



**Upper Tribunal
(Immigration and Asylum Chamber)**

Izuazu (Article 8 - new rules) [2013] UKUT 00045 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Determination Promulgated

On 9 October 2012

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Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

LORD BANNATYNE

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

UCHENNA EUCHARIA IZUAZU

Respondent

1. In cases to which the new Immigration Rules introduced as from 9 July 2012 by HC 194 apply, judges should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. Where the claimant does not meet the requirements of the rules it will be necessary to go on to make an assessment of Article 8 applying the criteria established by law. The Upper Tribunal observation in MF (Article 8-new rules) Nigeria [2012] 00393 (IAC) to the same effect is endorsed.
2. The procedure adopted in relation to the introduction of the new Rules provided a weak form of Parliamentary scrutiny; Parliament has not altered the legal duty of the judge determining appeals to decide on proportionality for himself or herself.
3. There can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact-sensitive inquiry is normally not needed. The more the new Rules restrict otherwise relevant and weighty considerations from being taken into account, the less regard will be had to them in the assessment of proportionality.
4. When considering whether a decision is in accordance with the law, it has been authoritatively established by the higher courts that the test to be applied is not exceptional circumstances or insurmountable obstacles.

5.The UKBA continues to accept that EU law prevents the state requiring an EU law citizen from leaving the United Kingdom, although contends with good reason, that this is to be distinguished from a case where an independent adult can choose between continued residence in the United Kingdom or continued cohabitation abroad.

Representation :

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer

For the Respondent: E Fripp instructed by Luqmani Thompson and Co.

DETERMINATION AND REASONS

Introduction

1.

This is the Secretary of State's appeal from a decision of Judge Keane sitting in the First-tier Tribunal given on 31 July 2012. This was originally a fast track appeal from a decision of the Secretary of State refusing Ms Izuazu leave to enter the United Kingdom on asylum and human rights grounds. We shall refer to Ms Izuazu as the claimant. The judge dismissed the asylum claim but allowed the claimant's appeal under Article 8 ECHR by reason of her marriage in March 2012 to Julius Akinola.

2.

The grounds of appeal submit that the judge erred in law in his Article 8 decision by failing to follow the provisions of the new Immigration Rules (HC 194) published on 13 June 2012 and stated to take effect on 9 July 2012 where the Home Secretary set out a scheme as to when leave to enter or remain would be granted on human rights grounds. This is an issue of considerable public importance as many decisions are being made to which the new rules have potential relevance.

3.

Permission to appeal was granted on 3 August 2012 and the case taken out of fast track. There was a case management hearing on 12 September 2012 following which the appeal was listed before a panel of the UT for a day.

4.

The claimant had been unrepresented before the First-tier Tribunal but she had subsequently secured the services of Luqmani Thompson and Partners before us. We acknowledge the assistance her representatives have provided to us to decide the points of principle and the appeal.

5.

On 5 October 2012 she lodged a skeleton argument signed by leading counsel Raza Husain QC as well as Mr Fripp and a bundle of authorities in support of the appeal and a copy was served on the Home Office Presenting Officers Unit. It was, therefore, with considerable dismay that the panel constituted to hear this appeal received the news shortly before the case was called on at 10.00am Tuesday 9 October, that Mr Nath was asking for a photocopy of the court bundle as he had no or incomplete papers. It was with greater dismay that we received an application to adjourn the case to a new date as he did not consider himself sufficiently prepared to advance his own appeal.

6.

We rejected this application given the history set out above and the need for a panel of the Tribunal to consider the important matters raised in the appeal. We adjourned the matter for one hour for further preparation to be undertaken and before we did so we posed some questions that we indicated we would like assistance on in due course. The hearing then proceeded and Mr Nath made submissions

but acknowledged he was still unable to answer our questions. At the end of the hearing we issued directions giving a timetable for a written response to our questions.

For the SSHD:

(i)

What difference, if any, do the recent changes in the Immigration Rules have on the pre existing case law of the Supreme Court and higher appellate courts as to the learning on Article 8? If it is contended that the relevant tests for assessing whether an immigration decision interferes unjustifiably with family life have changed, how can rules achieve such a change?

(ii)

Does the UKBA continue to accept that it is not reasonable to expect a British citizen party to genuine family life in the UK to relocate permanently abroad (paras 93 to 95 of Sanade and others [2012] UKUT IAC)? If not why not and how is it compatible with Dereci to require an EU citizen to live outside the EU?

For the claimant:

(iii)

Now that the rules make express provision for Article 8 claims to remain, is it accepted that the circumstances whereby a person who fails under the rules but may succeed under the law relating to Article 8 will be narrower and will be exceptional having regard to the new criteria? If not why not?

7.

We received the response of the Home Office on 24 October and the claimant in reply on 30 October 2012. We are grateful to the parties for their written submissions. We append the Home Office submission to this determination as appendix A, in the light of the potential importance to other cases of the observations made and for completeness we append the claimant's at appendix B.

8.

We, nevertheless, take this opportunity to express our dissatisfaction at the appellant's lack of preparedness in this case, although on what we were informed it does not appear to have been the individual responsibility of Mr Nath. This was the Secretary of State's appeal on a profoundly important new issue for determination by this Tribunal with potential impact on many cases being heard daily across the country. Whenever an issue of this significance arises the Upper Tribunal is likely to constitute itself as a panel and deploy the most senior judges available to it at the time. It needs to give clear and comprehensive guidance to judges sitting throughout the United Kingdom as speedily as possible. Here there had been a case management hearing attended, we were informed, by a Home Office Presenting Officer where the importance of the issue would have been made plain in the listing arrangements. Whether or not the Presenting Officers' Unit was aware that the President and a judge of the Court of Session were to sit on this appeal is not the point. The Tribunal is entitled to expect that any advocate before it will be properly briefed with the relevant documents, fully prepared to address the issues that everybody is aware arises, and is capable of addressing the issues orally when they arise. Not for the first time, we conclude that there has been a failure by UKBA of its duty of co-operation with the Tribunal to advance the over-riding objective of fast, fair and efficient adjudication.

9.

As it happens the urgency of this case as a guideline decision has been mitigated by the decision of the UT in MF (Article 8-new rules) Nigeria [2012] 00393 (IAC) promulgated on 31 October 2012.

The Facts

10.

The claimant is a citizen of Nigeria. She was born in 1967, married in 1989 and has five children by a marriage that broke down between 2006 and 2008. From October 2005 to November 2007 she made a number of visits to the United Kingdom on multiple entry visas, the last of which was issued in October 2007 for five years. It was during these visits that she met Mr Akinola.

11.

On 4 May 2008 the claimant entered the United Kingdom again as a visitor. On this occasion she overstayed her leave to remain by 10 months. She returned to the United Kingdom after a short break away and again over-stayed her leave to remain by two years. Subsequently evidence came to light that indicated that during this period she had started working in the United Kingdom using false identity papers.

12.

In March 2012 she travelled to Nigeria with Mr. Akinola. She applied for entry clearance as a spouse and the application was refused in April 2012, because the ECO was not satisfied that the relationship between the parties was genuine or that the accommodation that Mr Akinola personally occupied (one room in a flat that was rented out to others) was sufficient for the couple and the claimant's youngest daughter by her previous marriage.

13.

An appeal was lodged but the claimant returned to the United Kingdom on the 16 May 2012 where she once more sought to enter as a visitor. On this occasion the false identity papers and false National Insurance number came to light. She was charged with offences in respect of these documents to which she pleaded guilty at the Magistrates Court on 18 May and was given a sentence of twelve weeks' imprisonment. She was transferred to immigration detention on 29 June 2012. She then made a claim for asylum which she withdrew and then re-instated. The decision to refuse her leave to enter on asylum and human rights grounds was taken on 18 July 2012 and her appeal was heard before Judge Keane sitting at the Yarlswood detention and removal centre.

14.

Notwithstanding this history of deceit, the judge found the claimant to be a credible witness and genuine in her fear of her violent former husband and of being the victim of serious crime in Nigeria. He nevertheless dismissed her asylum claim as it did not relate to criteria for protection and there was adequate protection available in Nigeria against the harm feared. No issue arises in respect of that decision on the appeal before us.

15.

The judge also heard from Mr Akinola and another witness to the relationship between him and the claimant. He was satisfied that there was a genuine relationship of three years plus duration even though the parties had not been living together as man and wife. Mr Akinola was of Nigerian origin. He had come to the United Kingdom in 1989. He was now a British citizen. He had married and divorced in the United Kingdom. There was an adult daughter of the relationship who is a student who lived with her mother in the United Kingdom but kept in regular contact with her father. Mr Akinola

lived in Hounslow and had stable employment as a clerical officer employed by a cargo despatch company.

The UKBA Decision

16.

The Home Office devoted nine paragraphs of its 61 paragraph letter to the Article 8 claim. The first five paragraphs disputed the factual basis of the relationship and concluded that it was not accepted "you have shown you are in a subsisting and long standing relationship with Julius Akinola". The judge disagreed on the facts and no issue arises with respect to that finding.

17.

The letter nevertheless went to consider "for completeness" the assessment of the case under the Appendix FM (Family Members) to HC 194. Two particular points were taken:-

i.

The claimant was not in the United Kingdom as she had already been refused leave to enter at the time of the decision.

ii.

There were no insurmountable obstacles to family life continuing outside the United Kingdom namely by returning to Nigeria.

On this second issue the decision letter reads as follows:

"Although (Mr Akinola) has a daughter in the UK she is an adult who attends university. She does not live with him and only visits occasionally. Julius has family in Nigeria as evidenced by the fact that you married him in his home city of Ibadan in a ceremony attended by both your respective families. You are also both able to work and Julius is in full-time employment. The documents that your solicitor has submitted show that he is diabetic and takes medication for his medical conditions. However as has been discussed in your medical consideration, above, it is considered that while the healthcare in Nigeria may not be up to UK standards generally, there is a functioning healthcare system in place and as you both can work and earn money there is no reason why you cannot access private treatment if this is the better option for you. Indeed the payslips that your solicitor has submitted indicate that Mr Akinola is capable of working long hours in a respectable job and earning a reasonable amount of money".

