Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16641/2019 (V)**

THE IMMIGRATION ACTS

Heard by a remote hearing	**Decision & Reasons Promulgated**
On the 20 October 2021	**On the 22 December 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

B U
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Bashir, legal representative acting on behalf of the appellant.
For the Respondent: Ms Aboni, Senior Presenting Officer

DECISION AND REASONS

1. The hearing before the Upper Tribunal is a resumed hearing following the decision of the Upper Tribunal promulgated on 11 May 2021. In that decision I set out the reasons for reaching the conclusion that the decision of the FtTJ (Judge Hillis) (hereinafter referred to as the "FtTJ") involved the making of an error on a point of law, the FtTJ having dismissed the appeal against the decision of the respondent made on the 31 October 2019 refusing his application for entry clearance made on the 23 April 2019.

2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal. However for the purposes of this decision, the Tribunal is required to consider evidence relating to a minor including medical evidence and I have therefore exercised my discretion to make an anonymity direction.

3. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a minor. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

4. I intend to refer to the appellant as "BU" or "the appellant", his wife as the "sponsor" as she has been referred to by the advocates, and "S" for the minor child. No disrespect for the parties is intended by the use of initials but that it is for ease of reference during this decision.

5. This decision should be read alongside the earlier decision promulgated on 11 May 2021 setting out the position of the parties and the decision reached by the Upper Tribunal concerning error of law.

6. The hearing took place on 20 October 2021, by means of *Microsoft teams.* Upper Tribunal Judge Allen made an order on 10 September 2021 that the hearing should proceed by way of a remote hearing conducted by Microsoft teams. Following that direction no objection to that method of hearing was raised by either party. At the hearing on the 20 October both parties confirmed their consent to proceeding by this method of hearing and agreed that all issues could be determined in a remote hearing. Mr Bashir, legal representative appeared on behalf of the appellant and Ms Aboni, Senior Presenting Officer appeared on behalf of the respondent. Whilst the appeal was conducted from the hearing centre, the advocates attended remotely via video as did the sponsor who was able to see and hear the proceedings being conducted and who gave oral evidence. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing, and I am satisfied that the sponsor was able to understand and follow the proceedings and was able to give her oral evidence and both advocates were able to make their respective cases by the chosen means.

7. I am grateful to Mr Bashir and Ms Aboni for their oral submissions.

<u>The factual background:</u>

8. In the error of law decision, it had been noted that the tribunal had not been provided with all of the earlier decisions made by the Entry Clearance Officer (hereinafter referred to as the "ECO") or the

decisions reached by previous judges. Therefore a direction was made for the parties to file and serve those decisions. The respondent filed a short chronology dated 14 May 2021 and whilst referring to previous decision made by the ECO only provided one copy decision dated 12 March 2006. Other decisions were exhibited in the respondent's bundle. The appellant's representative also provided a copy of previous decisions made by the tribunal but not all of the ECO decisions. The following summary is taken from those documents.

9. The appellant is a national of Bangladesh. On 2 May 2005 he applied for a visa as a working holiday maker which was refused by the entry clearance officer on 12 May 2005 because he was not satisfied that the appellant would leave the UK at the end of two years. The appellant appealed that decision, and the decision was overturned on appeal in a decision made on 9 January 2006. However subsequent enquiries relating to his employment claims in Bangladesh revealed new evidence. Called the number given on the letter resulted in a negative response. The ECO reach the conclusion that the information in the employment letter was false. The application was therefore refused under paragraph 320(21) of the immigration rules.

10. The appellant lodged permission to appeal the refusal of 12 March 2006 and it is recorded in the chronology filed on behalf of the respondent that the appellant's appeal was allowed on a date in October 2006. No further information is provided.

11. The appellant was therefore granted entry clearance as a working holiday maker for the period 16 November 2006 to 16 November 2008.

12. The appellant entered the United Kingdom on 16 November 2006. Following the expiry of his entry clearance on 16 November 2008 the appellant remained in the United Kingdom overstaying his leave.

13. On 29 September 2009 he applied to the Home Office for a certificate of approval for marriage. The application was later withdrawn.

14. On 10 January 2010, the appellant underwent an Islamic marriage with his spouse J.

15. On 29 July 2010, the appellant was encountered at Heathrow airport and was served papers as an overstayer. He voluntarily left the UK on that same day.

16. The appellant states that he returned to Bangladesh and his wife came with him.

17. On 6 August 2010, the appellant registered the marriage in Bangladesh.

18. On a date unknown the appellant's spouse returned to the UK.

19. On 9 August 2010, the appellant applied for entry clearance as the husband of his spouse. The application was refused on 24 November 2010 under paragraph 320 (11) as well as paragraph 281 (v) and 281 (iv). There is no copy decision but the reasons for refusal are set out in the decision of Judge McDonald. It is recorded that the appellant did not leave the UK when his visa expired on 16 November 2008 and applied for a certificate of approval for marriage on 29 September 2009 10 ½ months after his leave and expired. The appellant remained in the UK after his entry conditions at expired and had made no attempt to regularise his stay. He had not shown how he had maintained himself during the period. Whilst the appellant had admitted his immigration history and left the UK voluntarily and was now seeking to re-enter the UK through proper channels he previously shown a clear disregard for the immigration rules and not provided a credible explanation for his failure to comply with the previous entry conditions or how he was able to maintain himself during the period he remained in the UK without leave. Therefore the appellant has significantly contrived to frustrate the intentions of the immigration rules and therefore paragraph 320 (11) applied. As to paragraph 281, the appellant had not produced sufficient evidence of the employment of the sponsor or evidence that the sponsor's parents are meeting their mortgage payments on the property and therefore is not satisfied that the appellant would be accommodated adequately.

20. On 26 December 2010, their child S was born in the UK.

21. On 14 December 2010, the appellant lodged an appeal.

22. On 8 August 2011 the appeal was dismissed by Judge MacDonald. In his decision promulgated on 5 August 2011, the FtTJ made the following findings:

    (1) the appellant had not established that the sponsor was in employment given the lack of evidence of earnings paid into her bank account and tax and NI payments. In the alternative even if on some form of unpaid maternity leave, the sponsor gave no indication when she intended to return to work.
    (2) The judge was not satisfied that the job offer for the appellant was a genuine vacancy or that the appellant had a necessary ability to fill such vacancy (at paragraph 39).
    (3) The judge found that the evidence as to where and how the sponsor met the appellant in the circumstances in which they met and how long they may have lived together in the UK was vague and lacking in clarity and that the sponsor's account as to when she and the appellant met is not credible or consistent (paragraph 45).
    (4) The appellant had not offered any explanation for his presence in the UK between the date his visa expired on 29 September 2009 when the application for a certificate of approval was made; 10 ½

months after his visa expired. The judge found that the appellant decided to stay in the UK by whatever means he could and that the sponsor and his family must have become parties to assist him (paragraph 46). The judge found that this is not a genuine subsisting marriage but was a marriage entered into as a marriage of convenience the sole purpose of enabling the appellant to remain in the United Kingdom (paragraph 47). This

(5) When considering paragraph 320(11) the judge considered the application for the certificate of marriage fell into the category of a vexatious or frivolous application because it must have been apparent in the application was made that he had no chance of success given that the appellant at that time had no right to remain in the UK and had been in the UK from illegally before the application was put in (see paragraph 49)..

(6) The judge found that the sponsor's evidence was that the appellant had lived with her since their Islamic marriage in January 2010 but there was no confirmatory independent evidence of cohabitation (paragraph 50). The judge accepted that the parties had a child and that the appellant was the father of S born in 2010. The judge found that there was family life between the appellant and the child but that she had never seen the appellant and when undertaking the proportionality assessment, the need to maintain firm and fair immigration control, the appellant's poor immigration history, his inability to meet the requirements of paragraph 281 and the lack of any support and interest in his daughter outweighed the best interests of the child the primary consideration. The appeal was dismissed.

23. On 9 February 2012, the appellant applied for entry clearance as a spouse. It was refused in a decision taken on 5 April 2012. The ECO refused the application under paragraph 320 (11), applying the appellant's previous immigration history and the dismissal of the appeal on 10 August 2011. The ECO considered that the appellant had previously evidenced a clear disregard for UK immigration rules and processes and not provided any credible explanation of his failure to comply with previous entry conditions in the application. Whilst it was noted that time had elapsed since the previous application had been made, the aggravating factors in the previous application was still relevant therefore he was satisfied that the appellant had previously contrived in a significant way to frustrate the intentions of the rules. As to the marriage, he last saw her on 23 November 2011 there was a copy of the sponsors passport, but it did not demonstrate that she visited the appellant in Bangladesh since that date. Little evidence of regular contact had been provided. Therefore the ECO was not satisfied that the parties intended to live permanently with each other or that the marriage was subsisting (paragraph 281(iii)). The application was also refused on the basis that the appellant had not provided satisfactory evidence that the sponsor was meeting their mortgage commitments (paragraph 281(iv)) and that he was also not satisfied the sponsor was working and earning the income is claimed and that the employment had not been shown for the sole purpose of

facilitating the application therefore was not satisfied that the appellant would be adequately maintained without recourse to additional funds (paragraph 281 (v)).

24. The appellant appealed that decision, and it came before Judge Reed on 11 April 2013. It is recorded in that decision that the respondent did intend to rely on the provisions of paragraph 320 (11) (see paragraph 6 of the decision). In a decision promulgated on 12 April 2013, the judge dismissed the appeal.

25. Having considered the further evidence, the judge saw no reason to depart from the previous findings made by Judge MacDonald about the nature of the marriage and the reasons why it took place. The judge also found that he had not been given credible evidence as to when the appellant and the sponsor 1st met and the evidence about when the sponsor became aware of the appellant status in the UK was found to be "confused and contradictory". As to the telephone records relied upon by the appellant they showed various phone calls to mobile telephones in Bangladesh, but they were not the appellant's number. The judge found that no real weight could be attached to the evidence to demonstrate a subsisting relationship between the appellant and the sponsor. Whilst some of the calls were lengthy, the evidence was looked at in the round, but little evidence was attached to that evidence. The judge took into account that the sponsor went to Bangladesh with their daughter in November 2011 and remained there for 4 weeks. There were also photographs showing the appellant sponsor during this period. Whilst they claimed to cohabit with each other during that period and in 2010, the judge found that there was no supporting evidence given by other relatives in Bangladesh and the sponsor had relatives on her mother's side in Bangladesh which might give the sponsor an incentive to visit the country other than to cohabit with the appellant. Consequently the judge found that the appellant had failed to show that there was a subsisting marriage within the meaning of paragraph 281 (iii) of the rules. The judge found that the appellant could meet the immigration rules relevant to maintenance and accommodation.

26. The judge also considered paragraph 320 (11). The judge saw no reason to depart from the findings made by judge MacDonald stating that clear reasons for his finding that the appellant and the sponsor had entered into a sham marriage and that he had taken the same view. The judge found that the appellant was an overstayer and that entering into a sham marriage was one of the aggravating circumstances referred to in the guidance. The judge therefore concluded that the respondent demonstrated that there was a condition precedent to exercise their discretion under paragraph 320 (11). The judge took into account that the sponsor and the appellant had a child and taking into account the best interests of the child as a primary consideration and that she could remain in the UK to receive the support for mother and other members of the family and the benefits derived from British citizenship. Whilst the marriage is not a

genuine and subsisting one, it is not been shown that allowing the appellant entry to the UK would mean that the young child would be living in a household with both parents. It was not unreasonable to expect sponsor to take her daughter to Bangladesh so that her father could have access to her.

27. In summary the judge did not accept that this was a subsisting marriage; the appellant came to the UK lawfully which is to his credit that he then became an overstayer. In an attempt to be able to continue living in the UK he entered into a sham marriage. It was to his credit that he left voluntarily and sought entry from overseas but based on his findings and those of the previous judge the application to leave to enter had been based upon the same sham marriage. Allowing the appellant entered the UK would give him increased prospects for contact with his daughter but those visits could take place in Bangladesh. Whilst more time had elapsed since the decision the previous appeal, the judge found that the appellant was not still being truthful about his intentions and seeking entry to the UK. He therefore dismissed the appeal. The appellant sought permission to appeal that decision, but it was refused by Judge Kamara on 23 July 2013.

28. On 16 June 2014, the appellant made a third application for entry clearance as a spouse. It was refused in a decision taken on 20 August 2014.

29. The appellant appealed that decision, and it came before FtTJ Shimmin on 8 June 2015. At paragraph 12 he set out the issues that he had to decide which were whether there was a genuine subsisting marriage, whether the appellant/sponsor met the financial requirements of the immigration rules and whether paragraph 320(11) applied. At the hearing the FtTJ heard evidence from the sponsor, two of her brother's, and her mother.

30. The FtTJ did not find the evidence of the sponsor to be credible concerning the contact that she came to have with the appellant and found her claim to be a "gross exaggeration in an attempt to bolster the evidence" (paragraph 29). The sponsor gave inconsistent evidence in relation to communication with the appellant over the Internet and that she provided implausible reasons for the inconsistent evidence (paragraph 32).

31. At paragraph 33 the judge found that the most marked inconsistency in the evidence was in relation to the early days of the claimed relationship between the sponsor and the appellant. The sponsor stated that they 1st met on 8 November 2009 before they met they had agreed to marry. Prior to the meeting she had seen his pictures and they got to know each other over the telephone. They told the family they liked each other, and the elders sorted out and there were discussions between the sponsor's 2 brothers. The FtTJ contrasted the evidence given by the sponsor and her brother and found there to be

a “marked difference between the accounts in relation to the couple’s 1st meeting (see paragraph 36) . The judge concluded that the appellant not provide any basis credible to the required standard of the balance of possibilities for challenging the assertions that the marriage is a sham. He therefore dismissed the appeal.

The application giving rise to the appeal:

32. Dealing with the most recent application, on 23 April 2019 the appellant made an application for entry clearance under Appendix FM to the Immigration Rules on the basis of his family life with his sponsor and spouse and his child S.

