IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/47760/2013
IA/05929/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1st October, 2014	**On 13th November, 2014**

Before

THE HON. LORD BOYD
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE D E TAYLOR

Between

RAFAQAT BEGUM
RUHUL AMIN

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Z Malik of Counsel instructed by Malik Law Chambers Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These two appeals have been listed together because they raise a common issue, namely the proper construction of the transitional provisions in HC 194 and the Court of Appeal's judgment in Edgehill v SSHD [2014] EWCA Civ 402 and Haleemudeen v SSHD [2014] EWCA Civ 558. With respect to the decision of Ruhul

Amin there is a second issue, namely whether the First-tier Judge erred in following the decisions in R (on the application of) Nagre v SSHD [2013] EWHC 720 and Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC). There are no challenges to the judge's findings of fact in either case.

The Appeal of Ruhul Amin

2. The Appellant is a citizen of Bangladesh, born on 10th October 1971.

3. It was accepted by the First-tier Judge and not subsequently challenged by the Secretary of State that the Appellant came to the UK in 2002 with the aid of an agent. Thereafter he remained unlawfully. In September 2008 he entered into a religious marriage with Tulip Sultana, a Bangladeshi citizen, who first came to the UK on 6th February 2008 as a student and was subsequently granted further leave to remain until 24th October 2011.

4. On 9th October 2009 he applied for leave to remain outside of the Rules and was refused. He then applied for a certificate of approval to marry, and they had a civil ceremony on 4th July 2011. They have two children, a son born on 5th December 2009 and a daughter born on 27th June 2013. She presently has leave as a Tier 1 HS Entrepreneur until 2016.

5. The Appellant submitted an application for leave to remain on the basis of his family and private life on 13th December 2011, which was initially refused on 3rd September 2012. That decision was withdrawn and it was refused again on 14th January 2014.

6. In her letter of refusal the Secretary of State wrote as follows:

   (i) "Further to our withdrawal on 17th September 2013 from your client's appeal against his refusal of leave to remain on 3rd September 2012 I have reconsidered your client's application under Article 8 ECHR taking into account Section 55 of the Borders, Citizenship and Immigration Act 2009 and the Immigration Rules put in place on 9th July 2012 under Appendix FM. In reaching this decision only the Immigration Rules and UK Border Agency policy applicable at the date of decision have been considered (as per the case of Odelola v SSHDU [2009] UKHL 25).

7. The letter recites the Appellant's immigration history and states as follows:

   "I have considered Article 8 by applying the relevant provisions of the Rules in force on 9th July 2012 (paragraph EX.1 of Appendix FM for family life and paragraph 276ADE for private life) as below.

8. There then followed a detailed consideration of the Immigration Rules, consideration of Section 55 and paragraph 353B and a final paragraph headed "Exceptional Circumstances" which reads as follows:

> "Your client's application has been considered exceptionally outside the Immigration Rules. However the Secretary of State's policy is not to exercise discretion unless there are clear exceptional compassionate circumstances which merit the exercise of discretion outside the Immigration Rules.
>
> You have raised some issues as a basis for a claim of exceptionality in your client's situation. These have been dealt with elsewhere in this letter. We do not consider that any of these or any other factors you have raised in your submission offer sufficiently compassionate or compelling circumstances for discretion to be exercised in this case."

9. The judge accepted that the Appellant, his wife and children enjoy family life together. It was a part of the Appellant's case that he could not return to Bangladesh because of his wife's established business in the UK. The judge found that it had only very recently been established and was not yet operational. If the Appellant and his family decided to return to Bangladesh, it would not mean the demise of an established business.

10. The judge also considered the children. He observed that they spoke both English and Bengali. He did not accept that they had no ties with Bangladesh nor that, as claimed, there would be any risk to the Appellant on return on account of his involvement in local politics in Tower Hamlets.

11. He concluded that, for the reasons set out in the refusal letter, the Appellant did not satisfy the requirements of Appendix FM with regard to family life or paragraph 276ADE with regard to private life. He then wrote as follows:

> "I now need to consider whether there are arguably good grounds for the granting of leave to remain to the Appellant outside the Rules and so necessitating a consideration of a freestanding Article 8 claim. Here I am guided by the case law of R (On the application of Nagre) v SSHD [2013] EWHC 720 (Admin) and Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC). I do not find that there are any arguably good grounds for granting leave to remain outside the Rules and also that there are no compelling circumstances in this Appellant's situation which are not sufficiently recognised under the Rules."

12. He found that the decision of the Respondent was in accordance with the law and the relevant regulations and dismissed the appeal on all grounds.

The Appeal of Rafaqat Begum

13. Mrs Begum is a citizen of Pakistan born on 16th November 1961. She originally entered the UK on 14th April 2005 on a visit visa. She made an application for leave to remain on 6th June 2011 on human rights grounds and included a claim that she had given birth to a child in the UK. Her application was refused in a decision dated 25th October 2013 by which time it had become clear that the child concerned was the child of her daughter and not the Appellant.