18.

Having examined the application from the viewpoint of the new rules only, the Secretary of State's conclusion was:

"You do not qualify for limited leave to remain and it is both lawful and proportionate to remove you from the UK. Your Article 8 rights will not be breached".

The Judge's Decision

19.

After he reached his conclusions of fact and his decision on the refugee claim, the judge at paragraph 22 onwards of his determination considered Article 8. He concluded that the claimant had established family life in the UK by reason of her relationship to Mr Akinola. He also found that she had a private life here by reason of her previous residence and wish to remain.

20.

He then went on to consider the five questions posed by Lord Bingham in Razgar [2004] INLR 349 HL and concluded:

i.

The claimant's removal would interfere with the family life enjoyed by her and Mr Akinola.

ii.

The interference was serious enough to engage Article 8.

iii.

The interference was in accordance with the law and for the legitimate aim of the prevention of disorder or crime.

iv.

The central question in the appeal was whether the interference was proportionate and a fair balance between the interests of the community and the claimant and her husband.

21.

The judge continued his analysis as follows

"26. I acknowledge the determination of the respondent to achieve the legitimate aims of the prevention of disorder or crime and the maintenance of an effective immigration policy. Such are laudable aims which she undertakes by means of her immigration and criminal policies and she does so in the interests of the wider United Kingdom community. I acknowledge that the legitimate aims thus expressed are rarely overridden. I particularly acknowledge the appellant's immigration history. In part, it was a poor history. The facts were common between the parties to the appeal. The appellant had overstayed during a previous period of residence in the United Kingdom. I also acknowledge the appellant's criminal offence. It was a most serious criminal offence which the magistrates' court marked by handing down a sentence of twelve weeks' imprisonment. I also acknowledge the appellant's conduct in travelling to the United Kingdom in possession of false documents. Such was lamentable conduct on her part.

27. I remind myself that I should strike a fair balance between the rights of the appellant and the interests of the community. Certainly, 'of course all will turn on the facts of the individual case' (per Owen J in Mthokozisi v Secretary of State for the Home Department [2004] EWCH 2964 (Admin) at paragraph 28, a passage from authority cited by Lord Bingham at paragraph 9 of his judgment in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41). I have also borne in mind that guidance which Lord Bingham offered at paragraph 12 of his judgment in EB (Kosovo). He stated:

'Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal...'

28.

Two factors have led me to strike the balance, the essence of an assessment of the proportionality of a decision such as the decision under appeal, in favour of the appellant. First, drawing on those

exclusively favourable findings of fact to which I have arrived in respect of the appellant's ... contentions, I find that a particularly strong family life exists between the appellant and Mr Akinola"

He reviewed the evidence supporting this conclusion and then went on to his second factor in favour.

29. Second, I find that it would not be reasonable to expect Mr Akinola to settle in Nigeria in order to continue family life with the appellant. Mr Akinola is a British citizen. He has resided in the United Kingdom for 23 years. He has a medical condition which at present is being satisfactorily treated by the healthcare services of the United Kingdom. It would be harsh in the extreme to expect Mr Akinola to sever his ties with the United Kingdom in order to carry on family life with the appellant in Nigeria. His has been a very lengthy residence in the United Kingdom. Drawing due and proper inferences from his circumstances as a whole, and indeed those reflected in the documents which the respondent referred to in her Reasons for Refusal Letter, his ties and connections are far greater with and in the United Kingdom than they are with and in Nigeria. He has a daughter with whom he is in contact. Such contact would surely be undermined by the geographical divide? I do acknowledge that Mr Akinola, doing the best I can on the evidence, grew up and developed as a man in Nigeria. He is not to be equated with the position of a person born and bred in the United Kingdom who is to accompany one such as the appellant to a country with which he has no connection, understanding or sympathy. However, I think the sacrifice - I do not put out of my mind the extreme difficulty which he would experience in achieving employment in Nigeria - would be too great. Mr Akinola would be separated from that life which he has built up over a period as long as 23 years. It would not be reasonable to expect him to leave the United Kingdom in order to carry on family life with the appellant in Nigeria."

22.

He therefore allowed the appeal on human rights grounds.

Grounds of Appeal

23.

The Secretary of State's grounds of appeal were concise. There were in substance four in number and may be summarised as follows:-

i.

The judge gave no consideration to Appendix FM 1 at all although it had been cited in the refusal decision.

ii.

He erred in asking the question whether it was reasonable to expect Mr Akinola to relocate to Nigeria rather than using the test under Appendix FM Section R-ILRP and the Section EX (b) Exception of whether "there are insurmountable obstacles to family life with that partner continuing outside the UK".

iii.

The judge failed to give sufficient reasons for his findings on Article 8 and whether it was reasonable to expect Mr Akinola to relocate.

iv.

The judge failed to give sufficient weight to the legitimate aim of safeguarding the economic well being of the UK through effective immigration control and the public interest in removing her.

24.

At the hearing Mr Nath clarified the appellant's case by indicating that ground iv. above was intended to include the submission that the judge's conclusions were wrong as a matter of law because they were irrational, in that no properly self-directing judge could legitimately have reached them on the findings of fact he had made.

The status of HC 194 Appendix FM

25.

HC 194 is a set of changes to the Immigration Rules laid before Parliament on 13 June 2012. It was accompanied by an Explanatory Statement indicating amongst other things that the purpose of the Rules was:

"To provide a clear basis for considering immigration family and private life cases in compliance with Article 8 of the European Convention on Human Rights (the right to respect for private and family life). In particular, the new Immigration Rules reflect the qualified nature of Article 8, setting requirements which correctly balance the individual's right to respect for private and family life with the public interest in safeguarding the economic well-being of the UK by controlling immigration and protecting the public from foreign criminals".

26.

The House of Commons debated a motion tabled by the Government in support of these Rules on 19 June 2012. The motion was carried without a division. The conventional negative resolution procedure required by Immigration Act 1971 s. 3(2) was adopted in the House of Lords. Both Houses were thus content for the Secretary of State to adopt the statement of practice she has laid before them.

27.

As a consequence, it has been submitted to us in the Secretary of State's written submissions:

"However, while the Rules do not bind the Courts, in the same way as primary legislation, they are a clear, democratically endorsed, statement of public policy which must now be taken into account by the courts when assessing proportionality. The Secretary of State would expect the Court to defer to the view endorsed by Parliament on how, broadly, public policy considerations are weighed against individual family and private life rights, when assessing Article 8 in any individual case. That is, save in a narrow group of cases where it is found that the consequences of the immigration decision are exceptional....

In summary, the Government can interfere in the exercise of Article 8 rights where in the public interest it is necessary and proportionate to do so, including to safeguard the UK's economic well being by controlling immigration and to protect the public, by deterring foreign criminals and removing them from the UK. Following the recent changes, the new rules now properly reflect the view of the Government and Parliament as to how the balance should be struck between that public interest and individual's rights under Article 8 the Government expect the Courts to have regard to that view in reaching their decisions."

28.

The Secretary of State submits in response to the first question we posed ("What difference, if any, do the recent changes in the Immigration Rules have on the pre existing case law...as to the learning on Article 8?") that the Rules make a substantial difference to the case law and essentially restore the exceptional circumstances test disapproved of by the House of Lords in *Huang v SSHD* [2007] UKHL

11; [2007] 2 AC 167 because their Lordships were considering a set of immigration rules that did not spell out the UK's response to Article 8 issues whereas the present rules before us do so.

29.

The claimant, by contrast, in her reply to the Secretary of State's written submission, states that the new rules can make no difference to the case law binding upon us since that is the law relating to Article 8 made in pursuit of the legal duties imposed by the Human Rights Act 1998, and the Rules, being only statements of executive policy do not have the force of law and cannot reverse or repeal authoritative judicial decisions.

Discussion

30.

In our judgment neither of the rival submissions can be accepted in full. We accept the claimant's submission on the status of the rules, and accordingly agree that the rules cannot over-ride either the legal duty imposed by statute or the existing learning on that duty supplied by the higher courts, and (to the extent it is consistent with that learning) the Upper Tribunal. However, we do not accept the implicit submission that the new rules are irrelevant to the Article 8 balance required by the law to be conducted.

31.

The Upper Tribunal has already observed in MF (Article 8-new rules) Nigeria (loc cit) and we agree that the rules are the rules. They are in force and clearly apply to any decision made after 9 July 2012 as this one was, unless and until they are struck down as being unlawful or irrational.

32.

The status of immigration rules is well known and was recently examined by the House of Lords in Odelola v SSHD [2009] UKHL 25 [2009] 1 WLR 1230, from which the following points may be summarised:

(i) The rules are not subordinate legislation but detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration. They are essentially executive not legislative (per Lord Hoffman at [6]; Lord Brown at [17], [34], [35]).

(ii) The rules are those of the Secretary of State not Parliament albeit that they are laid before Parliament (Lord Brown at [27]).

(iii) The rules nevertheless create legal rights and effects and provide a ground of appeal under s. 84 (1) (a) Nationality Immigration and Asylum Act 2002, 'that the decision is not in accordance with immigration rules.'

(iv) When deciding appeals on this ground judges of this and the First-tier Tribunal are bound by and must apply the rules (Lord Hoffman at [6], Lord Brown at [27], Lord Neuberger at [51]). To this extent as the Tribunal acknowledged in MF they have the force of law, not because they are law, but because the law relating to immigration appeals affords them a binding status for certain purposes and precludes judges exercising a discretion differently from the Secretary of State other than a discretion conferred under the rules (s.84 (1) (f)).

33.

We then turn to the separate question as to how the terms of the Immigration Rules can influence an assessment of whether an immigration decision is in accordance with the law, either generally (s. 84

(1)(e) NIAA 2002) or under s.6 of the Human Rights Act and whether the decision is compatible with the appellant's Convention rights (s. 84 (1) (c)).

34.

It is obvious that respect for a claimant's family and private life under Article 8 (1) is subject to proportionate and justified interferences in pursuit of a legitimate aim under Article 8(2).

