ARTICLE 8 REVIEW
18 March 2021

This webinar will provide an overview of Article 8 family caselaw, some recent and some well established, and the practical effects of these developments. Amarjit Seehra will be focusing on EX.1.(b) and the insurmountable obstacles test to family life continuing outside the UK, and other developments. Jamil Dhanji will be considering wider arguments under Article 8 ECHR.

INSURMOUNTABLE OBSTACLES – EX.1.(b) Appendix FM

Introduction

1. GEN 1.1 of Appendix FM defines its **purpose** as a route for those seeking to enter or remain in the UK on the basis of their family life with for example:
   - A British Citizen;
   - A person who is settled in the UK; or
   - One who is in the UK with limited leave as a refugee or person granted humanitarian protection (and who cannot apply under Part 11 of the rules)
   - A person with limited leave under Appendix EU

   Purpose

   *GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules), is in the UK with limited leave under Appendix EU, or is in the UK with limited leave as a worker or business person by virtue of either Appendix ECAA Extension of Stay or under the provisions of the relevant 1973 Immigration Rules (or Decision 1/80) that underpinned the European Community Association Agreement (ECAA) with Turkey prior to 1 January 2021**. It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002).** It also takes into account the need to safeguard and promote the welfare of children in the UK , in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009.*

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2. Under GEN 1.2, the term "partner" is defined as:

   GEN.1.2. For the purposes of this Appendix "partner" means-

   (i) the applicant's spouse;
   (ii) the applicant's civil partner;
   (iii) the applicant's fiancé(e) or proposed civil partner; or
   (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix.

3. The specific requirements appear in Appendix FM: Family members, Family life with a partner.
   https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members

4. Requirements for limited leave to remain under R-LTRP.1.1. include that:
   - Both the Applicant and partner must be in the UK
   - Must have made a valid application
   - Must not fall foul under the suitability requirements (Section S-LTR: Suitability-leave to remain)
     AND EITHER

   - Meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner
     OR
   - Meets the requirements of paragraphs E-LTRP.1.2-1.12 and E-LTRP.2.1-2.2, and paragraph EX.1. applies

5. In order to fulfill ALL of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner, the Applicant must satisfy the rules in relation to relationship, immigration status, financial means, and English Language. Alternatively, the Applicant can show the requirements of E-LTRP.1.2-1.12 (relationship) and E-LTRP.2.1-2.2 (immigration status) are met, and that paragraph EX.1. applies. For immigration status requirements, in summary, the Applicant:

   - Must not be in the UK as a visitor or with valid leave granted for a period of 6 months or less (unless it falls within a certain category – see E-LTRP.2.1.)
   - Must not be in the UK on immigration bail unless the Applicant arrived more than 6 months prior to the date of application and paragraph EX.1. applies (E-LTRP.2.2.)
   - Must not be in breach of immigration laws (except see paragraph 39E of the rules where any current period of overstaying is disregarded) unless paragraph EX.1. applies

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Rules under EX.1(b). and EX.2. – Insurmountable obstacles

6. Section EX provides the exceptions to certain eligibility requirements for leave to remain as a partner or parent:

   EX.1. This paragraph applies if
   (a)
   (i) the applicant has a genuine and subsisting parental relationship with a child who-
   (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
   (bb) is in the UK;
   (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
   (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or

   (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), ***and there are insurmountable obstacles to family life with that partner continuing outside the UK.***

   EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

7. Section EX.1.(b) requires "**insurmountable obstacles**" to family life with the partner continuing outside the UK. What does that mean? Section EX.2. defines insurmountable obstacles as:

   - **very significant difficulties** which would be faced by the Applicant or their partner in continuing family life outside the UK and
   - which **could not be overcome**
     OR
   - would entail **very serious hardship** for the Applicant or partner

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Case law

Lal [2019] EWCA Civ 1925

8. The Appellant was an Indian national and a student. Prior to the expiry of her leave she married her partner, a British Citizen, and in 2015 she made an application for leave to remain. The only issues relied upon by the SSHD were whether their relationship was genuine and subsisting, and whether they intended to live together permanently in the UK. The FTJ accepted the relationship was genuine and the financial requirements not being met by the Appellant, proceeded to consider briefly paragraph EX.1. and allowed the appeal. The SSHD successfully appealed to the UT.

9. Permission to appeal to the Court of Appeal was granted on the question of whether the test was subjective or objective. The Court explained the logical approach to insurmountable obstacles as a series of questions:

- First whether the obstacle amounted to a "very significant difficulty"
- Second whether the difficulty made it impossible for family life to continue outside the UK
- Third, if not impossible, whether it nevertheless entailed very serious hardship for the Applicant and / or partner. In considering this, the parties needed to consider the steps that could reasonably be taken to avoid or mitigate the difficulty.

10. As to whether the test was a subjective or objective test, it was not enough for the Appellant to show that the individual would perceive the difficulty as insurmountable, as this could give an unfair advantage to someone who was less resolute. The Court essentially held that it was not subjective in that sense, although regard was still to be had to the "*particular characteristics and circumstances*" of the individual concerned. It also expressed some doubt about whether it was necessary for the Appellant to show EX.1 applied where the SSHD reasons for refusing the application were limited to whether the relationship was genuine and subsisting.

