



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

Appeal Number: IA/45422/2014
IA/45420/2014
IA/45414/2014
IA/45416/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 7th November 2017**

**Decision & Reasons Promulgated
On 14th December 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MU AND OTHERS
(ANONYMITY DIRECTION MADE)**

Respondents

Representation:

For the Appellant: Mr McVeety, Senior Presenting Officer

For the Respondents: Ms Patyna, Counsel instructed on behalf of the Respondents

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Sangha) who, in a determination promulgated on 27th February 2017 allowed the Respondents' appeal against the decision to refuse to vary leave to remain in the United Kingdom and to remove

them from the United Kingdom. The decisions under challenge were made on the 20th October 2014.

2. Whilst this is the appeal of the Secretary of State I intend to refer to the parties as they were before the First-tier Tribunal for sake of convenience.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

3. Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity as the claim concerns minor children. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.
4. The Appellants are nationals of Sri Lanka. The background is set out in the determination of the First-tier Tribunal decision. The Appellants arrived in the United Kingdom on 15 October 2010; the first Appellant and been granted leave to enter as a Tier 4 (General) student. Her husband, the second Appellant, and the children entered as her dependents. The first Appellant completed the first year of the course but failed two subjects which she had to re-sit. In the second year she failed the same to subjects but the University did not allow her to continue her course. In or about November 2013 she enrolled with a different college to follow a management diploma. The family were subsequently granted an extension of stay in the United Kingdom until the 21 August 2015 on the basis of the first Appellant's studies. However that leave was curtailed to 26 August 2014 because the college licence was withdrawn by the Home Office. No further application was made for leave as a Tier 4 student.
5. However on 23 August 2014 an application was made by the first Appellant for leave to remain on the basis of family and private life with the second, third and fourth Appellants as her dependents. In a letter dated 22 August 2014 which accompanied the application, it was stated that the first Appellant had established her private and family life in the UK and that the two children were studying on a full-time basis. It was asserted that it would be difficult for the children to adjust to their life abroad and it would not be reasonable to expect the removal of the applicant, her spouse and the children from the UK.
6. This application was refused in a Notice of Immigration Decision made by the Secretary of State on 20 October 2014. Accompanying that notice was a reasons for refusal letter setting out the reasons why refusal to vary leave to enter or remain in the UK and the decision to remove them had been made.
7. The decision noted the first Appellant's immigration history as set out above, namely that she had entered the United Kingdom on 10 October

2010 with entry clearance as a Tier 4 general student. As to the decision under the partner route, the Appellant could not satisfy the requirements as her partner was not a British citizen nor was he present or settled in the UK or in the UK with refugee leave or humanitarian protection. Similarly under the parent route, the children were not British citizens nor were they settled in the UK or had lived in the UK continuously for at least seven years immediately preceding the date of the application. They also could not meet the eligibility requirements for leave as a parent as it was stated that whilst the first Appellant was in a relationship with the father of the children they resided together as a family unit therefore she did not have sole responsibility for any of the children.

8. As to private life under Paragraph 276ADE (1), it was noted that the first Appellant was a national of Sri Lanka who entered on the 10 October 2010 and thus had resided in the UK for 3 years and had not had 20 years residence and was over 18 (and not under 25) and thus could not meet Paragraph 276 ADE (1) (iii) or (iv) and (v). As to Paragraph 276 ADE (1) (VI) it was not accepted that there would be very significant obstacles to her integration into the country to which she would have to go if required to leave the UK. She had lived in Sri Lanka the majority of her life and that her familiarity with culture and understanding of social norms would not have deteriorated to a point whereby she would be unable to reintegrate. She spoke the language and this would be beneficial to her reintegration.
9. The Secretary of State also considered whether there are any circumstances for a grant of leave outside the rules and did so taking into account Section 55 of the Borders, Citizenship and Immigration Act 2009 in the light of the circumstances of the children who were then aged 9 and 6 and had been living in the United Kingdom for 3 years. The decision noted that the first Appellant would be returning with the children (and her spouse) and would be able to support the children whilst they became used to living there and enjoying their full rights as citizens of Sri Lanka. Whilst they were in education, the objective information available demonstrated that Sri Lanka had a functioning education system and the children would be able to enter. The Appellant had provided no evidence to indicate that she would be unable to maintain the children in Sri Lanka or would be unable to provide for the safety and welfare. They lived in Sri Lanka for five and two years respectively before entering the UK and were familiar with the Sinhala language and thus were familiar with the culture and would be able to adapt more easily to life there. Any relationships established in the United Kingdom could continue from overseas via other methods of communication. It was considered reasonable to expect the first and second Appellant and the children to return to Sri Lanka as a family unit and continue to enjoy family life there together. The Secretary of State noted that this might involve a degree of disruption to their private life but that it was proportionate to the legitimate aim of maintaining effective immigration control was in accordance with Section 55 duties. Thus it was considered that a refusal to grant leave outside the

rules would not result in unjustifiably harsh consequences for the first Appellant and the family members.