14. In a detailed reasons for refusal letter, the Respondent set out the Appellant's case which she considered under Appendix FM and paragraph 276ADE of the Immigration Rules. She then considered the claim using the five stage test outlined in the case of SSHD v Razgar.

15. The Appellant claimed that she had established a strong private and family life in the United Kingdom with her daughter, son-in-law and grandchildren, and said that she needed to be able to access medical treatment and to receive care for her multiple conditions.

16. The judge set out the relevant case law. The provisions governing Article 8 were now contained in Appendix FM but the Appellant did not meet the Rules, since she entered the UK on a visit visa and did not meet the requirements of paragraph 276ADE.

17. The judge conducted the five stage Razgar test, finding that the Appellant did have family life in the United Kingdom, and concluded that whilst removal would interfere with family life, it was in accordance with the law since she had no leave to be here and proportionate.

The Grounds of Application

Ground 1

18. The Appellant relies on Edgehill &Anor v SSHD [2014] EWCA Civ 402, which was concerned with the proper construction of HC 194.

19. Under the heading "implementation", it reads:

    (i) 'The changes set out in this Statement shall take effect on 9 July 2012 ... however, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8 July 2012'.

20. Jackson LJ (with whom Laws LJ and Black LJ agreed) concluded that an application made before 9 July 2012 may not be refused by reference to the provisions introduced by HC 194.

21. The grounds argue that the FTT accepted the application to the Secretary of State was made on '13 December 2011', and it was therefore not open to her to determine it by reference to Paragraph 276ADE and Appendix FM. The Secretary of State's decision was therefore not in accordance with the law, as plainly inconsistent with the statement laid before Parliament and the Court of Appeal authority.

22. It was recognised that, in Haleemudeen v SSHD [2014] EWCA Civ 558, the Court of Appeal arrived at a completely different conclusion. In Haleemudeen, it is lawful to assess an application made prior to 9 July 2012, by reference to the rules introduced by HC 194.

23. However it was submitted that Haleemudeen is decided per incuriam and should not be followed. In Young v Bristol Aeroplane Côte d'Ivoire Ltd [1944] KB 718, 725-6, it is open to the UT to refuse to follow Haleemudeen because it is in conflict with Edgehill.

24. The grounds quote Lord Bingham in R (Razgar) v Secretary of State [2004] UKHL 24, at paragraph 17'(1), who stated that in assessing Article 8 claims, the appellate authority must consider five questions, namely;

    (a) 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?

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

    (c) If so, is such interference in accordance with the law? (Emphasis added)

    (d) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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?

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

25. An immigration decision which is unlawful at common law (as is the case here) will always amount to an interference which is not in accordance with the law for the purpose of Article 8(2) (see SC (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056 (IAC)) In such a case, if it is established that there is a protected private/family life, an Appellant will necessarily succeed on the ground that the decision is incompatible with Article 8, and the question of proportionality does not arise. The FTT therefore erred in law in not allowing the Appellant's Article 8 appeal by finding that the answer to the third question of Razgar to be in the affirmative.

Ground 2 (Ruhul Amin only)

26. Second, the FTT, at paragraph 40, followed R (on the application ofNagre) v SSHD [2013] EWHC 720 (Admin) and Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 to dismiss the Appellant's Article 8 appeal. In MM & Ors, R (On the application of) v SSHD [2014] EWCA Civ 985, Aikens LJ (with whom Maurice Kay LJ and Treacy LJ agreed) overruled the approach taken in those authorities.

27. Permission to appeal was granted by Judge Lever on 30th July 2014 who said that, given the conclusion in Edgehill it was arguable that the judge ought to have looked

at the case under the Razgar test and had he done so it is entirely possible that he would have found no disproportionality in removal. Accordingly his failure to carry out the assessment was arguably an error of law.

Rule 24 Responses

28. The Respondent served a Reply on 29th July 2014, opposing the appeal of Rafaqat Begum. The issue of transitional provisions were not raised before the FtT and were in any event subsequently revised. She noted that the application to the Upper Tribunal was out of time but this had not been addressed in the grant of permission.

29. On 7th August 2014 the Respondent served a Reply in respect of Ruhul Amin. She said that there were no Article 8 rules at the date of application and so this was not a case that fell in line with Edgehill. At the date of decision the Respondent's policy was clearly that embodied in the new rules, notwithstanding that they themselves did not apply at the date of application. Any alternative approach would have resulted in the Appellant being treated differently from others purely by virtue of the date of application which would have been inconsistent. It was clear that the Appellant could not demonstrate a good arguable case for consideration under Article 8 in the light of Razgar. The judge was entitled to conclude that he did not make out a case that there was a disproportionate interference with his Article 8 rights on the basis of the adverse credibility findings. The case of Rafique [2014] EWHC 1654 at paragraph 12 considered the point and concluded that the result when considered under either approach, will be the same.

The Appellants' Submissions

30. Mr Malik submitted that the decision in Ruhul Amin was unlawful because the decision-maker refused the application solely by reference to the new Rules. The judge was bound to have found that the decision was not in accordance with the law and therefore incapable of justification under Article 8.