33. In a decision taken by the Entry Clearance Officer on the 4 July 2019 the application was refused.

34. The decision letter sets out some of the previous applications that have been made and in relation to an application made on 19 June 2014 it was noted that that application was refused on 24 August 2014 under paragraph 320 (11) as well as under the relationship and maintenance paragraphs. The decision letter states “it should be noted that your application was refused, and further concerns are raised in regard to the legitimacy of your sponsor’s stated employment (these findings are detailed in a document verification report). He once again lodged an appeal. This appeal was again upheld having regard to all points.”

35. The decision letter also refers to an application made for a Visa to Ireland to join his spouse. The decision letter states as follows “on 2/8/2015 you applied for a visa to Ireland to join your current spouse in Ireland where she intended to exercise EU treaty rights. This application was refused on 27/8/2018. It should be noted in this application you have made little attempt to address the previous concerns raised and since the last UK entry clearance application, it is evident you have made further attempts to bypass UK immigration rules. I recognised refusal under 320 (11) is a discretionary refusal but I do not believe you have addressed any concerns and therefore a refusal under 320 (11) is warranted.”

36. The ECO stated that in view of the above, he was satisfied that the application fell to be refused under paragraph 320 (11) of the immigration rules. As applied to the appellant’s case the entry clearance officer stated as follows “I am satisfied that you have previously breached the immigration rules by overstaying in the UK. There were additional aggravating factors in that you made an application that was later deemed frivolous and entering a marriage of convenience. In conclusion I am satisfied that you have previously contrived and significant way to frustrate the intentions of the immigration rules. I am therefore refusing an application under paragraph 320 (11) of the immigration rules. You should note that this

decision has been referred to and reviewed by an entry clearance manager."

37. Under the heading "suitability" the decision letter stated that under paragraph EC-P. 1.1.(c) the application fell for refusal on grounds of suitability under section S-EC of Appendix FM because "in light of your previous adverse immigration history. I have considered the circumstances of your application, but considering your character and conduct consider it is undesirable to issue you entry clearance and I am not prepared to exercise discretion in your favour. I therefore refuse application and paragraph EC-P. 1.1 (c) Appendix FM of the Immigration Rules (S-EC. 1.5).

38. As to the other requirements, there was no dispute that the appellant met the eligibility requirements of Appendix FM of the financial requirements and the English language requirements. However the ECO was not satisfied that he met the eligibility relationship requirement set out in E-ECP 2.1 to 2.10.

39. In this regard it was stated the marriage took place " 6/8/2010 one week after voluntarily departing the UK and applied for entry clearance as a spouse on 9/8/2010 three days after the marriage this was later refused. You appealed this application and in the judge's determination he deemed the application for certificate of approval application as "frivolous" and judged the marriage to be a "marriage of convenience". It should be further noted that this appeal was heard on 25 July 2011 and the immigration judge makes this judgement even considering the evidence of you and your sponsor having a child together.

40. Moreover since that appeal you have been refused an appeal upheld on the basis of your relationship to your sponsor, you have provided no further evidence for this application to address the prior concerns with your relationship. Therefore, I am not satisfied that your relationship with your sponsor is genuine and subsisting. I therefore refuse your application under paragraph EC-P 1.1 (d) of Appendix FM of the immigration rules.

41. Under the heading "exceptional circumstances" the ECO considered whether there were any circumstances which would render refusal a breach of article 8 of the ECHR because it would or could result in unjustifiably harsh consequences for the appellant or his family. In reaching the decision the ECO took into account the best interests of any relevant child as a primary consideration. Having considered the evidence, the ECO reached the conclusion that there were no such exceptional circumstances. Reference was made to the appellant's child suffering from medical problems (type I diabetes) and that the sponsor had medical conditions. However, it was stated that:
"we have reached a decision because you provided evidence both your sponsor and child are receiving medical support for their conditions. I also know your sponsor is in receipt of caring and

disability benefits on behalf of your child, I am satisfied your sponsor has a good level of care in the UK and is being financially supported, moreover the evidence you provided demonstrates you are able to give further support from Bangladesh via social media. It should also be noted that your adverse immigration history which warrants refusal under general grounds and suitability. I am satisfied the raised circumstances do not outweigh the need to maintain an effective immigration and border control. I am satisfied that a refusal would not result in unjustifiably harsh consequences for you, your sponsor or any further family members."

42. The application was therefore refused.

43. The appellant's appeal against the respondent's decision to refuse entry clearance came before the First-tier Tribunal on the 15 October 2020.

44. In a determination promulgated on the 12 November 2020, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rules in question and on Article 8 grounds. The judge heard evidence from the appellant's sponsor.

45. In summary, the First-tier Tribunal began as his starting point the previous findings of fact made by Judge Shimmin but having considered evidence since that decision the judge did not accept that he was in a genuine and subsisting relationship with his partner. The reasons are set out at paragraphs [27 – 30] and relate to the sponsor's lack of credibility relating to money transfers, the brief messages in social media and that there were no photographs from any trip to Bangladesh.

46. The FtTJ also concluded that the application fell for refusal under paragraph 320 (11) of the immigration rules for the reasons set out at paragraphs [31-36]. The FtTJ took into account that the appellant had overstayed in the UK and as an aggravating factor, and are set out in the decision letter, that the appellant applied for a visa to Ireland to join his spouse there where she intended to exercise EU treaty rights. The judge concluded on the evidence taken as a whole the visa application to Ireland was an attempt to circumvent the immigration rules and facilitate an application to enter the UK with an EEA residential permit.

47. In summary he did not find that the appellant had family life with the sponsor or his daughter that engaged article 8 of the ECHR. He therefore did not consider issues of proportionality. The judge also stated that there was no evidence for him to show that any family life that existed at present could not continue in the future without the appellant being granted leave to enter the UK. He therefore dismissed the appeal.

48. Permission to appeal was issued on the 3 December 2020 and on 18 December 2020, permission to appeal was granted by FtTJ Grant.

49. In a decision promulgated on 11 May 2021 the Upper Tribunal set out its reasons for finding that the decision of the FtTJ involved the making of an error on the point of law for the reasons set out at paragraphs [50 –77].

The hearing before the Upper Tribunal:

50. The appellant provided a bundle of documents, including the bundle previously filed before the FtT, the bundle sent with the application, previous decisions, a witness statement from the sponsor dated 6 October 2021, letter from the school relating to S, dated 4 October 2021, GP's letter relating to the sponsor dated 23 June 2021, evidence as to income, copy passport, photographs of the appellant and his daughter.

51. The tribunal had a copy of the previous respondent's bundle for the FtT hearing. No further documentation was filed on behalf of the respondent.

52. The sponsor gave oral evidence before the Tribunal. In her oral evidence she confirmed the contents of the witness statement dated 6 October 2021. No further questions were asked in examination in chief.

53. In cross-examination she was asked when she last saw her husband, she stated that she saw him in Bangladesh in January 2018 and that she had not visited since that time because of Covid and that the situation had not been very good.

54. She was asked how long she had stayed in Bangladesh in 2018 and she stated that it was "2 or 3 weeks".

55. The sponsor was asked how she had kept in contact since 2018 and she stated "daily, we talk on the phone, video calls and text. We speak every single day to each other."

56. She was asked if her daughter had the same contact. The sponsor stated "yes, every time she wants to she calls him. His picture is on her phone."

57. The sponsor was asked when was the last time that the appellant spoke to his daughter? The sponsor stated "yesterday", she explained that her mother-in-law had passed away and that they were all very upset and that her daughter was feeling sad because she loved her grandma.

58. She was asked in the past how frequently she visited Bangladesh. The sponsor stated that she had visited in 2011, 2014 and 2015 and the last visit was 2018 and that she had not visited him since that time

because of her finances, and the application fees and the legal costs that had to be paid. She said that she would love to visit him with her daughter, but the situation was not safe.

59. No further questions were asked.

60. In terms of clarification evidence, the sponsor was asked what family relations she had in Bangladesh. She said that only her father was in Bangladesh, her father-in-law and that her husband had his brother and sister. She said she had no family in Bangladesh and a whole family were in the UK including her 7 siblings who were all born in the UK.

61. The sponsor was asked if she had taken her daughter to Bangladesh. Sponsor stated that she had and that she 1st visited when she was 6 months old and looking at the photographs in the bundle she was smiling and happy. She was the 1st baby in the family, and they are excited to see her.

62. When asked what work the appellant had in Bangladesh she said that he had a small DIY shop and had income of 10,000 taka. The sponsor was asked why she sent him money, the sponsor said that she sent it so that it was for his spending and the clothes and for his own leisure.

63. The sponsor was asked to clarify her evidence as to how she contacted the appellant. The sponsor stated that they contacted each other by WhatsApp on their phones and that they spoke every day and that the appellant wanted to speak to his daughter. She said their main contact was by video call on WhatsApp when they see each other. She said that the line “gets cut which is why they are short- he lives in a rural village”.

64. The sponsor was asked who had made the application for a visa to Ireland? The sponsor stated that it was the appellant who made the application. She gave the following explanation “because we realised he could not get a Visa in the UK and Ireland was close by and I could visit family and the airfares were cheap and if the application was successful I could live with him in Ireland.” The sponsor was asked if she had ever lived in Ireland. She stated that she had never lived in Ireland and that she could not remember why and could not remember what had happened to the visa application.

65. The sponsor was asked to clarify the evidence relating to their daughter S and how she managed her diabetes. Sponsor stated that S become stressed and angry and that she asked every single day why dad can’t be with them and that she did not know what to tell her. She said that they had monthly meetings and that she will be having therapy with CAHMS with the school organising this.

66. Each of the advocates were asked if they had any questions arising out of the clarification evidence but neither advocate asked any further questions.

The submissions of the parties:

The respondent:

67. There was no written skeleton argument or written submissions filed on behalf of the respondent. Ms Aboni on behalf of the respondent submitted that she relied upon the decision letter summarised earlier in this decision. She submitted the application fell for refusal under paragraph 320(11) of the Immigration Rules and on the grounds of suitability under Appendix FM on the basis of his poor immigration history. There were aggravating factors as set out in the decision letter that he had previously overstayed and that he had made a frivolous application having sought to circumvent the Immigration Rules. She submitted that the parties had entered into a relationship in knowledge that the appellant had no basis of stay in the UK and that he would not be permitted to remain. It was accepted that whilst the appellant had made a voluntary departure in 2010, the parties must have been aware that there be no guarantee that he would be permitted to live in the UK.

68. Ms Aboni submitted that the circumstances had changed to some extent noting that there was no dispute that the appellant and the sponsor had a child together, S, now nearly 11 years of age and that the application turned on the best interests of that child and the relationship the appellant has with his daughter. She submitted that it was not suggested that the child should leave the UK or that it was reasonable for her to do so and that it was in her best interests to remain in the UK to be brought up by her mother and access her education and to support the services that are available. Ms Aboni submitted that denying entry clearance the appellant would not have unduly harsh consequences on the appellant or his daughter and that there will be no interference in any family life engaged. The appellant has never lived in a family unit with his daughter and that any face-to-face contact had taken place during brief visits in Bangladesh with the last one in 2018. The parties have been able to main pain contact throughout that time.

69. Ms Aboni submitted that there was evidence of some contact, but it could continue with the appellant remaining Bangladesh and that once Covid regulations had changed the sponsor and her child would be able visit Bangladesh.

70. Ms Aboni confirmed that it was accepted that there was a level of family life between the parties but there was no interference by way of the refusal of entry clearance as it maintains the status quo. She submitted that the appellant was unsuitable for entry clearance and there were no exceptional circumstances for a grant of leave outside the rules.

71. When asked to clarify the issue of family life, and the basis upon which the respondent’s case was based Ms Aboni confirmed that she accepted that there was a level of family life between the parties on

the basis of visits that had taken place and that there was video contact. However there was very little family life when in the UK and there would be no interference with the quality of family life as the status quo could continue.

The appellant:

72. Mr Bashir on behalf of the appellant relied upon the written skeleton argument he had prepared. This was a long document and I reproduce below the points set out in that document.

The written submissions:

73. It is submitted that the application was refused on two grounds, Paragraph 320(11) and subsisting relationship.

74. The circumstances of the family have dramatically changed following the last Tribunal decision in June 2015. The sponsor suffers from depression and other illnesses and the child has serious chronic illnesses. It is not difficult to imagine, how difficult for the mother to raise such a child with special needs on her own, particularly, given her poor health. These matters must be looked afresh. The marriage or the relationship has continued to subsist despite the adverse past decisions. The marriage has passed the test of time.

75. Under the current circumstances, it is unthinkable for the child and the mother to relocate to Bangladesh. It would be an inhuman expectation. The child requires, daily Insulin injections, sugar level testing, calories count, wet beds and therefore, requires nappy change at night, frequently upset and mood change, in addition, she requires, feeding, dressing, bathing, GP and hospital appointment, taking and picking her up from school. The family would not be able to meet the cost of medications. The costs of medical care are extremely high. It is also not safe for the child, particularly, given the Coronavirus situation and her pre-existing conditions. The mother also suffers from depression for which she is taking medications, received counselling and other illnesses.

Refusal under 320(11) and Suitability

76. The mandatory ban for an overstayer, who left voluntarily and paid his own fare is one year or 12 months. Parliament could not have constructed the discretionary rules to continue to be used to refuse applications, if that was such intention that why introduce mandatory ban in the Immigration rules**?**

77. The Respondent's refusal under 320(11), after 10 years, is highly irrational and unreasonable. Even the ECO noted that an application should not be refused under paragraph 320(11) indefinitely, at the

last refusal about 5 years ago and yet it has. Judge Shimmin made no adverse findings on paragraph 320(11) in June 2015.

78. Under paragraph 276ADE(1)(iii) of the Immigration Rules or under the 20 year rule, a person does not have to have lived in the UK lawfully, but simply "continuously". Clearly overstaying is not a factor under this rules.