10. The decision letter also considered the circumstances of the Appellant's spouse who, for the same reasons, could not meet either the partner route, or the parent route or those relating to Paragraph 276 ADE based on his length of residence in the United Kingdom and his previous residence in Sri Lanka. Each of the children were also considered in the decision letter and for the reasons given, could not meet the requirements under the child route (Appendix FM) or under Paragraph 276 ADE in the light of their length of residence and their ages. Their circumstances were also considered outside of the Rules.
11. The appeal came before the First-tier Tribunal on the 27th January 2017. In a decision promulgated on the 27th February 2017, the judge allowed the appeals on human rights grounds (Article 8). The judge reached the conclusion that none of the Appellants could meet the immigration rules dealing with Article 8 (Appendix FM 276 ADE private life) as a result of their length of residence in the UK and in the circumstances of the children, that they have not lived in the United Kingdom continuously for at least seven years. The judge allowed the appeal of the Appellants outside of the rules on the basis that it was disproportionate to remove them from the United Kingdom. The judge found that there were "good grounds grant leave to remain outside of the rules" having made reference at paragraph 29 to the length of time the Appellants had lawfully remained in the UK and the establishment of the business during that period, the creation of employment and additional voluntary work that the Appellant had engaged in. Furthermore the first Appellant's college had closed and her conduct had not been criticised. As to the children, the eldest child was at a critical age in his education and the judge took into account the length of time the children had remained in United Kingdom.
12. Permission to appeal that decision was granted by First-tier Tribunal Judge O'Garra on the 5th September 2017. The grant of permission states as follows:

"... the grounds assert that the judge failed to identify anything in the case which could be described as either compelling or exceptional in allowing the appeal of human rights grounds and that the decision lacks reasoning.

In R (on the application of Agyarko) (Appellant)v Secretary of State for the Home Department [2017] UKSC 11 the Court said this:

"54. As explained in Paragraph 49 above, the European Court said that, in cases concerned with precarious family life, it is "likely "only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8. That reflects the weight attached to the contracting states 'right to control their borders, as an attribute of their sovereignty , and the limited weight which is generally attached family life

established in the full knowledge that its continuation contracting state is unlawful or precarious. The court has repeatedly acknowledged that “a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residents there” (Jeunesse, para 100). As the court is made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a *fait accompli*. On the contrary “when confronted with a *fait accompli* the removal of a non-national family member by the authorities would be incompatible with Article 8 only in exceptional circumstances” (Jeunesse, 108).

In the light of this guidance, I find arguable merit in the grounds and the terms in which they are set forth permission to appeal is granted.

There are arguable errors of law in the judge’s decision.”

13. Thus the appeal came before the Upper Tribunal. Mr McVeety made the following submissions on behalf of the Secretary of State. He submitted that the Appellants could not meet the immigration rules and therefore the appeals were considered “outside of the rules”. The judge was required to undertake a proportionality balancing exercise and take into account all matters raised by both parties in reaching a conclusion on whether there were circumstances which were sufficiently compelling or in other words, gave rise to unjustifiably harsh circumstances to make their removal disproportionate. He directed the Tribunal to the determination and the list of authorities relied upon by the Secretary of State that dealt with legal issues relevant to these appeals, including reasonableness of return, importance of nationality, best interests assessment, and the public interest. There was no consideration in the determination at paragraphs 18 - 36 or engagement with those submissions. The judge essentially repeated the skeleton argument filed on behalf of the Appellants but did not support that with any reasoned analysis. Whilst at paragraphs 16 and 17 the judge recorded what had been set out in the refusal letter, that was insufficient when considering an analysis of the Respondent’s case on the evidence. The judge had not recorded or analysed any of the arguments raised on behalf Secretary of State and that this was a material error of law.
14. In general terms the judge cited case law that had been relied upon by the Appellants (see Paragraph 28 dealing with ZH (Tanzania) at Paragraph 32 dealing with UE (Nigeria)) but had made no findings in this respect.
15. Paragraph 29 similarly were not findings and in any event, some were neutral (such as having not had criminality) and other factors stated by the judge were required to be balanced against other factors - such as the children were not qualifying children by reason of the length of residence, the length of prior residence in Sri Lanka, lack of significant obstacles to