35.

There is nothing unlawful about the Secretary of State having published policies and practices designed to give effect to Convention obligations or aspects of the public interest considered to be weighty reasons justifying interference. Students of the history of immigration law and practice over the last 30 years will be familiar with a whole host of policies sometimes outside the rules and sometimes within them said to be designed to reflect Article 8 issues with respect to marriage by those with no leave to remain, serious criminal offending, the impact of removal on children, the period of irregular residence giving rise to a presumption of regularisation and so on.

36.

Many of these previous policy statements had been withdrawn at the time that the House of Lords considered the case of *Huang* (above). In that case the submissions advanced on behalf of the migrants include the fact that the Immigration Rules had not been amended to incorporate all classes of human rights claim that may be recognised under Article 8 (see the Law Reporter's summary of the submissions at 179 A-C); by contrast, where there was a relevant statement of policy, appropriate weight could be afforded to it (178 H).

37.

Lord Bingham giving the judgment of the Appellate Committee at [16] in a passage relied on by the Secretary of State in her written submissions in the present appeal, noted:

"The general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and serious breaches of the law and so on."

Later in the same judgment Lord Bingham described the giving of weight to the Secretary of State's views as when deportation or exclusion operated as a valuable deterrent in the public interest as:

"Performance of the ordinary judicial task of weighing up competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of information".

38.

We see no reason why a statement of policy as to when those with no other claim under the Immigration Rules will or will not be admitted or expelled, should not be expressed in the Immigration Rules, and when they are, appropriate weight should be given to it for the reasons given by Lord Bingham.

39.

There is the further consideration, not explored in the submissions before us, but reflected in particular in the case law relating to Article 5 ECHR that although the rules and similar statements of

policy do not have the force of law, they are considered to be part of the law for the assessment of whether an interference is “in accordance with the law” for rights that are balanced rights under the Convention : see Nadarajah v SSHD [2003] EWCA Civ 1768 [2004] INLR 139 cited and approved in Lumba and Mighty v SSHD [2011] UKSC 12 [2012] 1 AC 245 at [26] to [37], [206] and [302]. By analogy, a decision to interfere with Article 8 rights that was not in accordance with lawful policy, would, therefore, probably be considered as not in accordance with the law for the purpose of justifying an interference with Article 8 rights.

40.

We accordingly further endorse the Upper Tribunal’s observation in MF that judges called on to make decisions about the application of Article 8 in cases to which the new rules apply, should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. If he or she does, there will be no need to go on to consider Article 8 generally. The appeal can be allowed because the decision is not in accordance with the rules.

41.

Where the claimant does not meet the requirements of the rules it will be necessary for the judge to go on to make an assessment of Article 8 applying the criteria established by law.

42.

When considering whether the immigration decision is a justified interference with the right to family and/or private life, the provisions of the rules or other relevant statement of policy may again re-enter the debate but this time as part of the proportionality evaluation. Here the judge will be asking whether the interference was a proportionate means of achieving the legitimate aim in question and a fair balance as to the competing interests.

43.

The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the rules will depend both on the particular facts found by the judge in the case in hand and the extent that the rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom.

44.

For example, paragraph 399 of the Immigration Rules deals with family life claims by people who are liable to deportation. Paragraph 398 provides that those who have received a sentence of between one and four years imprisonment or have received a sentence of less than twelve months imprisonment but are persistent offenders can expect that the public interest in deportation will normally outweigh respect for family life unless paragraph 399 applies. This paragraph applies where the child is a British citizen, has lived continuously for at least seven years immediately preceding the immigration decision, and it would not be reasonable to expect the child to leave the UK. However in addition there must be “no other family member who is able to care for the child in the United Kingdom”. Focusing simply on the last requirement, it is very difficult to see how any weight could be given to this requirement in an Article 8 evaluation under the law as it is clear that the child’s best interests are a primary consideration to be taken into account, and a child’s best interests would normally require the maintenance of a genuine and effective care by both parents rather than a default position of the absence of any family member to care for the child. On the other hand the identification of seven years residence in the United Kingdom, may be a helpful starting point for the assessment of

when it would be reasonable to expect a child of whatever nationality to have the company of a caring parent in the United Kingdom.

45.

The decision under appeal was made after 9 July 2012 and so the new rules clearly apply. Unlike the Tribunal in ME we do not have to grapple with whether the rules can apply to immigration decisions that have been taken before the new rules were brought into effect. HC 194 Appendix FM is expressed not to apply to any application for entry clearance, leave to remain or indefinite leave to remain that had been made and not decided before 8 July, but note that Rule A 362 provides:

“Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 9 July 2012 are met regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.”

46.

The rules themselves are silent as to their application to deportation decisions that are made and the appeal determined before 9 July but may have to be re-examined later. It is at least clear that HC 194 cannot be used to undermine judicial decisions allowing an appeal on Article 8 grounds taken before they came into effect. A retrospective deprivation of the benefit of a favourable decision under the law would be offensive to basic public law and human rights principles. Equally we can see compelling reasons why a claimant who has or should have won an appeal that has been determined by a judge of the First-tier Tribunal before the new rules had come into effect should not be deprived of such a benefit, by virtue of the fact that the judge had made an error of law and the matter had to be remade. Otherwise, we can see that a fresh judicial decision on an Article 8 claim made after 9 July 2012 should take into account and give appropriate weight to the Secretary of state’s policy as set out in the rules.

47.

We now return to consider the Secretary of State’s submissions on the status of HC 194 and its effect on Article 8 decision making where the judge has to decide whether the decision is in accordance with the law. In our view, she over-states the significance of the rule change.

48.

First, the reference to Parliament’s approval of HC 194 seems an attempt to approximate the rules to a statutory assessment of the balance between competing interests such as that considered by the House of Lords in Kay v Lambeth Borough Council [2006] 2 AC 465 on which the Secretary of State placed reliance in her submissions in the case of Huang (loc cit) see [17].

49.

We cannot agree, for the following reasons:

(i)

Lord Bingham’s answer to the point remains a good one:

“the Immigration Rules and supplementary instructions are not the product of active debate in Parliament where non-nationals seeking leave to remain are not in any event represented”

(ii)

Only the Parliamentary process for primary legislation permits a clause by clause discussion of the measures, with opportunity for amendments and revision.

(iii)

By comparison, we accept the claimant's contention that the procedure adopted here provided a weak form of Parliamentary scrutiny: see R (Stellato) v SSHD [2007] UKHL 5, [2007] 2 AC 70 at [12].

(iv)

There may have been more active debate of the new rules in the House of Commons than is often the case under the negative procedure resolution, but the House of Commons is not Parliament and it has long been the law that a resolution of the House of Commons is not given supremacy akin to primary legislation by the court: see Stockdale v Hansard (1839) 9 A and E 1. The position has been succinctly summarised by A.W.Bradley and K D Ewing Constitutional and Administrative Law (15th Edition 2011 p.54):

"An Act of Parliament has legal force which the courts are not willing to ascribe to other instruments which for one reason or another fall short of that pre-eminent status. Thus the following instruments do not enjoy legislative supremacy and the courts will if necessary decide whether or not they have legal effect: a) a resolution of the House of Commons"

(v)

Just as in the case of Huang , Parliament has not altered the legal duty of the judge determining appeals in both Chambers, to decide on proportionality for him or herself.

(vi)

A claimant who relies on Article 8 will by definition have failed to succeed under the rules but may succeed under the law on Article 8 grounds despite the provisions of the rules. A failure to comply with the rules thus remains the starting point of the Article 8 inquiry and not its conclusion.

(vii)

There is a significant difference between broad issues of social policy and individual immigration decisions where there is private and/or family life to be respected. This is not a situation where Parliament has chosen to interfere with the rights of property holders by enabling tenants to enfranchise see (James v United Kingdom [1986] 8 EHRR 123, or when a court is able to prolong residence as a home beyond legal entitlement (Kay v Lambeth London Borough Council [2006] 2 AC 465).

(viii)

We note, in any event, that as the Article 8 case law has developed Pinnock v Manchester Corporation [2011] UKSC 6 and after, there are more grounds to suggest that greater weight must be given to individualised consideration than was suggested to be the case in Kay .

50.

Second, we are equally unimpressed with the submission that following the adoption of HC 194 and Appendix FM, the test to be applied by the judge in deciding whether the decision is in accordance with the law is whether there are "exceptional circumstances" for allowing the appeal notwithstanding the absence of compliance with the rules:

i)

Article 8 decisions apply to a wide variety of people: some may be outside the UK and seeking entry clearance to enter; others may be waiting a first decision on leave to enter albeit physically present, some may have entered irregularly before establishing private and family life; others will have

established such private and family life during periods of lawful residence and have had the reasonable expectation that their future lay in the UK.

ii)

One size does not fit all. It is not possible to apply one set of criteria, such as whether there are 'insurmountable obstacles' to these divergent cases, where the case law indicates that a fact sensitive assessment is necessary. The Upper Tribunal made similar observations in its decision in Sanade and others [2012] UKUT 468 (IAC) [2012] Imm AR 597 before the new Rules were adopted at [35] and [37]. The House of Lords has deprecated the test of exceptional circumstances in Huang and further explained why in EB Kosovo (see below at paragraph 56 below). In our judgment these observations remain as true after the new rules came into force, as before.

iii)

The package of changes made in regulating the admission of family members, grant of leave to remain or their expulsion are generally considerably more rigorous than previous practice. We note the Secretary of State's response to our question 1 and accept that HC 194 and Appendix FM does not reproduce every negative factor that has been identified in the case law of domestic and international courts. Nevertheless, it imposes very exacting requirements in a number of circumstances: minimum income at significantly higher levels than subsistence, continuous residence for 20 years in private life claims and in certain cases the absence of any ties; insurmountable obstacles to cohabitation by spouses and the like. The 'in accordance with the law' limb of the appeal is thus likely to arise as a real issue in more rather than fewer appeals.

51.

