Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19370/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd August 2017	**On 14th August 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CD
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Tufan , Senior Presenting Officer
For the Respondent: Miss Chapman, Counsel instructed by Bindmans LLP

DECISION AND REASONS

1. The Respondent is a citizen of Sri Lanka.

2. Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I make an anonymity

direction as this case concerns minor children. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him, his spouse or the children. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The procedural history and background:

3. The Secretary of State, with permission, appeals against the decision of the First-tier Tribunal (Judge MA Khan) who, in a determination promulgated on the 29th April 2016 allowed his appeal both under Appendix FM and on human rights grounds (Article 8 outside the Rules).

4. Whilst the Appellant in these proceedings is the Secretary of State, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

5. The Appellant's immigration history and the basis of his claim is set out within the determination at paragraph 18 of the FTT determination and in the decision letter issued by the Secretary of State. It can be summarised briefly as follows.

6. The Appellant is a national of Sri Lanka. He claims to have entered the United Kingdom avoiding immigration controls in 2002; he has never had any substantive right to remain. In January 2011 he met his wife and began cohabitation in the summer of 2011. They married on 17 March 2012.

7. On the 12th of June 2012 he made an application for leave to remain as the spouse of a British citizen on form FLR(M) . This was refused in a decision letter of 26 November 2012 on the basis that the Appellant did not have limited leave to enter or remain in the United Kingdom and did not meet the requirements of paragraph 284 of the Immigration Rules. His case was also considered under Appendix FM of the Immigration Rules and the Respondent concluded that the requirements of EX1 were not met and that the Appellant was also not entitled to a grant of leave to remain based on his private life pursuant to paragraph 276 ADE.

8. Judicial review proceedings were brought in February 2013 and was refused on the papers in a decision dated 11 October 2013. The application was renewed and the consideration at an oral hearing having been transferred to the Upper Tribunal (Immigration and Asylum Chamber). At an oral hearing in April 2014 the case was adjourned and a further refusal decision was made on 18 June 2014. When the matter came before the Tribunal, permission to apply for judicial review was granted. After the grant of permission in judicial review proceedings the hearing was adjourned for the Respondent to consider the Appellant's case once more. The Respondent reconsidered the decision and issued a further refusal decision dated 8th of May 2015 which was the decision which was the subject of the appeal before the First-tier Tribunal. In that decision the Secretary of State maintained her decision but provided the Appellant with an in-country right of appeal.

9. The appeal came before the First- Tier Tribunal (Judge MA Khan) at a hearing on the 5th April 2016. In a determination promulgated on the 29th April 2016 he allowed the Appellant's appeal. In the determination, he found that there were insurmountable obstacles family life outside of the United Kingdom and therefore allowed the appeal both under the rules (EX(1)(b) and outside of the Rules.

10. The Secretary of State sought permission to appeal that decision and permission was granted by the First-tier Tribunal Judge Astle) on the 6th October 2016.

11. The appeal was therefore listed before the Upper Tribunal on the 2nd February 2017 before Upper Tribunal Jordan.

12. In a determination promulgated on 3rd February 2017 Upper Tribunal Jordan found an error of law. That decision is annexed to the present determination.

13. As can be seen he set aside the determination of the First-tier Tribunal he did not re-make the decision at the hearing as he recorded that there could not be any finality and the remaking of the decision could await the birth of the twins. He stated at paragraph 21 as follows;-

> "their birth clearly herald the necessity on the part of the Appellant to reformulate his case on Article 8 grounds for the purpose of it being remade and for the Secretary of State to respond. This may require a further decision to be made in consideration will have to be given to whether these proceedings are now the right way forward. Second this will permit the Supreme Court to deliver its judgement in Agyarko and others. The Appellant made no attempt to establish whether this is a case where he me met or meets the requirements for entry clearance as a spouse and, in accordance with Chikwamba [2008] UKHL 40 and the numerous cases that followed it, whether it is appropriate for him to return to Sri Lanka to regularise his stay bearing in mind his poor immigration history. The First-tier Tribunal judge did not deal with this element."

14. Consequently the remaking of the decision was adjourned on that basis. On 22 June 2017 a transfer order was made by the Deputy Resident Principal Judge so that the appeal could be heard by a differently constituted Tribunal.

15. Thus the appeal came before the Upper Tribunal on 3rd August 2017 for the re-making of the decision.

<u>The evidence:</u>

16. For the purposes of the hearing, the Appellant's solicitors had indicated that the bundle that had been provided for the FTT was still relevant and they provided a copy of the index. In addition, they provided a supplementary bundle under cover of a letter dated 28th July 2017 which contained further evidence relied upon, including updating material from the Appellant and his wife and from other family members. There was also information provided concerning the birth of the twins and medical evidence.

17. The Respondent had produced a copy bundle of documentation which had been before the First-tier Tribunal and no further evidence was produced.

18. I heard oral evidence from the Appellant, his wife, and mother in law. His sister-in law was called but was not cross-examined similarly Mr Tufan indicated he did not take any issue with the other witness statements. There is a record of that evidence in my record of proceedings and I shall refer to that evidence during my analysis of the issues and conclusions reached.

The submissions:

19. I then heard a summary from each of the advocates. Mr Tufan made the following submissions. He submitted that the factual circumstances did not demonstrate that there were any "insurmountable obstacles" for the family relocating to Sri Lanka. In this regard he directed the Tribunal's attention to the decision of the Supreme Court in Agyarko and the particular factual circumstances in that case. He stated that the sponsor was a British citizen who had lived all his life United Kingdom and had employment and whilst they were difficulties, they could not be described as "insurmountable obstacles". As the court set out it is a "high test". The family could relocate and reside with family who have a home there.