reintegration and that they were in the United Kingdom on a temporary basis. There was also no findings of fact dealing with the issue of reasonableness of return. These matters when taken together demonstrated that the judge had not applied the correct legal test and analysis when reaching a conclusion on proportionality and whether there were such “compelling circumstances” or “unjustifiably harsh consequences”.

16. He submitted that the losing party was entitled to know why their case had been rejected. However it could not be properly be determined on a reading of this determination as the Respondents submissions were not recorded or analysed. He made reference to an 11 page submission which had formed the basis of the Respondents closing argument. He further submitted that this was a material error because only one side of the balance had been considered or in the alternative, the balance was flawed as all of the competing interests had not been considered and there had been a lack of reasoning. In this context the judge had made reference to lawful leave but had not made any reference to their leave as “precarious” which on the facts of these Appellants was a relevant consideration. He therefore invited the Tribunal to set aside the decision and to remit the appeal to the First-tier Tribunal for a further hearing given the change the family’s circumstances.
17. Ms Patyna relied upon the Rule 24 response which she had prepared on 24 October 2017 and also a document entitled “Counsel’s note”. She began her submissions by reference to the relevant law; this was a human rights appeal and that the Tribunal was required to carry out its own proportionality assessment under Article 8 based on all of the facts and the evidence. She submitted that in the light of the decisions of the Supreme Court in R (on the application of Agyarko) v SSHD [2017] UKSC 11 and Hesham Ali v SSHD [2016] UKSC 60, there was no requirement to find any unique feature or any exceptionality (see Paragraphs 56 and 60 of Agyarko).
18. She further submitted that the judge gave consideration to the immigration rules and concluded that they could not be met at paragraph 20 and at paragraph 22 took into account the statutory consideration set out in Section 117 of the 2002 Act (as amended). The judge was required to make an assessment of the facts and to give weight to the public interest which is what the judge had done in the determination. On the Respondent’s side was the maintenance of immigration control which the judge had expressly considered at [20]. Contrary to the Secretary of State’s grounds, she submitted that it was incorrect that the judge had failed to identify anything “compelling”. The judge reasoned that there were “good grounds” for the granting leave and set out the factors upon which he had reached this decision at paragraph 29. That paragraph was to be read with paragraphs 21 and 23 and in particular that the judge had found on the evidence that the first and second Appellants had immersed

themselves into the local community and that the children were also well integrated into British society and that the eldest child was well established in mainstream education in the UK (21) and that they had established a “very strong private life” (see paragraph 23).

19. Ms Patyna submitted that it was unfair to state that it was only the Appellant’s case that had been considered, when the judge at paragraph 31 did make reference to the public interest and that was the Secretary of State’s case. The judge also took into account the impact on the community and its relevance to the proportionality balance and that the case law of UE (Nigeria) relied upon by the judge remained good law. She acknowledged that the determination did not set out the submissions of the Respondent but submitted that there was no requirement for the judge to set out every detail of the arguments heard. The judge did record at Paragraph 5 vii that he had taken those cases cited into account and in any event those cases did not advance any arguments pertinent to the appeals and there is nothing to show that those cases applied to the present appeals. Therefore even if there was an error in this respect it was not material to the proportionality assessment.
20. It was acknowledged that the children were not “qualifying children” but that at the time of the Tribunal hearing both children have been living in the UK for over six years and that the position of the children was a very weighty factor in the Article 8 assessment (see Paragraph 29 of the decision). The eldest child had arrived at the age of five and the length of time in the UK after the age of four was likely to be more significant (see Azimi-Moayed and others (decisions affecting children: onward appeals) [2013] UKUT 197).
21. She further submitted that even if the Tribunal reached the conclusion the judge erred in not giving more express recognition to the children circumstances, it was not material because the judge had a social circumstances report prepared by ISW which made reference to the difficulties the children would face on return and supported the judges reasoning. She relied upon the report at Paragraphs 6.3.1, 7.5 and 7.2). There were also letters for the children’s school.
22. As to the nature of the leave that the Appellants had in the United Kingdom, she referred the Tribunal to the decision in Kaur (children’s best interests/public interest interface) [2017] UKUT 00014 and in particular the weight that should be attached to private/family life. Whilst Mr McVeety had made reference to their leave as “precarious” the decision in Kaur stated that the phrase “little weight “is unsophisticated and was not an “absolute measurement or concept” and that “little weight” is not to be confused with “no weight” and that the measurement of “little weight “is unlikely to be the same in every case vary according to the particular context. She further submitted that the issue of precariousness was not “overarching” and the same in every case. Thus she submitted the judge

