judge Peter Lane and at the time of the hearing before Sullivan LJ. There are, however, aspects of the way that both parties have pursued these proceedings that are troubling.

25. It may be that everyone was concentrating on the type of evidence required to support an application for long continuous residence rather than whether an item in the evidence submitted with Mr Khan's application in this case on its face undermined his application and was materially inconsistent with another document signed by the man responsible for the application for a work permit. This may have been because the question whether documents of the types identified in the letter to Mr Khan and in the guidance were the only ones that qualified has arisen in a number of cases.

26. Mr Lewis considered that the answer to question 14 of the 2002 application suggested that Mr Khan had not been in the United Kingdom for four of the 14 years upon which his application based on long continuous residence was based, so that his application under Rule 276B was fatally flawed. Moreover, because the application for judicial review appeared to have been made on what was, on the basis of the information in Mr Khan's possession, a fundamentally wrong factual premise which was not drawn to the attention of Sullivan LJ, Mr Lewis considered that there might be grounds for applying to have permission to appeal set aside. He stated to us that, because of the seriousness of this, he advised that before making such an application, further investigations should be made about Mr Khan's employment at the Hotel Sarban, and Mr Khan and his solicitors should be given an opportunity to comment and give their explanation.

27. *(ii) The evidence:* The gist of Ms Noshaba Khan's evidence is that on about 24 August 2015 the relevant litigation caseworker at UK Visas and Immigration ("UKVI") asked the Risk and Liaison Overseas Network to make inquiries of the hotel. UKVI received a witness statement dated 31 August 2015 of a Mr Mir, an Immigration Liaison Adviser working for the Risk and Liaison Overseas Network in Islamabad. Mr Mir stated that he had spoken to a Mr Bobby Joseph, the general manager of the Hotel Sarban on the telephone and that Mr Joseph stated that Mr Khan had been employed as a tandoori chef in the hotel for a period of four years. Mr Joseph was unable to provide the dates of Mr Khan's employment. At the request of the UKVI caseworker, Mr Mir telephoned Mr Joseph again in September 2015 and asked for more details of when Mr Khan was employed at the hotel. Mr Joseph's

response, in a letter dated 2 October 2015, was that there had been a misunderstanding on the telephone. There had been a mix-up with "another Shahzad Ahmad", who had worked at the hotel as a receptionist, and there was no Mohammad Shahzad Khan in the hotel's kitchen record.

28. In a letter dated 23 October 2015, the Government Legal Department on behalf of the Secretary of State wrote to Mr Khan's current solicitors, Law Lane, about the answer given to question 14 of the 2002 application and the correspondence with the hotel. Law Lane were invited to reconsider the claim and discontinue the appeal since it would be an abuse of process if Mr Khan had relied on evidence containing false claims. A reply was requested by 6 November 2015.

29. Law Lane Solicitors did not reply by the requested date but, after a chasing email by the Government Legal Department on 20 November, did so in an email dated 14 December 2015. They stated: (i) Mr Khan would be proceeding with the hearing, (ii) he maintained that he has been present in the United Kingdom continuously, and (iii) they would seek to file a witness statement once they were served with all the evidence the Secretary of State intended to rely on. The supplementary skeleton argument signed by Mr Ahmed and Mr Balroop dated 3 April 2016 appears inconsistent with that email in stating (at paragraph 9) that the Secretary of State "would have been aware that [Mr Khan] stated he had previous work experience in Pakistan from 1998 to 2001 and took that into account when making the decision". In an Order dated 8 April 2016 I required the parties to submit any further material upon which they intended to rely by 12 noon on 12 April. No statement was filed by Mr Khan, Mr Dad or Mr Khan's former solicitors but on 12 April 2016 a statement of Hina Kargar, a trainee solicitor with Law Lane Solicitors was filed. That statement largely consists of submissions rather than evidence. On the Secretary of State's application to adduce further evidence, it states that the evidence of the answer to question 14 "is misconceived" because it (a) was not raised by the Secretary of State in the decision letter and, (b) was not argued by counsel at the permission hearing in the Upper Tribunal.

30. The supplementary skeleton argument to which I have referred resisted the Secretary of State's applications on several grounds. It was submitted that the further evidence should not be admitted because it was not before the decision-maker and it could have been obtained with reasonable diligence. It also stated that, in view of the letter from Mr Joseph stating that there is no Mohammad Shahzad Khan in their records as a chef, the new evidence does not add anything to the proceedings, and (at paragraph 19) that the answer to question 14 in the 2002 application for a work permit "did not have a bearing in the grant of permission".