Since the hearing and in the course of making this determination, we have become aware of the decision of Lord Brodie in the case of MS v SSHD [2013] CSOH 1 9 January 2013. This was a fresh claim judicial review case in which it was not necessary to analyse the particular provisions of the new rules in any detail or the case law of the higher courts in the United Kingdom on issues addressed in part by the new rules and where the factual foundation of the claim did not lend itself to any feature out of the ordinary. Whilst we note some difference in emphasis at [28] to [31] and our observations above, we do not detect any conflict in approach as to the function of a judge in an Article 8 appeal where family life is indeed engaged.

52.

Third, we do not accept that all the criteria set out in HC 194 accord with the criteria for an Article 8 assessment established by the existing case law. The law relating to the best interests of minor children resident is one such issue, that we have already noted. We share the concerns of the Tribunal in MF that provisions of the Appendix FM do not appear to reflect the principle that a primary consideration in immigration decision making is the welfare and best interests of the child. The more the new rules restrict otherwise relevant and weighty considerations from being taken into account, the less regard will be had to them in the assessment of proportionality. We do not need to consider this further in the present appeal case as there are no such children.

53.

However, the decision does rely on the fact that the claimant fails under Article 8 because she cannot bring herself within the exception of 'insurmountable obstacles'. In our judgment, to reject a claim under Article 8 because the test of insurmountable obstacles is not met as the Secretary of State did at [17] above is to fail to comply with principles of the established law.

54.

The Secretary of State disputes that and submits that “insurmountable obstacles” is the test clearly established in the Strasbourg case law. Mr Nath referred us to Rodrigues da Silva and Hoogkamer v Netherlands (2006) 4th Section [2006] ECHR at [39]:

“The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants’ choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State’s obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül v. Switzerland , judgment of 19 February 1996, Reports 1996-I, pp. 174-75, § 38). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999).”

55.

Similar statements have been made recently in Nunez v Norway [2011] ECHR 1047 at [70] and Antwi v Norway [2012] ECHR 259 at [89] to [103]; we understand that the case is to be heard in the Grand Chamber.

56.

We acknowledge that in a number of Strasbourg decisions, different sections of the European Court of Human Rights have stressed that where initial entry has been unlawful or whether family life has been established at a time where status was precarious, it will only be exceptionally or where there are insurmountable obstacles to the family life being transferred abroad that removal will be a violation. We note that there is, therefore, some tension between those cases where these criteria are used and some of the decisions of senior courts in the United Kingdom. However, whereas the Strasbourg Court refers to this being one of several factors to consider (and others that were decisive in Nunez included the best interests of the child) HC 194 imposes a test that has to be met for leave to be granted. This turns a factor in the case into a minimum requirement to be always met. We do not read the Strasbourg cases as doing this.

57.

Further, where family life was established through lawful residence, the Grand Chamber in Boultif v Switzerland [2001] did not refer to insurmountable obstacles but posed a different question in its guidance at [48]:

“The Court has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or

the children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure in question was necessary in a democratic society.

In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."

It is thus the degree of difficulty the couple face rather than the 'surmountability' of the obstacle that is the focus of judicial assessment but again as a factor rather than a test.

58.

It has been repeatedly stated in national jurisprudence laid down by the higher courts in the UK that in none of these cases was Strasbourg laying down a test for engagement of Article 8 as opposed to reaching a decision on proportionality in the particular case. The requirement for exceptional circumstances or insurmountable obstacles has been authoritatively declared to be an erroneous one in the Article 8 immigration context by the House of Lords in [Huang](#) [2007] UKHL 11 at [20], [EB Kosovo](#) [2008] UKHL 41 at [8] [12] [18] [20] [21] and by the Court of Appeal on innumerable occasions including [LM \(DRC\)](#) [2008] EWCA Civ 325 at [11] and [13]; [VW \(Uganda\)](#) [2009] EWCA Civ 5 at [19] and [24]; [JO Uganda](#) [2010] EWCA Civ 10 at [14] to [15] and [23] to [26].

59.

Whilst it is open to Parliament to change the law by primary legislation unless and until it does so these decisions are binding on the Upper Tribunal and will be followed by it.

60.

Even if it were open to us to do so, which it is not, we would further reject any implicit submission that these decisions are contrary to the Strasbourg jurisprudence. In addition to the points we have made at [56] and [57] above, we observe that as a matter of fundamental principle in its international supervision of the application of Article 8 the European Court of Human Rights as an international court applies minimum standards rather than a uniform approach binding on every contracting state. The principle of subsidiarity affords a margin of appreciation to the institutions of the contracting state and the national authorities are better placed than the international court to conduct a primary examination of the competing considerations. Those authorities include the courts and tribunals called upon to make the assessment.

61.

For example, the House of Lords has stated on a number of occasions that in assessing the proportionality of an interference with rights in United Kingdom law the question is whether the interference is no more than necessary. This is an application of the least intrusive principle formulated by Lord Steyn in [R v Secretary of State for the Home Department ex parte Daley](#) [2001]

UKHL 26; [2001] 2 AC 532. This approach was applied in immigration cases by Huang (supra). The Supreme Court has recently affirmed this in Quila [2011] UKSC 46. At [45] Lord Wilson said:

“The amendment had a legitimate aim: it was ‘for the protection of the rights and freedoms of others’, namely those who might otherwise be forced into marriage. It was “in accordance with the law.” But was it “necessary in a democratic society”? It is within this question that an assessment of the amendment's proportionality must be undertaken. In Huang v Secretary of State for the Home Department [2007] 2 AC 167 Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:

- a) is the legislative objective sufficiently important to justify limiting a fundamental right?
- b) are the measures which have been designed to meet it rationally connected to it?
- c) are they no more than are necessary to accomplish it?
- d) do they strike a fair balance between the rights of the individual and the interests of the community?

In the present case the requisite enquiry may touch on question (b) but the main focus is on questions (c) and (d).”

62.

Lord Wilson concluded at [58]

“I would, in conclusion, acknowledge that the amendment is rationally connected to the objective of deterring forced marriages. So the Secretary of State provides a satisfactory answer to question (b) set out in para 45 above. But the number of forced marriages which it deters is highly debatable. What seems clear is that the number of unforced marriages which it obstructs from their intended development for up to three years vastly exceeds the number of forced marriages which it deters. Neither in the material which she published prior to the introduction of the amendment in 2008 nor in her evidence in these proceedings has the Secretary of State addressed this imbalance – still less sought to identify the scale of it. Even had it been correct to say that the scale of the imbalance was a matter of judgement for the Secretary of State rather than for the courts, it is not a judgement which, on the evidence before the court, she has ever made. She clearly fails to establish, in the words of question (c), that the amendment is no more than is necessary to accomplish her objective and, in the words of question (d), that it strikes a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages. On any view it is a sledge-hammer but she has not attempted to identify the size of the nut. At all events she fails to establish that the interference with the rights of the respondents under article 8 is justified”

63.

By contrast the European Court of Human Rights generally contents itself with the assessment of whether the interference can be justified because it represents a fair balance of the competing interests rather than the least intrusive way of achieving the legitimate aim. However, Strasbourg has never suggested that the Daly/Huang approach is inconsistent with Article 8 ECHR, and similarly has never suggested that it is inappropriate for the national court to ask whether it is reasonable to expect the couple to relocate the claimant’s country of origin. We do not explore how this principle applies in deportation appeals as opposed to considerations of policy. We note that in general if it is concluded that deportation or removal is necessary as a proportionate measure to protect a public interest

recognised by Article 8(2) nothing less will do, although in particular cases the length of the exclusion and the capacity for reform, particularly of a young offender may be relevant considerations.

64.

Apart from the principle of subsidiarity, there are further good reasons why the national approach may be more inclusive than the Strasbourg criteria. The national court has to apply the Convention through the prism of other legal obligations, for example the European Convention on Establishment 1955 Article 3 that affords particular weight to 10 years lawful residence, or to the consequences of nationality of the European Union in respect of measures that force an EU national to leave the Union in breach of their right of residence (see the Upper Tribunal's conclusions in Sanade and others (above) applying the principle established in Ruiz Zambrano ; see also Harrison (Jamaica) v SSHD [2012] EWCA Civ 1736 at [63] to [68]).

65.

The uniform application of the Immigration Rules is not a legitimate aim in itself justifying interference with Article 8 rights but a means of maintaining public safety, the economic well being of the country, prevention of disorder or crime, the protection of health or morals and the rights and freedoms others, (see Blake J in R (Mansoor) v SSHD [2011] EWHC 832 (Admin) [34] to [38] noted without disapproval in SSHD v Treebhowan; SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054, at [76] per Elias LJ). Therefore, the fact that a person cannot meet the requirements for leave under HC 194 does not mean that the Secretary of State can for that reason alone demonstrate a proportionate and justified interference to prevent disorder.

66.

We agree with the claimant's submission that reliance on the authorities dealing with Article 8 in the context of extradition will not normally be helpful in the context of deportation as there the legitimate aim of prosecuting criminals pursuant to an extradition agreement is significantly different.

67.

Accordingly, we conclude there can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact sensitive inquiry is not normally needed. Indeed, the conclusion under the Rules may often have little bearing on the judge's own assessment of proportionality. The Secretary of State may decide to only grant leave to remain in cases where there would be insurmountable obstacles to the family relocating to any country but the judge is unlikely to give weight to that factor in the proportionality assessment if he or she concludes that the obstacles to relocation are substantial and in the circumstances it would not be reasonable to expect the other family members to relocate there, whether for reasons of nationality, length of residence, the best interest of the child or otherwise. If there is no presumption that the provisions of the rules reflect and apply the balance between the competing considerations, exceptional circumstances cannot be the test to be applied under the law.

68.

However, when the judge makes his evaluation of proportionality under the law, he or she is entitled to have regard to particular factors identified in the international and national jurisprudence whether they are reflected in the rules or not. The cases continue to make relevant distinctions depending on the circumstances between criminal conduct and a failure to meet the requirements for continued residence; between criminality of an intermediate degree of seriousness and lengthy sentences for conduct of the highest degree of seriousness; between offenders whose propensity to re offend makes them a danger to the host community and those whose conduct is unlikely to be repeated; between

those who were lawfully admitted when family life arose and those who were not; between those who have resided here for many years or most of their life and others; between those whose family members are UK nationals and those who are not; between those irrespective of nationality who have strong and substantial ties with the claimant's country of origin and those who do not.