31. With respect to Rafaqat Begum, he accepted that the decision letter of 25th October 2013 was in accordance with the law since the decision was comprehensive and did not solely rely upon the Rules. However he submitted that it was clear that the judge had had regard to the new Rules in making her decision. At paragraphs 38 and 39 of the determination he had referred to them, and to the decision of Nagre at paragraph 40. At paragraph 52 he had concluded that this was not a case where the Appellant had satisfied him that a return to Pakistan would be unduly harsh, the language of the new Rules, which made it clear that she had relied upon them in reaching her decision.

Ground 1

32. Mr Malik relied on the decision in Edgehill made following a hearing on 25th February 2014 and handed down on 2nd April 2014. The principal issue was the proper application of the transitional provisions set out at the front of the Statement of Changes in Immigration Rules which came into effect on 9th July 2012. The case

involved Rule 276B of the old rules, namely the requirements for indefinite leave to remain on the ground of long residence in the UK, and Rule 276ADE of the new rules which set out the requirements to be met by an applicant for leave to remain on the grounds of private life.

33. The Court of Appeal set out the transitional provisions set out at the front of the Statement of Changes in Immigration Rules which provide:

> "With the exception of paragraphs 6-72, 74-80, 82, 86, 88-90, 93, 97, 98, 100, 102, 103 and 106 the changes set out in this statement shall take effect on 9th July 2012. Paragraphs 6-72, 74-80, 82, 86, 88-90, 93, 97, 98, 100, 102, 103 and 106 shall take effect on 1st October, 2012.
>
> However, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9th July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8th July, 2012."

34. The key issue was whether it was lawful to reject an Article 8 application made before 9th July 2012 in reliance upon the applicant's failure to achieve twenty years' residence as specified in the new rules. Lord Justice Jackson recorded that Counsel for the applicants placed reliance upon the second paragraph of the transitional provisions, which provide that any application for indefinite leave to remain made before 9th July but not yet decided, will be decided in accordance with the rules in force on 8th July 2012, in other words in accordance with the old rules.

35. He set out the Respondent's submissions. First, the old rule, 276B, provided that fourteen years' continuous residence was a substantive ground upon which the Secretary of State may grant indefinite leave to remain, whereas the new rule specifies requirements to be met by an applicant for leave under ECHR Article 8. An application for leave to remain under ECHR Article 8 is not an application under the rules and therefore the second paragraph of the transitional provisions does not apply.

36. Second, appellate Tribunals make Article 8 decisions by reference to the current state of affairs not by reference to the state of affairs when the decision was made. The present state includes the new rule providing a requirement for twenty years' continuous residence.

37. Jackson LJ concluded as follows:

> "I admire the dexterity of this argument. Nevertheless it produces the bizarre result that the new Rules impact upon applications made before 9th July 2012 even though the transitional provisions expressly state that they do not do so."
>
> The Immigration Rules need to be understood not only by specialist immigration Counsel but also by ordinary people who read the Rules and try to abide by them. I do not think that Mr Bourne's interpretation of the transitional

provisions accords with the interpretation which any ordinary reader would place upon them. To adopt the language of Lord Brown in Mahad:

"The natural and ordinary meaning of the words, recognising that they are a statement of the Secretary of State's Administrative Policy" is that the Secretary of State will not place reliance on the new Rules when dealing with applications made before 9th July 2012.

Accordingly my answer to the question posed in this part of the judgment is 'no'. That answer is subject to one important qualification. A mere passing reference to the twenty years' requirement in the new Rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision-maker relies upon Rule 276ADE(iii) as a consideration materially affecting the decision."

38. With respect to one of the two appellants in that case, since the Upper Tribunal had relied upon the new rules as a consideration materially affecting the decision, it was quashed and remitted back to the Upper Tribunal. In the second case, reference was made to the new rule but it was not relied upon as a consideration materially affecting the decision. His appeal was dismissed.

39. Mr Malik then took us to the case of Haleemudeen heard on 15th April 2014, two weeks after the promulgation of the decision in Edgehill. He said that it was clear that Edgehill was not cited to the court in Haleemudeen since there is no reference to it.

40. At paragraph 40 of that decision Beatson LJ said:

> "40. I however consider that the FtT Judge did err in his approach to Article 8. This is because he did not consider Mr Haleemudeen's case for remaining in the UK on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules.....
>
> 41. The FTT's decision on Mr Haleemudeen's Article 8 appeal is contained in [34]-[41], which I summarised and set out in part at [21]–[23] above. Those paragraphs do not refer, either expressly or implicitly, to paragraph 276ADE of the rules or to Appendix FM. None of the new more particularised features of the policy are identified or even referred to in general terms. The only reference to the provisions is in the FTT's summary at [30] of Mr. Richardson's submission that the reference to the new Rules in the refusal letter was of little relevance because at the time of Mr Haleemudeen's application those Rules had not been promulgated and thus did not apply to his case. That submission could not succeed in view of the decision of the House of Lords in Odelola's case, to which I refer at [25] above."