11. The Court referred to the partner's evidence (he was a retired man in his 70s who could not bear hot temperatures) and that he would not in fact go to India with the Appellant but considered that proof of these facts by itself was insufficient to establish insurmountable obstacles.

12. The question of whether there was "very serious" hardship and not just a significant degree of hardship or merely inconvenience was one of fact requiring a detailed examination of all of the facts. The Court considered that medical evidence was not required to show that exposure to hot weather was harmful if the other evidence available was "sufficiently compelling". In terms of the level of detail required, at paragraph 38 the Court posed a number of questions when considering the hot climate in India. For example:

- Where could the couple reasonably live in India?
- What were the average temperatures in that part of India during different periods?
- What steps could be taken to mitigate the heat e.g. air conditioning?
- How adequate would such steps be to meet the difficulty?
- Were there cooler places where they could live?

13. The Court considered the UT was entitled to find there were no insurmountable obstacles because of the lack of evidence on relevant issues. This highlights the importance of ensuring that the best possible evidence is presented in support of any application / appeal. However the Court also held that the Upper Tribunal Judge had erred by failing to assess all relevant factors and their cumulative impact. Experience shows that this is a common ground of appeal:

> *45…What the judge ought to have done was to identify all the significant difficulties which Mr Wilmshurst would face if required to move to India and to ask whether**, taken together**, they would entail very serious hardship for him.*
>
> *46. Had the judge approached the issue in that way and considered in combination Mr Wilmshurst's age, his proven sensitivity to heat, the fact that he has lived all his life in the UK, and his ties to friends and family including his four children and six grandchildren in the UK, we do not think that the answer to the question whether moving to India would entail very serious hardship for him is a foregone conclusion.*

AA (AP) [2019] CSOH 56

14. *AA* was a Ghanaian national who had applied for leave to remain the UK with his British Citizen wife. He petitioned for judicial review in the Outer House, Court of Session. His wife suffered from medical illnesses including cancer and she was unable to fly due to medical reasons. He had provided detailed evidence of his family circumstances, the lack of support available to him, medical evidence in relation to his wife, and information about the research he had conducted into the lack of medical care available in Ghana but his appeal had been refused.

15. It was accepted that considerations of immigration control were irrelevant to paragraph EX.1 because it only applied where all of the eligibility requirements were not satisfied. Citing *Agyarko and Ikuga* [2017] UKSC 11, the Court reiterated that the test for insurmountable obstacles was distinct from a proportionality assessment for Article 8 purposes [3]:

> *"By virtue of paragraph EX.1(b), 'insurmountable obstacles' are treated as a requirement for the grant of leave under the Rules in cases to which that*

paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. ***Even in the case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in 'exceptional circumstances', in accordance with the Instructions: that is to say, in 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate'"****.*

AS (AP) [2019] CSOH 43

16. *AS* involved a judicial review of a refusal of a fresh claim. He relied upon country information and an expert report on the difficulties his British Citizen wife would face in India including the acquisition of visas, financial obstacles, absence of comprehensive medical care, gender violence, cultural and linguistic difficulties, and lack of access to state benefits. In general terms the treatment of women in India was argued to be a relevant consideration which the SSHD had failed to take into account and there were specific examples within the report of violence against women of non-Indian origin. The Court confirmed the assessment of insurmountable obstacles where "*all factors require to be taken into account*" was not a proportionality assessment. It also indicated in strong terms that these were matters that *could* support a claim:

"…it is on the face of it relevant material that goes to the heart of whether a British citizen who has lived here all of her life, does not normally travel and has certain medical conditions would be able to cope with the considerable challenges of attempting to settle in a country where her legal ability to do so is no higher than having a right to apply for a visa, the threshold test for which is "very high" (Puri report page 32) and where significant linguistic and cultural barriers would be faced. ***Those are matters which are squarely raised by the new material such that an adjudicator could interpret it as supporting an insurmountable obstacles claim.*** *The respondent's own Country Guidance Information which as indicated is consistent on the issue of violence against women with Mr Puri's report, was clearly within the respondent's knowledge and is not referred to even in passing in the reasoning within the decision letter. An Immigration Judge would give careful consideration to that documentation, emanating as it does from the respondent.*

Mendirez [2018] CSIH 65

17. *Mendirez*, a Turkish national, entered the UK lawfully and formed a relationship with a UK citizen. They lived together in Scotland and

married. The Court criticised the FTT decision for its failure to consider the evidence with anxious scrutiny and to make important findings of fact on relevant issues such as their relationship, its duration, private life ties, the effect of the Appellant returning back to Turkey, and how easy it would be to find accommodation and employment. There were no findings on the Appellant's wife's status as a non-Muslim, her objections to wearing a hijab, and that the Appellant was a non-practising Muslim (note that the home office policy guidance considers cultural / religious barriers to relocation as relevant factors). The Court observed a finding from *MN (Somalia)* [2014] SC (UKSC) stating:

32…As Lord Carnwath observed in MN (Somalia) v SSHD at paragraph 31 when considering the expression "anxious scrutiny",

> *"It has by usage acquired special significance as underlining the very special human context in which such cases are brought, **and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account**."*

R (Kaur) [2018] EWCA Civ 1423, R (Mudibo) [2017] EWCA Civ 1949

18. The importance of detailed and supporting evidence was further highlighted by the cases of *Kaur* and *R (Mudibo) [2017] EWCA Civ 1949*. In *Kaur* the Court indicated there was a paucity of evidence on the issue of insurmountable obstacles. It was asserted that the Appellant would have no means of support in India but the Court considered that it should have been explained how she lived in India after her husband entered the UK, why her situation would now be different and what the couple's financial position would be if they returned. It was clear that the parties would prefer to remain in the UK but that did not meet the stringent test. There was a clear distinction between evidence and mere assertion.