20. As to the birth of the twins, when considering either EX1(a) or section 117(B) (6) there is no expectation for them to leave the United Kingdom and therefore the issue of reasonableness does not arise.

21. In respect of the guidance set out in paragraph 50 of the Appellant's bundle, it was considered in the decision of SF but on the facts of that case there was no other parents look after the children. The guidance was an attempt to implement the decision in Zambrano and refers to a parent as a "primary carer". In this case there is another parent who could look after the children.

22. In the alternative, it would be proportionate to require the Appellant to seek entry clearance from abroad. In this case the applicant would have to show that he could succeed in any application. However he has not demonstrated compliance with the documentation required under Appendix FM-SE which relates to payslips and bank statements. Whilst the Supreme Court in the decision of MM referred to flexibility as to evidence, there is insufficient evidence to show the application was succeed. In any event, the burden is upon the Appellant to show why it would be disproportionate to seek entry clearance although the case of Chen did make reference to where there are children involved it may be easier to show that it is disproportionate. There are other family members who could assist the Appellant's wife while she remains in the UK. Thus he submitted the appeal should be dismissed both under the rules and on Article 8 outside of the rules.

23. Ms Chapman had provided a skeleton argument setting out the Appellant's case and reference to the legal principles and relevant case- law to this appeal. It is not necessary for me to set out the contents of that skeleton argument as it a matter of record. She supplemented it by the following oral submissions.

24. As regards the decision of Agyarko, she reminded the Tribunal that the facts of the case did not involve any relevant children. Here it is common ground that there are two young children. The court is required to take into account their best interests as set out in skeleton argument and are relevant to the issue of whether there are insurmountable obstacles. The decision of Agyarko at paragraph 45 made reference to the correct interpretation of "insurmountable obstacles" as the "very serious difficulties in continuing their family life outside the UK, which could not be overcome or would entail very serious hardship." In considering that test, the best interests and the circumstances of the children are a relevant consideration.

25. The decision in Agyarko also reinforced the decision in Chikwamba (see paragraph 51 and paragraph 3.6 and 3.7 of the skeleton argument). In this case the Appellant's wife has a history of full-time employment and has set out her annual salary within the evidence. Whilst the documents necessary under Appendix FM-SE have not been set out, her circumstances are unusual at the present time as she is on maternity leave and thus the bank statements would not adequately reflect her normal salary. In any event, documentary evidence had been placed before the Secretary of State at an early stage in these proceedings and no issue had been taken as regards the financial requirements (see page 188 onwards). The "Chikwamba" issue had been raised in the proceedings issued for judicial review. Initially the application was made under paragraph 284 of the immigration rules and whilst Appendix-FM-SE now applies, at no stage has the Secretary of State taken issue with this aspect of the case.

26. The case of Chen had been raised by Mr Tufan however as can be seen on the facts of this case, the "Chikwamba point" had been raised at an early stage. As to the decision of SF, it was a fact specific and there was only one parent caring for the child. Here it is not the case and thus the guidance does merit consideration. The wording of the guidance makes it plain that it also encompasses a two-parent family and unless a parent falls within the bullet points then the appropriate course is to grant leave to remain. The exclusions relate to criminality whilst he may be described as having a "poor immigration history" it can be distinguished from a person who has deliberately breached immigration rules on more than one occasion. The guidance set out in the bundle is that presently on the UKBA website and relevant the date of this hearing. The court should be making its assessment on the facts and the evidence as they are today.

27. Miss Chapman submitted that the clear answer to this appeal is that the Appellant should succeed by reference to the Immigration Rules under either EX1(a) and (b) or in the alternative leave should be granted outside the rules on human rights grounds. In this respect the requirements of S117B (6) are the same as those under EX1(a) and applying the decision in MA(Pakistan) the public interest under section 117B (6) does not require the Appellant to leave. Thus she invited me to allow the appeal.

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

The appeal under Appendix FM

29. I shall consider the appeal based on the applicant's family life under Appendix FM.

30. The Respondent's decision is that of the 8th May 2015. The Secretary of State began by considering the decision under the partner route and as the Appellant and his partner had no children it was found that they could not meet the requirements of EX 1 (a). It was accepted that he had a genuine and subsisting relationship with his partner and that she was a British citizen. When considering the issue of whether there were "insurmountable obstacles" the Secretary of State consider the seriousness of the difficulties that he and his wife would face in continuing their family life outside the UK and whether they would entail something that they could not (or could not reasonably be expected to) overcome even with a degree of hardship. In particular, the Secretary of State considered the medical evidence and that relating to the issues of fertility. However there was evidence available that such medical treatment was available in Sri Lanka and that the Appellant and his wife had not shown any reason why they would be unable to access such treatment in Sri Lanka. It was noted that he had met his partner in January 2011 that began cohabiting in the summer of 2011 were married on 17 March 2012. He had entered the UK illegally in 2012 and thus the relationship started and developed the full knowledge of his precarious immigration status. It was considered that both he and his wife are fully aware of his immigration status and would have been aware that he may not be able to continue to live in the United Kingdom.

31. Whilst it was acknowledged that his wife had lived in the UK all of her life, it did not mean that she was unable to live in Sri Lanka. No evidence had been provided to demonstrate that the Appellant and his wife could not return to Sri Lanka or lawfully live there; their wish or preference to live in the UK would not amount to an insurmountable obstacle.

32. As to the issue of employment, the Appellant's spouse would be able to benefit from using skills and qualifications obtained in the UK to gain employment. There was no explanation or supporting evidence to show that the spouse would be prevented from obtaining employment outside of the UK.

33. Whilst it was claimed that there may be a cultural barrier for his spouse live in Sri Lanka and that some adjustment may be needed, it was not sufficient to amount to an "insurmountable obstacle". The Appellant faced a change of culture to live in the UK was not unreasonable to expect his wife to face such a change. No evidence of any particular hardship in adjusting to life had been submitted and therefore it was considered the difference in culture would not amount to an "insurmountable obstacle".