41. Mr Malik submitted that, whilst the authorities were on the face of it conflicting, Edgehill should be preferred. First the principal issue in Edgehill was the effect of the transitional provisions. Second the case of Odelola referred to in Haleemudeen was a statement of the general principle in these appeals that the material date was the date of decision. Third, Haleemudeen was decided per incuriam. It was clear that Edgehill was not cited to the court in Haleemudeen, because had it been cited, the Court of Appeal would have followed it, given that civil division judgments are binding on the civil division. Where there was a conflict of authority it was open to the Upper Tribunal to refuse to follow Haleemudeen as being in conflict with Edgehill.

42. The argument being put forward by the Secretary of State in this case i.e. that because there were no Article 8 rules at the date of application, it was not an application under the rules and therefore the second paragraph of the transitional provisions did not apply, was specifically rejected by the Court of Appeal in Edgehill.

43. Mr Malik drew our attention to the case of Singh (on the application of) v SSHD [2014] EWHC 2330 (Admin) which considered the case of Rafique cited in the Respondent's reply. In that case Mr Justice Nicol said that it was not necessary for him to resolve the difference between Edgehill and Haleemudeen. He said:

> "Nonetheless Mr Roe accepts that he cannot succeed if the decision inevitably would have been the same even if the Secretary of State had paid no attention at all to the criteria in the new rules."

He concluded as follows:

> "Bearing these factors in mind as well as all the other matters that were drawn to the Secretary of State's attention I am certain the Secretary of State would have decided that refusal of leave would not be disproportionate even if the test and structure of the decision-making in the new rules had not been referred to. Indeed the decision letter of 17 June 2014 does reach precisely that conclusion. Like Mr Mott in the Rafique case therefore I conclude that the reliance on the new rules was not a consideration materially affecting the decision as the result would have been the same in any case. Similarly, in Edgehill, the Court of Appeal considered that the Article 8 claim of HB was a weak one and the court concluded that both the Secretary of State and the Tribunal would have made precisely the same decision whether or not they had regard to the new rules, see paragraph 8."

44. Next Mr Malik took us to the cases SC (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056, and Patel (revocation of Sponsor licence – fairness) India [2011] UKUT 00211, where Blake J stated:

> "However any structured analysis of the Article 8 claim in this case would require consideration of whether the interference in question was in accordance

> with the law. At that point the Article 8 analysis reflects the Tribunal's general jurisdiction to determine whether decisions are in accordance with the law."

45. Mr Malik accepted that if an appeal was allowed on that basis, the Secretary of State was not bound to grant leave but he said, was bound to make a new lawful decision. If she materially relied on the new rules she had acted inconsistently with published policy i.e. the transitional provisions. Any decision on proportionality can only arise if the decision under appeal is capable of being justified, and if unlawful at common law, the issue of proportionality simply does not arise. A mere reference to the new rules was not a problem, but if there was material reliance, the analysis under Article 8 must stop at that point and the finding that the decision was not in accordance with the law had to be made. Since the Secretary of State had clearly materially relied on the new rules in this case, in reliance on Edgehill her decision was unlawful and the judge should have so held.

Ground 2

46. The second limb of Mr Malik's submissions concerns the proper application of Nagre and Gulshan.

47. At paragraph 21 of Gulshan Cranston J set out the test at paragraph 29 of Nagre as follows:

> "Nonetheless the new rules do provide better explicit coverage of the factors identified in case law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if after doing that there remained an arguable case that there may be good grounds for granting leave to remain outside the rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."

48. The test was endorsed in Gulshan where Cranston J concluded as follows:

> "After applying the requirements of the rules only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre."

49. Mr Malik submitted that Gulshan could not stand following the decision in MM & Others where the Court of Appeal said at paragraph 129:

> "Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the

> applicant cannot satisfy the rule then there either is or is not a further Article 8 claim. That will have to be determined by the relevant decision-maker."

50. Mr Malik submitted that this comment was not obiter, as argued by the Respondent because it was said as a part of a review of all of the leading Article 8 authorities from paragraph 94 to paragraph 135.

51. At paragraph 135, the court clearly rejected the decisions in Nagre and Gulshan in stating:

> "Where the relevant group of Immigration Rules upon their proper construction provide a complete code for dealing with a person's Convention rights in the context of a particular Immigration Rule or statutory provision such as in the case of foreign criminals then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to exceptional circumstances in the code will nonetheless entail a proportionality exercise. But if the relevant group of Immigration Rules is not such a complete code then the proportionality test will be more at large, albeit guided by the Huang test and UK and Strasbourg case law."

52. Finally Mr Malik took us to Patel & others v SSHD [2013] UKSC 72, handed down on 20th of November 2013 after the cases of both Nagre and Gulshan. At paragraph 54 of the judgment Lord Carnwath held:

> "The difference between the two positions may not be as stark as the submissions before us have suggested. The most authoritative guidance on the correct approach of the Tribunal to Article 8 remains that of Lord Bingham in Huang. In the passage cited by Burnton LJ, Lord Bingham observed that the Rules are designed to identify those to whom on grounds such as kinship and family relationship and dependants leave to enter should be granted and that such ties "to be administratively workable, require that a line be drawn somewhere….
>
> Such a rule which does not lack irrational basis, is not to be stigmatised as arbitrary or objectionable. But an applicant's failure to qualify under the Rules is for the present purposes the point at which to begin not end consideration of the claim under Article 8. The terms of the rules are relevant to that consideration but they are not determinative."