Aggravating factors :

79. The refusal pursuant to paragraph 320(11) was not made out. The respondent failed to identify aggravating features, as required by paragraph 320 (11), which states in relation to aggravating circumstances as:

> *'and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process.'*

80. Aggravating circumstances are now incorporated into the rules. The Respondent has not provided any evidence of the aggravating circumstances. The appellant has not breached any of the aggravating factors as specified in the rules as stated in paragraph (6). The burden is on the Respondent in accordance with the findings of In **JC (Part 9 HC395) – burden of proof) China[2007] UKAIT 00027,** It was ruled that in relation to all of the general grounds the burden of proof is on the decision-maker […] to establish the facts relied upon" (paragraph 10)

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81. The appellant admits that he has breached the Immigration Rules, but he denies that he has contrived in a significant way to frustrate the intention of the rules. The application to settle in the Republic of Ireland cannot be taken to mean that this was an attempt to circumvent the immigration rules until the appellant has made an application to enter the UK. The sponsor made it clear as to why they chose to settle in the UK, which is a rational decision given their circumstances in relation to the child's health and the proximity of the sponsor's family.

82. The Respondent does not give any reasons as to why he believes that the appellant has deliberately frustrated the rule rather than to accept that the event he described were arising naturally or spontaneously.

83. The appellant does not have any criminal convictions or committed any crime, he merely overstayed and only worked part time to survive. These are hardly a factor. In fact, The Home Office Guidance

specifically refers to illegal work in the context of *'breach on visitor conditions within a short time of arrival in the UK.'* This suggests not all illegal work will be an aggravating factor.

84. Additionally, in ***ZH (Bangladesh) v Secretary of State for the Home Department*** **[2009] EWCA Civ 8** the Court of Appeal noted that under the Secretary of State's policy regarding the 14 year rule, which was then in force, the applicant had to have been economically self -sufficient for a significant period of time spent in the UK in order to obtain indefinite leave to remain:

> *'The Home Office recognised that applicants under the 14 year rule, if they were to be successful, must be expected to have worked unlawfully for much of their time here'*.

85. This further suggests that not all illegal work should not be considered to be an aggravating factor. The Respondent has failed to identify any specific aggravating factors. In any event, working unlawfully is not specified as an aggravating factor in the rules.

86. The aggravating features should have been considered with the case law of **PS [2010] UKUT 440** and **ZH [2009]** in mind. The appellant left the UK, voluntarily in July 2010 and paid for his tickets, over 10 years ago. A permanent ban doesn't even last 10 years and therefore, it is reasonable to draw an inference that Paragraph 320(11) is used as a backdoor attempt to place an indefinite ban. If rules intended that paragraph 320(11) should serve as a permanent ban then why introduce paragraph A320.

87. The appellant left UK voluntarily and paid for his own ticket and therefore, the Respondent should have taken this into account. In ***PS (paragraph 320(11) discretion: care needed) India*** **[2010] UKUT 440 (IAC)** it was stated that:

> *"In exercising discretion under paragraph 320(11) [...], the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance."*

In the Tribunal's conclusions Kenneth Parker J elaborated:

> The Entry Clearance Officer, in making the decision of refusal, refers nowhere to the guidance under paragraph 320(11). It is therefore wholly unclear whether the Entry Clearance Officer has addressed his mind to the relevant question, namely whether in the circumstances of this case Mr S's breach of UK immigration law was sufficiently aggravating so as to justify the refusal. [...] If the aggravating circumstances are not truly aggravating there is in this context a serious risk that those in the position of Mr S will simply continue to remain in the United Kingdom unlawfully and will not seek to regularise their status as he has sought to do. The effect then is likely to be counter-productive to the general

> purposes of the relevant rules and to the maintenance of a coherent system of immigration.

88. PS basically held that if paragraph 320(11) was applied too stringently then there was no motive for a person to leave the UK and apply for entry clearance from abroad and they would simply remain illegally. In this case the Appellant had left voluntarily in 2010, over 10 years ago to make a proper application.

89. The Respondent had obviously failed to exercise <u>any</u> discretion when invoking reliance upon paragraph 320(11) when refusing the application and therefore the decision of the Respondent "*not in accordance with the* [IR's]" or *"otherwise not in accordance with law"*.

90. But S-EC.1.8 does not apply to the appellant because the appellant was not cautioned in accordance with section 22 of the Criminal Justice Act 2003. Under the suitability criteria a convicted offender's application for entry clearance can only be refused.

<u>Genuine and Subsisting marriage</u>

91. The Respondent states no evidence of relationship was provided. This is simply not correct. In any event in accordance with the in IDI, Family Members under Appendix FM of the Immigration Rules, Annex FM Section FM2.0 – genuine and subsisting relationship.

> 'For many faiths and cultures marriage marks the start of a commitment to a lifelong partnership and not the affirmation of a pre-existing partnership…… In particular, evidence of pre-marital cohabitation and joint living arrangements can be a factor associated with a genuine relationship; equally, their absence can be too. Caseworkers have discretion to grant or refuse an application based on that overall assessment, regardless of whether one or more of the factors below is, or is not, present in the case. Consideration of whether a relationship is genuine, and subsisting is not a checklist or tick-box exercise.'

92. The IDI further states in paragraph 3.2:

    a. 'If a case contains one or more of the factors listed below, this may prompt additional scrutiny of the application but will not necessarily result in a negative decision. Caseworkers must continue to look at the circumstances of the case as a whole.

    b. 'Even where additional scrutiny has been prompted by any of the following factors, it does not necessarily mean that the relationship is not genuine and subsisting.'

    c. 'In this guidance 'additional scrutiny' means that where a caseworker has doubts that a relationship is genuine and subsisting, they must consider whether further information needs

to be obtained, and the application investigated further, before they are able to make a decision on the case.'

93. The marriage has passed the test of times. Despite the previous adverse decisions, the marriage continued to subsist. The following evidence clearly indicate that the marriage is genuine, and it will subsist *Period of cohabitation Length of marriage, Visits, Family Photos, Frequencies and length of telephone contact, Sending money, Expense and trouble of supporting the repeated EC applications and appeal. Sponsor's evidence. The couple's intention to live together permanently.* These evidences clearly indicate the strength of the relationship and intervening devotion of the couple. Particularly, given the birth of a child. These evidences clearly indicate the strength of the relationship and intervening devotion of the couple. In particular the birth of child clearly indicates the strength of the Intervening devotion and shed light on the subsisting relationship. *In* ***saftar v SSHD [1992] Imm AR 1, CA.*** It was held, the fact that the marriage may have an economic or other motive is of little or no significance in assessing the intention of the parties to live together, cohabitation or birth of a child would satisfy the requirements of the rules.

94. It appears their circumstances fits in with the guidance offered in, **GA ("Subsisting" marriage) Ghana [2006] UKAIT 00046,** which held that "An immigration Judge when assessing the subsistence of a marriage will plainly have to bear in mind the cultural context and the wide differences that exist between individual lifestyles, whether by choice, or by circumstances, or by economic necessity. He will also be able to put the claim into the context of the history of the relationship and to assess whether and to what extent this illuminates the nature of the parties' present relationship and future intentions."

95. In **Goudey (subsisting marriage – evidence*), Sudan* [2012] UKUT 00041 (IAC).** The President observes (as he does in ***Papajoraji*)** that all 115 questions in the visa application form were properly completed and goes on to find that the immigration judge erred in law by imposing his own expectations of how a couple might conduct their relationship and by failing to appreciate that the evidence that was presented was properly corroborative of the relationship. The President then goes on: It may be that the ECO and the judge considered that the requirement to show a "subsisting marriage" imposes some significant burden to produce evidence other than that showing that there was a genuine intention to live together as man and wife in a married relationship. If so, we conclude that that is an error of law. The authority of **GA ("Subsisting" marriage) Ghana** * **[2006] UKAIT 00046; [2006] Imm AR 543** only requires that there is a real relationship as opposed to the merely formal one of a marriage which has not been terminated. Where there is a legally recognised marriage and the parties who are living apart

both want to be together and live together as husband and wife, we cannot see that more is required to demonstrate that the marriage is subsisting and thus qualifies under the Immigration Rules

96. ***Naz (subsisting marriage – standard of proof) Pakistan*** **[2012] UKUT 00040 (IAC),** was an appeal by the Entry Clearance Officer to the Upper Tribunal against an appeal that had been allowed. The President reiterates that post-decision evidence is admissible if it goes to show what the situation really was at the date of decision.

97. Furthermore, the decision is unlawful in relation to the definition offered by **BK and others, Turkey [2005] UKAIT 00174.** This case is reported for what we say about the meaning of 'subsisting' in relation to marriage within Part 8 of the Immigration Rules HC395, Family Members. A marriage is subsisting for the purposes of these Rules if it has been lawfully entered into and has not thereafter been lawfully dissolved or annulled.

98. However, the respondent decision is also not consistent with the IDI's in Chpt. 8 "Intention to live permanently with the other" means an intention to live together, evidenced by a clear commitment from both parties that they will live together permanently in the United Kingdom immediately following the outcome of the application in question or as soon as circumstances permit thereafter, and "intends to live permanently with the other" shall be construed accordingly.' There is clear commitment from the appellant and the sponsor.

99. **In Anju Malik *v* Entry Clearance Officer, New Delhi** [**2002] UKIAT 00738 IAT.** It was held, "There was evidence capable of supporting a history of contact between the parties. The adjudicator needed to consider whether, despite what he found to be serious lies told by the husband, it was nevertheless likely than not, in the light shared by the totality of evidence of contact, that they had indeed intended to live a normal marriage life in this country from the date of decision 6 days after their wedding."

100. In **Entry Clearance Officer, Islamabad *v* Nasir Mahmood [2002] UKIAT 01034, IAT**. It was held "…However the adjudicator was correct to focus on the central question before her, which was to determine whether the parties intended to live together as man and wife. The fact that they had been less then frank was regrettable but not decisive... The tribunal concluded that the adjudicator had properly addressed herself to the issue and that her decision to allow the appeal was not wrong, let alone perverse."

101. **In Kari Shahjad Miah**, [**2002] UKIAT 02533** the tribunal held. 'However, given the evidence of the sponsor, which was accepted, that she wanted to live with their husband, and given evidence of the appellant… that he wanted to live with her, it appeared to the tribunal

that there was no proper basis for refusing the application or dismissing the appeal on the grounds of intention.

Article 8 and Proportionality Assessments

102. The appellant has established a very strong family life with his wife and his child and therefore, resettlement in Bangladesh is not a pragmatic option, particularly, given the fact they have a chronically ill child.

103. The appellant has not done anything against the British public interest. He does not pose any risk to the national security or public safety in the UK. The appellant does not have any criminal conviction or been involved in any antisocial or criminal activities and affect the rights and freedom of others by staying in the UK. Therefore, he is a person of good character.

104. The appellant's wife is a British Citizen, and she is settled in the UK, and she has established a private and a family with her wider the family in the UK.

105. Ordinarily, family life can be easily found to exist between a parent and his or her biological child, notwithstanding lack of co-habitation and lack of regular contact. In ***Berrehab v The Netherlands (1989) EHRR 32*** the European Court said that the concept of family life embraces, even where there is no co-habitation, the tie between a parent and his or her child, regardless or not of whether the latter is legitimate.

    In ***Makhlouf v SSHD (2016) UKSC 59*** the Supreme Court said that in a case in which the Appellant had no contact with his children, that the possibility of such a relationship developing was nonetheless a factor to be considered. By guaranteeing the right to respect for family life, Art. 8 presupposes the existence of a family: ***Marckx v Belgium*** **[1979] 2 EHRR 330** at paragraph 31. The birth of a child creates between the child and its natural parents a bond amounting to family life which subsequent events cannot break, save in exceptional circumstances: see e.g. ***Gul v Switzerland*** **[1996] 22 EHRR 93**. A child being taken into public care does not terminate a natural parent's family life with their child*:* ***W v United Kingdom*** **[1987] 10 EHRR 29.**

106. FTT also failed to consider evidence of the emotional harm the child is and is likely to suffer by the lack of proximity to the appellant - such arguments appear to have revived following recent judgment of court of appeal in ***HA (Iraq) v SSHD [2020] EWCA Civ 1176*** esp. §§153-163. ***LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC)*** has also made similar findings, in particular, what President Blake has said in §21 are of particular relevance.

107. Consequently, family life and proportionality has to be considered in accordance with Huang, Razgar, Ganesabalan [2014] EWHC 2712 (Admin), MF (Nigeria) -v- SSHD [2014] 1 WLR 544, Halleemudeen v- SSHD [2014] Imm AR 6, R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin).

108. Article 8 claim and the law was recently re-emphasized by the Court of Appeal in GM (Sri Lanka) v SSHD [2019 EWCA Civ 1630) ['GM'].

109. Furthermore, communication not involving constant proximity is unlawful in accordance with the finding of LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC) President Blake said (§21) "*... We find his [the Immigration Judges] reference to maintain contact with his family 'in the normal manner' is extraordinary. Families normally live together. Family life consists of the interdependent bonds between spouses or stable partners and between parents and children with particular strength being placed upon the interests and welfare of minor children. It is not normal for family life to be enjoyed by correspondence and occasional visits (even assuming that there were no obstacles to such visits following this immigration decision'.* Therefore, such family life as A enjoys cannot reasonably continue in any country other than the UK.

110. Similarly, any expectation that the appellant can return to Bangladesh and apply for entry clearance would be unlawful in accordance with paragraph 30 (ix) of **LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC),** it was held:

111. *No useful purpose would have been served if the SSHD had required the Appellant to depart the UK in order to make an entry clearance from abroad. All the issues are to be determined in this appeal rather than in the course of an investigation abroad where there would in any event be an interference.*

112. Such arguments appear to have revived following recent judgment of court of appeal in **HA (Iraq) v SSHD [2020] EWCA Civ 1176,** Especially in paragraphs, 153-163.

113. **KO (Nigeria) [2018] UKSC 53**, it was also held that it should also not form part of the assessment of whether Article 8 requires that one parent remain in the UK with the child.

114. Therefore, proportionality assessment must be based on facts, specific to each cases' circumstances and a proportionality assessment must be undertaken in a full and rounded manor. Any restriction must be convincingly established, **Shazad (Art8: legitimate aim) [2014] UKUT 00085 (IAC).** It is our contention that the restriction is not convincingly established.