19. In *Mudibo*, the Court considered that the claim to insurmountable obstacles was mere assertion. The evidence on whether the Appellant's husband could work and support himself in Tanzania, the standards of medical care, what skills he had, the obstacles to employment and employment prospects for both parties, was considered tenuous and the medical evidence old and brief.

Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129

20. *Younas* was an example of where the SSHD accepted that there were insurmountable obstacles to family life continuing outside the UK but the Appellant could not succeed under EX.1. because she was a visitor at the time she made her application. The Appellant was found to have a genuine relationship with a British Citizen who had two teenage sons from a previous relationship and whom he saw regularly. The appeal was considered under Article 8 and dismissed.

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Home Office policy guidance

21. The Home office policy guidance on EX.1. explains that it is not a standalone provision. It sets out a non-exhaustive list of factors which might help when preparing an application/ appeal based upon there being insurmountable obstacles. For example:

- Whether parties can lawfully enter and remain in the proposed country.
    - In an example provided in the policy guidance it accepted that where an individual would be unable to gain entry to the proposed country this would be impossible to overcome
- Where the Sponsor has status through the refugee route and the partner is of the same nationality
- National laws, attitudes, country situation
- Serious cultural barriers to relocation e.g. where the partner would be *so* disadvantaged by the social, religious or cultural situation that they could not be expected to live there
    - The guidance referred to examples of same sex or inter-faith couples where the partner would face a real risk of prosecution, persecution or serious harm
- Mental / physical disability
- Serious illness requiring ongoing treatment, lack of adequate healthcare
- Absence of governance or security in the proposed country
- Unusual or exceptional dependency between extended family members
- Being separated from a child from a former family relationship could be relevant

Family Policy, Family life (as a partner or parent), private life and exceptional circumstances Version 13.0 28 January 2021
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957302/family-life-_as-a-partner-or-parent_-private-life-and-exceptional-circs-v13.0-ext.pdf

22. The guidance did not consider lack of knowledge of the language spoken in the proposed country or a material change in quality of life an insurmountable obstacle, unless the latter amounted to a particular hardship or there were exceptional factors. Note that the policy guidance is guidance for decision makers and not a strait jacket on the factors that could be raised in an application / appeal.

Comment

23. One topical scenario where you might think there would be insurmountable obstacles to family life continuing outside the UK is where a partner is unable to legally enter the Appellant's proposed country because of the

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pandemic. Even the Home Office's own guidance appears to suggest there would be insurmountable obstacles in these circumstances. However, experience has shown that it is not straightforward and the Court / Home Office have suggested this was only a temporary state of affairs and that family life could still continue albeit with a period of temporary separation.

24. It may also be helpful to consider whether:
    - There would be an economic impact of continuing family life outside the UK leading to destitution
    - Are they able to support and house themselves? Is there background evidence that can show the proposed country is in a state of deep economic recession?
    - Would there be an impact on the parties' ability to earn a living for example, as a result of any medical issues?
    - Are there medical / general health issues? Ensure that in so far as is possible, any information put forward is comprehensively evidenced. For example medical conditions should be supported by medical reports, GP records, counselling records if relevant, background country information and detailed witness evidence
    - Is there an impact on other family members in the UK e.g. because the Applicant / partner is the main carer?
    - Are there other issues of dependency / relevant social or other ties?
    - Can family life be continued outside the UK, in any meaningful sense, in their circumstances?

Pandemic issues

25. Consider obtaining background evidence from the Foreign & Commonwealth Office and other health websites. The FCO website provides information which could be helpful when preparing an application / appeal (Note – the Home Office policy guidance prefers the use of relevant country information rather than FCO travel advice). For example in one instance there was useful information on the difficulties of travelling into and out of the proposed country, guidance on non-essential travel, quarantining and self-isolation periods, that non-citizens were unable to enter legally (e.g. FCO advice for Sri Lanka is that entry for non-nationals is prohibited and for Malaysia entry for British Nationals is prohibited although there may be some exemptions), the difficulties with curfews and the impact of the pandemic on the healthcare structure in the proposed country. All of these factors could assist in presenting factors in support of there being insurmountable obstacles.

26. There are websites such as Travel Health Pro and Centres for Disease Control and Prevention (national public health institute in the US), in addition to the NHS website, where information is provided about the current risk of exposure to COVID-19 in certain countries and individuals at higher risk. These could help in establishing whether there is a higher

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risk of exposure in certain countries (e.g. Albania, India), particularly to a person who is considered vulnerable.

27. Note that if the Appellant meets the requirements of the rules then the refusal of leave is disproportionate and incompatible with Article 8 - *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109.

NOT REASONABLE TO EXPECT THE CHILD TO LEAVE THE UK?