34. Lack of knowledge of language spoken in the country to which the couple would be required to live would not usually amount to an insurmountable obstacle. English is spoken by approximately 10% of the population and is widely used for official and commercial purposes.

35. As to the decision outside of the immigration rules, the Secretary of State considered that there were no "exceptional circumstances" that would mean removal was disproportionate, particularly having regard to the precarious circumstances in which the relationship was formed and consideration given to the issues of fertility but it was not considered that they were "exceptional" and in the circumstances, the public interest in firm immigration control was at the forefront in the balance of interest in the present case such that the removal of the Appellant was not considered to be disproportionate. Thus the Secretary of state refused the application.

Findings of fact:

36. My starting point is the determination of the FTT and the findings made in 2016. The judge had the opportunity to hear the oral evidence from the Appellant, his spouse and four other family and friends, including the sponsor's mother, her two sisters and a friend of the parties. As the judge recorded at paragraph 37 that were also 11 other statements and letters of support all of which were not the subject of challenge by the presenting officer. Indeed the only witnesses who were cross-examined were the Appellant and his spouse. For the purposes of this hearing, the evidence was also in the great part unchallenged by the presenting officer. There was little cross examination of any of the witnesses (either the Appellant, his spouse or mother-in-law). The other witnesses who were present give oral evidence were not required to be cross-examined.

37. The First-tier Tribunal judge recorded at paragraph 42 that the Appellant's spouse was an "extremely credible witness, her evidence is outstanding and could not be doubted in any way." He also recorded that he found the spouse's mother, sister and two other witnesses to be "credible and consistent". I have also had the opportunity of hearing oral evidence insofar as it was the subject of challenge and would also describe the evidence that I have heard to be wholly credible and consistent and that includes the evidence of the Appellant as to his life in the United Kingdom since his arrival. I have found the evidence of the Appellant and his spouse in particular to be both thoughtful and insightful and have not found that either of the parties have sought to either overplay their evidence or to exaggerate any aspect of the evidence that has been given before me.

38. I shall deal with the circumstances of the Appellant. As the First-tier Tribunal judge recorded, the Appellant entered the United Kingdom illegally in or about 2002 and failed to make an application to regularise his immigration status. In his evidence (see paragraph 22] he had said he had not made an application to regularise his immigration status because he was scared he would be returned to his country of origin where he would have to re-join the army to complete his service. He said that he had thought about making an asylum application, but had spoken to solicitors and had never made the application. He said that he did not wish to return because he did not want to serve in the army. He said that he had not seen his family in Sri Lanka in 14 years (paragraph 25).

39. The judge found that this aspect of this case was not credible (see paragraph 42). I take this to mean that he had entered the United Kingdom illegally but had failed to make any application to regularise his immigration status. There does not appear to be any dispute as to his circumstances prior to his arrival namely that he had undertaken some education in Sri Lanka which is the equivalent to O-levels in the United Kingdom and that he had been in the army for one year. When he had entered the United Kingdom he had not studied here and that he had worked in the United Kingdom the last time being in 2011. His brother has lived in the UK for about 15 years. His mother continues to live in the family home in Sri Lanka but it has two bedrooms and has to accommodate both his mother, her brother, one of his brothers and his niece. He described the circumstances as "overcrowded" not only in his statement (B1) but also his oral evidence before this Tribunal. He made reference to having another brother and sister who live in Sri Lanka but they live with their family members and do not have the capacity to accommodate the Appellant, his wife and two children. I am satisfied that there is no realistic prospect of the Appellant, his spouse and 2 children living in that property given the overcrowded nature of that accommodation. In addition I find from the evidence given before me that he has worked as a chef and has some experience in this capacity although he has not worked in Sri Lanka.

40. As to his relationship with his wife, there is no dispute that the parties met in 2011 and that she has been aware of his immigration status from approximately July 2011. The parties went on to marry in May 2012 and their relationship has continued since that time. There is no dispute between the parties and it is accepted by the Secretary of State that the Appellant and his wife are in a genuine and subsisting relationship. There is also no doubt in my judgement that they have a strong and supportive relationship. Furthermore, the extended family of his spouse have welcomed the Appellant into their family and it is abundantly plain that he is both well liked and has received the support of all those family members and friends who know him. As he described his first statement (page 2 of AB1) they were very welcoming and made him feel like he was part of their family. They were married in the church of his spouse's family. The evidence of his wife is consistent with this and makes reference to both of them having a good relationship with the extended family members whom they see a regular basis and with whom they are in frequent contact (page 8 AB 1).

41. The evidence in support of the family members is set out in the original bundle which includes the evidence of the Appellant's mother, and sisters and friends. None of that evidence has been disputed in any way by the Secretary of State and I accept the contents of those statements in their entirety. The general thrust of that evidence is that the Appellant is very much part of their family life life and is well settled within that family.

42. The circumstances before the First-tier Tribunal judge referred to the steps taken by the couple to start a family. I need not set out the evidence in this regard and it is referred to in the determination of the First-tier Tribunal judge, the witness statements and references made to it in the Upper Tribunal's decision in February of this year, who recorded that the Appellant's spouse was pregnant at the time of the

hearing. The Appellant's spouse gave birth to twins in April 2017. The circumstances of the birth and her pregnancy are set out in the witness statement of the Appellant at pages 20 to 21. It is plain that the circumstances were extremely difficult and I need not set out the medical evidence in this regard which is not been the subject of any challenge.