115. The burden rests on the state to establish that the interference with rights under Article 8 was justified under paragraph 8(2), (Shazad **(Art8: legitimate aim) [2014] UKUT 00085 (IAC**). It is our contention that the reasons given does not establish that interference is justified.

116. JFT or the Respondent must undertake a balancing exercise**, Shazad (Art8: legitimate aim) [2014] UKUT 00085 (IAC).** Effective Immigration control is essentially the economic well-being of the State **(Shazad).** In the appellant 's case it is difficult to convincingly establish restriction or justify interference.

117. The Respondent has made no reference to what factors are being put forward to justify the legitimate aim/public interest in justifying his entry. It is arguable that absent clear and cogent reasons for the interference that there is no justification for the interference: **Philipson (ILR - not PBS: evidence) India [2012] UKUT 39 (IAC) (06 January 2012):**

"22. In our judgment, the judge has not directed himself properly. If he had adopted a structured approach of human rights adjudication he would have looked for a legitimate aim within the meaning of Article 8(2) and asked whether refusal of the application was a proportionate measure to pursue that legitimate aim in the factual context of this case. Controlling immigration is not a legitimate aim in itself but is certainly a means to protecting the economic and social order and the rights of others. However there was nothing in the immigration rules or generally to suggest that the claimant or her family threatened economic or social disorder or did not qualify for settlement."

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118. The appellant has a chronically ill child and uprooting her to live in Bangladesh is not a fair or a reasonable option. The child requires, daily Insulin injections, sugar level testing, calories count, wet beds and therefore, requires nappy change at night, frequently upset and mood change, in addition, she requires, feeding, dressing, bathing, GP and hospital appointment, taking and picking her up from school. The family would not be able to meet the cost of medications in Bangladesh. The costs of medical care are extremely high. It is also not safe for the child, particularly, given the Coronavirus situation and her pre-existing conditions. It is particularly bad in Bangladesh. This separation is aggravating the family situation further for the worse. The mother also suffers from depression for which she is taking medications, received counselling and other illnesses.

119. Therefore, the Respondent's assessment of exceptionality is bizarre. The child is chronically ill with such severe illness and yet the

Respondent does not consider this exceptional. The If this child's circumstances do not constitute exceptionality, then what would?

120. The photographs clearly show how happy the child was with her father and the strength of the father-child relationship. The child's circumstances has to be considered in light of S117B(6), Immigration Act 2014, the Home Office guidelines and the findings of **ZH (Tanzania)** to their entitlement to remain in the UK as a fact countervailing any suggestion it was reasonable to expect them to leave the UK, **SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 and MT and ET (child's best interest; extempore pilot) Nigeria [2018] UKUT 00088 (IAC),** where the President, Lane J expressly determined that even a significantly poor immigration history of parents, involving past criminality, was not the powerful reason required to dislodge the assumption of continuing residence of "qualifying" children.

121. **The recent case of GM (Sri Lanka) v SSHD [2019 EWCA Civ 1630**) ['**GM**'], held that uprooting their settled lives to move overseas and should do so and refusing do so was their choice was not lawful. Case **C-34/09 Ruiz Zambrano** now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so. Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the **Zambrano** principle, see **C256/11 Murat Dereci**. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union. In **Sanade[2012]UKUT 00048(IAC)**in paragraph 106,it was stated that, 'Further as British Citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law, and that as a matter of relevant consideration they cannot reasonably be expected to relocate outside of the European Union.' **Sanade** *makes it clear that the appellant's partner and the child cannot, as a matter of European Union Law, be required to leave the European Union.*

122. The Respondent has failed to consider Article 8 in accordance with the tests set out in Razgar and Huang. Failure to meet the criteria set by the Immigration Rules is not determinative of the issue of whether a particular application succeeds on Article 8 grounds in accordance

with the recent authorities, such as, **MF (Article 8-new rules) Nigeria [2012] 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC)** and **Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC)**. The respondent has also failed to engage in a proportionality assessment in accordance with the findings of **Shazad (Art8: legitimate aim) [2014] UKUT 00085 (IAC),** in particular, any restriction must be convincingly established and must undertake a balancing exercise.

Exceptions and EX1

123. The couple have a child. The appellant obviously satisfy (a)(i),(aa), (bb) and (cc). on and recovered.' this is a clear error of law because it does not comply with the clear findings of the reported cases, where it has been found that 'persuasive reason' is required, the fact the child is British, itself is sufficient for the appellant to qualify for exception under EX1 in accordance with the above and the following authorities. It would not be reasonable to expect a British young chronically ill child to return to Bangladesh with her mother to join her father.

124. The case of **Gulshan (Article 8 – new rules-correct approach)[2012]UKUT 00640 (IAC), R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin): Mf (Article8-new rules) Nigeria [2012] UKUT 00393 (IAC): and Izuazu (Article8 – new Rules) [2013]UKUT 00045 (IAC).** The Tribunal in the case of Gulshan drew attention to the guidance and noted that:

> *"Paragraph 3.2.8 of the guidance covers 2exceptional circumstance2, where an applicant does not meet the requirements of the rules under Appendix FM. If that is the case refusal of the application will normally be appropriate, but leave can be granted outside the rules where exceptional circumstances apply.*
>
> *"Where an applicant fails to meet the requirements of the rules, caseworkers must go on to consider whether there are exceptional circumstances."*

125. At paragraph 15, the Tribunal concluded:

> *"The Guidance continues that exceptional does not mean unusual or unique. While all cases are to some extent unique, those unique factors do not generally render them exceptional. A case is not exceptional just because the criteria set out in EX.1 of appendix A FM have been missed by a small margin. The guidance reads, exceptional "means circumstances in which refusal will result in unjustifiably harsh consequences for the individual or their family*

such that refusal of the application would not be proportionate. That is likely to be the case only very rarely." The paragraph continues that in determining whether there are exceptional circumstances, the decision-maker must consider all the relevant factors such as:

"a) the circumstances around the applicant's entry to the UK and the proportion of the time they have been in the UK legally as opposed to illegally. Did they form their relationship with their partner at a time when they had no immigration status, or this was precarious? Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less
weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.

b) Cumulative factors should be considered. For example, where the applicant has family members in the UK, but their family life does not provide a basis for their stay, and they have a significant private life in the UK. Although under the rules family life and private life are considered separately, when considering whether there are exceptional circumstances private and family life can be taken into account."

126. There has been a failure to consider whether to exercise discretion outside the Rules will be unlawful in accordance with the findings of ***Ganesabalan (R on the application of Ganesabalan v Secretary of State for the Home Department* [2014] EWHC 2712 (Admin)** and **Aliyu & Anor v SSHD [2014] EWHC 3919**. A more recent finding in **R (Behary & Ullah) v SSHD [2016] EWCA CIV 702**, held that the Secretary of State is under an obligation to consider discretion outside of the Immigration Rules to grant leave to remain.

127. In addition to his written submissions Mr Bashir made the following oral submissions:

(1) The respondent had relied upon an aggravating factor which was said to be an application to Ireland to circumvent the rules. He submitted that the evidence was clear that the sponsor said that she had wanted to settle in Ireland but did not make an application to the UK. In order to circumvent the rules they would have to be an application for a visa, but the sponsor did not make any application. The burden was on the respondent and there was no evidence as the sponsor was clear about her intention.

(2) As to the respondent's submission that the appellant and the sponsor could maintain family life as currently enjoyed, such an argument is unlawful. They have a child together and they video call and there have been visits to Bangladesh that is not sufficient for family life and such an argument is "unlawful".

(3) He submitted that the presenting officer had not addressed the issue of interference and that the burden was on the respondent to prove the interference and to justify it and there was no evidence to support the allegations that he had tried to circumvent the immigration rules.

(4) In answer to the submission made by the presenting officer that there were no exceptional circumstances under article 8, the child S had a medical condition which was exceptional. Mr Bashir refer to page 3 (letter from the school) which he stated identified the issues in relation to the child and that she often talked about her dad and what it would be like if she lived with her dad. The child had a lack of confidence and self-esteem and was emotionally affected in the absence of her father. This was a well detailed letter.

(5) He submitted that there were trips to Bangladesh on page 36 and page 41 the 1st visit showed photos clearly showing the child happy and close with her father stop there was a 2nd visit page 49 on page 51 showed 1/3 visit. The photographs show the relationship with his daughter and that the "pictures tell all". He also referred to the money receipts. In relation to the sponsor, he submitted that her state of health was poor, and she had anxiety due to the separation of her family and the family life could not continue in the way that it had.

(6) Dealing with the decision letter and paragraph 320(11), he submitted that it was a discretionary refusal, and it is not correct to say that little attempts had been made to address the previous concerns because all the evidence had been sent. In the decision letter of 2014 the respondent recognised that an application should not be refused under paragraph 320 (11) indefinitely, but the application was refused again on this issue.

(7) When looking at the aggravating factors, he submitted the burden was on the respondent to prove the factors relied upon. In relation to the allegation made to Ireland the decision letter refers to an application made for a Visa made on 2 August 2015 but was refused on 27 August 2018. Reference was made to this as a "chronology" that the respondent had not made any adverse findings or suggested that this was an aggravating factor. It is also not allege that this was a frivolous application, and it would be expected for the respondent to argue that this would be an aggravating factor however the sponsor has said that it was not her intention, and the burden is on the respondent to show that this was the case. The burden shifts because of the denial of the sponsor. He submitted that this was not a frivolous application as there are rules which allow an application to be made. However they have not made an application and it was simply an assumption made by the ECO which needed to be backed up with evidence.

(8) The only aggravating factor was the appellant overstaying his leave. He had not done anything unlawful, and he voluntarily left the UK and then reapplied as he satisfies the test set out in PS. Therefore his overstaying in the UK is insufficient. When considering suitability, the guidance refers to people with criminality and offences rather than overstaying.

(9) As to whether the marriage is subsisting, he submitted the evidence is clear that had undergone an Islamic marriage and the sponsor went to Bangladesh. They spent time together. Whilst previous judges' have found it not be a genuine subsisting relationship, due regard should be given to the passage of time and that they have been together 11 years and it is not therefore arguable that the relationship is not subsisting. Despite separation the relationship has continued, and they have a child together. This is also supported by the family visits that have taken place, the level of contact and the money that the sponsor has spent on the applications. These are critical factor, and the evidence shows the strength of the relationship and the intervening devotion between them.

(10) When considering article 8, the child has a relationship with her father and established family life. The photographs show how close relationship is in the video images show S smiling. The school reports referred to her being unhappy and having low self- esteem whereas the video images give a different picture and show her relationship with her father. The school confirms the position that the child S always talks about her father. The burden is on the state to justify that the interference in family life is justified. There has been no argument advanced before this tribunal and the presenting officer has not addressed the issue of proportionality. The only aggravating factor is his overstaying, and this is a weak ground.

(11) When considering the best interests of the child, S suffers from diabetes and there are a number of medical reports showing that she is emotionally suffering, and it is affecting her education. The best interest of the child are paramount and are a critical factor in the appeal. She remains a young child and the sponsor is a single parent who has a condition of anxiety. When taken together they are the exceptional circumstances. Consequently EX1 is satisfied. Mr Bashir submitted that the respondent failed to consider discretion based on the evidence and therefore the decision was "unlawful".

128. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

129. The only ground of appeal available to the appellant is whether the refusal of entry clearance breaches Section 6 of the Human Rights Act 1998 and the relevant question is whether the refusal interferes disproportionately with the any established family/ private life of the appellant, the sponsor and the child S.

130. However in considering that issue, whether the appellant meets the Rules is a relevant consideration.

Consideration of the relevant Rules:

131. When assessing the evidence I remind myself that the burden of proof lies on the appellant and that he is required to establish the factual circumstances “on the balance of probabilities”.

132. For the purposes of this appeal, the appellant has applied for entry clearance by making an application under Appendix FM. The application was refused on grounds of suitability under EC-P. 1.1 (c), on grounds of not meeting the eligibility relationship requirements, the entry clearance officer reaching the conclusion that there was insufficient evidence to demonstrate a genuine and subsisting relationship and also under paragraph 320 (11) and the general grounds for refusal based on the appellant’s past immigration history and conduct.

133. The skeleton argument prepared on behalf of the appellant and replicated above addresses a number of issues in no particular order. The starting point of my assessment of the relevant issues are the previous factual findings made by the previous judges applying the principles in Devaseelan v Secretary of State for the Home Department [2002] UKIAT 702.

134. In the decision of SSHD v BK (Afghanistan) [2019] 4 WLR 111 Rose LJ set out the relevant legal principles at [31] to [39] of her judgment and summarised it by reference to 8 factors as follows.

(1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle, issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
(2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
(3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
(4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.

(5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.
(6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.
(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.
(8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case.

135. Rose LJ cited with approval paragraph 66 of the UT decision in *Mubu*. This was an example of the flexible approach enjoined in *Djebbar*. She concluded her review of the principles to be applied at [39]:

> "There has been some discussion in the cases about the juridical basis for the *Devaseelan* guidelines. The authorities are clear that the guidelines are not based on any application of the principle of res judicata or issue estoppel. The Court of Appeal in *Djebbar* referred to the need for consistency of approach. The Court of Appeal in *AA(Somalia) v SSHD* [2007] EWCA Civ 1040 also referred to consistency as a principle of public law and the well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently."

Rose LJ went on to say at [44]:

> "I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal."

136. There are 3 previous decisions made by First-tier Judges in August 2011, April 2013 and 12 June 2015. In summary, the factual position is that there have been substantial factual findings made by three different judges that either this was a marriage of convenience, a sham marriage and that the marriage was not genuine and subsisting, and the parties did not intend to live together. This was found to be

the position notwithstanding the birth of S as all appeals were heard after the birth of S. I shall therefore summarise those factual findings.