carried out a proper balancing exercise reached a conclusion in the Appellant's favour on the evidence.

Decision on error of law:

23. To consider whether the First-tier Tribunal erred in law as the Respondent submits, it is necessary to set out the judge's findings of fact and analysis of the issues in the determination. They can be summarised as follows. The first Appellant entered the UK as a Tier 4 General Student on 15 October 2010 and was followed by her spouse and children shortly thereafter. The judge accepted the first Appellant's account of her studies and that she was unable to obtain a refund of money because the college licence was withdrawn [19]. The first and second Appellants (the parents) could not meet the rules under Appendix FM as a parent or partner, nor the provisions as to private life under Paragraph 276 ADE. It was also accepted that at the date of the hearing the children had not lived in the UK for at least 7 years and could not meet Paragraph 276 ADE (IV) [at 23].
24. As to Article 8 outside the rules, the judge was satisfied that Article 8 was engaged, the decision to refuse the application to vary leave to remain interfered with their family/private life and that this was in accordance with the law and that the issue related to that of proportionality [at 30].
25. Earlier in the decision, the judge had set out the Section 117 public interest factors at [22] and at [28] had set out case law relating to the best interests of children (ZH (Tanzania)).
26. The judge was required to apply that to the factual findings that were made.
27. As to the extent of private life established in the UK at [21] the judge referred to the lawful residence on the part of the adult Appellants and the age of the children and the eldest child (age 12) was well-established in school. The judge found that the second Appellant had established himself in a business and had made a significant contribution to the U.K.'s economy by paying taxes and creating employment by taking a failing shop and turning it into a "thriving business". The judge made reference to "numerous letters and support from customers and employees who held him in very high esteem and considered them to be hard-working and honest people and benefit to the community". At [23] the judge therefore concluded that the "Appellants have established a very strong private life in the UK". The judge then went on to cite extracts of general law which were all taken from Counsel's skeleton argument (see 24,25,26 27, 28).
28. When looking at the balancing factors identified on the Appellant's side they are in summary set out at [29]; the length of lawful residence, the age of the eldest child and at a critical time in education, the establishment of the business and creation of employment, the fact that

the college first Appellant attended was closed that her conduct was not criticised and voluntary work that the Appellant had engaged in.

29. On the public interest side the judge at [31] made reference to the need to maintain “fair and effective immigration control” on the facts of the case of these Appellants, but that:

“... the refusal of leave to remain and set removal directions is based solely on the need to implement immigration control. There appears to be little or no consideration of the impact that the removal will have upon the Appellants or indeed the wider community. I accept Mr Lewis’ arguments that, in all of the circumstances, that impact is particularly relevant to the proportionality of the decision, particularly given the evidence of the Appellant having created employment and their voluntary work in the UK and within their community in the UK.”

30. The judge then went on to cite with approval the decision of the Court of Appeal in UE (Nigeria) and others v SSHD [2011] 2 All ER at [32] and at [33]-[34] made reference to the decision of Huang and why on the facts of that case it was disproportionate to remove the Appellant (the facts there on an entirely different basis to the present appeals) and at [36] concluded that “in these particular cases the decision to refuse the Appellant’s application leave to remain on the basis of their family/private life and to remove them from the UK is a disproportionate measure and therefore contravenes Article 8 of the ECHR”.
31. I have had the advantage of reading the Rule 24 response on behalf of the Respondents and a document entitled “Counsels note” and hearing the oral submissions made by both Mr McVeety and Ms Patyna. In both the written materials and the oral argument, the advocates made reference to the relevant law.
32. Appendix FM, “Family Members”, begins with a general statement which explains that it sets out the requirements to be met by those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (para GEN.1.1). It is said to reflect how, under Article 8, the balance will be struck between the right to respect for private and family life and the legitimate aims listed in Article 8(2). The Appendix nevertheless contemplates that the Rules will not cover all the circumstances in which a person may have a valid claim to enter or remain in the UK as a result of his or her Article 8 rights. Paragraphs GEN.1.10 and GEN.1.11 both make provision for situations “where an applicant does not meet the requirements of this Appendix as a partner or parent but the decision-maker grants entry clearance or leave to enter or remain outside the Rules on Article 8 grounds”.
33. This is a case in which it was conceded on behalf of the Appellants that they could not meet the Immigration Rules either under Appendix FM