43. I have no hesitation in accepting the evidence given by the Appellant and his wife concerning the circumstances of the birth of the children, her medical complications and the physical effects of looking after twins. I also find from the evidence that this is not the case of the Appellant simply helping out but that he has taken on an equal care of the welfare and upbringing of the children which, but for his help, would be extremely difficult and overwhelming. The oral evidence that I have heard from the parties, which I accept, demonstrates the significance of the physical assistance that he has given in the care of the twins who were born prematurely.

44. It was suggested in cross examination that the Appellant's mother, who lives a great distance away in a different part of the country, could care for the children in the absence of the Appellant. From the evidence before me I do not find that to be either realistic or feasible. The Appellant's mother-in-law is in her 70s and whilst she provides some care and assistance for the Appellant's spouses' sister, the circumstances are entirely different. On the evidence before me they are older children who do not have the needs of the twins and this is not done on any regular basis. Furthermore she lives in a different part of the country in a village far from the nearest town or city. I find on the evidence before me that if the Appellant were to be removed, that whilst her mother would wish to assist, any assistance would be minimal and that the Appellant's spouse would be caring for the twins including their medical needs, on her own.

45. I accept the evidence given by his spouse as to her concern about the availability of medical care for the twins both of whom were born prematurely.

46. I also do not accept the submission made by Mr Tufan that her sister would be able to provide assistance to her. Her circumstances are set out in the written evidence which demonstrates that she works full-time and has a family of her own (see page 26-7 AB2). Any assistance that could be given would be minimal and be from afar. Although I do find that there would be some support from her even if it could not be in the form of any realistic offers of care. His spouses other sister (page 28) lives closer to them but again has full-time employment, a partner and children and I am satisfied that any help would be of a minimal nature.

47. As to the financial circumstances of the parties, they have lived in their own home for approximately four years and the Appellant's spouse has an extremely good salary. She has supplemented her salary also by teaching Pilates (see page 8 AB1). The current circumstances are set out in her second witness statement (page 22) which refers to her maternity leave and she received six months maternity pay at 90% of the salary which was a sum far in excess of the requested figure for maintenance necessary under the immigration rules (of £18,600) and is receiving statutory

maternity pay. She described taking up to one year of maternity leave but that she was likely to return to work.

48. Her evidence before me was that she would not be able to obtain employment of a similar nature in Sri Lanka. She has no knowledge of the indigenous languages in that country and whilst she accepted in cross examination that there is some English spoken it is not widespread nor does it permeate every part of society. The position that she currently has, she stated, could not be replicated abroad. Her evidence made reference to the number of years that she had worked in her employment, the hard work that she had undertaken to get to that stage and that it was a job that she had enjoyed and progressed in (page 23 AB2). Her future circumstances were not entirely certain but I do not find any inconsistency in her evidence as to whether she would work in the future. It seemed to me that given the nature of her employment and that she would be able to continue that employment along with the assistance of her spouse, that it is more likely than not she will continue in that capacity. Whilst the Appellant told me that he wished to obtain work, it would be in the food industry as he has no qualifications or experience in and any other field. However the hours that type of work not preclude him from continuing to carry out a child caring role which he is presently under taking.

Discussion:

49. 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".

50. Section R-LTRP sets out the requirements for limited leave to remain as a partner. Certain requirements apply in all cases: for example, that the applicant meets suitability requirements relating to such matters as his or her criminal record. Other requirements depend on the applicant's circumstances. In particular, under paragraph R-LTRP.1.1(d), the applicant must not be in the UK on temporary admission or temporary release, or in breach of immigration laws (disregarding an overstay of 28 days or less), unless paragraph EX.1 applies.

51. That paragraph applies if either of two conditions is satisfied. The first applies to persons applying for leave to remain as parents. The second applies to persons, such as the Appellant, who apply for leave to remain as a partner and reads as follows:

> EX1"(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

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

53. The Supreme Court considered insurmountable obstacles and Article 8 in the decision of R(Agyarko) v Secretary of State for the Home Department [2017] UKSC 11. Mrs Agyarko had made her way to the Supreme Court by way of a failed appeal in the Court of Appeal against a decision of the Upper Tribunal to refuse to grant permission for judicial review. She had argued that in refusing permission the Tribunal had failed to recognise that the Secretary of State had imposed too high a threshold in respect of paragraph EX.1 of the Rules, and had failed to take relevant facts into account. This argument was rejected by both Court of Appeal and the Supreme Court, who held that the Secretary of State had applied the correct legal framework. For the purpose of this appeal, they also held that on the facts presented, neither Mrs Agyarko nor her co-Appellant Mrs Ikuga could possibly have established that there were insurmountable obstacles to their family life continuing abroad.

54. Mrs Agyarko was a long-term overstayer of Ghanaian nationality. She had married a British citizen; they had no children. She however, had three children of her own (now adults), a sister and a mother living in Ghana. Her partner was British and had lived all his life in the UK. He was in employment here. The Secretary of State had accepted that there would be a degree of hardship for her husband going to live in Ghana (a country with which he had no connection) but that this did not meet the test in the rule. Mrs Ikuga was a Nigerian, also an overstayer. Her British husband was of Nigerian origin. She placed particular reliance upon the assertion that she was receiving medical treatment, including for infertility, in the UK which would have been disrupted if she were to leave. The Secretary of State had cast some doubt on whether she was actually living with her husband and found that the claimed medical problems were not in fact as serious as the application had indicated.

55. In neither case were there any children involved which is the distinguishing feature here from the instant appeal.

56. At paragraph 43 the court considered the European jurisprudence and that the "words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned".

57. However the Court went on to state: "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119".

58. Thus the Court found that the requirement of insurmountable obstacles is a stringent test to be met and this was not incompatible with Article 8.

59. The Court also found that the requirement must be interpreted in a sensible and practical way and the definition in EX.2 was approved at paragraph [44] as follows: "The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2."