53. Mr Malik submitted that that was a clear indication that the Tribunal in Gulshan was wrong in holding that non-compliance with the Rules was, more or less, the end of the matter, and that the analysis of Nagre and Gulshan was undermined and should not be followed.

The Respondent's Case

54. At the end of the legal submissions, before the lunch adjournment, Mr Melvin made an application for an adjournment. He said that the Appellant raised questions of general importance which had not been flagged up in the grounds and he was not in a position to make proper submissions on them.

55. Mr Malik opposed him on the basis that he had not relied upon any point which had not been raised in the grounds and the Respondent should always have been aware that these cases raised issues of general importance. His clients were paying privately and would be disadvantaged by an adjournment at this stage.

56. We refused the request. We observe that it was made at an extremely late stage of the proceedings, after Mr Malik had made his principal submissions. It should have been plain to the Respondent what the issues in both these cases were, since they were clearly set out in the grounds and most, if not all of the decisions relied upon by Mr Malik today were cited in the grounds. Mr Melvin was given the lunch adjournment to consider his submissions.

57. After lunch Mr Melvin repeated his request for further time to make written submissions. He relied on the points made by his colleagues in the replies and submitted that Edgehill did not apply because they were in relation to a different Rule, namely the significant change for a stay based on fourteen years under the old Rules and twenty under the new. Gulshan and Nagre remained good law.

58. We decided to allow Mr Melvin fourteen days to make further written submissions and seven further days for Mr Malik to respond. We consider that there is no proper basis for the Respondent to contend that she has been taken by surprise by any of the arguments but on the other hand are conscious that we would be assisted by full argument from the Respondent in this matter.

The Respondent's written submissions

59. They are as follows;

(i) "Article 8 Transitional Arrangements

When the family and private life Immigration Rules entered into force on 9 July 2012, they were accompanied by a set of transitional provisions. The transitional provisions preserved the effect of the previous version of the rules in those cases in which the material application had been made before the new rules entered into force. Accordingly, an application made pursuant to the rules would be determined in accordance with the rules in force when the application was made.

The transitional provisions do not apply to applications made outside the rules, which rely simply upon Article 8. In such cases, there being no reliance on the

rules by the applicant, there are no old rules to preserve and the transitional provisions have no effect.

When considering an application made under Article 8, the Secretary of State is required to undertake a proportionality assessment by balancing the applicant's right to respect for his private/family life against the public interest in removal. The current version of the rules sets out the framework for that assessment and contains the considerations material to it. The current rules reflect the view of the Secretary of State as to how the balance between the rights of the individual applicant and the public interest should be struck. They have been endorsed by Parliament.

As explained in MF (Nigeria), the new rules concerned with striking the Article 8 proportionality balance do not seek to change the law. They properly reflect the Article 8 jurisprudence (including the Strasbourg case law) and have been designed to achieve clear and consistent decision making which pays due regard to the public interest in deciding how the Article 8 proportionality balance should be struck. In light of the public interest in removal or deportation reflected in the new rules, it will only be in an exceptional case that that public interest will be outweighed by the Article 8 rights of the individual.

So, Article 8 proportionality assessments conducted after the coming into force of the new rules should be conducted in accordance with the framework provided by those rules. The date on which the application is made is immaterial. The new rules provide caseworkers, and the Court, with a structure for conducting the proportionality assessment which properly reflects the public interest, as the Secretary of State (and Parliament) have expressed it to be.

This does not amount to a retrospective application of the new rules to cases commenced before 9 July 2012. It simply means that, whenever the proportionality assessment is conducted, it is conducted with proper regard to the public interest.

The importance of having regard to the material provisions of the new rules when conducting the Article 8 proportionality assessment, including in cases where the material application was made before the new rules came into force, was recognised by the Court of Appeal in Haleemudeen v SSHD [2014] EWCA Civ 558. In that case the Appellant's application for ILR had been made on 28 February 2012. The question of whether the Appellant qualified for leave under the rules was addressed, correctly, by applying the rules as they stood at the time of the application. But when it came to the subsequent question of the merits of his Article 8 claim, the Court found that the FTT had fallen into error by not conducting the Article 8 assessment with proper regard to the new rules and the policy of the Secretary of State contained within them. The Court noted the endorsement of the new rules in both Nagre and MF (Nigeria) and found that the FTT had failed to identify anything exceptional or compelling about the

Appellant's case sufficient to render his removal disproportionate. Haleemudeen stands, therefore, as clear authority for the proposition that, when addressing Article 8 proportionality, that assessment must be conducted with proper regard to the new rules and the public interest they reflect.