31. *(iii) Our decision to admit the evidence:* When announcing our decision, Longmore LJ stated that the evidence was highly relevant to the question whether permission to appeal should be discharged and it was evidence that was not available to the Secretary of State at the time of her decision. I respectfully agree. I add only that Mr Khan deployed the 2002 work permit application in his July 2012 application and the correspondence, the evidence was not available at the time of the hearing before Upper Tribunal Judge Peter Lane, and its substance had been provided to Mr Khan and his representatives in October 2015, almost six months before the hearing, but he has provided no evidence in response.

32. *(iv) The application to set aside permission to appeal:* The 2002 application for a work permit was not in the original bundles for the appeal submitted on behalf of Mr Khan to the Civil Appeals Office. It was only obtained by the court with or soon after the recent applications by the Secretary of State. Mr Lewis stated that he assumed it was in the papers before Sullivan LJ and Sir Stanley Burnton and the hearing before us was conducted on that basis. But, because it was not asserted on behalf of Mr Khan that Sullivan LJ's attention had been drawn to the relevant page or to the document, he submitted that Sullivan LJ was not given the full picture as to the evidence in the bundle in relation to the 2002 application. Mr Lewis maintained that Mr Khan and/or his representatives are therefore in serious breach of their duty of candour in judicial review proceedings and that the grant of permission to appeal should be set aside. He also submitted that the failure of Mr Khan to provide a witness statement explaining the discrepancy between his long continuous residence application and the information in the work permit application was surprising in the light of the letter dated 23 October 2015 putting him on notice and the evidence subsequently filed, and was unacceptable. He argued that the court was entitled to draw adverse inferences from the absence of a statement and was not in a position to find that the factual basis upon which the application for judicial review was made is true.

33. Mr Ahmed submitted that there was no "compelling reason" for setting aside permission to appeal pursuant to CPR 52.9(2) because the materials before Sullivan LJ were not misleading or inaccurate. This was a very different case to *R (Sabir) v Secretary of State for the Home Department* [2015] EWCA Civ. 1173. In that case counsel for the applicant had informed the Lord Justice considering permission that the judge below, in her draft judgment, had concluded that, had certain evidence been submitted, the claim would have succeeded when the judge had clearly had not so concluded.

34. In the present case Mr Ahmed submitted:-

(a) The background was one in which all relevant information, including the work permit application was before the Secretary of State when she made her decision, and she did not rely on the answer to question 14.

(b) The point was also not taken in the Secretary of State's summary grounds filed in response to the application for judicial review.

In circumstances where the material had been before the Secretary of State who was not troubled by the point, was before the Upper Tribunal at the contested renewal hearing, and the attention of both the Secretary of State and those subsequently considering permission to appeal to this court was focussed on whether the Secretary of State was entitled to disregard the "non-official" evidence submitted in support of Mr Khan's application and his Article 8 claim, the failure specifically to draw Sullivan LJ's attention to the answer to question 14 should not lead to permission being set aside.

(c) Mr Ahmed also submitted that because Sullivan LJ granted permission on two grounds unrelated to the issue of long residence, permission would have been given in any event and that the application, made over a year after Sullivan LJ, granted permission, was not made promptly.

35. The duty to disclose all material facts known to a claimant in judicial proceedings including those which are or appear to be adverse to his case prior to applying for permission is well established. Since the introduction of the provision for a respondent to judicial review proceedings to file an acknowledgement of service and summary grounds, as a result of the *Review of the Crown Office List* chaired by Sir Jeffrey Bowman in 2000, the initial stage of an application for permission to apply for judicial review is no longer without notice in the way that many applications for injunctive relief are. The Bowman Committee[1] recommended (paragraph 19) that "the application process should be a with notice procedure". The aim was to enable the court to give fuller consideration to the merits of an application for permission and, by encouraging the respondent to review its decisions at an early stage, encourage earlier settlement of cases.

36. Notwithstanding the provision by CPR 54.8 for a respondent to judicial review proceedings to file an acknowledgement of service and summary grounds, it remains the case that a claimant in judicial review proceedings must ensure that the judge dealing with such an application has the full picture in order to make the relevant decision: see *R (I) v Secretary of State for the Home Department* [2007] EWHC 3103 (Admin) *per* Collins J at [8] – [10] and the useful recent review of the duty of candour and misuse of process by McCloskey J in *R (Bilal Mahmood) v Secretary of State for the Home Department* [2014] UKUT 00439 at [15]ff to which I have referred. I respectfully agree with McCloskey J (at [15]) that the provision for a respondent to judicial review proceedings to file an acknowledgment of service and summary grounds does not justify a claimant taking a more relaxed view of the duty of candour.