60. In conclusion the Court held at [45] "By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship".

61. That is the test that I must apply when considering the appeal under EX1(b).

62. 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".

63. 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.

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

64. 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."

65. 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."

Conclusions reached on EX(1)(b):

66. I have considered this issue in the light of the jurisprudence that I have set out in the preceding paragraphs. Whilst the test I must apply is a "stringent one" it must be defined sensibly and practically as to whether the continuation of family life outside the UK would entail very significant difficulties of very serious hardship for the Appellant and/or his British Citizen spouse.

67. I have therefore approached this issue on the basis of the findings of facts that I have made earlier in this determination. Whilst the factors that I shall go on to identify may not singularly demonstrate there are "insurmountable obstacles" it is important in my judgement to consider them all cumulatively and also on the basis that it now includes the presence of two children and their particular circumstances which are relevant to this issue.

68. As can be seen, the Appellant's spouse is a British citizen who was never lived outside of the United Kingdom. There is no doubt on the evidence before me, both written and the oral evidence that I have heard, that she has particularly strong

family ties in the United Kingdom due in part to losing a parent to young age. Moving to abroad would mean that she would lose those strong family ties as it is not likely that her mother and sisters would be able to maintain any physical contact with her by way of visits given the circumstances (presence of their own children) and the distance of travel involved. This would not preclude contact by telephone or Skype but this is entirely different to the support she has received to date. The Appellant is in well-paid employment and have spent many years establishing herself in her field of expertise. She does not speak indigenous languages of Sri Lanka and does not know anything of the culture in that country.

69. In general terms I would agree that such matters are similar to ones that are difficulties often faced by an individual who, through choice or work or through compulsion, have when settling in a foreign country as stated by the Upper Tribunal Judge at paragraph 6. However in my judgement, those factors have to be viewed in greater depth and in accordance with the evidence relating to the parties and their factual circumstances. There is no dispute that the issue now has to be viewed in the light of the presence of the two children who were born prematurely and the circumstances of their birth are a material consideration when considering whether there are "insurmountable obstacles".

70. In this regard, I find that their presence and their ongoing needs for a settled existence and home would not be met by having to live abroad at this time. As set out in the findings of fact, I do not accept that they will be able to live in the former family home as the accommodation for two more adults and two children would be more than overcrowded. Therefore the family do not have any housing available to them. As to the prospects of settling in a new country, I have found that the Appellant's spouse and her circumstances are such that she would not be able to obtain employment; she has no knowledge of indigenous languages and whilst English is spoken it is not widespread nor does it permeate every strata of society. There is no equivalent job to that held in the United Kingdom and any employment prospects abroad have to be seen in the context of the care of the children. The Appellant has not been in his country of origin since 2002 and has not maintained any ties with that country, either through family or otherwise, and has no work history or contacts that he would be able to rely upon to obtain employment to ensure that the family are supported and accommodated. This may have been different if the parties were only a couple but the presence of the children make the circumstances entirely different.

71. Whilst in normal circumstances, a partner in the position of the Appellant's spouse would miss her family members, however, in my judgement it goes beyond that on the facts of this case. It is evident from the evidence before me which I accept, the birth of the children has not been without its problems and this has had an impact upon her well-being. Consequently she would be leaving the support that she has from family. Although I have found that the support that they can give her in

practical terms is minimal, there is the prospect of there being some support and contact available to which she would not have in Sri Lanka. The Appellant has had no contact with his family or friends having left in 2002 and there is no form of network support available nor is it likely that there would be any state support of the type the Appellant's spouse has in this country given the age of the twins.

72. Therefore taking into account all of those factors that I have outlined above and when taken cumulatively, I am satisfied that the particular circumstances facing this family and the continuation of their family life outside of the UK, would entail very significant difficulties or very serious hardship for the Appellant, his spouse and children. I therefore allow the appeal under the immigration rules and EX (1) (b).

73. In those circumstances it is not necessary to consider the issue of whether the Appellant can satisfy EX1(a) which was matter that the Secretary of State had not considered in the decision letter of the 8th May 2015 because as can been seen from the chronology, the Appellant's partner was not pregnant and the children had not been born.

74. When the matter was before the Upper Tribunal in February 2017, the judge was aware of the change of circumstances (see paragraph 21). He made it plain that the circumstances of the children's birth would "herald the necessity on the part of the Appellant to re-formulate his case on Article 8 grounds for the purposes of it being re-made and or the Secretary of State to respond. This may require a further decision to be made and consideration will have to be given to whether these proceedings are the right way forward."

75. This has not been done. The Appellant's case although re-formulated was not put to the Secretary of State in any proper form as envisaged. At best a letter was sent on the 16th January 2017 (set out at supplementary bundle AB 60) in which the solicitors confirmed that they were relying on the original bundle of documents for the hearing then listed on the 2nd February 2017, and confirmation of the pregnancy. This was sent to the UT and copy of the letter and enclosures was sent to the Secretary of State. I have not been shown any further correspondence sent to the Secretary of State since this other than a copy of the supplementary bundle sent for this hearing in August dated July 2017. Whilst these documents made reference to the change in circumstances, and the birth of the children, the Secretary of State has not received any re-formulation of the case and has not issued any further decision letter. Thus there has been no consideration of EX1(a) nor any explanation as to how the Tribunal should consider this issue against that background.

76. That does not however preclude any assessment outside of the Rules and in particular, S117B(6).

Assessment outside of the Rules under Article 8:

77. The alternative submission made in the skeleton argument is that if the Appellant could not meet the Rules, there are "compelling circumstances" meriting the grant of leave to this Appellant outside of the Rules.

78. The law I should apply has been set out in a number of decisions. 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.

79. 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.