69.

The Strasbourg case law indicates that weighty reasons are needed to justify expulsion of someone who has had long residence as a child or that would risk separating devoted partners in a family relationship. It may, by contrast, require weighty reasons or exceptional factors to outweigh the strong justification for the expulsion of those who entered by deception, remained by fraud, established their relationship in the host state in precarious circumstances and never have had an expectation of being permitted to remain to conduct their family and private life in the host state.

70.

The use made of such guidance by the Upper Tribunal and the application in the course of the evaluation of the term exceptional circumstances is not a reference to a definitive test or otherwise unlawful, but is an appropriate way of setting the context for the particular decision (see Harrison (Jamaica) v SSHD [2012] EWCA Civ 1736, 21 December 2012 at [72] to [74]).

Error of law

71.

We now return to the case in hand and consider each of the four grounds of appeal noted at [23] above.

72.

Ground One : It follows from what we have said above, that a judge considering a decision made on or after 9 July 2012 should consider whether the claimant complies with HC 194 and Appendix FM. Judge Keane did not do so. It is accepted to be the case, that the claimant did not comply with the Rules. However, any error of law in failing first to assess the claim under the Rules would be immaterial if the assessment of the Article 8 case as a matter of law apart from the Rules was satisfactory.

73.

Ground Two : Judge Keane made no error of law in considering whether it was reasonable to expect Mr Akinola to relocate to Nigeria. The requirement of EX 1 (b) that "there are insurmountable obstacles to family life with that partner continuing outside the UK" may be a requirement of the Secretary of State's policy but it is not a requirement for the judge to apply in considering Article 8.

74.

Ground Three : Judge Keane gave reasons at paragraph 29 of his decision for his conclusion that it would not be reasonable for Mr Akinola to move permanently to Nigeria. He is a British citizen, he has a daughter who is a student here, he has resided here for 23 years and has stable employment and a home here. It is not alleged that his decision is irrational or perverse. In determining whether there is an error of law, we do not need to consider whether we would have reached this conclusion for ourselves. These are matters of assessment for the judge and we find no error of law.

75.

Ground Four : We accept that there was a material error of law made by the judge in this aspect of his considering whether the decision was in accordance with the law. He nowhere took into

consideration the precarious immigration status of the claimant at the time of the marriage and the decision to refuse her admission. He should have done so. The claimant was in the United Kingdom as a visitor and had no claim to remain for any other purposes. Her visa was granted on the basis that she had satisfied the ECO that she would leave the UK at the end of each visit. From 2008, when her relationship with Mr Akinola deepened she was in breach of the terms of leave to enter and remained without authority, moreover she used false documents, including a forged settlement visa to enable her to work. It is unclear why she needed to work if she was a dependant of Mr Akinola's before her return to Nigeria.

76.

In Nunez v Norway June 2011 the Fourth Section of the European Court of Human Rights stated the principles for assessment where a person had entered the country irregularly and sought to remain on the grounds of a family relationship and concluded at [70] :-

"The Court further reiterates that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül, cited above, § 38; and Rodrigues da Silva and Hoogkamer, cited above, § 39). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Rodrigues da Silva and Hoogkamer, cited above, *ibid.*; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (see Jerry Olajide Sarumi v. the United Kingdom (dec.), no. 43279/98, 26 January 1999; Andrey Sheabashov c. la Lettonie (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see Abdulaziz, Cabales and Balkandali, cited above, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others, cited above; Rodrigues da Silva and Hoogkamer, cited above, *ibid.*).

77.

In this case the claimant and her husband must have known she was developing family life when her immigration status was precarious, indeed when she had overstayed her leave to remain. In addition to breaching immigration control she had employed false documents to obtain unlawful employment. She was prosecuted for this conduct. The claimant did maintain strong ties to Nigeria albeit that her previous marriage had broken down through her husband's violent conduct. She returned regularly to Nigeria and had married there. The decision under appeal was taken after her application for entry clearance as a spouse had been rejected and when she was seeking to enter the UK from Nigeria. As in the case of Nunez, this combination of factors meant that weighty reasons existed to refuse her entry and justify her removal to Nigeria.

78.

For reasons we have already explained this is not to adopt a general test of exceptional circumstances, but to identify the need for weighty factors in favour of the claimant in this class of case. The Upper Tribunal has consistently had regard to the circumstances in which the family life was contracted and the degree of deception or breach of immigration control. All judges making such decisions must do so.

79.

The reasons relied on by the claimant for why a human rights analysis required her admission were not strong. By contrast with the case of *Nunez* there were no interests of minor children to consider. The claimant and her husband had not founded a family of their own, and there was no evidence of any ties between the claimant and Mr Akinola's daughter by a previous marriage. In any event that daughter was now an adult and living in a separate household. The claimant had returned to Nigeria to get married, and was seeking admission in a false capacity as a visitor when her intentions were to remain with her husband. HC 194 Appendix FM makes it necessary that an applicant for leave on Article 8 grounds must not be in the UK as a visitor, with leave for less than six months (save as a fiancé (e)) or with temporary admission. Whilst we do not accept that these requirements are fatal to an Article 8 claim, they serve to emphasise how precarious this claimant's connection with the UK was and how recent were her continuing connections with Nigeria.

80.

For these reasons we are satisfied that not only did the judge fail to remind himself that the family life was established in precarious circumstances, but overall he reached a conclusion in the claimant's favour that he was not entitled to reach. The strength of the public interest in removal and the weakness of the right to respect for family life established in these circumstances, was such that any properly self-directed judge was bound to conclude that the Secretary of State had justified refusal of admission as a proportionate measure in the interests of prevention of crime and disorder, irrespective of the consequences to claimant and her husband. This is a case where Lord Bingham's observations cited at [37] are particularly applicable. There is a material error of law and we set aside the decision allowing the appeal.

81.

In the light of this conclusion, we conclude that we can re-make the case on the information before us without a further hearing, as we informed the parties we anticipated would be the case, in the event that we found the conclusion irrational. However we ascertained at the hearing that Mr Akinola is a dual Nigerian and British national. It is clear that he has maintained his ties with his home country, including of course, the fact that he returned to marry the claimant there in March 2012.

82.

Whilst we did not find an error of law in the judge's conclusions that it would not be reasonable for Mr Akinola to live in Nigeria, now we have found an error of law it is open to us to re-visit the question. We do not disturb the primary facts found but note that we now know that Mr Akinola is a dual national. He has retained his Nigerian nationality and has visited the country recently. We do not think that the indefinite separation of this couple is inevitable if she is removed to Nigeria. Even if Mr Akinola had understandable reasons to want to remain in the United Kingdom and relocation to Nigeria would be a hardship for him, we have seen nothing to suggest that he would not be able to follow his wife to Nigeria.

83.

In the particular circumstances of this case, given the circumstances in which the relationship arose we conclude that it is not unreasonable for him to have to decide between retaining his residence in the United Kingdom and following his wife to Nigeria for the time being to continue family life there. In any event, the fact that it may not be reasonable to expect the other family members to relocate does not mean that in every case deportation or removal is disproportionate or not justified.

84.

The facts are materially different from those of the case of the successful appellant in *Sanade* where it was not reasonable to expect the spouse to leave the EU as in that case the claimant had been granted indefinite leave to remain before committing the offence and requiring the mother to leave would also require the minor children to be compelled to do so. The UKBA continues to accept that EU law prevents the state requiring an EU law citizen from leaving the United Kingdom, although contends with good reason, that this is to be distinguished from a case where an independent adult can chose between continued residence in the United Kingdom or continued cohabitation abroad.

85.

Taking all the facts found below in the claimant's favour into account, it is clear that the Secretary of State's decision is in accordance with the rules and the applicable policy and is not unlawful. In our judgment it is taken in support of a legitimate aim of protecting public order and the rights and freedoms of others, is a proportionate and fair balance in all the circumstances and thus a justified interference with Article 8 rights.

Conclusions:

86.

The determination of the First-tier Tribunal involved the making of an error on a point of law.

We set aside the determination.

We re-make the decision in the claimant's appeal by dismissing it.

All members of the panel have contributed to the making of this decision

Signed Date

21 January 2013

Chamber President

APPENDIX A

Home Office letter 24 October 2012

Dear Mr Justice Blake,

Uchenna Eucharia Izuazu v Secretary of State (Appeal AA/06877/2012)

On 9 October 2012 you directed that the Secretary of State respond to the following two questions raised in this appeal:

i. What difference, if any, do the recent changes in the Immigration Rules have on the pre-existing case law of the Supreme Court and higher appellate courts as to the learning on Article 8? If it is contended that the relevant tests for assessing whether an immigration

decision interferes unjustifiably with family life have changed, how can rules achieve such a change?

The Secretary of State's starting-point is that the Immigration Rules are a statement of her practice in deciding applications. The purpose in including provisions in the rules which reflect Article 8 consideration is to ensure efficiency and consistency and prevent arbitrary decision-making. This is important to applicants and caseworkers and to ensure public confidence in the immigration system.

The Secretary of State has carefully considered the broad principles set out in the Strasbourg and domestic case law when formulating the new rules. The new rules properly reflect the right balance, in the great majority of cases, between individual rights and the wider public interest in maintaining immigration control and protecting the public from criminals. This does not mean that the new rules fit exactly with every previous Strasbourg and domestic judgment. Many decisions were fact-specific and they were decided in a policy vacuum.

It is not the Secretary of State's position that in every case which meets the requirements of the new rules a refusal prior to the new rules would have been a breach of Article 8 (in some cases in order to ensure greater consistency the new rules are more generous than strictly required under the case law), nor that in every case under the new rules a refusal would not be a breach of Article 8.