Runa [2020] EWCA Civ 514

28. The question of whether it "*would not be reasonable to expect the child to leave the UK*" in EX.1.(a)(ii) is the same as in section 117B(6) of the Nationality Immigration and Asylum Act 2002. In *Runa* [2020] EWCA Civ 514 the Court of Appeal confirmed that when considering section 117B(6), it was a self contained provision where the focus was on the child and the only question to be asked was whether it was reasonable to expect the child to leave the UK. This was a fact-finding exercise. If the answer was no, then there was no need to consider Article 8(2) more generally. If the answer was yes, then a conventional proportionality assessment was required. The question was not whether there were insurmountable obstacles to family life outside the UK, or whether the children could remain with their father in the UK. This was considered fundamentally the wrong approach. The Court also referred to *AB (Jamaica)* [2019] EWCA Civ 661 where the Court rejected the SSHD submission that there was no need to ask the section 117B(6) question where it was not expected that the child would leave the UK. The Court stated that this was a single question, which always had to be asked.

29. *UT (Sri Lanka)* [2019] EWCA Civ 1095 and *SD (British Citizen children – entry clearance) Sri Lanka* [2020] UKUT 00043 are different types of cases involving children but have been highlighted simply to provide an example of the types of argument that could be put forward in support of applications / appeals and to highlight relevant principles.

30. *SD* involved an entry clearance human rights appeal by a partner applying to join her British Citizen husband in the UK. They had two dependant dual British Citizen / Sri Lankan children who would accompany *SD*. The UT discussed relevant principles concerning the children's British Citizenship, that this was a relevant factor but "*not necessarily a powerful factor*", that the rights and benefits flowing from their other nationality should be considered, and that there was no equivalent to section 117B(6) relating to entry clearance Applicants. *SD*'s counsel highlighted the ironic position that by applying for entry clearance *SD* was in a worse position than simply entering illegally the UK or overstaying and thereby benefiting from the provision under section 117B(6).

31. In *UT* (entry clearance appeal where *UT* was found to have previously used a false document and he was applying to rejoin his wife and children in the UK), the Court of Appeal affirmed the FTTJ's positive decision

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referring to factors in her proportionality assessment such as the children being settled in school, that they were British Citizens, their length of residence, that they had spent their formative years in the UK, the difficulties with adjusting to life in Sri Lanka at their age, and that their father's deception was not of their making. The Court also gave short shrift to the argument that this was a matter of choice as the family was free to leave the UK to join *UT* in Sri Lanka. The Court considered that where the children's best interests lay in remaining in the UK and it would be unreasonable for them to leave, this was indeed a separation case. The consequences of the decision had to be assessed in the real world.

32. As an aside, note that the Court made some detailed observations about the approach to appealing to the UT and that the Courts should not rush to find misdirections.

VICTIM OF DOMESTIC ABUSE, REFUSAL OF HUMAN RIGHTS CLAIM

33. *MY (refusal of human rights claim) Pakistan* [2020] UKUT 00089 concerned a settlement application under Section DVILR of Appendix FM, as a victim of domestic violence. In his covering letter he also made a human rights claim. The SSHD refused the settlement application and refused to consider the human rights claim suggesting the Applicant should instead make a further application using the appropriate application form. It was said that the Tribunal had been adopting an inconsistent approach in cases where the SSHD had refused to engage with the human rights claim, and that the Tribunal had appeared to be listing and allowing appeals.

34. The Appellant argued that when refusing leave as a victim of domestic violence, the SSHD had also refused a human rights claim (whether he chose to engage with the claim or not), and the Respondent's guidance was unlawful.

35. The UT considered the cases of *AT* [2017] EWHC 2589 (Kerr J held that some domestic violence claims are also human rights claims and he did not consider it fair or lawful that domestic violence victims should be required to make two separate applications), *Shrestha* [2018] EWCA Civ 2810, and *Balajigari* [2019] EWCA Civ 673 (the Court could see no reason in principle why a human rights claim could not be raised in the covering letter or by ticking a box on the application form. The refusal of the application would constitute a refusal of the claim and could be appealed). The UT raised concerns about being the primary decision maker in a significant number of human rights cases if the Appellant's propositions were correct. The UT considered that section 82(1)(b) of NIAA 2002 required a decision on the claim and it followed that there needed to be engagement with the claim with a refusal. The UT decided that the "human rights claim had not been considered" by the SSHD and the avenue open to the Applicant would be judicial review. The SSHD

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was not obliged, subject to her overriding public law duties, to engage substantively with a human rights claim.

36. We understand that the Court of Appeal have granted permission on the basis that it is "*well arguable that a human rights claim is refused both if it is considered and rejected on its merits and if the Secretary of State refuses to consider it at all*" (Garden Court North Chambers website). The appeal is floating to be heard in May 2021.

REQUIREMENTS OF APPENDIX FM NOT MET

37. The Home Office must consider the position where the Applicant does not meet the requirements of Appendix FM or Part 9 and whether there are exceptional circumstances i.e. **unjustifiably harsh consequences**, rendering any decision to refuse leave unlawful.

GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

*(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain**, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences** for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.*

38. In *Lal*, the Court reiterated that the relevant question when considering whether there were "exceptional circumstances" was whether refusing leave to remain would result in "unjustifiably harsh consequences" such that refusal would not be proportionate. This involved not only identifying and assessing the degree of hardship, but also conducting a balancing exercise between the impact on the individual of refusing leave to remain against the strength of the public interest.

39. At the present time, relevant issues will also include how the pandemic impacts upon cross-border travel and arguments on proportionality for example, in the context of arguments on ***Chikwamba*** [2008] UKHL 40.