80. It is now clear from Agyarko and Ikuga [2017] UKSC 11 that there is no separate test for exceptional or compelling circumstances to be satisfied; but 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.

81. The question I have to decide is whether, in terms of this Appellant's private and family life, it would be disproportionate to the public interest to remove him, and I need to consider that in terms of the provisions of s. 117B of the Nationality, Immigration and Asylum Act 2002.

82. I am satisfied that Article 8 (1) is engaged as the Appellant's removal will interfere with the family and private life of the Appellant and that the decision is in accordance with the law. His removal will be for the legitimate aim of effective immigration control.

83. Consequently the issue relates to that of proportionality and it requires 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 Appellant's wife and children and other family members whose evidence I have heard, read and considered.

84. In R(MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43] set out the central issue as follows:

> "whether a fair balance has been struck between the personal interests of all members of the family in maintaining family life and the public interest in controlling immigration."

85. When assessing the proportionality of the removal decision I am obliged to consider the best interests of the children who are affected by the decision and those best interests are assessed without reference to the parents' circumstances. In making the assessment of the best interests of the children I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that "in all actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

86. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". Lady Hale stated that "any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of Article 8(2)". Although she noted that national authorities were expected to treat the best interests of a child as "a primary consideration", she added "Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration."

87. The importance of a child's nationality was the subject of discussion in the decision of **ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4** Lady Hale said that "Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child". She noted with approval **Wan v Minister for Immigration and Multicultural Affairs [2001] FCA 568,** in which the Federal Court of Australia, pointed out at para 30 that, "when considering the possibility of the children accompanying their father to China, the Tribunal had not considered any of the following matters, which the Court clearly regarded as important: "(i) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle');(ii) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;(ii) the loss of educational opportunities available to the children in Australia; and(d) their resultant isolation from the normal contacts of children with their mother and their mother's family." Lady Hale also took the view that the intrinsic importance of citizenship should not be played down. "As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all

this when they come back as adults". Lord Kerr said that "The significance of a child's nationality must be considered in two aspects. The First of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the Respondent, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted". In **ZH** the SC said that the "best interests of the child" meant the well-being of the child. That involved asking whether it was reasonable to expect the child to live in another country. Relevant to that would be the level of the child's integration in the UK and the length of absence from the other country; where and with whom the child was to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which would be severed if the child had to move away.

88. Although nationality was not a "trump card" it was of particular importance in assessing the best interests of any child. The UNCRC recognised the right of every child to be registered and acquire a nationality and to preserve that identity, including nationality. In the instant case, the children were British not just through the "accident" of being born in Britain, but by descent from a British parent. They had an unqualified right of abode, had lived in Britain all their lives, had been educated here and had other social links with the community. Furthermore, they had a good relationship with their father. It was not enough to say that a young child might readily adapt to life in another country, particularly in the case of children who had lived in Britain all their lives and were being expected to move to a country which they did not know and would be separated from a parent who they also knew well (paras 29 – 31). The intrinsic importance of citizenship should not be played down. As citizens the children had rights which they would not be able to exercise if they moved to another country. They would lose the advantages of growing up and being educated in their own country, their own culture and their own language."

89. With that in mind I must make an assessment of the best interests of the children involved. I remind myself that their best interests are "a"primary consideration but not "the"primary consideration. The starting point is that the children should be brought up by both parents (the Appellant and his wife). As British citizens, the children should have the benefit that their nationality brings to them. As set out in the preceding paragraphs and in accordance with the decisions of the Supreme Court (both ZH (Tanzania) and Zoumbas) nationality is an important factor although I recognise is not a "trump card". There is no dispute on the evidence before me that the Appellant has a genuine and subsisting parental relationship with the twins and indeed on the evidence before me demonstrates that he shares the care of the children with his wife to the extent that I am satisfied that without his assistance she

would find the circumstances as she outlined to me to be overwhelming. The medical evidence to which there has been no challenge and the circumstances of the birth of the twins demonstrates my judgement that the assistance, support and care provided by the Appellant is more than there would be in the usual circumstances and has been exceptional. Given their young ages, and the circumstances of their birth, it cannot be ruled out that they may require further medical attention. On the evidence I am satisfied that it is that the best interests of these children to reside with both of their parents. The separation of the children from their father at this stage in their development would not be in their interests and to the contrary I find would be detrimental. It is not necessary for there to be medical evidence to reach that conclusion, given the ages of the twins and the importance of the bonding and attachment process at this present time. I would also find that it is in their best interests for their father to remain with them in the United Kingdom. Whilst the Appellant has family members in Sri Lanka, I am satisfied that he would not be able to live with his mother and the relatives he has described. The property would not accommodate the Appellant, his spouse and two children. On the present evidence, the Appellant's wife, who has no knowledge of the indigenous languages of that country would not be able to obtain employment and as the Appellant himself has been out of that country since 2002, and has little by way of qualifications, would not be able to obtain employment sufficient to finance and accommodate the family. The children are very young only a few months old and have had difficult premature births and there is no realistic family or other support available for them there.

90. In the assessment under Article 8, the best interests of the child must be a primary consideration. That meant that they must be considered first. They could, of course, be outweighed by the cumulative effect of other considerations.

91. 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 section117B 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).

92. 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.

93. I am required to consider whether there are any "sufficiently compelling" circumstances to outweigh the public interest because the refusal of leave would result in "unjustifiably harsh consequences" (see decision in Agyarko at [48]).

94. The public interest identified in this appeal is the effective maintenance of immigration control.

95. Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K.

96. In R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC) the Tribunal found that there "may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place

before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40".