(parent or partner route) or under Paragraph 276 ADE dealing with private life (see Paragraph 8 and Paragraph 20 of the determination). The children had not been present in the UK for at least seven years (see Paragraph 20). Thus the judge accepted that the issue related to an assessment "outside of the Rules." There did not seem to be any issue as to whether the first four limbs of the Razgar test were satisfied thus the issue related to that of proportionality (see Paragraph [30]).

34. This required a fair balance to be struck between the public interest and the rights and interests of the Appellant and others protected by Article 8 (1) (see Razgar at [20]) which includes the adult Appellants and children (see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43]).

35. When looking at the issue of Article 8 outside the Rules at Paragraph [48] the Court stated:

"[48] As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be incompatible with Article 8 for leave to be refused. The Rules and Instructions are therefore compatible with Article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with Article 8: that is a question which, if a decision is challenged, must be determined independently by the court or Tribunal in the light of the particular circumstances of each case".

36. At Paragraphs 49-51 the Court stated:

"49. In Jeunesse, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under Article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be "precarious". Where this is the case, the court said, "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8" (para 108).

50. Domestically, officials who are determining whether there are exceptional circumstances as defined in the Instructions, and whether leave to remain should therefore be granted outside the Rules, are directed by the Instructions to consider all relevant factors, including whether the applicant "[formed] their relationship with their partner at a time when they had no immigration status or this was precarious". They are instructed:

"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."

That instruction is consistent with the case law of the European court, such as its judgment in *Jeunesse*. As the instruction makes clear, "precariousness" is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.

37. The correct approach is set out at Paragraphs [56]-[57] when the Court considered the earlier jurisprudence and MF (Nigeria):

"56. ... Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.

57. That approach is also appropriate when a court or Tribunal is considering whether a refusal of leave to remain is compatible with Article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In

general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.”

38. In summary the Court stated at [60]:

“[60] It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with Article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.”

39. Thus I accept the submission made by Ms Patyna that the law set out in the more recent cases indicate a departure from the requirement to find some additional factor before Article 8 can be considered outside the rules. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 Lord Reed at Paragraphs 47 to 50 endorsed the structured approach to proportionality and said what has now become the established method of analysis can therefore continue to be followed in this context.
40. That approach was also endorsed in MM (Lebanon) [2017] UKSC 10 (in particular paras 66 and 67) and in Agyarko [2017] UKSC 11 where Lord Reed in explaining how a Court or Tribunal should consider whether a refusal of leave to remain was compatible with Article 8 made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the Article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.
41. However, it is now clear from Agyarko and Ikuga [2017] UKSC 11 whilst that there is no separate test for exceptional or compelling circumstances to be satisfied; that one would expect to find such circumstances, if it were to be decided that it was disproportionate to remove somebody who could not satisfy the provisions of the Immigration Rules.
42. In considering the issue of proportionality, the judge was required to make an assessment of the best interests of the children and to assess that in

the light of the evidence. The judge did make reference to the basic and uncontroversial principles set out in ZH (Tanzania) at paragraph [28] but did not make any assessment of the best interests of the children taking into account their nationality and their length of residence and the points that were set out in the decision letter and relied upon by the Secretary of State. There had been a social circumstances report written by an independent social worker (see [AB18]) which assessed the family circumstances on 19 December 2015. The summary of the conclusions are at [AB21] which was that in the opinion of the ISW a significant change in children circumstances would have a detrimental effect on their health, and emotional well-being and development and their opportunities to achieve. The ISW also found that the family would be likely to be subject to financial hardship if removed to Sri Lanka and made reference to destitution (7.2) and at (7.3) stated that it was unclear what resources (in terms of education) would be available for them there, and at (7.8) the risk of emotional harm to the children.