137. The first set of factual findings are set out in a decision promulgated on 8 August 2011 by Judge MacDonald. In his decision promulgated on 5 August 2011, the FtTJ made the following findings after hearing oral evidence from the sponsor and her brother as set out between paragraphs [25]-[61].

138. In relation to the issue of maintenance, the appellant had not established that the sponsor was in employment given the lack of evidence of earnings paid into her bank account and tax and NI payments. In the alternative even if on some form of unpaid maternity leave, the sponsor gave no indication when she intended to return to work. The judge was not satisfied that the job offer for the appellant from the sponsor's brother was a genuine vacancy or that the appellant had a necessary ability to fill such vacancy (at paragraph 39).

139. As to the issue of the marriage that had taken place and whether this was a genuine and subsisting marriage, the judge made the following factual assessment from the evidence.

140. The judge found that the evidence as to where and how the sponsor met the appellant and the circumstances in which they met and how long they may have lived together in the UK was vague and lacking in clarity and that the sponsor's account as to when she and the appellant met was not credible or consistent (paragraph 45).

141. The judge took into account that there was no witness statement from the appellant and that the grounds of appeal did not address any of the immigration issues raised in the refusal letter. The judge quoted that the only written evidence of the appellant which was in the form set out at paragraph 9 of the VAF, in which it was stated "… I was due to return to Bangladesh before my visa expired. However my wife 's family were discussing a wedding proposal for us as an arranged marriage at that time…." The judge found that this "indicates to me that the wedding proposals were underway at or about the time the appellants visa expired in November 2008.

142. The judge recorded the evidence in the VAF at paragraph 8.4.2 where the appellant was asked to state when he had met his sponsor. The ECO had stated in the decision letter that the entry was unclear as to whether they had met on 8 January 2009 or 8 November 2009. The judge found that the appellant had not addressed that issue. The judge also found that at the commencement of the hearing the sponsor amended her own witness statement changing the date that she 1st met the appellant from 8 January 2009 to the 8 November 2009. It was said that this was an error, but the judge found that "whichever date one looks at neither date fits comfortably with the

appellant's statement in his VAF that wedding proposals were 1st discussed possibly in September 2009 when there were discussions between her elder brother and the appellant's brother. The sponsor's evidence is that she and the appellant met about 2 months later in November 2009 which was at least a year later than the appellant initially said when giving information in part 9 of his VAF" (at [42]).

143. The judge went on to state that the sponsor's evidence was that when the proposal for marriage was 1st made it was made to her brother and the appellant's brother who were friends. Her evidence was that she did not think the appellant was looking for a wife at that time. The judge found "this does not accord with Mr A's evidence who said that he was aware when the proposals were 1st discussed that at that time the appellant was looking for a wife "(at [43]).

144. At [44] the judge set out the evidence from the sponsor in her witness statement that the negotiations regarding the marriage took place between the families and they did not always progress smoothly as possible but after things were agreed they had an Islamic wedding on 10 January 2010. The judge found "this account does not mention the application for a certificate of approval of marriage at all. The application was made on 29 September 2009, and I do not accept that such an application would have been made if the terms of marriage had not been agreed by the respective families. I therefore conclude that the sponsor's account as to when the marriage arrangements took place is not consistent".

145. At [45] the judge considered the evidence given by the sponsor in her witness statement which he found "seems to contradict the evidence that she and the appellant had never met prior to 8 November 2009. The judge cited paragraph 5 of the witness statement where it was said "we hope to be able to get married…" And at paragraph 6 "we also used another firm of solicitors to make an application to the Home Office for a certificate of approval of marriage. From this evidence the judge made a finding as follows "this clearly implies that the sponsor was a party to the application at least 5 weeks before the affidavits in support were prepared. The affidavits are dated 5 November 2009 and are to all intents and purposes mirror images of each other save for the references to the identities of the sponsor and the appellant and the respective parties proposed wedding. Both affidavits were sworn before the same solicitor on the same day. Yet in each affidavit the deponee swears that they have never met each other and that they have agreed to marry on the basis of an exchange of photographs. I therefore do not find the sponsor's account as to when she and the appellant met to be credible or consistent".

146. At [46] the judge found that "The appellant has not offered any explanation for his presence in the UK between the date his visa expired and on 29 September 2009 when the application for a certificate of approval was made"; 10 ½ months after his visa expired. The judge recorded that the sponsor had said she had no idea

because she had not asked him and that the witness Mr Ali said he thought it was because he liked it here the judge found “I do not consider that to be inadequate or acceptable explanation. Mr Ali’s evidence contradicted the evidence of the sponsor regarding the appellant’s intentions. His evidence is that he had been told that the appellant was looking for a wife. He also said that he found out just before the marriage was arranged that he was in the UK illegally. This evidence strongly suggests to me that the appellant had decided to stay in the UK by whatever means he could. As he was unable to work he saw the wife of his own community in the United Kingdom who was a UK citizen in order to achieve his aim. I consider that the sponsor and his family must have become parties to assist him in this. I cannot find any other vaccination as to why the sponsor’s family would agree to her marrying the appellant. He was a man who would not work for 2 years and had no prospects of employment in the UK as he was not allowed to work. He had no assets or prospects. He was in the UK illegally and face the prospect of being returned to Bangladesh any time. “

147. The judge found that the appellant decided to stay in the UK by whatever means he could and that the sponsor and his family must have become parties to assist him (paragraph 46). The judge found that this is not a genuine subsisting marriage but was a marriage entered into as a marriage of convenience with the sole purpose of enabling the appellant to remain in the United Kingdom (at paragraph 47).

148. When considering paragraph 320(11) the judge considered the application for the certificate of marriage fell into the category of a “vexatious or frivolous” application because it must have been apparent in the application was made that he had no chance of success given that the appellant at that time had no right to remain in the UK and had been in the UK for almost a year illegally before the application was put in (see paragraph 49). The judge was satisfied that the decision to refuse the application under paragraph 320 (11) was correct.

149. In his decision the judge considered whether the appellant and the sponsor had ever lived together in the United Kingdom. The judge found that the sponsor’s evidence was that the appellant had lived with her since their Islamic marriage in January 2010 but there was no confirmatory independent evidence of cohabitation (paragraph 50). At paragraph [56] he found the marriage to the appellant was “not genuine and subsisting”.

150. The judge accepted that the parties had a child and that the appellant was the father of S born on 26 December 2010. The judge found that there was family life between the appellant and the child but that she had never seen the appellant. The judge also found at [58] that there was no evidence that he had expressed any kind of interest in seeing his daughter; he had not submitted any written evidence to show he

has expressed any interest in the well-being of the child or take any part or interest in her upbringing thus far. The judge found that the sponsor had cared for S since her birth and that her links were with her mother and grandmother. The judge found at [60] that the sponsor was the "primary carer for her child and that she receives help and support from her mother. There is no evidence the appellant is in a position to or ever has made any financial contribution towards the child".

151. When undertaking the proportionality assessment, the need to maintain firm and fair immigration control, the appellant's poor immigration history, his inability to meet the requirements of paragraph 281 and the lack of any support and interest in his daughter outweighed the best interests of the child the primary consideration.

152. It is not stated that the appellant sought permission to appeal that decision. However 6 months later on 9 February 2012, the appellant applied for entry clearance as a spouse. This was the 2nd application. It was refused by the respondent for the reasons summarised earlier when dealing with the chronology of applications.

153. The appeal came before FtT Judge Reed on 11 April 2013. In a decision promulgated on 12 April 2013, the judge dismissed the appeal. He made the following factual findings on the evidence that was before him.

154. Having considered the further evidence, the judge saw no reason to depart from the previous findings made by Judge MacDonald about the nature of the marriage and the reasons why it took place. He set out his reasoning at paragraph [24](i)- (vi).

155. The judge also found that he had not been given credible evidence as to when the appellant and the sponsor 1st met having placed weight on the affidavit sworn on 5 November 2009 for the certificate of approval in which they claimed that they had not yet met (at [24] (iii))).

156. The judge made a finding that the evidence about when the sponsor became aware of the appellant status in the UK was found to be "confused and contradictory". The judge set out the sponsor's evidence that she and the appellant 1st met on 8 November 2009 explaining how they talked and liked each other and how their views and feelings met and that "he did not have a proper immigration status" that also stated, "however I liked him for who he was, and I trust my family who checked his family background". The judge found "this evidence does not sit well however with what he said in a signed witness statement of 13 July 2011 in which he stated, "I did not initially know what his status was in the UK that I learned later that he'd come to the UK on a working holiday maker Visa, but that is visa had expired a short while earlier". The Judge referred to evidence

from the witness given in March 2013 that he knew about the appellant being in overstayer before asking for a photograph to show his sister. The sponsor had said the photograph was shown in September 2009 the judge found “as a brother already knew about the appellant being an overseer at that time, I do not find it credible that the sponsor would also not have known from her brother about this at that time.” (at [24](iv).

157. At paragraph 24 (ii) the judge considered the evidence as to whether the sponsor’s brother would have considered the appellant to be a suitable match for the sponsor and considered that there would be no problem about the certificate of approval for marriage and that he’d been told this would only take 4 to 6 weeks to sort out. The judge found “if that were the advice of a given, then I do not accept that they would have been any point in making arrangements or in going through the Islamic ceremony of marriage so quickly because little delay would have been anticipated in waiting for the certificate of approval.” The judge also found that in both affidavits filed the appellant and the sponsor had said that they had considered the possibility that were advised that it would not be possible without a certificate of approval. The judge found “this does not sit well with the fact that the couple went ahead with the Islamic ceremony in any event or what Mr A said about the advice he was given. The evidence put forward by the appellant does not explain why Mr A allowed the arrangements of the Islamic ceremony to continue without obtaining the certificate of approval.”

158. As to the evidence of contact relevant to whether this was a genuine and subsisting marriage the judge considered the telephone records relied upon by the appellant.

159. The judge found that they showed various phone calls to mobile telephones in Bangladesh, but they were not the appellant’s number. The judge found that no real weight could be attached to the evidence to demonstrate a subsisting relationship between the appellant and the sponsor. Whilst some of the calls were lengthy, the evidence was looked at in the round, but little weight was attached to that evidence.

160. The judge took into account that the sponsor went to Bangladesh with their daughter in November 2011 and remained there for 4 weeks. There were also photographs showing the appellant sponsor during this period. Whilst they claimed to cohabit with each other during that period and in 2010, there was no supporting evidence from other relatives in Bangladesh; the sponsor has relatives on her mother’s side in Bangladesh which might give the sponsor an incentive to visit the country other than to cohabit with the appellant. Consequently the judge found that the appellant had failed to show that there was a subsisting marriage within the meaning of paragraph 281 (iii) of the rules.

161. The judge found that the appellant could meet the immigration rules relevant to maintenance and accommodation.

162. The judge also consider paragraph 320 (11). The judge saw no reason to depart from the findings made by judge MacDonald stating that clear reasons set out his finding that the appellant and the sponsor had entered into a sham marriage and that he had taken the same view. The appellant was an overstayer and entering into a sham marriage is one of the aggravating circumstances referred to in the guidance. The judge therefore concluded that the respondent demonstrated that there was a condition precedent to the exercise of the discretion under paragraph 320 (11). The judge took into account that the sponsor and the appellant had a child and taking into account the best interests of the child as a primary consideration and that she could remain in the UK to receive the support for mother and other members of the family and the benefits derived from British citizenship. Whilst the marriage was not a genuine and subsisting one, it had not been shown that allowing the appellant entry to the UK would mean that the young child will be living in a household with both parents. It was not unreasonable to expect sponsor to take her daughter to Bangladesh so that her father could have access to her.

163. In summary the judge did not accept that this was a subsisting marriage; the appellant came to the UK lawfully which is to his credit but that he then became an overstayer. In an attempt to be able to continue living in the UK he entered into a sham marriage. It was to his credit that he left voluntarily and sought entry from overseas but based on his findings and those of the previous judge the application to leave to enter had been based upon the same sham marriage. Allowing the appellant entered the UK would give him increased prospects for contact with his daughter but those visits could take place in Bangladesh. Whilst more time had elapsed since the decision the previous appeal, the judge found that the appellant was not still being truthful about his intentions and seeking entry to the UK.

164. The appellant sought permission to appeal that decision, but it was refused by Judge Kamara on 23 July 2013.

165. On 16 June 2014, the appellant made a third application for entry clearance as a spouse which was refused in a decision taken on 20 August 201

166. The third set of factual findings were made by FtTJ Shimmin on the 12 June 2015. At paragraph 12 he set out the issues that he had to decide which were whether there was a genuine subsisting marriage, whether the appellant/sponsor met the financial requirements of the immigration rules and whether paragraph 320(11) applied. At the hearing the FtTJ heard substantial evidence from the sponsor, two of her brothers, and her mother.

167. The factual findings made by the FtTJ are as follows. It had been argued that the persistence of the appellant and sponsor in making the 3rd application was evidence of the genuine and subsisting marriage. The judge considered this but found "it does not carry weight" (at [26]). The FtTJ did not find the evidence of the sponsor to be credible concerning the contact that she claimed to have with the appellant and found her claim to be a "gross exaggeration in an attempt to bolster the evidence" (paragraph 29). The sponsor gave inconsistent evidence in relation to communication with the appellant over the Internet and that she provided implausible reasons for the inconsistent evidence (paragraph 32).

168. At paragraph [33] the judge found that the "most marked inconsistency" in the evidence was in relation to the early days of the claimed relationship between the sponsor and the appellant. The sponsor stated that they 1st met on 8 November 2009 before they met they had agreed to marry. Prior to the meeting she had seen his pictures and they got to know each other over the telephone. They told the family they liked each other, and the elders sorted out and there were discussions between the sponsor's 2 brothers. The FtTJ contrasted the evidence given by the sponsor and her brother at paragraphs 34 and 35 and found there to be a "marked difference between the accounts in relation to the couple's 1st meeting. He stated "there is no mention before of the appellant approaching his brother and telling him about the sponsor. The sponsor's version was that there was a discussion between the families (but he did the 2 brothers) and she had seen photographs of the appellant before they met. I find this seriously damages the credibility of the appellant and the sponsor" (see paragraph [36]) . The judge made a finding of fact that the appellant not provide any basis credible to the required standard of the balance of possibilities for challenging the assertions that the marriage is a sham. He therefore dismissed the appeal.