97. In this case there is such evidence. The Appellant's bundle provides evidence concerning the length of the temporary separation between the Appellant, his spouse and the children. Whilst it is said that settlement visas and such applications are processed between 60 to 90 days, I have considered this in the light of the witness statement at page 71 AB2 which makes reference to the delays in appeals relating to entry clearance and that requests for expedited hearings are not often successful. The length of time for the temporary separation then is approximately 60 to 90 days or in the event of there being a refusal the appeal could take up to 18 months. The Respondent has not sought to place any contrary evidence to the Tribunal and I am satisfied that that evidence to which I have referred is realistic in all the circumstances. In the light of my findings of fact that this is an important stage in the development of the children both of whom are being cared for by their father and mother jointly, that it is not in their best interests or their protected rights for the Appellant to be absent from their lives even for the temporary period. Even a period of 90 days (on the best case scenario) would be a significant period at this stage of the children's attachment and development. If there was to be any further delay, that would be also detrimental to their welfare and in my judgement there is evidence that such temporary separation would interfere disproportionately with both the rights of the children and the rights of the Appellant's spouse. I am therefore satisfied that the particular factual circumstances of this case places in that category envisaged in the case of Chen as outlined above.

98. Furthermore as set out in Agyarko at paragraph [51]

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

99. On the facts of this case it is submitted on behalf of the Appellant that the financial circumstances of the Appellant's wife are such that the Appellant will be able to satisfy the requirements.

100. I have made reference to the financial circumstances of the parties earlier in this determination. The Appellant's wife has an extremely well paid job and her annual salary is three or four times in excess of the figure of £18,600 which is necessary to meet the maintenance requirements. There is no dispute that the Appellant and his wife have appropriate accommodation in United Kingdom; they own and occupy

their own home. Her present circumstances of that she is subject to statutory maternity pay which although less than her usual salary would be likely to meet the maintenance requirements. In any event, as submitted by Miss Chapman the Respondent has taken no issue with the Appellant's ability to meet the requirements of the rules as to maintenance and accommodation. When the case originally was considered, paragraph 284 applied. Even if, as Mr Tufan submitted, the documentary evidence required under appendix FM-SE is not available before this Tribunal, the evidential flexibility referred to in the decision of MM would apply in the light of the acceptance of their financial circumstances. I am satisfied also from the evidence before me that the Appellant's spouse intends to obtain employment and that if it were necessary there is the likelihood of some third party financial support available from the extended family members. The Appellant's speaks fluent English given the length of time that he spent in the United Kingdom and as evidenced before this Tribunal and giving oral evidence. I consider that there would be no difficulty in the Appellant passing any English language test which would be necessary.

101. In those circumstances, I am satisfied that the public interest in effective immigration control is considerably weakened given the ability of the Appellant and his wife support themselves in the United Kingdom at the requisite level as required under the rules. As set out in the decision of Agyarko at [51] (as cited) notwithstanding his residence in the UK as being unlawful, if otherwise certain to be granted leave to enter if an application were made, there might be no public interest in his removal. It is a factor of some weight which weighs in favour of the Appellant's removal being disproportionate when carrying out the balancing exercise.

102. Applying the section 117 factors, the public interest in effective immigration control is engaged in this appeal (see s. 117B (1). I am satisfied that he can speak English and has an understanding of it so that the public interest in s. 117 B(2) is not engaged but the fact that he can speak English does not provide a positive right to leave to remain and is essentially, a neutral factor (see decision of Ruppiah v Secretary of State for the home Department [2016) EWCA Civ 803 at paragraphs [59] – [61]). The Appellant, on the present evidence, is financially independent for the purposes of section 117B (3) but this is a neutral factor also. I also take into account that his family life with his partner has developed whilst his presence was unlawful and is therefore entitled to "little weight" (s 117B (4) (b).

103. The Secretary of State seeks to justify removal either with the Appellant leaving and therefore splitting up the family or to expect the Appellant's wife and newborn twins to join him in Sri Lanka. Although the Secretary of State couches that option in terms of a choice that the Appellants partner would have to make, the fact that the immigration decision itself forces such a challenging choice does interfere with the family life of all of those affected. Presenting a couple with such a choice does not, of itself, absolve the United Kingdom of its duty to respect family life. It is accepted that the Appellant is a genuine and subsisting relationship with his spouse and with the children, all of whom are British citizens and Secretary of State would have to establish that the public interest was such to outweigh the factors that have been

identified in the balance on behalf of the Appellant. In this case the public interest identified is that of effective immigration control and that the Appellant entered United Kingdom unlawfully in 2002 and has remained here since that time with no legal right to be in United Kingdom and established a family life in the full knowledge of his unlawful status. I therefore acknowledge the public interest factors as set out above in section 117 of the 2002 Act and in particular that there is a public interest in removing the Appellant who has failed to respect legitimate immigration control having entered unlawfully and remaining so. It is a strong factor in my judgement that must be taken into account in determining his case to remain.

104. However S117B(6) provides that 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.

105. The definition of "qualifying child" is found in section 117D:"qualifying child" means a person who is under the age of 18 and who-
(a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more;"

106. There is no dispute that the Appellant is not liable for deportation and nor is there any dispute that the Appellant has a genuine and subsisting parental relationship with the twins, both of who are "qualifying children" by virtue of their British Citizenship. The evidence that I have set out above demonstrates that he plays a full parental role and indeed shares the care of the children with his partner.

107. Mr Tufan on behalf of the Secretary of State submitted that section 117B(6) had no application here since there is no expectation that the children will leave the UK. He submitted that on a true construction of the words the question of reasonableness does not arise for such children. I would not accept that submission. The effect of it would be that s117(6)(b) would offer protection to parents whose children faced removal with them, but not to parents whose settled children were staying here. Given that the focus of the provision is the protection of the parental relationship this makes little sense. I am not satisfied that anything turns on the words "to expect". The meaning of the entire phrase is clear. Would it be reasonable for this child to leave the UK?