37. The authorities on the duty that lies on a claimant concern disclosure. *Bilal Mahmood* was a case in which the applicant relied on a letter from the Secretary of State but did not produce it, either when filing his application or in response to the evidence submitted by the Secretary of State with her acknowledgement of service and summary grounds. If a material document is not disclosed, the fact that the claimant did not know it contained material facts is no excuse if the claimant would have known had he or she made appropriate inquiries before applying for permission: *R v Kensington General Commissioners, ex p. Polignac* [1917] 1 KB 486.

38. In the present case the 2002 application for a work permit was disclosed. The question is whether that is sufficient, or whether a claimant must do more to provide the judge dealing with the application with the full picture. That question has arisen in cases involving the duty of candour which lies on a respondent to judicial review proceedings in relation to the facts and reasoning process that led to the decision that has been challenged. It was in that context that, in *R v Lancashire County Court, ex p. Huddleston* [1986] 2 All ER 941 at 945, Sir John Donaldson MR made the often cited statement that the process fell to be conducted with "all the cards upwards on the table and the vast majority of the cards will start in the authority's hands". In *R (Quark) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1409 at [50] Laws LJ stated that there is "a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide."

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[1] The other members were Simon Brown LJ, Professor Jeffrey Jowell QC, Keene J, Anne Owers (then Director of Justice) and the Directors of Civil Justice, Legal Services and Operational Policy in the Lord Chancellor's Department.

39. Is there a similar duty on claimants to assist the court with "full and accurate explanations of all the facts relevant to the issue" raised by their application? In this case, was it incumbent on Mr Khan and his legal representatives when making the application to draw the attention of those considering the application for judicial review to the answer to question 14 and the inconsistency between it and Mr Dad's letter dated 11 December 2011 both of which were submitted with the papers? Does the way in which the statement of facts appended to the form N461 was phrased (see [18] above) create a misleading impression in the context of this application? This is not discussed in *Bilal Mahmood's* case and counsel have not been able to put any judicial review decision directly in point before us. Although, in *Bilal Mahmood*'s case, McCloskey J (at [17]) described the duty of candour as "bilateral in nature, applying fully to all parties to the proceedings", the cases do not treat the position of the claimant and the respondent, who is under a duty to provide full and accurate explanations of her decisions and her documents, in the same way.

40. Is guidance to be obtained from the disclosure required to support a without notice application for an injunction? In that context, it is clear that it is insufficient just to disclose the document. In *R (Lawler) v Restormel BC* [2007] EWHC 2299 (Admin) a without notice injunction was obtained from the duty judge as the result of an urgent out of hours application in support of a challenge by way of judicial review of a housing authority's refusal to provide the claimant with temporary accommodation pending a review of her case. The grounds and the supporting witness statement referred to the fact of a conversation with the defendant's Assistant Housing Services Manager but not to its content. The injunction was discharged. Munby J stated at [69] that "the duty to make proper disclosure requires more than merely including relevant documents in the court bundle. Proper disclosure for this purpose means specifically identifying all relevant documents for the judge, taking the judge to the particular passages in the documents which are material and taking appropriate steps to ensure that the judge correctly appreciates the significance of what he is being asked to read". In *R (Awuka and others) v Secretary of State for the Home Department* [2012] EWHC 3298 (Admin), in the context of without notice applications to stay removal, Sir John Thomas PQBD (as he then was) stated at [15]:

> "It must be appreciated, in particular in this kind of case where on many days this court is faced with a very large number of applications, that it is absolutely essential that there is put on the face of the submission all the points that tell against the grant of relief; that is the absolute duty of the solicitor or counsel."

41. The position is the same in applications in the Commercial Court or the Chancery Division for freezing injunctions or permission to serve out of the jurisdiction. In *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437, Bingham J stated that "an applicant for *ex parte* relief must 'identify the crucial points for and against the application, and not rely on general statements, and the mere exhibiting of numerous documents … He must disclose all facts which could or would be taken into account by the judge in deciding whether to grant the application'". In *Masri v Consolidated Contractors International Co Sal and others* [2011] EWHC 1780 (Comm) at [58] Burton J stated that, particularly in a paper application, the judge must not be left to consider on his own "what may often be a

pile of undigested exhibits". See also *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] EWHC 248 (Ch) at [40], where Mann J stated that "the obligation of disclosure involves both the disclosure of relevant material, and a manner of disclosure which, in the circumstances, is commensurate with its significance." An important, but not decisive, consideration in considering whether to discharge an injunction for non-disclosure is whether the non-disclosure was innocent in the sense that the fact was not known to the applicant or that its relevance was not perceived: see *Brinks Mat v Elcombe* [1988] 1 WLR 1350 at 1357D.