The recent changes in the Immigration Rules relating to family and private life do not therefore alter the test set out in Razgar 1 which the Secretary of State accepts are the correct steps to follow when assessing whether an immigration decision interferes unjustifiably with family or private life. However, the new rules represent a significant change in the way the caseworker assesses whether interference in an individual's family or private life is proportionate to the legitimate public policy objective to be achieved (step 5 of the Razgar test). The case law lists possible relevant factors but leaves it to the decision-maker in an individual case to determine how best to balance the relevant factors, based on that person's individual perception of public policy considerations. Inevitably, caseworkers and the Courts have had to reach their own view on the public policy imperatives, without a clear statement from the Secretary of State and Parliament on where the public interest lies.

Since the new rules came into force, caseworkers and the Courts no longer operate in a policy vacuum. The facts of the individual case are the starting-point when considering proportionality, but they are the starting-point which then has to be balanced against the public interest as reflected in the new rules. The public interest achieved by applying clear rules must be measured by the effect of the rules across the board, not just in relation to an individual case.

As the new rules are the Secretary of State's statement of practice to be applied by her caseworkers it remains for a court or tribunal to determine whether an immigration decision is compatible with Article 8 on the facts of that case. This is clear from the legislation on appeals which states that an appeal must be allowed if the decision was not in accordance with the law. The appellate immigration authority, deciding an appeal, is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up-to-date facts. The need for the authority to have regard to the rules and public policy consideration, now clearly expressed by the Secretary of State in the new rules, is supported by Huang 2 -

"...the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be

unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.”

However, while the rules do not bind the Courts in the same way as primary legislation, they are a clear, democratically endorsed, statement of public policy which must now be taken into account by the Courts when assessing proportionality. The Secretary of State would expect the Courts to defer to the view endorsed by Parliament on how, broadly, public policy considerations are weighed against individual family and private life rights, when assessing Article 8 in any individual case. That is, save in a narrow group of cases where it is found that the consequences of the immigration decision are exceptional (discussed in section iii. of this letter).

In summary, the Government can interfere in the exercise of Article 8 rights where in the public interest it is necessary and proportionate to do so, including to safeguard the UK’s economic well-being by controlling immigration and to protect the public, by deterring foreign criminals and by removing them from the UK. Following the recent changes, the new rules now properly reflect the view of the Government and Parliament as to how the balance should be struck between that public interest and individuals’ rights under Article 8. The Government expects the Courts to have regard to that view in reaching their decisions.

The Secretary of State makes the following supplementary points:

(a) Controlling immigration in the UK’s economic interests and protecting the public are matters of public policy which it is the responsibility of the Government to determine, subject to the views of Parliament. The Immigration Rules, laid before Parliament by the Secretary of State under section 3(2) of the Immigration Act 1971, are a vehicle for the detailed expression of that policy. They are a statement of the normal practice to be followed by the Secretary of State’s caseworkers in making immigration decisions under the statutory framework that Parliament has provided. It is in the interests of a clear, consistent and transparent immigration system, in which applicants and the public can have confidence, that these rules should enable the Secretary of State’s caseworkers to decide individual cases lawfully and in accordance with the Government’s immigration policy

(b) When the Human Rights Act 1998 was commenced in 2000, no attempt was made to reflect the detailed implications of this in the Immigration Rules. In particular, the rules were amended, in paragraph 2, to require all Home Office staff to carry out their duties in compliance with the provisions of the Human Rights Act, but there was no substantive change to the family or private life part of the rules to reflect any consideration of proportionality under Article 8 and there was no attempt thereafter to align the rules with developments in case law. Instead, previous Secretaries of State asserted that if a Court thought that the rules produced disproportionate results in a particular case, the Court should itself decide the proportionate outcome on the facts before them rather than hold that the rule itself was incompatible with Article 8.

(c) This approach – which meant that the Courts could not give due weight to the Government’s and Parliament’s view of where the balance should be struck under Article 8 between individual rights and the public interest, as the Courts did not know fully what that view was – was not conducive to clear, consistent and transparent decision-making by the Secretary of State’s caseworkers. It meant that each case was decided by the Courts on its own facts without reference to the role of the Secretary of State as the primary decision-maker. It meant that foreign criminals and those who failed to meet the requirements of the Immigration Rules, and who should not therefore be allowed to come to or remain

in the UK, were increasingly able to challenge their decisions in the Courts on the grounds of a breach of Article 8.

(d) This approach did not properly reflect the responsibility of the Government and Parliament for determining the public policy framework under which immigration decisions should be taken. Indeed, it left the Courts to develop public policy themselves through case law on issues such as the appropriate level of maintenance for family migrants. Where Parliament had clearly expressed its views as to the public interest, the Secretary of State noted that the Courts would have regard to that, for example the deportation provisions in the UK Borders Act 2007.

(e) The recent changes to the Immigration Rules relating to family and private life deal with these issues. They fill the public policy vacuum the Government inherited by setting out the position of the Secretary of State on proportionality under Article 8, in the light of existing case law and of evidence such as the report of the independent Migration Advisory Committee on the minimum income threshold for sponsoring family migrants. The new rules state how the balance should be struck between individual rights and the public interest. They provide clear instructions for the Secretary of State's caseworkers on the approach they must normally take and they therefore provide the basis for a clear, consistent and transparent decision-making process

(f) The Secretary of State recognises that the Courts have a clear constitutional role in reviewing the proportionality of measures passed by Parliament and of the executive decisions made under them. However, as the Immigration Rules now explicitly take into account the public interest element of an assessment of proportionality under Article 8, the Secretary of State submits that the focus of the Courts when considering individual cases should be on considering proportionality in the light of this clear statement of public policy. The Government expects that the Courts will give effect to the determination of the Government and Parliament on matters of public policy.

(g) Both the new rules and the Secretary of State's guidance to her caseworkers make clear that the Immigration Rules are the starting-point for decision-making and are not absolute: no set of rules can deal with 100 per cent of cases. However, in light of the new rules, which incorporate the principles set out in the Strasbourg jurisprudence, the Secretary of State submits that only in exceptional cases will a decision made in accordance with the rules lead to a disproportionate outcome.

(h) In bringing forward the recent changes to the Immigration Rules relating to family and private life, the Government has sought to underline the importance of the views of Parliament on the issues of public policy to which the qualified right under Article 8 gives rise. The Government recognises that the procedure to which the Immigration Rules are subject under section 3(2) of the 1971 Act is not of the same order as the process for Parliamentary consideration of primary legislation. For that reason, the Immigration Rules cannot be said to carry the same weight as primary legislation in representing the settled view of Parliament on a matter of public policy. Nevertheless, the Immigration Rules are subject to Parliamentary scrutiny; they can be prayed against and debated in Parliament, as they were in the House of Lords on 23 October 2012; and they can be disapproved by a resolution of either House of Parliament. These procedures provide essential Parliamentary oversight and accountability for the Government's regulation of entry to and stay in the UK under the Immigration Rules.

(i) In the case of these recent rules changes, and within the constraints of the Parliamentary time available to it, the Government has supplemented the statutory procedure under the 1971 Act by tabling a motion inviting the House of Commons to agree that, in the context of the qualified right under Article 8, the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules. The House of Commons debated and

unanimously agreed the Government's motion on 19 June 2012. As Secretary of State set out in opening that debate (Hansard column 763):

"Of course, judges will continue to consider each case on its individual merits, but it is the Courts themselves that have said that Parliament needs to make its views clear. In a case in 2007³, the House of Lords said that a statement from Parliament was needed on where the public interest lies in the operation of Article 8 in immigration cases. The Court of Appeal, last year and this year⁴, has indicated that greater weight is to be given to the public interest when that has been endorsed by Parliament. Today's motion provides the Courts with the statement and the endorsement from Parliament that they have said is needed. The Courts should then give that statement from the elected legislature the weight that it deserves".

ii. Does the UKBA continue to accept that it is not reasonable to expect a British citizen party to genuine family life in the UK to relocate permanently abroad (paras 93 to 95 of Sanade and others [2012] UKUT IAC)? If not, why not and how is it compatible with Dereci to require an EU citizen to live outside the EU?

It was held in Dereci that EU law -

"does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union...",

The Court was aware of the need for Member States to consider Article 8 issues even where a third country national does not qualify to remain under EU law.

The Secretary of State continues to accept that where the primary carer of a British citizen is denied a Zambrano right of residence on the basis that his or her removal or deportation would not force the British citizen to leave the EU, it will not logically be possible when considering any Article 8 claim made by such a person to determine their claim on the basis that the family (including the British citizen) can relocate together to a place outside the EU. However, the Secretary of State does not accept that it follows that there will be no circumstances in which a decision taken in respect of the primary carer of a British citizen can require that British citizen to leave the UK. The Secretary of State does not consider that the UK Border Agency letter sent to the Tribunal in Sanade suggested that she did accept that it is never reasonable to expect a British citizen party to genuine family life in the UK to relocate permanently abroad but apologises for any lack of clarity in the correspondence which may have caused the Tribunal to reach this conclusion

The Secretary of State makes the following points in relation to these issues:

(a) It is clear that the effect of Zambrano (as clarified by the subsequent decision of the ECJ in Dereci) is that a Member State cannot deny the primary carer of an EU citizen a right of residence where to do so would force the EU citizen to leave the EU because they are unable to remain in the EU without the support of their primary carer. A decision to remove or deport a primary carer to another Member State would therefore be compatible with the Zambrano judgment even if that decision forced a British citizen to relocate to that Member State. It is therefore not the case that any decision which

has the effect of forcing a British citizen to leave the UK is incompatible with the judgment in Zambrano.

(b) It is the Secretary of State's position that the proposition in Zambrano cannot sensibly be read as imposing a complete bar to the deportation or removal of the primary carer of an EU citizen in circumstances in which that decision would force the EU citizen to leave the EU. Such a proposition would suggest that irrespective of the severity of the threat to public policy posed by such a person, the Member State in question would be powerless to take any action to remove or deport them. This is not a proposition which the Secretary of State accepts and is difficult to reconcile with the fact that even the rights conferred directly by the Treaties are subject to limitation on public policy grounds.