There is no inconsistency between that proposition and the earlier judgment of the Court of Appeal in Edgehill. Edgehill was concerned with a situation where the Appellant could argue that a provision in the old rules applied to her circumstances, and the question it addressed was a narrow one: "Is it lawful to reject an Article 8 application made before 9 July 2012 in reliance upon the applicant's failure to achieve 20 years' residence, as specified in the new rules". In JE's case, she had accrued 14 years' continuous residence, which would have been enough under the rules as they stood at the time of her application, had she applied under that provision. In dismissing her appeal the UT placed 'substantial weight' on the fact that the new rules required 20 years' continuous residence. By contrast, HB had accrued only 8 years' continuous residence and so would not have met the requirements under the old rules either. Her appeal was dismissed as she was unable to point to a material change in the rules which had materially affected her case. It is clear from the judgment in Edgehill that the transitional provisions will be relevant only when there is some equivalent provision in the old rules which, if applied to the case in question, would have a material bearing on the outcome, to the applicant's advantage.

Edgehill has no effect in the context of an Article 8 proportionality assessment undertaken for the purposes of determining whether the application should be granted outside the rules. In such a case there is no equivalent provision in the old rules (whether more generous or otherwise) setting out the framework for the Article 8 proportionality assessment. So, when caseworkers are considering whether an application which does not meet the requirements of the rules should nonetheless be granted on Article 8 grounds, they should have regard to the new rules and the public interest that they reflect.

The point is conveniently illustrated by Haleemudeen. The Appellant is that case did not qualify under the rules in force at the time of his application by virtue of his unspent conviction. There was, therefore, no question of him seeking to rely on a more generous old rule, in force at the time of his application, which would have had a material bearing on his application. In those circumstances the transitional provisions were simply not relevant to his case. The relevant question was simply whether the Article 8 proportionality assessment had been properly conducted for the purpose of determining whether his application should be granted outside the rules. As observed above, the Court correctly identified that the assessment should be conducted 'against' the policy reflected in the new rules (see para.40).

The General Position on Article 8

In regard to the state of the law on the status and function of the family and private life Immigration Rules, the Secretary of State continues to rely on in MF (Nigeria) v SSHD [2013] EWCA Civ 1192, Nagre v SSHD [2013] EWHC 720 (Admin) and Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC). The Secretary of State has always accepted that no set of Immigration Rules can cater for all conceivable circumstances arising in an Article 8 claim in a non-criminal case, and that where an applicant has failed in such a case to meet the requirements of the Immigration Rules, it is necessary to go on to consider whether to exercise her residual discretion.

The High Court has endorsed this approach, saying in Nagre that 'the immigration control regime as a whole (including the Secretary of State's residual discretion) fully accommodates the requirements of Article 8'. Nagre found that it was only in circumstances where there is a remaining 'good arguable case' after the applicant has failed to meet the rules that a further consideration of proportionality under Article 8 ought to be undertaken. However, since then the case of R (Ganesabalan) v SSHD EWHC 2712 at paras 10-11 and MM & Ors, R v SSHD (Rev 1) [2014] EWCA Civ 985 at paras 128-129 have found that an assessment of whether or not the decision is proportionate under Article 8 ought to be undertaken in every case.

This accords exactly with the Secretary of State's policy, which has, since the implementation of the family and private life rules on 9 July 2012, always been to consider in every non-criminal case that falls for refusal under the Rules whether there are exceptional circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate under Article 8. The way this discretion is exercised is set out in the relevant guidance, the importance of which is well recognised in the case law and that case law is summarised in para 15 of Ganesabalan. This guidance is in the terms which were held in Nagre to 'fully accommodate the requirements of Article 8' and Nagre itself has been cited with approval by the Court of Appeal, e.g. in Haleemudeen at para 17."

The Appellants' written response

60. In summary, the Appellant's position is as follows. First, the submission that the transitional provisions do not apply to applications made outside the rules, which rely upon article 8, was expressly rejected by the Court of Appeal in Edgehill.

61. Second, the submission that Article 8 proportionality assessments conducted after the coming into force of the new Rules should be conducted in accordance with the framework provided by those rules produces the bizarre result that the new rules impact upon applications made before 9 July 2012 even though the transitional provisions states that they do not (Edgehill).

62. Third, the Upper Tribunal is required to decide whether to follow Edgehill or Haleemudeen and Edgehill should be followed.

63. Four, the Secretary of State appears to have accepted that Nagre and Gulshan are no longer good law.

64. Finally, the Secretary of State did not engage with the submission as to the third question in Razgar and as to the effect of the Supreme Court's judgement in Patel.

Findings and conclusions

The Transitional Provisions Issue

65. The Secretary of State argues that Edgehill is confined to cases where there is an equivalent provision in the old rules which would have a material bearing on the outcome of the case, such as the 14 years continuous residence rule, and has no effect in the context of an Article 8 proportionality assessment, undertaken for the purpose of deciding whether an application should be granted outside the rules. Where there is no equivalent provision in the old rules it is their position that caseworkers should have regard to the new rules and the public interest they reflect. We reject her submission.