42. In my judgment, while some general guidance can be obtained from decisions as to the content and extent of the duty of candour in without notice applications for injunctions and similar orders, they are of limited assistance in the present context and caution is needed. First, in those contexts what is sought is an immediate coercive order of the court, and not simply permission. Secondly, applications in those cases are generally made on an urgent basis and the respondent will either have no knowledge at all of it or only limited knowledge shortly before the hearing.

43. In both applications for permission to apply for judicial review and applications for permission to appeal to this court, the respondent will be aware of the application and the material relied on by the applicant. CPR 54.7 requires the claim form in applications for permission to apply for judicial review to be served on the defendant within seven days and CPR 54.8 requires the defendant to file an acknowledgment of service and summary grounds within 21 days. In an application for permission to appeal, CPR 52.4(3) requires the appellant's notice to be served on the respondent as soon as practicable and in any event within seven days. The appellant must also inform the respondent of points which are to be raised at a renewal hearing of the application, although the respondent is not expected to attend: CPR PD52C, paragraph 16(1)(a) and (2).

44. There is, moreover, encouragement to respondents within 14 days of service of the appellant's notice or skeleton argument to file and serve a brief statement of any reasons why permission should be refused in whole or in part: CPR PD52C, paragraph 19(1)(a). In applications for permission to appeal decisions in judicial reviews of decisions of the Secretary of State concerning immigration matters, it is now very rare for such a statement to be filed, no doubt because of the heavy workload on the relevant officials and the lawyers advising them. In my judgment that is unfortunate. Although in this case the Secretary of State had not identified the crucial point at the permission stage, were the opportunity to file a statement taken up more often than it is by the Secretary of State, in the vast majority of cases this Court would be better informed when deciding whether to give permission to appeal. The introduction of the acknowledgment of service in applications for judicial review resulted in real benefits to the process.

45. Notwithstanding the differences between without notice applications for injunctions and applications for permission to apply for judicial review and for permission to appeal, there is force in Mr Lewis's submission that to limit the obligation of a claimant in judicial review proceedings in all circumstances to do no more than to furnish the material document and to say that there is no duty to draw the significance of a document to the attention of the court where the Secretary of State has not identified the point and relied on it in her decision or in the acknowledgement of service is unsatisfactory and would significantly dilute the duty of candour. The

courts and tribunals which consider permission applications in judicial reviews in immigration cases and appeals from them have heavy and growing case-loads and the obligations on claimants, applicants for permission to appeal, and indeed the respondents to such applications should reflect the practical realities of dealing with the applications in a limited time. If, as Collins J stated in *R (I) v Secretary of State for the Home Department* [2007] EWHC 3103 (Admin), claimants in judicial review proceedings must ensure that the judge dealing with the application has the full picture: in some circumstances to ensure this they will have to do more than just furnish the document. The position should be the same for those applying for permission to appeal from the first instance decisions in such proceedings.

46. It is clear from *R (Sabir) v Secretary of State for the Home Department* [2015] EWCA Civ 1173 that where counsel knows something and keeps it from the court or makes a positively misleading statement, there will be a breach of the duty of candour which justifies setting aside permission to appeal. I referred to *R (Lawler) v Restormel BC* and *R (Awuku and others) v Secretary of State for the Home* Department at [40] above. Although those cases concerned applications for injunctions, it should follow from the judgments in them that providing a partial explanation in the statements of grounds and facts which is misleading will be a breach of the duty of candour in an application for judicial review even where it is not linked with a without notice application for an injunction. Beyond that, in particular, I do not consider that it suffices to provide a pile of undigested documents, particularly in a document heavy case, or where the claimant has knowledge which enables him or her to explain the full significance of a document. I also consider that in considering the effect of a failure to explain material in a disclosed document that is adverse to the claim, it is relevant to consider whether the failure to explain the material was innocent in the sense that the relevance of the material was not perceived.

