PIPE'S TOP OF THE 'CASE LAW' POPS

Here are my top ten immigration, asylum and human rights cases from the last 6 months or so (I have cheated a bit as under most headings there is more than one case). This is a purely subjective list of cases which have caught my eye. You may find it useful to cut and paste from these notes into to your representations etc or you could be a geek and read them on the bus like me!

10. Protection Claims Based Upon Sexual Identity

A v Staatssecretaris van Veiligheid en Justitie (United Nations High Commissioner for Refugees (UNHCR) intervening)(Judgment) [2014] EUECJ C-148/13 (02 December 2014)

http://www.bailii.org/eu/cases/EUECJ/2014/C14813.html

The CJEU gave guidance on the assessment of a protection claim based upon sexuality. This will hopefully deal with the inappropriate questioning by the Home Office based upon misconceived stereotypes.

> *Article 4(3)(c) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Article 13(3)(a) of Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities, founded on questions based only on stereotyped notions concerning homosexuals.*
>
> *Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.*
>
> *Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.*
>
> *Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.*

See also: Brown (Jamaica), R (on the applications of) v Secretary of State for the Home Department [2015] UKSC 8 (4 March 2015)
http://www.bailii.org/uk/cases/UKSC/2015/8.html

Home Office Guidance: Sexual identity issues in the asylum claim

https://www.gov.uk/government/publications/sexual-identity-issues-in-the-asylum-claim

UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, available at: http://www.refworld.org/docid/50348afc2.html

9. Getting Around the Rules: Discretionary Powers of Waiver and Further Enquiry

Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 540 (IAC) (12 November 2014)
http://www.bailii.org/uk/cases/UKUT/IAC/2014/[2014]_UKUT_540_iac.html

In this case the UT considers discretionary powers of waiver and further enquiry within the immigration rules (eg flexibility within the rules: see §D of Appendix FM-SE set out below). Practitioners should set out clearly in the application when apply on the basis of a discretion. A failure by the decision maker to consider a discretion may render the decision unlawful.

(1) Paragraph [D] of Appendix FM-SE is an example, within the context of the requirement to supply specified evidence, of the increasing influence of discretionary powers of waiver and further enquiry in the Immigration Rules.

(2) Where applicants wish to invoke any discretion of this kind, they should do so when making the relevant application, highlighting the specific provision of the Rules invoked and the grounds upon which the exercise of discretion is requested.

(3) Where any request of this kind is made and refused, a brief explanation should be provided by the decision maker.

(4) A refusal to exercise a discretionary power as described in (1) above may render an immigration decision not in accordance with the law, under section 84(1)(e) of the Nationality, Immigration and Asylum Act 2002.

(5) Powers of waiver are dispensing provisions, designed to ensure that applications suffering from certain minor defects or omissions can be readily remedied.

(6) The hierarchical distinction between the Immigration Rules and Immigration Directorate Instructions ("IDIs") must be observed at all times.

(7) A failure to recognise, or give effect to, an IDI may render an immigration decision not in accordance with the law.

24. Whatever the decision making context under the Immigration Rules, where discretionary powers of waiver and/or further enquiry are conferred, the possibility of a finding by a tribunal that a decision by the primary decision maker was not in accordance with the law arises. This would be so, for example, where it can be demonstrated that the decision maker was not alert to the relevant power and that such error was material. Furthermore, by well established principle, where a decision maker declines to exercise a discretion of this kind, belonging as it does to the domain of public law, the ensuing decision is potentially open to challenge on a variety of grounds. These include, inexhaustively though typically, a failure to take into account all material considerations; disregarding a material consideration; emasculating the discretion by the imposition of an inappropriate fetter; improper motive; material error of fact; irrationality; and misunderstanding the nature and/or scope of the discretion in play. These are all grounds upon which the ultimate refusal decision could, in principle, be successfully challenged on appeal or, where no appeal lies, by an application for judicial review.

25. Where a decision is challenged on the basis of an unlawful failure to exercise a discretionary power of further enquiry or waiver or an unlawful exercise of such power, Judges will be guided by considering the purpose underlying powers of this kind. We consider that such powers are to be viewed as dispensing provisions, designed to ensure that applications suffering from minor defects or omissions which can be readily remedied or forgiven do not suffer the draconian fate of refusal. In such cases, the blunt instrument of immediate, outright and irrevocable rejection is softened to accommodate applicants whose applications suffer from insubstantial imperfections which can be easily and swiftly rectified or excused. Furthermore, in our estimation, discretionary powers of further enquiry and waiver promote the valuers of fairness and common sense, while simultaneously minimising unnecessary dominance of and emphasis on bureaucratic formality. They also fortify the overall integrity of the United Kingdom immigration system, as expressed in the UKBA letter dated 19 May 2011 wherein the origins of these powers can be discovered: see Appendix A to the decision of the Upper Tribunal in Rodriguez (supra). We further consider that, in the particular context of paragraph 245AA of the Immigration Rules, these powers are properly to be viewed as measures capable of promoting the economic wellbeing of the country and should be construed accordingly. Thus the mechanism initially known as "evidential flexibility" and promulgated in a policy, now superseded and expressed in more elaborate and regimented terms in the Immigration Rules, serves to advance an identifiable public interest of some importance.