169. I have set out in detail the factual findings made by the 3 previous judges based on the evidence that was before them, both written and oral evidence. Those 3 judges have found that the parties have entered into a marriage of convenience or alternatively a sham marriage. All 3 have found that notwithstanding the birth of S, this was not a genuine and subsisting marriage. I remind myself that those findings are only the starting point of my assessment. I have therefore assessed the evidence now put before the tribunal and considered whether that evidence undermines those previous findings of fact and whether I reach different factual findings.

170. Both the appellant and the sponsor have filed witness statements. The appellant's is dated 11 June 2020 and the witness statements from sponsor I dated 14 June 2020 and 6 October 2021. I have set out earlier in this decision a summary of the oral evidence of the sponsor. No other witnesses were called on behalf of the appellant.

171. When undertaking an assessment of that evidence neither the appellant nor the sponsor provided any further evidence or detail concerning the factual circumstances of how they met, how the marriage was arranged or any evidence to demonstrate that they lived together in the UK in 2010. There was no factual evidence given in the sponsor's witness statement concerning those issues. At its highest the sponsor stated that it was "naïve of the ECO to assume that I would marry someone who is using me to come to the UK particularly given that my marriage has lasted 10 years" (at paragraph 9 witness statement 14/6/20). The same evidence is replicated in the witness statement dated 6/10/21 at paragraph 9. Paragraph 2 refers to having undertaken a marriage, but no further details have been given in evidence concerning the factual circumstances. Similarly the appellant's witness statement refers the marriage as having taken place at paragraph 4 but nothing more is set out.

172. On the evidence before me I conclude that there has been no attempt to provide further evidence concerning how the parties met, the circumstances of the marriage from either the appellant or the sponsor nor has there been any evidence from witnesses who had previously given testimony to the tribunal and who were present at the time that the events took place. Indeed they would also have evidence to provide about the current circumstances of the relationship. Thus there has been no further elucidation or explanation given in evidence.

173. The written and oral submissions made on behalf of the appellant by Mr Bashir refer to the marriage having "passed the test of time". This is in the context of the issue of the genuine and subsisting nature of the relationship but in my judgment this does not reflect on the previous judgements and factual findings made that this was a marriage convenience or a sham marriage. The previous 3 judges heard evidence from family members and those who were concerned with the marriage at the time it was entered into. The judges were not satisfied that the witnesses had provided credible or consistent evidence for the reasons they have given in their judgements. I have neither heard nor seen any new evidence about those circumstances. Nor have I been provided any further evidence concerning the period of claim cohabitation in 2010 in the UK.

174. I therefore conclude that there has been no cogent evidence before me to undermine the previous factual findings made that the parties entered into a marriage of convenience or a sham marriage.

175. I now turn to the issue of whether there is a genuine and subsisting marriage. In this context I remind myself of the following. Firstly, a marriage of convenience may start as such but could also be relationship which is genuine and subsisting thereafter. The previous factual findings made by the first-tier judges did not find that the relationship was genuine and subsisting post- marriage in 2011, 2013

and 2015 having taken account of the evidence as to contact, the visits that had taken place and the birth of S in 2010 and the length of time that it was said the marriage had endured. I accept that an important factor in weighing up the evidence is the passage of time.

176. I have summarised earlier the factual reasons given by each of those judges for reaching the conclusion that this was not a genuine and subsisting marriage. The point relied upon by Mr Bashir is that the passing of time since those findings of fact were last made in 2015 is sufficient to demonstrate by itself that the relationship is genuine and subsisting. He further submits that the evidence as to contact and financial remittances and photographs alongside one further family visit is supportive evidence of there being a genuine and subsisting relationship.

177. I have therefore undertaken an assessment of that evidence. Dealing with the evidence of contact between the parties, I have found that there is no evidence to undermine the factual findings that the parties did not live together in the UK in 2010. That was a factual finding made by 2 previous judges and there has been no evidence put before this tribunal to undermine those previous factual findings. As to residence in Bangladesh, the evidence before the tribunal is that there were visits made by the sponsor in 2011, a visit from 26 December 2013 until 20 January 2014. The judge in April 2013 found that at paragraph 24 (vi) that the parties had claimed to have cohabited during that time but that there was no supporting evidence from those relatives in Bangladesh who would reasonably have had the opportunity to observe this. The judge took into account that the sponsor had relatives on her mother's side in Bangladesh and thus this might give the sponsor an incentive to visit that country other than to cohabit with the appellant. Since that decision there have been 2 further visits made on 18 January 2015 until 8 February 2015. Judge Shimmin was aware of that visit but notwithstanding that evidence was satisfied when considering the evidence as a whole it did not demonstrate there was a genuine and subsisting relationship. Since his decision, there has been a further visit from 14 December 2017 to 4 January 2018. It is the sponsor evidence that he visited her husband at that date and had taken S with her.

178. There has been no dispute that the sponsor and S visited Bangladesh on those dates. I have therefore considered whether the evidence is probative of the genuineness of the relationship. There is no account given of any of the visits in the appellant's evidence. His evidence is silent and devoid of detail concerning those visits made; what the parties did, where they resided. Similarly the sponsor's evidence does not provide any details of those visits made other than saying visits were made on that date (see paragraph 7 of the witness statement). In the sponsor's oral evidence she claimed that she had no relatives in Bangladesh. However that evidence is not consistent with the factual finding made by the previous judge that the sponsor had family members resident in Bangladesh (see paragraph 24(v)). If the

circumstances had changed, is reasonable to assume that that would have been evidenced.

179. Also in this context Mr Bashir has directed the tribunal's attention to the photographs in the bundle. He submits that they show the appellant and the sponsor together on those visits and that the expressions of S demonstrate that this is a genuine and subsisting relationship. The photographs are set out in the updated bundle at page 41 onwards. None of those photographs are dated save that it is stated "1st visit", 2nd visit, and 3rd visit. They do not appear to be any photographs to support and show the last visit that was made in 2017/2018. The photographs that are said to be of the 1st visit at pages 42 – 44 give the appearance of taken on the same day. I would accept that the photographs show that the appellant, sponsor and S together. This is not in issue. However I attach little weight to those photographs as demonstrating a genuine and subsisting relationship between the sponsor and the appellant. Photographic evidence can only ever be a snapshot in time and therefore cannot by themselves substantiate whether a relationship is genuine and subsisting. Mr Bashir submitted the photographs show S smiling and thus is evidence of a subsisting relationship. It may be evidence of the relationship between S and a father that it does not in my judgement demonstrate the subsisting nature of the relationship between the sponsor and the appellant.

180. I therefore turn to the other evidence relied upon. It is submitted on behalf of the appellant that the parties maintain regular contact, and this is supports the subsisting nature of the relationship.

181. I have given careful consideration to that evidence. The appellant's witness statement makes no reference to the issue of ongoing contact whatsoever. All that is stated is that if the marriage was not genuine "my wife would not have maintained contact…". He has provided no explanation of how contact is maintained, what the nature of the contact is, details of matters that are discussed or any evidence that is relevant to this issue. The sponsor's evidence in the witness statement (4/6/20) mirrors that of the appellant at paragraph 9 stating that if the marriage is not genuine, I would not maintain contact. The same is stated again at paragraph 9 of the up-to-date witness statement (6/10/21). Nothing further is stated as to the nature of contact and how it is maintained. In her oral evidence, the sponsor submitted that she had kept contact since 2018 daily; that they talked on the phone video calls and text. She claimed that they spoke every day to each other. The previous judge in 2013 did not accept that the sponsor had given a credible account and that the evidence as to contact in the form of the telephone cards did not show who had made the calls nor showed any record of what number had been dialled (see paragraph 24(v)). The judge did have a sheet of calls between the parties but found that if determined to gain entry the number of telephone calls was a "small price to pay" and that having assessed the evidence the round gave little weight to it. The

Judge in 2015 made a number of adverse factual findings about the nature of contact which was set out at paragraphs 29 – 32 of his decision and expressly found that the sponsor's evidence as to contact was "a gross exaggeration".

182. Against that background, I have considered the evidence as to the continuing contact that it is said has taken place between the parties. In this context I note that no evidence or chat messages had been placed before the entry clearance officer. In the bundle of documents put before Judge Hillis there is exhibited chat messages at pages 18 – 143 and in the updated bundle from page 63. The 1st tranche of messages appear to be WhatsApp messages from S's phone between S and the appellant. They are not dated with the year. The content of those messages provides no indication of the nature of the relationship between either the appellant and S nor that between the sponsor and the appellant. Upon careful examination they are properly characterised as brief one line exchanges often by way of a greeting such as "good morning", are you okay? I'm good". There is no detailed conversation within any of that evidence.

183. The sponsor's evidence is that they talk on the telephone. Unlike previous applications no call records been provided in the current application to assess and therefore the ongoing contact since the last decision in 2015 is only substantiated by the messages from social media which do not in my judgement provide any basis upon which the tribunal can reach a conclusion that they are indicative of a genuine and subsisting relationship. The bulk of the WhatsApp messages are between S and the appellant and not the sponsor. Oral conversations undertaken by telephone contact could be evidenced by either a summary or examples of the type of conversations that have been undertaken between the couple. For example concerning particular events in each other's lives. An alternative way to evidence such contact would be to exhibit call logs. The oral conversations referred to are not evidenced in either of those 2 ways.

184. Mr Bashir in his written submissions has directed the tribunal's attention to a number of authorities that refer to genuine and subsisting marriages. He submits that the decision in GA (subsisting marriage) Ghana [2006] UKUT 00046 only requires a real relationship as opposed to the merely formal one of a marriage and that evidence of calling cards would be sufficient to demonstrate that there is a genuine and subsisting marriage.

185. I have given careful consideration to that submission of the context of the evidence. As with any case authority in this area the cases are necessarily fact sensitive and none of the cases referred to have a factual background such as that in the present appeal. I have considered the decision of the Tribunal in GA (subsisting marriage) Ghana* [2006] UKAIT 00046 which refers to previous Immigration Rules (paragraph 218). It is clear from paragraph 10 of that decision that this Rule requires that there be a currently valid legal marriage

and that each of the parties intends to live permanently with the other as his or her spouse. That goes to the substance of the relationship rather than form and in looking at the future of that relationship and the prospective and present intention of the parties. The decision is therefore authority for the proposition that the requirement in paragraph 281 for the marriage should be "subsisting" is not limited to considering whether there has been a valid marriage which normally continues. The word requires an assessment of the current relationship between the parties and a decision as to whether in the broadest sense it comprises a marriage properly described as "subsisting".

186. In Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 000 41 it was held that the matrimonial relationship must continue at the relevant time, but it does not require the production of particular evidence of mutual devotion for entry clearance can be granted. It also stated that evidence of telephone cards is capable of being corroborative of the contention of the parties they communicate by telephone, even if such data cannot confirm the particular number the sponsor was calling in the country in question. It is not a requirement that the parties also write or text each other. However the decision goes on to state at (iii) "where there are no countervailing factors generating suspicion as to the intention of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant. The claimant is to establish the requirements of the rules are met or that an immigration decision would be an interference with established family life and in both cases the relevant standard for establishing the facts is the balance of probabilities. On the facts of this appeal, the ECO and the respondent plainly point to "countervailing factors generating suspicion" based on the history of the relationship and the previous factual findings made by the 3 individual judges concerned over a substantial period of time. The claim necessarily must be considered in the context of the history of the relationship and an assessment must be made whether and to what extent that illuminates the nature of the present relationship and future intentions (see paragraph 14 of GA).

187. Other evidence relied upon are the financial remittances. There are sporadic financial remittances evidenced in the documentation. They consist of 2 sums sent in 2013 (page 34 and 35 VCO bundle, one in 2017, one in 2018 3 in 2019 and in the updated bundle 3 more in 2019. There were 3 in 2020 and 2 in 2021 in small amounts. When assessing that evidence, there is no consistency of amounts or in the periods of time that they have been sent although I would accept that there have been more sent since 2019 but that they may be a reflection that the application of entry clearance was made in 2019. By way of contrast, there are little financial sums sent between the sponsor and the appellant in the preceding years between 2013 – 2018.

188. As to the reasons why the sums of money were sent, the sponsors evidence was that the sponsor had a DIY shop and that he had an income. When asked why she sent him money she said it was for spending on clothes and for leisure. The oral evidence given before the tribunal was to the effect that he did not require the financial support for any essential items but for extras such as going out. However that oral evidence is not consistent with the written evidence placed before the ECO in a letter dated 25/4/2019 (page 65 ECO bundle) where the sponsor referred to the appellant's circumstances and that he is "earning barely enough for food". That is an entirely different picture from the oral evidence given and reflects upon her credibility and why money was being sent.