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ARTICLE 8 ECHR "OUTSIDE THE RULES": TIPPING THE BALANCE IN YOUR FAVOUR

40. The objectives of this part of the webinar are to:

    a. Review recent (and some historic) caselaw raising issues that are relevant to the consideration of article 8 ECHR rights "outside the Immigration Rules";

    b. Restock our "toolkit" of arguments we can use when representing clients in cases that raise article 8 issues where the private and family life provisions of the Rules are not met.

41. To achieve those objectives, we will look at some of the issues that arise in article 8 cases raising issues "outside the Rules" sequentially, working through the steps of the *Razgar* test (it is trite law, but see paragraph 17 of *Razgar, R (on the Application of) v. Secretary of State for the Home Department* [2004] UKHL 27).

The existence of family life

42. In the recent case of *Uddin v The Secretary of State for the Home Department [2020] EWCA Civ 338 at para 40*, the Court of Appeal reflected on the test for the establishment of article 8 family life.

43. The case involved a Bangladeshi national, born in Bangladesh in December 1999, who was mistreated as a child before being brought to London and abandoned in early 2013. In the same year, he was treated as a trafficked child and placed with foster carers by a local authority. His asylum application was refused, but he was granted leave to remain as an unaccompanied asylum-seeking child until June 2017. He applied for further leave, which in part relied on his family life with his foster carers and their family. His application was refused and his subsequent appeal to the First-tier Tribunal was dismissed. He appealed to the Upper Tribunal. The issue of whether refusal to grant leave would breach his right to respect for family life under article 8 ECHR was the sole issue considered by the Upper Tribunal. The Upper Tribunal dismissed his appeal and he appealed to the Court of Appeal on the basis that the First-tier Tribunal had given inadequate reasons for its findings, defined family life too narrowly, and erred in its finding that there was insufficient dependency. The evidence from the Appellant and his foster mother had been that he is treated as her own child, and has a strong bond with her and her family. Evidence from the local authority confirmed their '*close attachment*' and the commitment shown towards the Appellant by his

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foster mother, as well as confirming that he continued to live with them after becoming an adult, having been assessed as not yet ready for 'independent living.'

44. The Court of Appeal allowed his appeal. Bean LJ, who gave judgment, confirmed that the existence of family life will depend on the substance of the relationship, not the form. This is a fact-specific analysis that must be based on the evidence provided. Bean LJ rejected the submission by the Secretary of State that foster care is a special category of case, requiring an appellant to prove family life in a different manner than if it were a birth family. He found no basis in law for a difference in principle between a relationship that has arisen from a foster care arrangement or from both. In doing so he rejected the assumption reached by the Upper Tribunal, that as a foster care relationship is a commercial, non-voluntary relationship with financial support from the state, there was no emotional dependency. Again, there must be a factual finding regarding the *substance* of the relationship. Similarly, whether family life exists after a child turns 18, is a question of fact, with no presumption either way, though continued cohabitation is a highly material factor.

45. At paragraph 40 of his judgment, Bean LJ held:

"Accordingly, the following principles can be described from the authorities:
i. The test for the establishment of Article 8 family life in the Kugathas sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency.
ii. The test for family life within the foster care context is no different to that of birth families: the court or tribunal looks to the substance of the relationship and no significant determinative weight is to be given to the formal commerciality of a foster arrangement. It is simply a factual question to be considered, if relevant, alongside all others.
iii. The continued existence of family life after the attainment of majority is also a relevant question of fact. No negative inference should be drawn from the mere fact of the attainment of majority, while continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life."

The nature of interference in cases where the partner of a British citizen is facing removal

46. Not a new case, but an observation made by Lady Hale in an older case, *Ali & Bibi v SSHD* [2015] UKSC 68, is one of our favourites and can be used to good effect in establishing the nature of the interference with article 8 rights and setting the scales (see below) of the proportionality assessment in cases where the partner of a British citizen is facing removal. Lady Hale said, at paragraph 52 of her judgment:

"The interference with the article 8 rights of the British partners of the people who face these obstacles is substantial. They are faced with indefinite separation, either from their chosen partner in life, or from their own country, their family, friends and employment here. It is worth recalling that the interference in Aguilar Quila, which was termed "colossal", was merely temporary, whereas the interference here may be permanent."

Proportionality

47. There are now a number of authorities that emphasise that the test for an assessment outside the Rules requires a fair balance to be struck between the public interest in an individual's removal and that individual's private interests. Reflecting on a few of these well-known cases for a moment to provide some context to the discussion that follows:

a. In *GM (Sri Lanka) v The Secretary of State for the Home Department (Rev 1) [2019] EWCA Civ 1630,* the Court of Appeal held at paragraph 29 of its judgment:

"…the test for an assessment outside the IR is whether a "fair balance" is struck between competing public and private interests. This is a proportionality test: Agyarko (ibid) paragraphs [41] and [60]; see also Ali paragraphs [32], [47] - [49]. In order to ensure that references in the IR and in policy to a case having to be "exceptional" before leave to remain can be granted, are consistent with Article 8, they must be construed as not imposing any incremental requirement over and above that arising out of the application of an Article 8 proportionality test, for instance that there be "some highly unusual" or "unique" factor or feature: Agyarko (ibid) paragraphs [56] and [60].

b. In *Hesham Ali (Iraq) (Appellant) v Secretary of State for the Home Department* (Respondent) [2016] UKSC 60, Lord Thomas encouraged the use of the now ubiquitous "balance sheet" approach at paragraph 83 of his judgment:

"One way of structuring such a judgment would be to follow what has become known as the "balance sheet" approach. After the judge has found the facts, the judge would set out each of the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders."

c. In *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC), the then President of the Upper Tribunal,

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McCloskey J emphasised the importance of properly preparing the scales in every balancing exercise:

"(6) In every balancing exercise, the scales must be properly prepared by the Judge, followed by all necessary findings and conclusions, buttressed by adequate reasoning."