47. In my judgment, whatever the grounds given by the Secretary of State for rejecting the application for long continuous residence, those considering bringing judicial review proceedings should have carefully reconsidered the material relied on in support of the application before instituting proceedings. That material included Mr Dad's letter dated 11 December 2011 stating that Mr Khan had resided at a specified property belonging to Mr Dad between 1998 and May 2005 and the contents of the 2002 application for a work permit signed by Mr Dad stating that Mr Khan had worked at a hotel in Pakistan between 1998 and 2002. I bear in mind the advantages of hindsight and the fact that the inconsistency between the information in the two documents was not identified by the Secretary of State and her legal advisers before Mr Lewis's review. But, in my judgment had Mr Khan or his legal advisers undertaken a proper and careful review of the viability and propriety of a challenge to the refusal of the application for long continuous residence and the evidence in support of it before proceedings were filed, the existence of the two documents should have raised at least a bright amber light, if not a red one. The need for an explanation in a witness statement, either of Mr Khan or Mr Dad, or at least in the statement of facts and grounds, with the application for judicial review would have been manifest.

48. It must also be borne in mind that the duty of candour is a continuing one. It includes a duty to reassess the viability and propriety of a challenge in the light of the respondent's acknowledgment of service and summary grounds. In this case, however, the summary grounds would not have led Mr Khan and those advising him

to revisit the 2002 work permit application. Where a material document that tells against the claim is disclosed when proceedings were filed, should it be open to the claimant to rely on the fact that in the acknowledgment of service the respondent does not take the point? I consider that in many cases, it should not because the factual material in question is that submitted by or on behalf of the claimant. In particular circumstances a claimant might be able to rely on the failure of the respondent, but this will depend on the precise factual scenario and on the explanation given by the claimant once the point is taken.

49. In the present case, as I have stated, I accept that Mr Ahmed did not know of the answer to question 14 in the 2002 application at the time the application for permission to appeal was renewed and at the time of the hearing. But the position of Mr Khan is different. He knows how long he has been in this country and whether he has been here continuously. The information provided by Mr Dad's solicitors, who were also Mr Khan's solicitors when the application for the work permit application was granted, was something within Mr Khan's knowledge. Absent any explanation, it appears that he instructed representatives to make the long continuous residence application, to challenge the Secretary of State's decision in judicial review proceedings, and then to seek permission to appeal against the refusal of permission on a fundamentally false basis. He used two documents signed by Mr Dad which contained inconsistent information on the crucial question in support of his application for long continuous residence leave. The court has had no explanation of the discrepancy from Mr Khan in an affidavit or statement at any time, and in particular since the respondent drew it to the attention of his present solicitors. There has also been no statement by Mr Dad explaining the discrepancy.

50. The written and oral submissions on behalf of Mr Khan have not sought to address the discrepancy beyond repeating Mr Khan's claim that he has been present in the United Kingdom continuously: see, for example, Law Lane Solicitors' email dated 14 December 2015 which I refer to at [29] above. I observe that it appears to be accepted in the supplementary skeleton argument dated 3 April 2016 to which I have referred (see [29] above) that Mr Khan was not present in this country continuously. Notwithstanding that, at the hearing, it was stated on his behalf through counsel that it is his case that he was in the United Kingdom continuously between 1998 and 2002.

51. I consider it crucial in this case that Mr Khan has provided no statement explaining the discrepancy in the contents of the 2002 application for a work permit signed by Mr Dad and Mr Dad's letter as landlord in support of the appellant's long continuous residence application. As I stated at [49] above, he knows whether he was or was not in Pakistan between 1998 and 2002. He knew that at the time he launched these proceedings and at the time he decided to appeal against the decision of the Upper Tribunal. Mr Khan's failure to explain the discrepancy in the documents before the Secretary of State identified it might have been a simple oversight which would not be "a compelling reason" within CPR 52.9(2) for setting aside permission to appeal. I agree with Longmore LJ, whose judgment I have seen in draft, that applications such as this should be discouraged except in the clearest of cases. In my judgment, Mr Khan's failure to provide any explanation since the Secretary of State identified the discrepancy makes this such a case. It allows the court to infer that he has none and that he put forward his applications for long continuous residence, for judicial review, and for permission to appeal to this court on a fundamentally false factual basis and

did so knowingly. That in my judgment amounts to a compelling reason for setting aside permission to appeal. I have concluded that, subject to the argument that the Secretary of State's applications were not made promptly, notwithstanding the indication given in court, permission should be set aside.