189. I have stood back and considered the evidence before the tribunal "in the round" concerning the issue of whether there is a genuine and subsisting marriage. I would accept the submission made by Mr Bashir that the length of time that has elapsed since the last factual findings is a relevant consideration and should be afforded weight in any assessment undertaken. However, it cannot be considered in isolation and has to be considered in the light of the supporting evidence. I have set out above my factual assessment of the supporting evidence which confirms the last visit made was 2017 – Jan 2018. There have been no photographs provided of that visit or any factual account given of it. There have been no visits made since that time. I would accept that the sponsor has limited income and post March 2020 with the pandemic travel has been problematical. However there has been no explanation as to why no detail has been provided of the visits that have taken place or any support given from those who were also present. I have assessed the content of the social media messages which in my judgement are very limited in its contents for the reasons that I have given alongside the financial remittances where it has not being consistently explained why such remittances have been made. The witness statements and evidence given provide no illumination of the relationship to support the genuine nature or subsistence of that relationship. There have been no examples of the type of conversations that the parties have with each other, on matters of importance to them or how they are resolved. There is also no supportive evidence from any witnesses who know the couple. This was a matter highlighted by the previous judge, but it remains the position that there has been no supporting evidence provided by those who know the parties and who would be able to provide a picture of the parties relationship. It is of course a matter for the appellant as to what evidence he produces in support of his appeal, but the burden remains upon him to demonstrate on the balance of probabilities that there is a genuine and subsisting relationship, and this requires cogent evidence and particularly when there have been 3 previous adverse decisions on this issue. However for this present appeal and for the reasons I have given the evidence is lacking and is not of such cogency to make a positive assessment that the appellant has discharged the burden that is upon him. Mr Bashir has properly submitted that the existence of S demonstrates

the nature of the relationship. In this regard as the respondent submits the presence of S did not preclude 3 previous judges finding that this was not a genuine subsisting relationship. Furthermore, even if it could be said that the sponsor has a genuine and subsisting relationship with the appellant, it is the intentions of the appellant which are equally necessary and in light of the paucity and lack of cogent evidence which illuminates his intentions he has not discharged the burden upon him to demonstrate that there is on his part a genuine and subsisting relationship with his intention to permanently live with the sponsor. Consequently having assessed the evidence in the round, the evidence is such that I do not depart from the earlier findings that were made. It follows that the appellant has not demonstrated that he can meet the eligibility relationship requirement under Appendix FM of there being a genuine and subsisting marriage.

190. I now turn to the suitability requirement and paragraph 320(11) of the Rules.

" Section S-EC: Suitability-entry clearance

191. S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply.

S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance.”

192. The suitability requirement is a mandatory ground for refusal under Appendix FM.

193. Paragraph 320(11) sets out a general ground of refusal where entry clearance "should normally be refused" in the following terms:

"(11). Where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:

(i) overstaying; or

(ii) breaching a condition attached to his leave; or

(iii) being an illegal entrant; or

(iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);

and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process".

194. Paragraph 320(11) is now replaced by paragraph 9.8 of the Rules which reads as follows:

" 9.8.2. An application for entry clearance or permission to enter may be refused where:

(a) the applicant has previously breached immigration laws; and

...

(c) the applicant has previously contrived in a significant way to frustrate the intention of the rules, or there are other aggravating circumstances (in addition to the immigration breach), such as a failure to cooperate with the redocumentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding."

195. I therefore apply the Devaseelan principles in this respect also to determine whether the appellant has acted in such a way that he cannot meet the suitability requirements under Appendix FM or in the alternative paragraph 320 (11) applies. The 3 previous judges of all made findings of fact that paragraph 320(11) applied to the appellant.

196. Mr Bashir has referred the tribunal to the decision in PS (paragraph 320(11) discretion: care needed) India UKUT 440 (hereinafter referred to as" PS (India)"). It states as follows:

> " In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance.

197. Whilst reliance is placed on the decision of PS (India), the circumstances of the appellant in that appeal are not the same as the facts of the current appeal. Paragraph 320 (11) applied in PS because the appellant remained in the UK without leave and was an overstayer, but the tribunal had not taken account of or assessed whether there were any aggravating circumstances. I accept there is a tension between paragraph 320 (11) and the public interest in encouraging those who overstay to leave the UK make an application to enter the UK. This is a point made by Mr Bashir. His submissions are advanced on the basis that firstly the respondent has not identified any “aggravating circumstances” nor is the respondent provided any evidence aggravating circumstances. He submits that the appellant admits that he breached immigration rules (I assume as a result of overstaying his leave) but that he denies that he had continued frustrate the intention of the rules. Mr Bashir submits that beyond the appellant overstaying the respondent has not identified any aggravating circumstances and therefore paragraph 320(11) does not apply.

198. The respondent's guidance entitled; Suitability; previous breaches of UK immigration laws sets out the following non-exhaustive list of matters which may be considered to constitute "aggravating circumstances":

- absconding

• not meeting temporary admission/reporting restrictions or bail conditions

• failing to meet the terms of removal directions after port refusal of leave to enter

or illegal entry

• previous working in breach on visitor conditions within short time of arrival in

UK (indicating a deliberate intention to work)

• receiving benefits, goods or services when not entitled

• using an assumed identity or multiple identities

• getting NHS care to which they are not entitled

• attempting to prevent removal from the UK, arrest or detention by Home Office

or police

• escaping from Home Office detention

• switching nationality

• troublesome or frivolous applications

• not meeting the terms of the re-documentation process

• taking part, attempting to take part, or facilitating, in a sham marriage or

marriage of convenience

• harbouring an immigration offender

• people smuggling or helping in people smuggling."

199. When considering the relevant law, Paragraph 320 (11) has 2 elements to it. First an applicant must fall into 1 of the categories set out in (i)-(iv) and secondly, there must be an aggravating circumstance. There appears to be no dispute that the appellant overstayed his leave which ended in November 2008 and therefore the first subparagraph (i)

of Paragraph 320(11) applies to him. I take into account his voluntary departure from the UK. As to the second element, Mr Bashir submits that there are no aggravating circumstances.

200. The decision letter plainly sets out that the application was considered in the light of the previous findings made. Whilst Mr Bashir sought to argue through his submissions that paragraph 320(11) could not apply because the respondent had only considered the appellant's overstaying and therefore was considering this as an "open ended" refusal, this was not reflected in the decision. The ECO made it clear that the grounds for refusal included the appellant's historical overstaying but also aggravating circumstances. The ECO was satisfied that there were additional aggravating features such as entering into a marriage of convenience/sham marriage and making a further attempt to bypass the UK immigration rules (referring to the Visa application made to Ireland). As a result of those considerations, the appeal was also refused under the suitability requirements under EC-P1.1 (c) and S-EC 1.5). The appellant also did not meet the eligibility relationship requirements on the basis of the past factual findings and that he had not provided any evidence to address the prior concerns relating to the relationship and therefore was not satisfied the relationship was genuine and subsisting. Therefore applying the principles of Devaseelan, the aggravating circumstances found previously with that the appellant and the sponsor entered into a marriage of convenience and that this was also a sham marriage. Under the guidance they can be no dispute that this conduct would fall within "aggravating circumstances". For the reason that I have set out, I have reached the conclusion that no evidence has been presented that has led me to go behind those earlier factual findings made. It therefore follows that that the respondent has properly identified an aggravating circumstance relevant to the appellant which was having been a party to a marriage of convenience and a sham marriage. Additionally Judge McDonald also found that the application made for a certificate of approval for marriage was an application that fell within the category of "frivolous" application for the reasons that he gave in his judgement. No further evidence has been placed before me concerning the certificate of marriage for approval and the circumstances in which it was entered into which judge McDonald had found to be inconsistent and not credible. That finding therefore remains as before as there is no evidence before me to revisit that finding of fact either.

201. The other circumstances in issue relates to an application made entry clearance under the EEA regulations. The decision letter demonstrates that it was not just the appellant's historical overstaying and the marriage of convenience/sham marriage, and the previous finding made as to the certificate of approval for marriage but that the ECO took into account the application made for a visa to enter Ireland which was made on 2 August 2015. The decision of Judge Hillis referred to this at paragraphs 34 and 35 of his decision. He records that there was nothing in either witness statements filed on behalf of the appellant or the

sponsor or the oral testimony to explain why the application for a visa to Ireland was made or to deny that the respondent was in error when stating that the sponsor's intention was to move to Ireland and exercise her treaty rights which he inferred to be as a worker. Judge Hillis inferred that the sponsor and the appellant accepted that it was her intention to move to Ireland as opposed to going there for a holiday meeting her husband in a 3rd party country. He concluded that that evidence demonstrated that the Visa application was an attempt to circumvent the immigration rules and facilitate an application to the enter UK with an EEA residence permit. It was also an application made on 2 August 2015 within weeks of Judge Shimmin's decision being promulgated on 12 June 2015. In the error of law decision I stated at [76] that it was not only the historical overstaying raised by the ECO is relevant conduct to both suitability and under paragraph 320(11) but that the ECO took into account the application made for a Visa to enter Ireland as a further attempt to bypass the UK immigration rules.

202. Mr Bashir submitted that the appellant had not made such an application. At paragraph 10 of the written submissions it is stated that "the application to settle in the Republic of Ireland cannot be taken to mean that this was an attempt to circumvent the immigration rules until the appellant has made an application to enter the UK. The sponsor has made it clear as to why they chose to settle in the UK, which is a rational decision given their circumstances in relation to the child's health and the proximity of the sponsor's family." At paragraph 11 it is submitted "the respondent does not give any reasons as to why he believes that the appellant has deliberately frustrated the rule rather than to accept that the event he described were arising naturally or spontaneously."

203. In his oral submissions Mr Bashir submitted that the respondent had not made any adverse findings and the sponsors evidence was that there was no intention to circumvent the rule.

204. I have therefore considered the evidence on this issue. Firstly I find from the evidence that the appellant did make an application under the EEA regulations based on the sponsor exercising her treaty rights on the basis of residence in Ireland. This is set out in the appellant's VAF form at question 32 where he refers to having made the application under the EEA regulations but was refused on 27 August 2018 as he "did not meet the legal requirements". Therefore the appellant accepts that he made such an application which had been refused. The appellant makes no reference to this application in his witness statement dated 11 June 2020 and has provided no further evidence of this. The sponsor similarly does not refer to this in her 1st witness statement but in her updated witness statement and in answer to the finding made by Judge Hillis, the sponsor sets out at paragraphs 15-16 the following evidence ; "the reasons why my husband made an application to settle in the Republic of Ireland is that we realised after all these efforts, over a longer period of time that my husband was not likely to get a Visa. Consequently, after careful consideration, we decided to settle in Ireland. We felt that the advantage of settling in Ireland that I can visit my family frequently, given it is

nearby and the return airfare is very cheap, it is about £60 and even cheaper if it is booked in advance. This is not possible if my husband stayed in Bangladesh. Furthermore, it would not be safe for the child to settle in Bangladesh because of the poor quality of healthcare and it is very expensive, which my husband cannot afford. His income is only about 10,000 takaas a month, which is about hundred pounds. We were fully aware that my husband will not be able to come to the UK because of his immigration history. His application would have been refused an appeal dismissed under the European laws because allegation would be made that we are trying to get round the immigration rules."

205. In her oral evidence the sponsor stated that it was the appellant who made the application. She gave the following explanation "because we realised he could not get a Visa in the UK and Ireland was close by and I could visit family and the airfares were cheap and if the application was successful I could live with him in Ireland." The sponsor was asked if she had ever lived in Ireland. She stated that she had never lived in Ireland and that she could not remember why and could not remember what had happened to the visa application.

206. Whilst there is no copy application form, it is common ground from the evidence of the appellant and the sponsor that such an application was made. The respondent has not provided the reasons why the application was refused. Nor has the appellant provided any evidence about this application and why it was made. However on the evidence before this tribunal the sponsor's own evidence is that she had never lived in Ireland and could give no explanation, nor could she remember why she did not. She refers to the reasons why the application was made, and it was based upon her evidence that it would not be safe for the child to settle in Bangladesh because of the poor quality of healthcare and this was part of the reasoning for the application (see paragraph 15 of witness statement. However the explanation is not consistent with the evidence. The application was made on 2 August 2015 and the medical condition of S was not diagnosed until 2016. Furthermore, I find the sponsor's evidence to be contradictory. The evidence presently is that she has struggled as a single parent, and this has impacted upon her mental health and that she has a wide circle of family members in the UK including 7 siblings (I refer to her oral evidence). I do not accept her evidence as credible that she chose Ireland as it was close to the UK. The sponsor's evidence does not adequately or satisfactorily explain why she would uproot herself to live alone in Ireland (before the appellant could enter) without that surrounding family support or employment and to a place to which she has no links, support or interest.

207. It is submitted on behalf of the appellant that this should not be considered as a "frivolous" application and the ECO was wrong to consider this application in such a way. I have considered whether such application can be considered a "frivolous application". A frivolous claim is where the claim has no merit whatsoever. In this respect, I accept the submission made by Mr Bashir that there is no supporting reasoning as

to why the application was considered “frivolous”. However that was not the reasoning of the ECO who considered this application to demonstrate a “further attempt to bypass the UK immigration rules”. Taking into account the evidence of the sponsor which is not consistent or credible as to why the decision would be taken to live in Ireland the country which she accepted she had never lived in or had any links to, nor any form of support. Furthermore the fact that this application was made within weeks of the decision of Judge Shimmin refusing the application for entry clearance it adds further evidential support for reaching the conclusion overall that the application was made for the purposes of circumventing the immigration rules. Thus whilst I accept that it does not fall to be considered as an aggravating circumstance as a “frivolous application” in my view it fell within an aggravating circumstance as an application made as an further attempt to bypass the UK immigration rules.

208. Therefore in summary and as recognised Paragraph S-EC 1.5 is a mandatory ground of refusal and I am satisfied that the appellant’s overstaying, that he was a party to a marriage of convenience and/or sham marriage, and that an attempt was made to bypass the immigration rules are factors which properly fall within the definition of past conduct and that the appellant’s presence in the UK is undesirable based on the reliable evidence from the previous factual findings that fall within this category and that this is sufficient to engage and meet S-EC1.5 and therefore the appellant fails to meet the grounds relating to suitability. Turning to paragraph 320 (11), which is a discretionary grant for refusal. For the reasons given earlier in this decision, there has been no evidence to undermine the previous factual findings concerning the aggravating circumstances which therefore remain. I take into account that there is a public interest in encouraging those to return home to regularise their immigration status and have considered that in the context of discretion. In addition I have upheld the entry clearance officer’s assessment that the application made under the EEA regulations was an attempt to bypass the UK immigration laws as no reasonable explanation has been provided as to why such an application was made only within weeks of the adverse decision made by Judge Shimmin. In any exercise of discretion and taking into account the voluntary departure from the UK, the aggravating circumstances are of such seriousness and gravity as to demonstrate that the paragraph applies. The appellant therefore cannot meet the rules either by reference to paragraph 320 (11).

209. In any event for the reasons set out earlier in the decision, even if the suitability requirements or paragraph 320(11) did not apply to the appellant , the appellant has not demonstrated the eligibility relationship requirement that there is a genuine subsisting marriage, and this is sufficient to demonstrate that the appellant cannot meet the requirements of the rules for an application for entry clearance as a spouse.