(c) The Secretary of State therefore submits that Member States must be entitled to refuse to recognise Zambrano rights in cases where the primary carer in question can be deported under the domestic law of the relevant Member State. In such cases there would therefore also be the prospect of an EU citizen being required to leave the EU. This position is now reflected in the Immigration (European Economic Area) Regulations 2006 following their amendment by the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012.

(d) Dereci did not extend the rights of a family member of an EU citizen who has never exercised their free movement rights to put that family member on a par with the family member of an EU national who is exercising free movement rights. A person's status as an EU citizen allows them to be joined by their family members who do not benefit from EU law rights only in accordance with the domestic law of their Member State and having proper regard to their rights under Article 8. Therefore, it does not add to the consideration of the new rules and Article 8 already required.

iii. Your letter of 9 October invited the claimant to respond to the following question:

Now that the rules make express provision for Article 8 claims to remain, is it accepted that the circumstances whereby a person who fails under the rules but may succeed under the law relating to Article 8 will be narrower and will be exceptional having regard to the new criteria? If not, why not?

If it is helpful to the Tribunal, the Secretary of State, in answering this question in the affirmative, would submit that "exceptional" does not equate here to "unusual". Instead, "exceptional" should mean

circumstances in which refusal of an Article 8 claim on the basis that the requirements of the new Immigration Rules were not met would result in an unjustifiably harsh outcome for the claimant.

The Secretary of State's view on this point is informed by the Supreme Court's assessment of the proper operation of Article 8 in the context of extradition proceedings. 5

As Lady Hale commented at paragraph 32 of that judgment:

"32. The second main criticism of the approach in later cases is that the courts have not been examining carefully the nature and extent of the interference in family life. In focussing on "some quite exceptionally compelling feature" (para 56 in Norris), they have fallen into the trap identified by Lord Mance, tending "to divert attention from consideration of the potential impact of extradition on the particular persons involved ...towards a search for factors (particularly external factors) which can be regarded as out of the run of the mill" (para 109). Some particularly grave consequences are not out of the run of the mill at all. Once again, the test is always whether the gravity of the interference

with family life is justified by the gravity of the public interest pursued (see also Lord Wilson, at para 152). Exceptionality is a prediction, just as it was in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368, and not a test. We are all agreed upon that”.

In considering, in the light of this judgment, the operation of Article 8 in the immigration case now before the Tribunal, the Secretary of State would submit that there are no exceptionally serious consequences for this claimant to outweigh the clear public interest in her removal from the UK. She is a serious immigration offender. She should expect to be removed from the UK. The public interest in effective immigration control reflected in the new Immigration Rules requires that she be refused leave to remain in the UK. The Secretary of State submits that there is nothing to prevent the claimant and her husband continuing their family life together outside the UK. And, if the consequences for her and/or her husband of relocating to Nigeria are harsh, which the Secretary of State does not accept, then those consequences are justified by that clear public interest

Yours sincerely,

CLIVE PECKOVER

Head of Family Migration Policy

1 Razgar v SSHD [2004] UKHL

2 Huang v SSHD [2007] UKHL

3 Huang v SSHD [2007] UKHL

4 RU (Bangladesh) v SSHD [2011] EWCA; Gurung v SSHD [2012] EWCA

5 HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC

Appendix B

Claimant’s written submissions in reply

REPLY ON BEHALF OF RESPONDENT

TO DIRECTIONS OF 9 TH OCTOBER 2012

Introduction

1. On 9 th October 2012 the Upper Tribunal (Immigration and Asylum Chamber) directed that the Appellant Secretary of State for the Home Department (“SSHD”) should respond to two specified questions by 24 th October 2012 and that the Respondent Ms. Izuazu (“R”) should by 31 st October 2012 reply to any further submissions for the Appellant and to a further question posed by the Tribunal to R. The question for R is as follows:

Now that the rules make express provision for Article 8 claims to remain, is it accepted that the circumstances whereby a person who fails under the rules but may succeed under the law relating to Article 8 will be narrower and will be exceptional having regard to the new criteria? If not why not ?

2. R's answer is "No", for the following five reasons, which are developed below:

a. It is established principle that there is in law no exceptionality test in Article 8 cases involving immigration;

b. The Rules are executive statements of policy, and do not carry a legislative imprimatur sufficient to alter the correct legal test. The suggestion to the contrary is wrong in principle and ill-founded in context;

c. In the appellate context, no deference is owed to the executive assessment of where the public interest in removal lies. There are no institutional grounds (based on lack of appellate expertise) nor constitutional grounds (based on accountability) for such deference. The question is one of weight, and the approach is not altered because the Rules now seek to make (inadequate and inaccurate) provision for Article 8: before the recent changes, the Secretary of State was obliged to and did make Article 8 assessments case by case;

d. The Rules operate independently of Article 8. The success of an Article 8 claim is not to be measured by its proximity to meeting the requirements of the Rules;

e. The approach of the Strasbourg Court to Article 8 cases does not vary according to the stringency of the municipal immigration policy at issue. The assessment is independent.

R's reasoning on the points is set out sequentially below.

(1) No exceptionality test in law

3. In *Huang v SSHD*; *Kashmiri v SSHD* [2007] UKHL 11; [2007] 2 AC 167, Lord Bingham for the House famously held that, unlike the position in housing cases, the Rules did not and could not strike the balance between private right and public interest in the way that housing legislation over the years had [underlining added]:

17. Counsel for the Secretary of State nevertheless put his case much higher even than that. She relied by analogy on the decision of the House in *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, where the House considered the article 8 right to respect for the home. It held that the right of a public authority landlord to enforce a claim for possession under domestic law against an occupier whose right to occupy (if any) had ended and who was entitled to no protection in domestic law would in most cases automatically supply the justification required by article 8(2), and the courts would assume that domestic law struck the proper balance, at any rate unless the contrary were shown. So here, it was said, the appellate immigration authority should assume that the Immigration Rules and supplementary instructions, made by the responsible minister and laid before Parliament, had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community. The analogy is unpersuasive. Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.

4. The reasoning in Huang is not undermined because the Secretary of State asserts her own view as to the Article 8 balance in the Rules. The Rules are not the subject of active debate and discussion over the years, and immigrants or potential immigrants are not represented. The Article 8 balance remains for the Courts, whose task (classically) is to safeguard the rights of vulnerable minorities. In a different context, as Justice Jackson for the US Supreme Court famously held, “ The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. ”: *West Virginia State Board of Education v. Barnette* 319 U.S. 624 (1943), at 638.

5. The conclusion in Huang as to exceptionality was of course as follows:

20. In an article 8 case ... the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* , para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test.

6. There are two points to note concerning this passage. The first obvious point is that the Committee reversed the approach of the Court of Appeal at [2005] EWCA Civ 105; [2006] QB 1, as set out by Laws LJ at §§52-62. This considered the Immigration Rules themselves to “ strike the balance between the public interest and the private right ” and to be entitled to deference as having Parliamentary imprimatur:

58. In the present case the policy is given and the balance struck by the Rules and not by main legislation. But the balance so struck is not in our judgment entitled to less respect or deference on that account. We would emphasise the particularity with which the Rules have prescribed which classes of aliens will in the ordinary way be allowed to enter the United Kingdom and which will not

7. Second, Lord Bingham’s “expectation” as to exceptionality in Huang was not one he held with respect to the vertical or horizontal splitting of nuclear families. Indeed the expectation in such cases was reversed : it would be the “rare” case where a separation of spouses or a parent and child would be sanctioned by the Court. This was made plain in *EB (Kosovo) v SSHD* [2008] UKHL 41; [2009] 1 AC 1159, one of the four Article 8 cases decided a year after Huang, at §12, and in *Chikwamba v SSHD* [2008] UKHL 40; [2009] 1 All ER 363 at §44 . Huang and Kashmiri concerned non-nuclear family relationships (grandmother, adult daughter and grandchildren; adult son respectively).

(2) The Rules are executive statements of policy

8. As the Secretary of State recognises, the Rules are a “ statement of her practice in deciding applications ” (Secretary of State's submissions of 24.10.12). R’s Skeleton rehearsed the case law making it plain that the Rules are statements of executive policy: Skeleton at §§18-19.

9. The Rules do not have sufficient legislative imprimatur to alter the Huang approach. The Secretary of State's contrary submission is wrong in principle and ill-founded in context.

Principle

10. The principled position is plain from Huang itself (see preceding submissions), and was underscored in a "policy" context both in Chikwamba (see R's Skeleton at §20(b), pp. 8-9), and in R (otao Quila & Anor) v SSHD [2011] UKSC 45; [2011] 3 WLR 836, §§44-46.

11. In the latter case, Lord Wilson for the majority (Lord Phillips P, Lady Hale and Lord Clarke) held at §46 that [underlining added]:

46. ... Lord Brown's call, at para 91 below, for the courts in this context to afford to government a very substantial area of discretionary judgement is at odds with my understanding of the nature of their duty. Indeed, in the case of Huang ... Lord Bingham proceeded to explain, at para 16, that it would be wrong to afford "deference" to the judgments of the Secretary of State on matters related to the above questions albeit that appropriate weight had to be given to them to the extent, in particular, that she was likely to have had access to special sources of knowledge and advice in connection with them. He added, at para 17, that, notwithstanding the limited right of Parliament to call upon the Secretary of State to reconsider proposed changes in the Immigration Rules provided by section 3(2) of the Immigration Act 1971, it would go too far to say that any changes ultimately made had the imprimatur of democratic approval such as would be relevant in particular to any answer to [the fair balance proportionality] question ...