52. As to promptness, in my judgment, once Mr Lewis was instructed, the Secretary of State acted promptly. That, however, was some six months after permission to appeal was granted. Had there been evidence by Mr Khan or Mr Dad providing some explanation for the discrepancy between the information in the application for a work permit and the application for leave on long continuous residence grounds and Mr Dad's letter dated 11 December 2011 on Sky Accommodation Services' notepaper, in the light of that and the fact that the Secretary of State missed the point, the lack of promptness may have sufficed to deprive the Secretary of State of the remedy sought. That is, however, not this case. I emphasise that, in reaching my conclusion, I do so primarily because the court has no evidence explaining a significant discrepancy which, if not answered, fatally undermined the main plank upon which Mr Khan's application rested and was on a matter within his own knowledge.

53. *(v) The Secretary of State's failure to file a skeleton argument:* In the circumstances of this case, I consider that it would have been disproportionate to debar the Secretary of State from participating in the substantive appeal because she is in breach of the rules requiring a skeleton argument to be filed within 42 days of the grant of permission. There are other steps that can be taken for such breaches of the rules. For instance, the breach can be reflected in any costs order.

54. The Secretary of State has offered no reason for her failure. In the course of his submissions. Mr Ahmed indicated that the appellant had been told that the respondent considered that the application to set aside permission to appeal meant that she was no longer required to file a skeleton argument. That explanation could not apply to the period between the expiry of the 42 day period at about the end of April 2015 and Mr Lewis's review of the merits and discovery of the significance of the answer to question 14 of the application. Accordingly, between the end of April and August 2015, the Secretary of State has been in breach and no excuse has been given for that period. In this case, although there was an acknowledgement of service which set out the Secretary of State's case in summary form, it did not (see [58] below) reflect the Secretary of State's position before this court in relation to long continuous residence.

55. I note that in *R (Sabir) v Secretary of State for the Home Department* [2015] EWCA Civ 1173 at [27], McCombe LJ referred to a concern that had arisen as to a pattern of the delays on the part of the Secretary of State in complying with the rules, in that case as to the time for filing a respondent's notice. The Secretary of State, as a frequent and experienced litigator in the Upper Tribunal's Immigration and Asylum Chamber, the Administrative Court and this court, should set an example in complying with the rules, whether as to filing a respondent's notice or an acknowledgment of service. Where she has not complied with the rules, she should give an explanation to the court.

V The appeal

56. If my Lords agree, the grant of permission will be set aside and there is no need to decide the appeal. Since we heard full argument on that and because of the wider importance of the question of what documents qualify for consideration by the Secretary of State, I deal briefly with the substantive grounds.

57. *(i) Long continuous residence:* The Secretary of State's decision was that the evidence in the letters from friends and neighbours was not acceptable evidence of residence in the UK: see [17] above. The position was maintained in the acknowledgement of service and summary grounds dated 2 October 2013, where the Secretary of State maintained that she was "plainly entitled to define the information required to substantiate an applicant's period of residence in the UK and that a restriction to official documents is plainly reasonable".

58. At the hearing before us, Mr Lewis acknowledged that a restriction providing that only official documents were acceptable evidence could not be defended. It was accepted on behalf of the Secretary of State that the statement in the decision letter that she would not consider such evidence was an error of law. It is not clear whether this was the reason that shortly before the hearing the Secretary of State withdrew her decisions in the two cases to which I referred at [2] above. Mr Lewis accepted that account should have been taken of the evidence before the Secretary of State, but submitted that the evidence put before her by Mr Khan for the period 1998 to 2002 carried little weight.

59. It is, to put it at its lowest, unfortunate that the clarification of the Secretary of State's position occurred only at the hearing. Mr Ahmed submitted that the failure of the Secretary of State to file a skeleton argument in accordance with the rules was because there was no answer to the issue of principle as to whether the Secretary of State was entitled to define the categories of evidence which would be considered. Whether or not that is so, it was very unsatisfactory that the appellant and the court did not know whether the point was disputed until the afternoon of the hearing.

60. It is understandable that the Secretary of State has sought to put in place procedures to enable her officials to deal with a very large number of applications in a reasonably expeditious manner according to clear objective criteria: see, albeit in the context of the points-based system, *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517 at [28]. But in my judgment, the Secretary of State was correct in not seeking to defend the part of the decision letter in which she stated that there was no evidence of residence in the UK from 1998 to 2001 because there were no official documents to this effect.