66. This has most recently been considered by the Vice President of the Upper Tribunal (Immigration and Asylum Chamber), Mark Ockleton, sitting as a Deputy High Court Judge in Jallow v SSHD (CO/3862/2013). He observed that the argument raised before him on behalf of the Secretary of State was the same as that in Edgehill where Mr Bourne, on behalf of the Secretary of State is recorded as submitting as follows:

> "An application for leave to remain under ECHR is not an application under the Rules. Therefore, the second paragraph of the transitional provisions does not apply to it."

67. Mr Ockleton concluded:

> "The Court of Appeal therefore rejected the argument which is in my view that advanced now by Ms Rowlands on behalf of the Secretary of State, and which she advanced by reference to what she described as the standard submission. It is a submission which in my judgment fails."

68. Mr Ockleton considered the effect of the subsequent decision in Haleemudeen. He wrote as follows:

> "In Haleemudeen however there is no discussion of the transitional provisions themselves and it is clear that in that case, for reasons which are not given in the judgment, the view was taken by Beatson LJ who gave the lead judgment; the other members of the court who agreed with him, that the relevant provisions of Appendix FM came into effect on 9 July 2012 without there being any need in that case to advert to any reservations to that judgment.

> There is no doubt that in Haleemudeen's case the application was made before 9th July 2012 and I do not know because the Court of Appeal do not tell me why it was that in Haleemudeen's case it was so clear that the post 9th July amendments to the rules applied both to the Secretary of State's consideration of the application, and indeed as the later paragraphs of Beatson LJ's judgment make clear to any reconsideration that the Secretary of State might apply if her decision challenge were quashed.
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> Both Edgehill and Haleemudeen turn on questions under paragraph 276ADE and it may well be that a proper analysis of paragraph 91 and the paragraphs which it introduces to the Immigration Rules demonstrate exactly why those results were achieved. I am however not concerned with paragraph 276ADE. I am concerned with paragraph 284. When I read the implementation provision at the beginning of HC 194 I find that an application made before 9 July 2012 is to be decided in accordance with the rules in force on 8 July 2012 which does not include Appendix FM.
>
> I then find that I am told that Appendix FM applies to applications made on or after 9th July 2012 which the present application was not and that its application is governed by paragraph 91. Paragraph 91 introduces Appendix FM and deals with the interaction between Part 8 and Appendix FM.
>
> Paragraph A277 indicates that Appendix FM will apply to all applications except some and of those some it looks as though the claimant's application is within paragraph A280(c).
>
> Whether or not that last point is right however it seems to me that so far as the application of Appendix FM to spouse applications is concerned, the meaning of the implementation provisions at the beginning of the Immigration Rules is clear. Appendix FM is not part of the rules applicable to the decision on an application that was made before 9 July 2012."

69. The main issue with which the Court of Appeal was considered in Edgehill was the effect of the transitional provisions, and the exact argument which was rejected there is the same as that which is being put forward here. We consider that we should, as in Jallow, follow the Court of Appeal's reasoning in Edgehill.

70. The case of Ruhul Amin was decided only under the Immigration Rules and UK Border Agency policy applicable as at the date of decision, i.e. Article 8 by applying paragraph EX.1 of Appendix FM for family life and paragraph 276ADE for private life. We adopt the comments of Jackson LJ cited above and agree that the natural interpretation of the transitional provisions is that the new rules would not impact upon applications made before 9th July 2012.

71. We conclude that the Secretary of State's reliance on the new rules in Amin was an error and, similarly, the FTT Judge was in error in basing his decision solely on whether the Appellant had satisfied the requirements of Appendix FM with regard to family life or paragraph 276ADE with regard to private life.

The effect of the error

72. Mr Malik has argued that the Secretary of State's decision, in materially relying on the new rules, was not in accordance with the law. The First-tier Judge should have so found and allowed the appeal outright without any consideration of proportionality.

73. In support of his argument he relies on the Tribunal decision in SC. However SC is not authority for the proposition that error in assessment inevitably leads to a decision that it is not in accordance with the law.

74. Blake J said:

> "We recognise that there are cases where a decision to refuse an extension of stay or remove a person may be so contrary to a requirement contained in an established policy or practice as to be not in accordance with the law. In such a case the analysis does not move on to justification for Article 8 purposes and the decision must be re-made in accordance with the law either by the Secretary of State or the judge. However in our judgment this was not such a case."

75. Whilst in Patel the Tribunal held that the decision was not made fairly, and thereby not in accordance with the law, the underlying question in deciding whether the consequence of error should be that the decision by the Secretary of State has to be considered afresh, is whether injustice was caused.

76. The crucial issue is whether the result would have been the same had the new rules not been applied, because if it was the same, reliance on the new rules could not be a consideration materially affecting the decision.