Article 8:

210. There is no dispute as to the relevant law. Article 8 of the ECHR provides as follows:

" Article 8 - Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home, and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In R (Razgar) v SSHD [2004] UKHL 27 at [17], Lord Bingham set out the 5-stage approach when applying Art 8:

" In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

211. The burden of proof lies upon the appellant to establish, on a balance of probabilities, a breach of Art 8. However, once Art 8.1 is engaged it is for the Secretary of State to establish any justification under Art 8.2.

212. Question (5), and the issue of proportionality, (per Lord Bingham at [20]):

" ... must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. "

213. Further, in determining the issue of proportionality, a court of tribunal must have regard to the factors set out in s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended) (see s.117A(2)) which provides 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."

214. The introduction of Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') has not altered the need for a two-stage approach to

article 8 claims. Ordinarily, the Tribunal will firstly consider an appellant's article 8 claim by reference to the Immigration Rules ('the Rules') that set out substantive conditions without any reference to Part 5A considerations. Such considerations only have direct application at the second stage of the article 8 analysis, when the claim is considered outside of the Rules.

215. Ultimately, whether the case is considered to concern a positive or a negative obligation, the question for the court is whether a fair balance has been struck. As was explained in *Hesham Ali* at paras 47-49, that question is determined under our domestic law by applying the structured approach to proportionality which has been followed since *Huang*.

216. I confirm that I have taken account of those legal principles when reaching my decision. In this regard, I have had to consider whether family life has been established between the appellant and the sponsor. For the reasons given earlier, I have found that the evidence submitted on behalf the parties when taken together “in the round” does not discharge the evidential burden on the appellant to demonstrate that this is a genuine and subsisting marriage and that both parties intend to live with the other. For the reasons also given above, I have reached the overall conclusion that there has been no new evidence of any cogency that would lead me to reach any different decision to that reached by the earlier judges who have heard the evidence and made factual findings. It therefore follows that it has not been established that there is family life between the appellant and the sponsor.

217. There does not appear to be any dispute that the relevant child S, is the child of the appellant and the sponsor. Family life can be found to exist between a parent and child notwithstanding lack of cohabitation and regular contact (see Berrehab v Netherlands (1989) EHRR, Markx v Belgium [1979] 2 EHRR).

218 There is remains some dispute as to whether family life is established between the appellant and S, and this was set out in the submissions made by Ms Aboni on the basis of the evidence before the Tribunal. In this context I am required to consider whether there is a subsisting parental relationship between S and the appellant.

219. The authority of R (on the application of RK) (s.117B(6); "parental relationship" (IJR) [2016] UKUT 31, was approved by the Court of Appeal in AB (Jamaica) [2019] EWCA Civ 661 in which it was said;

> "89. Like UTJ Plimmer I also have found helpful the judgment of UTJ Grubb in **R (RK) v Secretary of State for the Home Department [2016] UKUT 31 (IAC)**. Although the facts of that case were quite different as they concerned a grandmother and whether she needed to have parental responsibility for a child, what UTJ Grubb said at paras. 42 to 43 contains an analysis of the concept of parental relationship with which I would respectfully agree:
>
> > '42. Whether a person is in a parental relationship with a child must, necessarily, depend on the individual circumstances.

> Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have parental responsibility in law for there to be a relevant factor. What is important is that the individual can establish that they have taken on the role that a 'parent' usually plays in the life of their child.
>
> 43. I agree with Mr Mandalia's formulation that, in effect, an individual must 'step into the shoes of a parent' in order to establish a 'parental relationship'. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a 'parental relationship' with the child. It is perhaps obvious to state that 'carers' are not per se parents. A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a 'parental relationship.'
>
> 90. Returning to the case of **SR (Pakistan)** I would also respectfully agree with what was said by UTJ Plimmer at paragraph 39:
>
> > 'There are likely to be many cases in which both parents play an important role in their child's life and therefore both have subsisting parental relationships with the child, even though the child resides with one parent and not the other. There are also cases where the nature and extent of contact and any break in contact is such that although there is contact, a subsisting parental relationship cannot be said to have been formed. Each case turns on its own facts.'

220. When applying that guidance and by reference to the specific facts and evidence in this appeal, the history demonstrates that there has been little contact between the appellant and his daughter since her birth in 2010 other than short visits and social media messaging. I have considered the appellant’s evidence which has provided no factual details of his role as a parental figure in the life of S and there is no evidence before me of any exercise of care or control in her upbringing. The independent evidence demonstrates that her main carer is her mother and that is where her primary attachment is and there is no evidence of any part that he plays in her upbringing and as such the evidence does not demonstrate that a subsisting parental relationship has been formed. I do not accept the submission made by Mr Bashir that the photographs are sufficient evidence to demonstrate a parental relationship. Furthermore whilst I would accept the evidence of the sponsor that S misses her father, this

does not demonstrate a parental relationship in the sense of the appellant exercising control in her life and upbringing.

221. I am required to undertake the best interests assessment of S. Section 55 of the Borders, Citizenship and Immigration Act 2009 considerations are "capable in principle of forming a factor relevant to proportionality (see GEN.3.1-GEN. 3.3 that it part of the Immigration Rules that "[i]n considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.3.1 or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child."

GEN.3.3.2 defines 'relevant child' to mean a person who is under 18 at the date of application and "(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application." GEN. 3.3 (1)(b) and GEN. 3.2(2) clarify that the exceptional circumstances at issue relate to those 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.

222. Even before the change to the Rules made in August 2017, it was well-settled that for the purposes of entry clearance decision-making, the best interests of the children were still be taken into account: see, e.g. *SM(Algeria)(Appellant) v Entry Clearance Officer, UK Visa Section* (Respondent) [2018] UKSC 9 at [19]; *MM(Lebanon)* at [109]; *Mundeba* [2013] UKUT 88 (IAC); *T (s.55 BCIA 2009 - entry clearance*) Jamaica [2011] UKUT 483(IAC).

223. When addressing the best interests of S, I remined myself of the relevant principles set out in the case law.

224. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74; [2014] Imm AR 479, Lord Hodge, at paragraph 10, paraphrased the legal principles deriving from ZH (Tanzania), H v Lord Advocate [2012] SC (UKSC) 308 and H (H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338 as follows:-

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a

child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

225. There is no dispute on the evidence that S has medical needs which are currently being met by her mother. In 2016 S was diagnosed as having type I diabetes and is insulin-dependent. She has to undergo injections and regular blood checks. It is plain from reading the evidence from her school that she finds coping with her condition to be difficult and that she is struggling with this emotionally (I refer to the letter dated 4/1/21). In my view, the evidence demonstrates that S struggles with her medical condition and that this has impacted on her life at school and her emotional well-being.

226. Her mother is described as the main parental figure in her life and that she has an extremely close relationship with S. The evidence from the GP is that she has informed him that she struggles with her daughter's condition, and this causes stress, low mood and anxiety. It is stated that she would feel supported and less stressed with her husband being in the UK. The evidence before the tribunal demonstrates that the sponsor finds coping with her daughter's condition difficult and it has impacted on her health. She had previously been provided with counselling in 2017 (see letter 3/8/17 page 92). The assistance that she required was around managing her daughters diagnosis and the evidence from the school is supportive of this. It sets out that S struggles emotionally with her condition and has presented low self -esteem as she feels different from her peers. S is reported by her mother to become anxious when she has a doctor's, or a hospital appointment and the anxious behaviour is seen in school. The letter from the school also sets out the strategies in place to help regulate her feelings. Whilst the sponsor's evidence is that S's behaviour is due to separation from her father, on reading the evidence before the tribunal it is consistent in my view in describing that S's anxieties and distress as centring upon her medical diagnosis and coping with that condition which I do not underestimate as acutely difficult for a young person, but that this has not been attributed to the separation from her father.

227. Having assessed the evidence before the Tribunal I find that the work for the strategies S needs are being met by her mother and with the assistance of state help and through the provision of CAMHS and that it is in her best interests that she remains in the UK with her mother supported by the help and assistance that she is receiving. Her mother is

plainly her primary carer and is doing well in difficult circumstances to meet S's physical and emotional needs. The letter from the school sets out that if the appellant was in the UK he would be a support for both S and her mother. It is not known however what the school or the GP knows about the history of the relationship of the reasons why the appellant has not been able to enter the United Kingdom. Nonetheless I would accept that S has had some contact with her father and has expressed a wish to see more of him. I would also accept that he would provide support for her in the sense of being more available to see her. No evidence been given as to his knowledge of her condition or that he understands how her condition should be managed. Nonetheless I find that it would also be in her best interests to be able to have the support from both her natural parents.

228. I am satisfied that the appellant has a family life with his daughter S on the basis that he is her natural father and whilst there is no evidence of any parental relationship, he has had continuing contact with her via short visits since her birth in 2010 and some contact via social media. I am satisfied that the proposed interference will have the consequences of gravity so as to potentially engage article 8 and that the proposed interference is in accordance with the law. I therefore turned to the proportionality with the observation that this assessment is necessarily a fact specific one.

229. As part of the structured approach and consideration proportionality I am required to consider the statutory provisions of part V of the 2002 Act as set out above and remind myself that a limited degree of flexibility must be provided for so that the application of the statutory provisions will lead to an end result consistent with article 8 of the ECHR (applying the decision in Rhuppiah v SSHD [2018] UKSC 8).

230. I have therefore considered whether the refusal of entry clearance would be a disproportionate interference with the rights of the appellant, the sponsor and S. In carrying out that proportionality balance, I take as a weighty factor on the respondent's side of the balance that the appellant cannot meet the rules substantively as he has not demonstrated that there is a genuine subsisting relationship between him and the sponsor or that both parties intend to live with the other permanently. Additionally on the assessment of the evidence the appellant has not met the suitability provisions and that his presence in the UK is not conducive to the public good given breaches of immigration law. There is a public interest in such circumstances to refuse admittance to the UK and this is relevant under section 117B (1) of the 2002 Act. I have taken into account on the appellant's side the balance that he did voluntarily leave the UK but the factual findings which have not been disturbed by any recent evidence is that the marriage was one of convenience and /or a sham marriage and was not a genuine one or established to be so thereafter. On the factors balancing in favour of the appellant, the appellant has passed an ILET test and therefore can speak English and whilst the issue of maintenance was not an issue under the spousal application based on the sponsor's financial circumstances of

being in receipt of DLA, it is not known what the appellant's financial circumstances would be if living in the UK but separately from the sponsor. Nonetheless even if he could meet the financial requirements, section 117B(2) and (3) are essentially neutral factors whilst they do not count against him in the balancing exercise. Whilst the appellant's relationship commenced when he was unlawfully in the UK and as such little weight should be attached, it has not been argued on behalf of the respondent that section 117B (4) or (5) has any real relevance for the proportionality balance.

231. Whilst Mr Bashir submits that Section 117B (6) applies, it does not apply to entry clearance cases (see decision of the President in SD (British citizen children - entry clearance) Sri Lanka [2020] UKUT 43(IAC) at paragraphs [48]-[49].

232. There is no dispute that the appellant is the natural father of S but on the evidence before the tribunal it has not been established that the relationship is a parental one in the sense that it has been demonstrated that he has had any ongoing control for her upbringing and no evidence has been adduced to support such subsisting parental relationship. I have found from the evidence that S's primary attachment and carer is her mother. However I accept that S has developed some links with her natural father through those short visits and the social media contact that has taken place.

233. It is not submitted on behalf of the respondent that it is reasonable for S to leave the UK and live in Bangladesh to enable the appellant to build on his relationship with S or vice versa. In any event I would have found that given the importance of S in maintaining her other wider family links in the UK, the weight attached to her British Citizenship and the importance for S of maintaining her close contact with professionals overseeing her medical health needs, that such a course would not be either reasonable or in her best interests. As it is not been found that the sponsor's marriage to the appellant is genuine and subsisting, or that both parties intend to live with the other permanently, it would therefore be unreasonable for her to expect to relocate to Bangladesh.

234. When drawing together those factors, and having undertaken the proportionality assessment, I am satisfied that the refusal of entry clearance is proportionate even placing weight as a primary consideration to the best interests of S. S is a British citizen with the rights that that brings for her in terms of her medical health needs and her access to professional assistance and education . I have found that it is in her best interests to be brought up by her mother and for her to continue to access the support and assistance that she requires in dealing with her medical condition. It would be in her best interests also to maintain contact with her father. However I am satisfied that the need for S to continue her relationship with her father can be maintained as it has been since 2010. In this context I accept the submission made on behalf of the respondent that the maintenance of family life and the ongoing relationship with her father can be undertaken by visits, letter

and by social media and skype in the future. I do not accept the submission made by Mr Bashir that this type of contact is unlawful. There are many parents who are geographically separated but are still able to maintain their relationships with their children via such means.

235. In undertaking the proportionality assessment, I have taken full account of the impact upon the sponsor and that she has struggled with her daughter's condition causing her stress and anxiety and that she would feel more supported and less stressed if the appellant were in the UK. I do not underestimate the difficulties faced by her in caring for S nor those facing S having to cope with her medical condition which has affected her emotional well-being. However in carrying out the balance I am satisfied that the best interests of S, which are a primary consideration are outweighed by the other factors in play in this appeal and that in light of his poor immigration history, his inability to meet the rules and that he is not established a parental role for S, that the need to maintain immigration control and the significant public interest outweighs any family life established between S and the appellant which can continue to be maintained as it has been so far. For those reasons it has not been established that the consequences of refusal of entry clearance are unjustifiably harsh for either the appellant, the sponsor or S.

236. For those reasons, the decision to refuse entry clearance does not constitute a disproportionate interference with the rights of those impacted by the decision and there is no breach of Section 6 of the Human Rights Act 1998. The appeal is dismissed.

Notice of decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law; the decision of the FtT shall be set aside. The decision is remade as follows: the appeal is dismissed.

I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a minor. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds
Dated 13 December 2021