61. I leave aside the fact that the guidance enclosed with the letter dated 23 February 2013 appeared to concern marriage/cohabitation applications, a different type of application to Mr Khan's. I focus on what was stated in the letter itself. First, as Mr Lewis accepted, there is no authority for such a restriction in legislation or the Immigration Rules. Secondly, as recognised, for example in *ZH (Bangladesh) v Secretary of State for the Home Department* [2009] EWCA Civ 8 at [3], the 14 year rule set out in Rule 276B(i)(b) is specifically directed to people who have managed to stay in the United Kingdom for 14 years or more without lawful authority, and is in effect an amnesty clause. It is likely that those in the United Kingdom without leave,

and therefore without status, will have no official documentation, particularly in the early period of their residence. Thirdly, although most of the documents listed by the Secretary of State can be classified as "official" in the sense that they are from institutions and not individuals, a tenancy agreement and a letter from a landlord, which are listed, are difficult to classify as "official".

62. Mr Lewis submitted that the appeal on this ground should not be allowed because the error made no difference in this case. On the state of the evidence before the Secretary of State, it was inevitable that the continuous long residence application could not succeed. Mr Ahmed accepted that the weight of the evidence was a question for the Secretary of State and that if the letters contained no detail their weight was significantly reduced, but argued that it was not inevitable that, if the matter was remitted for a new decision, the Secretary of State would reach the same result. I reject this submission and accept Mr Lewis's submissions on this point.

63. In the light of the combination of the answer to question 14 in the 2002 application for a work permit and the absence of evidence by Mr Khan or Mr Dad explaining the position, there is a serious question about the continuous nature of Mr Khan's residence. Mr Ahmed accepted that the high point of the evidence supporting residence in the United Kingdom before 2002 was the letter signed by Mr Dad as a partner in Sky Accommodation Services (see [13] above) stating that Mr Khan was a tenant of a specified property belonging to Mr Dad and resided there between 1998 and May 2005. That evidence was problematic, to put it at its lowest, in the light of the answer to question 14 in the 2002 application, which was completed on behalf of Mr Dad and signed by him. The remaining letters are of very little weight because they are in (almost identical) general terms, none refer to Mr Khan being known to the writer by reason of his residence in the United Kingdom, and none state that he was present in the United Kingdom continuously. In this context, I have not taken account of the deeply troubling statement (see [29] above) in the appellant's very recent supplementary skeleton argument that Mr Khan had stated he had previous work experience in Pakistan from 1998 to 2001.

64. *(ii) Article 8 and paragraph 276ADE:* Mr Ahmed submitted that the decision letter focused on the old Rule 276B of the Immigration Rules but did not consider the Article 8 points separately, did not consider whether there were exceptional circumstances or compelling factors in Mr Khan's case which would have justified granting him leave outside the Rules, and erred in considering it under paragraph 276ADE of the Immigration Rules which came into effect after Mr Khan's application. Relying on the decision in *R (Ganasabalan) v Secretary of State for the Home Department* [2014] EWHC 2712 (Admin), Mr Ahmed submitted that the failure of the Secretary of State to consider whether there were exceptional circumstances rendered the decision unlawful. The evidence he submitted should have been considered in this context was the duration of Mr Khan's stay in the United Kingdom, the steps he took to ensure that he was able to speak English in the form of the ESOL test, and his employment in the United Kingdom.

65. I am not assisted by the decision in *Ganasabalan*. Its facts are very different. The claimant in that case had been lawfully in this country for nine years and he was married to a United Kingdom citizen who had been in this country for 16 years. Although the treatment of Article 8 in the decision letter is relatively brief, I consider that the letter deals with the main evidence. The degree of detail required in a decision

letter depends on the nature of the evidence submitted. In this case it was common ground that Mr Khan's claim rested on private life rather than family life. The decision letter addresses Mr Khan's claim to have been in the country for a long time, and the fact that this was not a family life claim. As the Upper Tribunal Judge stated, while the fact that Mr Khan has worked in the United Kingdom and knows people here has given him a degree of social interaction which he would otherwise have lacked, on the material before the Secretary of State and the Upper Tribunal, there was nothing in his case that demonstrated what might be regarded in Article 8 terms as exceptional. I respectfully agree.

66. As to the submission that there has been no consideration of Mr Khan's Article 8 claim outside the rules, it is only where consideration of the new rules does not fully dispose of a claim based on Article 8 that the Secretary of State is obliged to consider granting leave to remain outside the rules. Mr Khan was a man who had been here without leave since 2002. He had not drawn benefits, had learnt some English and had acquaintances who thought him to be of good character. I have referred (at [23] above) to the reasons of the Upper Tribunal Judge for concluding that there was nothing on the material before the Secretary of State or the Upper Tribunal to demonstrate what might be regarded as exceptional or compelling circumstances in Mr Khan's case. I respectfully agree.