<u>The guidance:</u>

108. The Home Office IDI of August 2015, headed "**Family Life as a Partner or Parent and Private Life, 10 year Routes**", gives guidance to caseworkers – in cases <u>not</u> involving serious criminality – on when it would be unreasonable to expect a British child to leave the UK, in terms of **EX.1(a)** of **HC 395.**

109. At [9.1] of the document under the heading "Exceptional Circumstances", the Respondent notes that the best interests of the child remain relevant in determining

whether there are exceptional circumstances to justify a grant of leave outside the Rules and that this entails consideration of section 11 of the guidance.

110. Section 11 then deals with the best interests of children affected by the relevant decision and at [11.2.3] deals with the position of British citizen children under the heading "Would it be unreasonable to expect a British citizen child to leave the UK?" Having made reference to the ECJ judgment in Zambrano, the guidance says this:-

"Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:
Criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision.

Where the applicant has made an application under the family and/or private life Immigration Rules, the application must:
a) be considered under those Immigration Rules First;
b) where the applicant falls for refusal, the decision maker must go on to consider whether there are any exceptional circumstances that would warrant a grant of leave to remain outside the Immigration Rules; and
c) where the applicant falls for refusal under the Immigration Rules and there are no exceptional circumstances, and where satisfactory evidence has been provided that all of the following criteria are met, the case must be referred to European Casework for review:
i) the child is under the age of 18; and
ii) the child is a British Citizen; and

iii) the primary carer?. of the child is a non-EEA national in the UK; and
iv) there is no other parent/guardian/carer upon whom the child is dependent or who could care for the child if the primary carer left the UK to go to a country outside the EU."

111. The guidance does explain that the effect of the parent's removal must not be to force the British child to leave the EU and has been interpreted in that way by the Upper Tribunal (see ***SF and others (Guidance, post-2014 Act) [2017] UKUT 120 (IAC)*** a Vice-Presidential panel applied this guidance when deciding that it would be unreasonable to expect a British child to leave the UK with his mother and siblings). The facts are different to the present case, but in reality the effect of the removal of the Appellant would force the children to leave as the Appellant's wife would be faced with the separation of the twins from their father at an important time in the attachment process. The earlier error of law decision of the Upper Tribunal appeared to place weight upon the spouses evidence recorded at paragraph 11 of that determination and that if her husband had to go back that she "had no choice, she would go live with him there." In her oral evidence for this Tribunal I asked her about that evidence as recorded and what she meant by it. She told the Tribunal that it was said under the "extreme circumstances of being forced to". She said that since the last hearing, she had become the mother of two children and that her circumstances had changed and that she would not go, taking into account the circumstances. I have no reason to disbelieve that evidence and this it is plain that her circumstances have changed since that earlier evidence was given. Therefore I place no weight on that earlier evidence given as recorded by the First-tier Tribunal.

112. The guidance also was considered in the decision of MA (Pakistan) [2016] EWCA Civ 705, Elias LJ at [46]]:

> "46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

> 47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interest's assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so."

113. The instant case involves a British citizen child. By contrast MA (Pakistan) addressed "how the test of reasonableness should be applied when determining whether to remove a child from the United Kingdom once he or she has been resident here for seven years" - see [1] of MA (Pakistan). At [45] Elias LJ concluded that when assessing reasonableness the wider public interest considerations must be taken into account, but that significant weight must be given to the seven years length of residence when carrying out the proportionality exercise [46].

114. MA (Pakistan) concludes that the reasonableness test in this context is wide ranging, effectively bringing back into play all potentially relevant public interest considerations, including the matters identified in section 117B. Accordingly, when considering the reasonableness of the children leaving the UK, a relevant factor is that the Appellant had entered into the UK unlawfully and had so remained for a significant period and he established a family life in the knowledge that he had no right to remain and this strengthens the public interest in his removal.

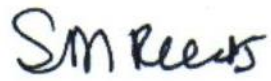
115. However, regardless of the nature of the conduct of the Appellant, I am not satisfied that it would be reasonable to expect the children to leave the UK. The children are British citizens with a mother who is a British citizen. The Respondent's own guidance recognises that it would not normally be reasonable to expect a child who is a British citizen to leave the UK. See the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes" dated August 2. The guidance makes reference to the circumstances whereby it would be appropriate to refuse to grant leave and indicates that the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation. The circumstances envisaged cover criminality falling below the threshold set out in paragraph 398 of the immigration rules and a very poor immigration history, such as where the person has repeatedly and deliberately breached the immigration rules. When applied to the facts of this case, whilst the Appellant entered the UK unlawfully and has remained for a significant period establishing family life in the knowledge that he had no right to remain, is not in my judgement, conduct would fall within those two limbs- it cannot be said that he has repeatedly breached the immigration rules nor is there any evidence of him having committed any form of criminality. Thus I am satisfied that he does not fall within the envisaged exclusion categories.

116. Therefore taking the circumstances as a whole, as I have set out above, I find that the Appellant's removal is disproportionate having regard to all of those circumstances. I have taken into account the best interests of the two children which are a primary

consideration and the public interest in effective immigration control which is engaged in this case and the public interest as it is expressed in the S117 considerations. However having taken into account the impact upon the children and his spouse which will result upon the Appellant's removal, in the light of the specific facts of this particular appeal, I find it is not outweighed by the public interest considerations that I have identified. Consequently I am satisfied that there are "compelling" circumstances that produce unjustifiably harsh consequences to outweigh the public interest in effective immigration control in the light of the Appellant's individual circumstances and that of his family members.

117. Consequently the appeal is allowed under the Immigration Rules and on human rights grounds outside of the Rules.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed Date: 8/8/2017
Upper Tribunal Judge Reeds