43. There was no reference in this determination to that report of the ISW or any assessment made by the judge of that report whatsoever, either addressing the question of the children's best interests or in assessing the reasonableness or otherwise of return. As Mr McVeety submitted anyone reading the determination would be completely unaware of the existence of such a report and also of any contrary view expressed by the Secretary of State in relation to the general tenor of that evidence. In this context, the availability of education in Sri Lanka, the cultural and social ties of the first Appellant and her husband, the nationalities of the children.
44. Whilst this was a case where the children were not "qualifying children" under Section 117B (6), it seems to be the position that the question of reasonableness of return formed part of the judges assessment. That is understandable in the context of removal but the assessment made was, in my judgement, entirely one-sided. I can see no consideration given to the Respondents submissions relating to the relevant issues despite the judge referring to the case law relied upon by the presenting officer set out at Paragraph [5 vii] which included MA (Pakistan) and EV (Philippines) and other relevant case law. Contrary to the submissions made by Ms Patyna, those cases did concern issues relevant to the Appellants.
45. Similarly there was no consideration or engagement of the Respondent's case when considering this aspect of the Appellant's case. Whilst at Paragraphs [14 - 17] the judge summarised the Respondent's refusal letter that is entirely different from engaging with its contents when carrying out an assessment of the evidence and reaching a reasoned conclusion. For example, there is no reference to the ISW report and its conclusions as to whether the children would be able to access education. Whereas the judge had recorded the refusal letter at [17] where reliance was placed by the Respondent upon the evidence available that the children would be returning to Sri Lanka with their parents who would be

able to support them and that the objective evidence was that the country had a functioning education system which the children would be able to enter. There is no analysis or assessment of that evidence in the light of the contents of the ISW report.

46. Furthermore the ISW report also made reference to the parents being subject to financial hardship and destitution. The refusal letter had set out the Respondent's case that the parents are provided no evidence which indicated that they would be unable to maintain the children or would be unable to provide for their welfare. There was no engagement or any analysis of that part of the Respondent's case and reaching a decision. That is particularly so when considering the core finding made by the judge relating to the establishment of a business in the United Kingdom and thus having assets upon which the family could potentially draw upon and recent experience in the field of employment.
47. Ms Patyna submit that even if the judge erred in not giving more express recognition to the children circumstances, it was not an error that was material (see Paragraph 10 of Counsel's note). I cannot agree with that submission. Whilst making this submission Ms Patyna made reference to the ISW report however there was no analysis whatsoever or any reference to that report in the factual findings made by the judge. I accept the submission made by Mr McVeety there had been no assessment whatsoever in the light of the Respondent's case to which I have referred. In my judgement, the judges lack of analysis as regards the best interests of the children and the lack of analysis of the evidence as a whole is a material error of law and demonstrates that any balancing exercise undertaken which related to the proportionality of removal, was flawed.
48. Similarly whilst the judge set out that the Appellant's case was that they could not meet the rules, there was no proper reference to this in the balancing exercise undertaken as to the weight that should be attached to that factor. It is correct that the judge made reference to the decision of Huang at [34 - 35] but the factual circumstances of Huang set out by the judge at [34] bear no resemblance to the factual circumstances of the appeals before the First-tier Tribunal. Importantly there was no reference to the weight that should be attached to the failure to meet the immigration rules. As set out earlier GEN 1.1 of Appendix FM states that the requirements of the immigration rules reflect how Article 8 and the ECHR balance will be struck between the right to respect for family and private life and the legitimate aim of maintaining an effective system of immigration control. The way in which the immigration rules relating to private life are considered and applied is directly relevant to whether a decision is lawful under Section 6 of the Human Rights Act 1998 because the rules are relevant to the assessment of a claim based on human rights.

49. In my judgement, it is not sufficient to state, as the judge did at [31] “that the public interest side of the balance there is a need to maintain fair and effective immigration control but on the facts of these Appellants, the refusal of leave to remain and set removal directions is based solely on the need to implement immigration control”. There is no recognition firstly that the Appellant cannot meet the immigration rules and secondly, why they cannot meet the immigration rules which is part of the exercise the judge was required to consider when making an assessment outside of the rules and the proportionality balancing exercise. One issue of relevance was that the Secretary of State had concluded from the factual background that there were no very significant obstacles to reintegration of the first and second Appellants to Sri Lanka and thus they could not meet Paragraph 276 ADE (1) (vi) but there was no consideration of that factor when making an assessment of the issue outside of the rules.
50. In carrying out the balancing exercise and reaching a finding on proportionality, the Tribunal must “have regard” to the considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 (Section 117A). Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under Section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
51. S117B 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.