67. Finally, the complaint that the Secretary of State and the Upper Tribunal should not have considered the rule that came into effect on 9 July 2012 is misconceived. The Secretary of State's decision was made on 12 March 2013. Although, when "Statement of Changes to the Immigration Rules" HC194 first came into force on 9 July 2012, the Secretary of State was not entitled to take into account the provisions of the new rules when making decisions on private or family life applications made prior to that date, paragraph A277C of the Immigration Rules which came into effect on 6 September 2012, changed the position: see *Singh and Khalid v Secretary of State for the Home Department* [2015] EWCA Civ 74 at [56]. The effect was that, as from 6 September 2012, the Secretary of State has been entitled to take into account the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules in deciding private or family life applications, even if they were made prior to 9 July 2012.

VI Conclusion

68. For the reasons given above, if my Lords agree, I would set aside the permission to appeal granted by Sullivan LJ. For the reasons I have also given, had I not reached the conclusion that I have on setting aside permission, I would have dismissed the appeal.

Lord Justice Ryder:

69. I agree that had the appeal been allowed to proceed then I would have dismissed it for the reasons given by Beatson LJ.

70. I have had the benefit of considering in draft the judgments of my Lords on the question of whether the permission to appeal granted on 25 February 2015 should be set aside. For the reasons that he gives, I agree with Beatson LJ. The lack of candour demonstrated by the appellant, Mr Khan, is patent. The two different factual versions of the appellant's residence between 1998 and 2001 cannot both be correct without

further explanation. There has been no explanation despite an opportunity to provide the same. The supplementary skeleton argument of 3 April 2016 only emphasises the inconsistency by reiterating that [the appellant] "stated he had previous work experience in Pakistan from 1998 to 2001".

71. I agree with McCloskey J in *R (Bilal Mahmood) v Secretary of State for the Home Department* [2014] UKUT 00439 that the duty of candour which is a duty to disclose all material facts known to a party in judicial review proceedings applies to all parties in the proceedings. The duty is not to mislead the court which can occur by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact.

72. I agree that in this case either the appellant or someone with knowledge of the facts should have filed a statement to explain the factual basis of the claim and the apparent inconsistency on the papers. In the alternative, the claim should have been withdrawn.

73. I am mindful of the possibility that the decision in this case may be seen by some as approving satellite litigation in the form of applications to set aside orders granting permission to appeal. I emphatically do not anticipate that such applications will become any more numerous than at present. They are rare and should continue to be so. The change in behaviour that is anticipated is a more careful attention to the duty of candour that already exists.

Lord Justice Longmore:

74. I agree that, if the appeal is allowed to go ahead, it must be dismissed for the reasons given by Beatson LJ.

75. In those circumstances it will be rather pedantic to dissent from his prior conclusion that the permission to appeal granted by Sullivan LJ on 25th February 2015 should be set aside. But I do not think it should be.

76. I, like Beatson LJ (para 24), accept that Mr Ahmed, like the Secretary of State in her acknowledgement of service of the judicial review proceedings, missed the point that the papers contained an application for a work permit which stated that Mr Khan had been working in Pakistan from 5th February 1998 to 27th June 2001. It is not therefore Mr Khan's advisers who have been guilty of a breach of the duty of candour. The lack of candour is, therefore, that of Mr Khan himself, who, as my lord says, must have known, when he launched the judicial review proceedings on 11th June 2013 and instructed his lawyers to appear before Sullivan LJ in February 2015, that he had not been continuously in the United Kingdom for 14 years before his application for leave to remain on 2nd July 2012.

77. The difficulty I feel about using this lack of candour on the part of Mr Khan as the reason for setting aside Sullivan LJ's grant of permission to appeal is that, if Mr Khan were asked why in February 2015 he was not candid with the court, he might with some justification respond that it was all a long time ago and he had left the right information with his lawyers whose job it was to sort it all out.

78. The position was, of course, quite different once the Secretary of State's advisers made the position clear to Mr Khan's advisers in their letter of 23rd October 2015. The fact that Mr Khan thereafter made no witness statement means that the court can only infer that Mr Khan was indeed in Pakistan between 1998 and 2001 and that his claim, based on 14 years continuous residence must therefore fail. But that is all well after permission to appeal was granted on 25th February 2015. Once it became clear that Mr Khan was not going to make a witness statement Law Lane have should, of course, have withdrawn or discontinued the appeal but that is a rather different matter.

79. I would, for myself, wish to discourage applications to set aside permission to appeal because the time and energy lawyers are likely to devote to such applications and the time and energy taken up by this court in dealing with such applications is counter-productive. In most cases, of which this is one, it is far simpler to dismiss the appeal.