48. Keeping these concepts in mind is essential when determining how a fair balance between the competing public and private interests is to be struck.

Section 117B NIAA 2002

49. That determination must take place through the prism of section 117B NIAA 2002. The provisions of that section will no doubt be well known to you, but are as follows:

"117B Article 8: public interest considerations applicable in all cases
(1)The maintenance of effective immigration controls is in the public interest.
(2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a)are less of a burden on taxpayers, and
(b)are better able to integrate into society.
(3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a)are not a burden on taxpayers, and
(b)are better able to integrate into society.
(4)Little weight should be given to—
(a)a private life, or
(b)a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
(6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a)the person has a genuine and subsisting parental relationship with a qualifying child, and
(b)it would not be reasonable to expect the child to leave the United Kingdom."

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50. Considering these subsections in turn:

Section 117B(1)

51. The Tribunals have repeatedly warned that it is not enough simply to pay lip service to section 117B(1). Weigh must be attached to the fact that the maintenance of effective immigration control. A recent example of this is the Upper Tribunal judgment in *Younas* (see above). However, it is always worth trying to identify factors arising in each individual case, if applicable, that support the argument that permitting your client to stay would not undermine effective immigration control, would undermine it to a limited extent or reduce the weight that should be attached to the public interest consideration in section 117B(1). For example, if your client has always complied with immigration control previously and made his application in-time; if your client has cooperated and made efforts to assist the Home Office in dealing with his case; or identifying how the immigration system has failed your client (a point that is developed in further detail below).

Sections 117B(2) & (3)

52. This point will, in all likelihood, be obvious by now, but it is worth repeating: financial independence and the ability to speak English are *neutral* factors. No weight will be applied in positive side of the balance sheet to the fact that your client is financially independent or speaks English. At paragraph 57 of *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, the Supreme Court observed:

> "The further submission on her behalf is and has been that the effect of section 117B(2) and (3) is to cast her ability to speak English and her financial independence as factors which positively weigh in her favour in the inquiry under article 8. But the further submission is based on a misreading of the two subsections and was rightly rejected by Judge Blundell, upheld by the Court of Appeal, just as an analogous submission was rejected in para 18 of the decision in the AM case, cited at para 38 above. The subsections do not say that it is in the public interest that those who are able to speak English and are financially independent should remain in the UK. They say only that it is in the public interest that those who seek to remain in the UK should speak English and be financially independent; and the effect of the subsections is that, if claimants under article 8 do not speak English and/or are not financially independent, there is, for the two reasons given in almost identical terms in the subsections, a public interest which may help to justify the interference with their right to respect for their private or family life in the UK. In seeking to portray the strength of their private or family life by reference to all their circumstances, claimants may wish to

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highlight their ability to speak English and/or their financial independence; but the legitimate deployment of such factors in that context is to be contrasted with the erroneous further submission that the subsections propel a conclusion that, where those factors exist, there is a public interest in favour of the claims."

53. However, remember that if it is found that your client is not financially independent or cannot speak English, weight will be attached to those facts in the negative side of the balance sheet. It is, therefore, essential that evidence of financial independence and English language ability is included in appeal bundles.

Sections 117B(4) & (5)

54. A common mistake that is made by practitioners and Tribunal judges relates to the application of the public interest consideration in section 117B(4) to cases where *family life* is established when a person was in the United Kingdom unlawfully. Section 117B(4) applies only to private life or a relationship formed with a qualifying partner; it makes no reference to family life generally and so, family life with a partner who is not a qualifying partner (i.e. British or settled, see section 117D(1) NIAA 2002), between parent and child or between adult relatives (e.g. where an elderly relative is dependant on a younger relative) are not caught by section 117B(4).

55. Another common mistake that is made is applying the public interest consideration in section 117B(5) to cases involving family life. This is wrong, because section 117B(5) only relates to private life, as was made clear by the Court of Appeal in *GM (Sri Lanka).* At paragraphs 36-37 of its judgment, the Court held:

> "[Counsel], whilst acknowledging that the reasoning of the FTT was ambiguous, argued that taken as a whole and upon a fair reading the Judge wrongly applied the "little weight" provisions of section 117B(4) and (5) to the generality of the evidence relating to family life and in so doing made an error of law and also of assessment. On our reading of the text of the judgment it is unclear whether the judge did improperly discount the family life evidence by reference to section 117B(4) and/or (5). But we do see how the criticism could well be correct. The Judge did refer to sections 117B and it is of some relevance that the UT construed the judgment as applying section 117B(4) and (5). The starting point is that neither section has any material relevance in the context of a family life case such as the present. In Rhuppiah the Court clarified that the "little weight" provision in section 117B(4) applied only to private life, or a relationship formed with a qualifying partner, established when the person was in the United Kingdom unlawfully. It did not therefore apply when family life was created during a precarious

residence ie. a temporary, non-settled, but lawful, residence, which is the case in this appeal. At paragraph [22] the Court held:

"22. Section 117B(4) is not engaged in the present case: it is agreed that Ms Rhuppiah established her relevant private life in the UK in particular her role in caring for Ms Charles, long before 2010 and at a time when her presence here was predominantly lawful."