77. Ruhul Amin has been in the UK unlawfully for many years. The judge concluded that the wife's business had only very recently been established and at the time of the hearing it was not yet operational. The effect of removal would not mean that an established business would be unable to continue. He also considered the best interests of the children. The older child was only 4 years old and the main focus of his life was his parents and younger sibling. The children speak Bengali. They have relatives in Bangladesh, namely the Appellant's mother and two of his three brothers. The judge did not find the evidence of a lack of contact with either his family or his wife's family to be at all credible. He concluded that family life would continue on return to Bangladesh, and whilst there would be some disruption and hardship, it would not present any great difficulties. The Appellant had entered illegally and has continued to breach immigration law in remaining here and working, and his wife has only ever had temporary leave. Both will have acquired some skills which could be put to good effect in Bangladesh and enhance their prospects here.

78. The position is even clearer in relation to Rafaqat Begum. A full Razgar analysis was undertaken both in the original decision and in the judgment of the First-tier Tribunal. There was no material reliance on the new rules. The Respondent set out the Appellant's case both under Appendix FM and paragraph 276ADE and also considered the claim using the five stage test outlined in Razgar. The First-tier Judge similarly conducted the five stage Razgar test. Whether or not the judge had referred to the new Rules in making her decision, or used the language of the new rules is immaterial since on any view this was not a case which could ever have succeeded. The Appellant has a poor immigration history. She has been untruthful during the application process, significantly misrepresenting her situation. She has used the NHS inappropriately. On the judge's unchallenged findings, the Appellant had significantly more contact with her children and sister in Pakistan than she was willing to disclose. She has an adult daughter and grandchildren who can visit her in Pakistan, and, if she wishes to make an application to settle in the UK, she can apply for entry clearance through the proper channels.

79. In both cases, whether or not the appellants could comply with the provisions of the new rules is immaterial to the decision because the result on any view would be the same. No injustice has been caused so as to render the decisions unlawful.

The proper Application of Nagre and Gulshan

80. In her response the Respondent endorsed the approach of the Court of Appeal in MM & Others, relied upon by Mr Malik, in the sense that she agreed that an assessment of whether or not the decision is proportionate under Article 8 ought to be undertaken in every case. It was not argued that failure to qualify under the rules is the end of the consideration of whether removal would breach Article 8 rights.

81. Michael Fordham QC sitting as a Deputy High Court Judge in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin) said:

> "There is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations, those threshold circumstances include -
>
> (a) whether an arguable basis for the exercise of the discretion has been put forward;
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> (b) whether the relevant factors have already been assessed;
>
> (c) whether a repeat evaluation is unnecessary.
>
> Para 33 of Green J's judgment in Ahmed v SSHD [2014] EWHC 300 (Admin) in my judgment very clearly recognises that, having addressed the Immigration Rules and reached conclusions on their application, there is a duty by reference to the guidance on the decision-maker then to step back and formulate a view. The need for a view is not triggered by there being some good arguable basis.

> Rather, as Green J there explains, one of the questions – indeed the first question – to be considered in formulating that view is the question whether there might be a good arguable case."

82. In R (On the application of) Oludoyi (JR/3674/2013) Upper Tribunal Judge Gill wrote as follows:

> "There is nothing in Nagre, Gulshan or Shahzad that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. If for example there is some feature which has not been adequately considered under the Immigration Rules but which cannot on any view lead the Article 8 claim succeeding (when the individual circumstances are considered cumulatively) there is no need to go any further. This does not mean that a threshold or intermediate test is being applied. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. The guidance given must be read in context and not construed as if the judgments are pieces of legislation."

83. We adopt the same approach. The issue here is whether the answer to the question of proportionality would have been the same whether or not the judge applied the Article 8 Razgar analysis. There has been no intention to introduce a new step in the process, but there has to be something over and above the matters already considered in order for it to be necessary to consider Article 8 outside the rules. In so far as the judge was purporting to apply a threshold test he was misapplying the case law which, properly read, simply states that in cases which cannot on any view lead to success in an Article 8 claim, there is no need to go further than saying that there is no arguable basis for considering Article 8 under the Razgar test.

84. The Secretary of State said that the application had been considered exceptionally outside the Rules. Whilst some issues as a basis for a claim of exceptionality had been raised they had been dealt with elsewhere in the letter and it was not considered that these or any other factors offered sufficiently compassionate or compelling circumstances for discretion to be exercised in this case. On the facts it was not necessary for her to go any further. Furthermore it was open to the judge to conclude that there was nothing in the facts which would require him to conclude that there was any feature in his case which had not been adequately considered under the Immigration Rules so as to require a full Article 8 analysis.

85. Whether or not a simple statement that there are no exceptional circumstances is sufficient will depend on the circumstances of the case. Certain cases will require more reasoning than others. If there is an arguable basis for the exercise of discretion outside the Immigration Rules, a full Article 8 assessment will be necessary. It is certainly possible to conceive of circumstances in which making a decision by reference to the new rules when, according to the transitional provisions, they do not apply, and not conducting a full Razgar test, would give rise to injustice. In such a

case the proportionality decision would have to be remade. However that is not the case here.

86. Accordingly there is no material error in the decisions which shall stand.

Signed Date **1st October, 2014**

Upper Tribunal Judge Taylor