52. Whilst the judge set out the Section 117 public interest factors earlier in the determination at [22], that was merely a recitation and there is little to indicate that the judge applied them when considering the balancing exercise. It is plain from reading the determination that the judge appears to have given great weight to the Appellant's establishment of a successful business. At paragraph 21 the judge made reference to the lawful residence and his contribution to the economy by paying taxes and creating employment. In his analysis of this factor the judge made reference to a decision of the Court of Appeal in UE (Nigeria) (see Paragraph 32). This is a decision which predated the coming into force of the public interest considerations in Section 117 of the 2002 Act (as amended). Furthermore, whilst the decision did make reference to a broad approach being taken to the community "losing something of value" and that this is a principle capable of being relevant to the assessment of the public interest, the decision went on to state that it was unlikely in practice to carry much weight (see Paragraph 43 of the decision).

53. In this context also, the judge placed weight on the fact that the Appellant had established his business and that this was a "strong element" of his private life and whilst they were in the UK lawfully. However there was no consideration that his status, whilst lawful, had been precarious in the sense that the second Appellant, who was a dependent of the first Appellant, had no expectation of permanent status and the establishment of his business had to be seen in that light. It is common ground that the first Appellant came as a student and her husband as her dependent along with the children. She did not complete her studies in the United Kingdom and it was against that background that the application leave to remain was made. Section 117B (5) states that "little weight" should be given to a private life established by person at a time when a person's immigration status is precarious. The Appellants were granted a period of limited leave to remain United Kingdom on the basis of the Appellants Tier 4 status as a student but that leave was still precarious for the purposes of Section 117B(5) (see AM (S117B) Malawi [2015] UKUT 0265 and Ruppiah [2016]

EWCA Civ 805). Whilst Ms Patyna submits that “little weight” does not mean that “no weight” can be given and that it is dependent on the circumstances of the particular case, there was no assessment made of this part of the Section 117B public interest considerations and therefore again the balancing exercise was flawed and as the Respondent submits it was unclear as to how the proportionality balance was properly reached.

54. I have considered with care the arguments advanced by Ms Patyna on behalf of the Appellants but I am satisfied that the judge fell into error in his assessment of the Article 8 issues for the reasons given in the earlier paragraphs. I am also satisfied that the submission made by Mr McVeety is made out that there appears to be no proper consideration of the Respondents arguments beyond reciting the contents of the refusal letter. The judge made no analysis of the evidence that was before the Tribunal (which related to the children) in the light of the Respondents submissions (both in the refusal letter and generally) and instead appeared to cite (with approval) large amounts of what is uncontentious extracts of law. In this context I agree with Mr McVeety that there was a failure to engage with the Respondent’s case and whilst the judge cites with approval throughout the determination the Appellants counsel’s skeleton argument, it lacks an assessment of any alternative analysis. It would have been open to the judge to reject the Respondent’s case but it has not been demonstrated that such an analysis was undertaken.
55. Consequently I am satisfied that the errors demonstrated are material to the outcome. The balancing exercise undertaken as a consequence is materially flawed and thus the decision should be set aside.
56. When considering the issue of remaking the decision, Ms Patyna submitted that in the event of a material error of law, she would request that the decision be remitted to the First-tier Tribunal for a further hearing. There are a number of reasons for that; principally the position of the children has changed. The decision of the Secretary of State was made in 2014 and the hearing before the First-tier Tribunal was in January 2017. The children are now “qualifying children” under Section 117D, as they are under 18 years of age and have now lived in the United Kingdom for a continuous period of seven years or more. The ISW assessment of their circumstances and that of their parents was also made in December 2015 and is two years old and may require updating in line with the children’s circumstances. In the light of those factors, I am satisfied that Ms Patyna’s submissions as to the necessity for a further hearing is correct and that the appeal should be remitted to the First-tier Tribunal to make further findings of fact and analysis of the evidence as a whole. Mr McVeety also agreed with that course.
57. Consequently for the reasons I have given, I am satisfied that there is a material error of law in the decision of the First Tier Tribunal and that it

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should be set aside and the matter shall be remitted for further hearing before the First Tier Tribunal on a date to be fixed.

Notice of Decision

The decision of the FTT involved the making of an error on a point of law; it is set aside and remitted to the First Tier Tribunal to hear the appeal.

An anonymity direction is made.

Signed 

Date: 11/12/2017

Upper Tribunal Judge Reeds