The Court also clarified that section 117B(5) applied only to private life and not family life:

"37. It is obvious that Parliament has imported the word "precarious" in section 117B(5) from the jurisprudence of the ECtHR to which I have referred. But in the subsection it has applied the word to circumstances different from those to which the ECtHR has applied it. In particular Parliament has deliberately applied the subsection to consideration only of an applicant's private life, rather than also of his family life which has been the predominant focus in the ECtHR of the consideration identified in the Mitchell case. The different focus of the subsection has required Parliament to adjust the formulation adopted in the ECtHR. Instead of inquiry into whether the persistence of family life was precarious, the inquiry mandated by the subsection is whether the applicant's immigration status was precarious. And, because the focus js upon the applicant personally and because, perhaps unlike other family members, he or she should on any view be aware of the effect of his or her own immigration status, the subsection does not repeat the explicit need for awareness of its effect,"

56. However, the Court went on to find that the relevance of the knowledge of the individual facing removal and his family member(s) that family life may not be able to continue in the United Kingdom is an important consideration, holding at paragraphs 39-40 of its judgment:

"A further argument advanced…concerned the subjective knowledge of the family as to the persistence of their family life in the United Kingdom. In Ali Lord Reed described this as an "important consideration" (ibid paragraph [28]). This is a point arising out of the Strasbourg case law and first principles. In Rhuppiah (paragraph [28]) the Supreme Court articulated the point as follows: "…the question became whether family life was created at a time when the parties were aware that the immigration status of one of them was such that the persistence of family life within the host state would from the outset be precarious". Mr Jafferji points out that this is a different test from the normal precariousness test as applied to an applicant's own, personal, private life interest (as set out in section 117B(5)). This is because the awareness referred to by the Supreme Court concerns the position of all the relevant parties, and in a family life case would include the partner of an Appellant or applicant and any children capable of being relevant on the facts to such an awareness.

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This must be right and flows directly both from the logic of collective family life cases as distinct from individualised, private life cases, and is a distinction drawn in the case law. Indeed, in Rhuppiah, at paragraph [37], Lord Wilson referred to the "explicit need for awareness" when distinguishing between a precariousness analysis of an individual applicant (under section117B(5)) and the analysis of a family. The same point was made in Ali paragraphs [28] and [33] citing the judgment of the Strasbourg Court in Jeunesse (ibid) with approval."

57. The essence of these paragraphs is that where a couple has held a reasonable expectation of being able to stay together in the UK, that might make removal disproportionate. On the other hand, if the couple always knew or should have known that they might be unable to live together permanently in the UK, then requiring them to live elsewhere may be proportionate. This reflects what has previously been said in *Jeunesse v The Netherlands* [2014] ECHR 1036 (see paragraph 108) and *Agyarko* (see paragraph 53).

58. In *Birch (Precariousness and mistake; new matters) [2020] UKUT 00086 (IAC),* it was confirmed that these principles applied as much to cases in which section 117B(4) applied, that is where the individual facing removal had established private life/family life with a qualifying partner at a time when they were in the United Kingdom unlawfully, as to those under section 117B(5).

59. Drawing the discussion about the public interest considerations in sections 117B(4) and (5) to a close, it is worth reminding ourselves that the Supreme Court confirmed in *Rhuppiah* that the Tribunal is not required to attach little weight to private life or a relationship formed with a qualifying partner pursuant to sections 117B(4) and (5). Section 117A(2)(a) provides the Tribunal with a "limited degree of flexibility" and the guidance in sections 117B(4) and (5) "may be overridden in an exceptional case by particularly strong features of the private life in question." The Court held at paragraph 49 of its judgment:

> "…But, as both parties agree, the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:

> "53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question …"

60. The concept "little weight" involves a spectrum. In *Kaur,* the Upper Tribunal held at point 5 of the headnote to its judgment:

> "(5) The "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case."

61. For completeness, we have not revisited section 117B(6) here. Recent case law on the "reasonableness" test has been addressed earlier in the handout. It is by now well settled that if an individual meets the requirements of section 117B(6) that is determinative of the issue of proportionality: see, for example, *SR (subsisting parental relationship - s117B(6)) Pakistan* [2018] UKUT 334 (IAC) (which has received positive affirmation in a number of decisions of the higher courts).

The "Chikwamba" line of case law

62. Practitioners have been making arguments, with variable degrees of success, based on the principle established in *Chikwamba v SSHD* [2008] UKHL 40 since the judgment in that case was handed down. To remind you, the principle was outlined by Lord Brown at paragraph 44 of *Chikwamba* as follows:

> "…Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad…"

63. It was applied in *Hayat v Secretary of State for the Home Department* [2012] EWCA Civ 1054. The Court of Appeal held at paragraph 30 of its judgment:

> "In my judgment, the effect of these decisions can be summarised as follows:
> a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute

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a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.
b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.
c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in Chikwamba. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.
d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.
e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. Chikwamba was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question."