12. Quila concerned the proportionality of an amended provision of the Rules as to marriage. Lord Brown had held (in a minority view) that:

91. Really these questions are questions of policy and should be for government rather than us. Of course, the ultimate decision on article 8(2) proportionality must be for the courts but in this particular context the courts should to my mind accord government a very substantial area of discretionary judgment. Huang v Secretary of State for the Home Department [2007] 2 AC 167 (to which Lord Wilson refers at para 46 of his judgment) was a very different sort of case from the present, concerning as it did the article 8 claims of two particular individuals on their own special facts. No one was seeking there, as here, actually to strike down an immigration rule. Certainly, at paragraph 16 of the committee's opinion (given by Lord Bingham) in Huang, we deprecated the use of the term "deference" to describe the weight to be given to certain factors considered important by the Secretary of State. But we expressly recognised the need to accord "appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice." That is precisely what I am suggesting should be done here: it is the Secretary of State who has the responsibility for combating forced marriages in the context of immigration and who should be recognised as having access to special sources of knowledge and advice in that regard.

13. Indeed Lord Brown's minority view is difficult to square with his own approach in Chikwamba, to the Secretary of State's "policy" of requiring prior entry clearance.

14. The fact that the Secretary of State has sought to address Article 8 considerations in the Rules therefore does not attract deference, or weight, any more than her case-by-case consideration of Article 8 did before HC 194.

15. Nor do the Rules attract deference or greater weight because they fill a “ policy vacuum ” or represent “ democratic endorsement ” or “ Parliament’s view ”: these themes run through the Secretary of State's further submissions in this case and are redolent of the approach of the Court of Appeal’s decision in Huang overturned by the House of Lords (see above). Policy is subject to law, not vice versa , as the House of Lords/Supreme Court recognised in Huang, Chikwamba and Quila . The Rules are executive statements of policy; they are not Parliament’s view of where the balance in Article 8 cases lies, as between the State and the individual.

Context

16. Moreover, in the present context, and given the nature of the debate before the House of Commons, these principled objections to affording the Rules a legislative warrant sufficient to alter the Huang approach are all the more strong. See R’s Skeleton at §24(c) pp.15-18.

(3) No deference

17. In the appellate context, in the ordinary run of immigration cases, there is no basis for deferring to the Secretary of State's view of where the balance lies. Firstly there is the observation of Lord Bingham in Huang , at §15, that the appellate authority, having heard evidence under cross examination from the appellant and witness, will very often be better placed than the Secretary of State in assessing the strength of family life and therefore better placed that the Secretary of State to perform the Article 8 balancing exercise.

18. Second, there are no institutional reasons, concerning expertise, for affording deference to the Secretary of State. The specialist appellate authority had long been assigned the task by Parliament to consider, and has built up expertise in assessing, the strength of the case for removal in individual cases on the merits . Contrary to the Secretary of State's further submissions, in an appellate context, she is not the “ primary decision-maker ”. Consider the IAT’s longstanding previous merits jurisdiction under s15 IA 1971 concerning deportation appeals where removal was asserted to be conducive to the public good. Lord Wilson in Quila at §46 was with respect correct in summarising Lord Bingham in Huang, at §16, to the effect that appropriate weight had to be given to the Secretary of State’s view “to the extent” that she was likely to have had access to special sources of knowledge and advice .

19. Thirdly, there are no constitutional reasons, concerning the separation of powers, for affording deference to the Secretary of State. The Tribunal’s jurisdiction to hear merits appeals is of course entirely statutory.

20. Craig, Administrative Law , 7 th edition, 2012 concludes (at 20-036) that the Court owes no deference to the decision maker in an appellate context.

21. Accordingly, there is no reason now to give greater weight to the Secretary of State's assessment of Article 8 considerations in the Rules than there was before HC 194 to the Secretary of State's assessment in individual cases. See R’s Skeleton at §24ff, p.19. The judicial task is not transformed. Still less is it transformed by a set of Rules that blatantly misrepresent the binding learning on Article 8, e.g. as to insurmountable obstacle, exceptionality and so forth. It is ambitious in the extreme to suggest that they “ incorporate the principles set out in the Strasbourg jurisprudence ” (Secretary of State's further submissions).

(4) The Rules operate independently of Article 8

22. The balance of the case-law indicates that the Rules operate independently of Article 8. The implicit premise contained in the UT's question to R is the flip-side of the "near-miss" argument, which has been rejected by the Courts. The success of an Article 8 claim is not to be measured by its proximity to meeting the requirements of the Rules.

23. Thus in *Miah; Bibi; and Salman v SSHD* [2012] EWCA Civ 261; [2012] 3 WLR 492, the Court of Appeal (Maurice Kay, Stanley Burnton, and Lewison LJ) rejected various submissions based on what it called the "near-miss argument", delineated by Stanley Burnton LJ at §2 as being "that where an appellant misses satisfying the requirements of the Immigration Rules by a small margin, and contends that his removal from the UK will breach his rights under Article 8, the weight to be given to the maintenance of immigration controls should be diminished for the purpose of the assessment as to whether his removal from this country should be permitted under Article 8(2)." The Court held, endorsing earlier decisions in *Mongoto v SSHD* [2005] EWCA Civ 751 and *Rudi v SSHD* [2007] EWCA Civ 1326, that the existence of the Immigration Rules or of policy in other forms did not enable what Laws LJ, in *Mongoto* at §25, described as "the building of expectations approaching enforceable rights on the back of such a policy for the benefit of persons to whom, in terms, the policy did not apply and, it is assumed, was not intended to be applied..." In *Rudi Carnwath LJ* had said of the near-miss argument that "This argument is, in my view, based on a misconception. The Secretary of State is of course entitled to have a policy. The promulgation of the policy normally creates a legitimate expectation that it will be applied to those falling within its scope unless there is good reason for making an exception. So much is trite law. It is also trite law that the existence of the policy does not excuse the decision-maker from due consideration of cases falling outside it. However, the law knows no "near-miss" principle. There is no presumption that those falling just outside the policy should be treated as though they were within it, or given special consideration for that reason."

24. Similarly, Blake J in *R (Mansoor) v SSHD* [2011] EWHC 832 (Admin) expressly rejected the proposition that the Immigration Rules represented in themselves a legitimate aim in their own right and/or themselves came to represent the balance to be struck between the public interest and the rights of the individual:

34. The terms of the immigration regulations are not themselves a legitimate aim within the context of Article 8.2, but as has been repeatedly pointed out maintaining the integrity of our system of immigration control is a means of protecting the economic well-being of the country and may thus justify an interference with family life. Lord Bingham makes the point in *Huang* that deception and fraud and the perception that our borders should be should be discouraged. The removal of those who commit serious criminal offences, enter unlawfully and in breach of previous orders, and who remain with no colour of an arguable claim to do so may engage more than one legitimate aim within Article 8(2) but protecting the economic well-being of the country is normally the most appropriate one to consider.

35. However the terms of the immigration rules are not a legitimate aim in their own right. Family life is not to be interfered with to protect the Immigration Rules and their numerous requirements. A judgment needs to be made as to how significant the aim, and how far the removal of the particular claimant in the circumstances of her case is necessary to promote that aim. The mere fact that a genuine spouse lawfully admitted with her British citizen husband and settled children can no longer meet one requirement of the rules through no fault of her own is unlikely to amount to a weighty reason to justify interference with family life here that otherwise to be respected. The importance of this observation may be illustrated by the facts of this case. The claimant never got ILR simply because her husband was made redundant and therefore had recourse to public funds to which he

and the children were entitled but the claimant, because of the period of time when she was subject to conditional leave, could not have recourse. As Lady Hale has pointed out, general considerations of economic well-being, where other factors are strongly in favour of the claim, are unlikely to be of great weight.

36. The claimant only failed to meet the Rules because she (unlike her children was subject to the two year requirement). This was not a requirement imposed to prohibit general future dependency on state funds, but to guard against insubstantial marriages. This was not a consideration that could apply to the this marriage and this claimant. Certain rules applied to people in different circumstances than the mischief aimed at can have disproportionate outcomes as the Court of Appeal have more recently made plain in the case of *Quila & Anr v SSHD* [2010] EWCA Civ 1482.

37. Non-compliance with the Immigration Rules is the starting point for human rights analysis, because if you can comply with the rules you do not need to rely on human rights to remain; it is not the end point. The Rules themselves as Lord Bingham has pointed out in *Huang*, are not the source of balance between the public interest and that of the individual.

38. It is thus misdirection for the decision maker to state as in this case, the policy of the immigration regulations justifies interference with family life. It would be of considerable benefit if decision-makers grappled with that point in the future.

This is considered and evidently approved in *SSHD v Treebhowan*; *SSHD v Hayat (Pakistan)* [2012] EWCA Civ 1054, at §76 per Elias LJ, effectively giving the judgment of the Court.

(5) The Strasbourg approach does not vary according to the stringency of local immigration laws

25. The point can be tested by considering the approach in Strasbourg to Article 8 cases. The Strasbourg Court's approach does not vary according to the stringency of the municipal immigration policy at issue. The assessment of Article 8 is independent of local policy.

(6) Further matters

26. The Secretary of State's reliance on extradition authority (*HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25; [2012] 3 WLR 90) is telling. Plainly nothing in *HH* was intended to nor did alter the approach in the House of Lords/Supreme Court immigration Article 8 cases.

27. The Secretary of State's concession in *Sanade and others (British children -Zambrano - Dereci)* [2012] UKUT 48 (IAC) at §94 was well made. It will be unreasonable - and a denial of EU citizenship and local nationality - to expect an EU citizen to move to a country outside the EU as the price for maintaining family life. This is the logical result of the trio of CJEU cases in *Ruiz Zambrano* (European citizenship) [2011] EUECJ Case C-34/09 OJ 2011 C130/2; [2012] QB 265 , *McCarthy* (European citizenship) [2011] EUECJ C-434/09; [2011] 3 CMLR 10 and *Dereci & Ors* (European citizenship) [2011] EUECJ C-256/11.

28. This factor was not weighed by the FTT and adds to the harshness of expected R's husband to relocate to Nigeria. It also heightens the threshold of justification which the Secretary of State is required to meet to justify R's expulsion and the separation of the couple.

Conclusion

29. Article 8 is a fundamental right, upon which there are authoritative statements of law which HC 194 crudely seeks to challenge. Fundamental rights and the law are not subject to the vicissitudes and political expedients of executive policy. HC 194 does nothing to alter the approach to Article 8 in an appeal as a matter of law.

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30 October 2012