64. The Upper Tribunal has tried to re-cast that principle on a number of occasions, restricting its use. For example, in *Chen, R (on the application of) v Secretary of State for the Home Department) ((Appendix FM – Chikwamba – temporary separation – proportionality)* (IJR) [2015] UKUT 189 (IAC), the Upper Tribunal emphasised the need for the individual facing removal to place before the Home Office evidence that temporary separation from his/her family member(s) would disproportionately interfere with their article 8 rights. The Tribunal held in the headnote to its judgment:

"(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.
(ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD [2011] EWHC 2070 (Admin))."

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65. More recently, in *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129 (IAC), the Upper Tribunal emphasised the need to weigh findings made pursuant to a *Chikwamba* argument against the other public interest considerations in section 117B. It held at point 1 of the headnote to its judgment:

> "(1) An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this."

66. However, the principle continues to be an important argument that can be deployed on behalf of individuals facing removal in an appropriate case, exemplified most clearly by what Lord Reed said at paragraph 51 of *R (on the application of Agyarko) (Appellant) v Secretary of State for the Home Department* [2017] UKSC 11:

> "51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department."

67. The takeaway points from the above authorities are that the *Chikwamba* principle is still of relevance to a consideration of article 8 outside the Rules in appropriate cases. However, it is essential that evidence proving that an individual facing removal would meet the Rules in a future entry clearance application is included in appeal bundles (and with human rights claims if the exceptions in paragraph EX.1 of Appendix FM cannot be met) and that information is placed before the decision-maker/Tribunal about the detriment to the individual facing removal and his family of temporary separation whilst an entry clearance application is made.

68. Currently, it is a useful tactic to cite the Home Office's published policy guidance at https://www.gov.uk/guidance/coronavirus-covid-19-advice-for-uk-visa-applicants-and-temporary-uk-residents as a basis for arguing that, in light of the Home Office's COVID-19 'concessions', there is no public interest in requiring individuals in the UK, who cannot meet the

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requirements of an in-country application for further leave to remain as a partner, to leave the UK to make a family life based entry clearance application if they can show that they would succeed with that application. The relevant guidance states:

> "Coronavirus (COVID-19): advice for UK visa applicants and temporary UK residents
> This is advice for visa customers and applicants in the UK, visa customers outside of the UK and British nationals overseas who need to apply for a passport affected by travel restrictions associated with coronavirus.
> […]
> If you intend to stay in the UK
> If you decide to stay in the UK, you should apply for the necessary permission to stay to regularise your stay. You'll be able to submit an application form from within the UK, whereas you would usually need to apply for a visa from your home country…"

69. That said, it is not inconceivable that if this argument were to be considered by the higher courts, the courts would conclude that it is contrary to section 117B(1) to permit individuals to "jump the queue" by relying on a *Chikwamba* argument in an appeal when they could make a (paid) application from within the UK in circumstances where they would not face separation from their families whilst they did so.

Historical injustice

70. Another consideration that is relevant to the proportionality balancing exercise arises when the individual facing removal is able to show that he/she has suffered some wrong as a result of the Home Office's operation of her immigration functions. This notion is not a new one. For example, the principle that delay in immigration enforcement might be relevant to the proportionality of removal was established as long ago as 2008 in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159. The Court held at paragraph 15 of its judgment:

> "Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be

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aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see Boultif v Switzerland (2001) 33 EHRR 50, para 48; Mokrani v France (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal."

71. The above principle was endorsed by Lord Reed at paragraph 52 of *Agyarko:*

"It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in Jeunesse."

72. More recently, the Upper Tribunal had cause to address the relevance of "historical injustice" to the issue of proportionality in *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 00351(IAC), a judgment in which the Tribunal spent a great deal of time explaining the difference between the expressions "historic injustice", which, in the immigration context, "should be reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past" (point 1 of headnote) and "historical injustice". It is the expression "historical injustice" that is of greatest interest to us as we identify arguments that can be successfully deployed when considering article 8 claims outside the Rules.

73. At point 3 of the headnote to its judgment, the Tribunal described the expression "historical injustice" in the following terms:

"B. Historical injustice
(3) Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions.

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

74. Here, we are thinking of cases where we can argue that the individual facing removal has lost out because of the wrongful acts or omissions of the Home Office. For example, erroneous ETS refusals, possibly unlawful Tier 2/*Pathan* decisions where JR is no longer available due to the passage of time, failure by the SSHD to give the individual the benefit of a policy, unreasonable delay in deciding an application etc.

The relevance of the SSHD's policies to the issue of proportionality

75. It is, by now, well settled that the Home Office's policies are relevant to the determination of issues arising in article 8 appeals. See, for example, *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120(IAC). However, in the recent case of *BH (policies/information: SoS's duties) Iraq* [2020] UKUT 00189 (IAC), it was held that the Home Office is under a duty to draw to the Tribunal's attention a policy that may throw doubt on the Respondent's case. At point (a) of the headnote to its judgment, the Upper Tribunal held:

"(a) The Secretary of State has a duty to reach decisions that are in accordance with her policies in the immigration field. Where there appears to be a policy that is not otherwise apparent and which may throw doubt on the Secretary of State's case before the tribunal, she is under a duty to make a relevant policy known to the Tribunal, whether or not the policy is published and so available in the public domain. Despite their expertise, judges in the Immigration and Asylum Chambers cannot reasonably be expected to possess comprehensive knowledge of each and every policy of the Secretary of State in the immigration field."

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