Appendix FM-SE

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/393496/20150108_Immigration_Rules_-_Appendix_FM_SE_final.pdf

D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decisionmaker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies. (b) If the applicant:

(i) Has submitted:

(aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(cc) A document that is a copy and not an original document; or

(dd) A document which does not contain all of the specified information; or

(ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted:

(i) A document in the wrong format; or

(ii) A document that is a copy and not an original document, or

(iii) A document that does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body,

the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

8. A Consensual Arrangement: Costs & Consent Orders

Muwonge, R (on the application of) v Secretary of State for the Home Department (consent orders: costs: guidance) (IJR) [2014] UKUT 514 (IAC) (7 November 2014) http://www.bailii.org/uk/cases/UKUT/IAC/2014/[2014]_UKUT_514_iac.html

Throughout 2014 practitioners have had difficulties with the question of costs where the SSHD submits a consent order with her Acknowledgment of Service. This case sets out the procedure that should now be followed in respect of consent orders.

(i) There appears to be a practice, relatively entrenched, whereby an AOS which contains a concession, with or without an accompanying draft consent order, incorporates a claim for costs, liquidated or otherwise. In most cases, the claim for costs has no justification.

(ii) There may be cases, likely to be small in number, where an AOS which embodies a concession on behalf of the Secretary of State, with or without an accompanying draft consent order, justifiably and reasonably incorporates a claim for costs. In such cases, good practice dictates that the AOS should state, briefly, the justification for such claim.

(iii) Where a draft consent order is tabled, both parties should proactively take all necessary and appropriate steps designed to achieve consensual resolution within a period of (at most) three weeks.

(iv) Where consensual resolution is not achieved within the timescale recommended above, this should operate as a bilateral incentive to redouble efforts to do so.

(v) In every case possessing the factor of an unexecuted draft consent order, it is essential to provide the Upper Tribunal with each party's explanation, brief and focussed, for non-execution. This explanation should be provided by both parties, in writing:

(a) Within four weeks of the date of the AOS or, if different, the date of receipt of the draft consent order.
(b) Where a case is listed, not later than five clear working days in advance of the listing date.
(c) In cases where there is any material alteration or evolution in the terms of the explanation, not later than two clear days in advance of the listing date.

(vi) It is recognised that, exceptionally, there may be cases in which for good and sustainable reasons a consent order cannot be reasonably executed until a very late stage indeed, postdating the periods and landmarks noted above. However, the experience of the Upper Tribunal to date is that consent orders are very frequently not executed and presented to the Tribunal for approval until the last moment, frequently late on the day before the scheduled hearing and that no good reason is proffered for the parties' failure to do so at an earlier stage. This practice is unacceptable.

(vii) The practice whereby executed consent orders materialise during the period of 48 hours prior to the listing date is unsatisfactory and unacceptable in the great majority of cases. The Upper Tribunal recognises that there may be a small number of cases where, exceptionally, this is unavoidable.

(viii) In matters of this kind, parties and their representatives are strongly encouraged to communicate electronically with the Tribunal and, further, to seek confirmation that important communications and/or attachments have been received.

(ix) In determining issues of costs, Upper Tribunal Judges will take into account the extent to which the recommendations and exhortations tabulated above have been observed and will scrutinise closely every explanation and justification proffered for non-compliance.

7. PBS and Fairness: two tough cases

Han, R (on the application of) v Secretary of State for the Home Department [2014] EWHC 4606 (Admin) (04 November 2014)
http://www.bailii.org/ew/cases/EWHC/Admin/2014/4606.html

Reps sent in Tier 4 application one day late. Application failed on maintenance as could not therefore rely on established presence. Court refused to intervene.

1. *MR JUSTICE CRANSTON: The claimant is a national of China who challenges by means of judicial review a decision of the Secretary of State to refuse her application for an extension of her leave as a Tier 4 general migrant. It is a very unfortunate case in which the claimant has been badly let down by the agents she employed -- the Overseas Student Service Centre Limited (the "OSSC") -- a company which provides services in relation to the completion of migrant applications like this. As a result of what happened in this case, they have apologised to the claimant and they have refunded her application fee. That, however, is no consolation at all for what occurred.*

2. *The background is that on 10 September 2011 the claimant was granted leave to enter the United Kingdom as a Tier 4 general student migrant. That leave continued until 13 September 2012. The claimant was undertaking a BA in Business and Management at the University of Northampton. She graduated in June 2012. She wanted to continue her studies in this country and was admitted to study a MSc in Events Management at Bournemouth University at the beginning of September 2012.*

3. *On Friday 7 September 2012 she entered into a contract with OSSC to make her application to extend her leave to remain as a Tier 4 general student migrant so she could undertake the Bournemouth course. She signed the application on Wednesday 12 September. The OSSC signed it on the 13 September and lodged the application the following day, Friday 14 September. That was one day late. On the 18 September the Secretary of State wrote to the OSSC in standard format acknowledging the receipt of her application. The letter stated:*

> *"If there is any problem with the validity of the application such as missing documentation or omissions on the form, the caseworker will write to you as soon as possible to advise what action you need to take to rectify the problem."*

4. *The claimant had a bank account with Lloyds Bank in Bournemouth. On 9 September it had issued a statement about her account to be included with her application. That showed that over the summer of 2012, there had been several payments into her account so that on 3 September the balance was £7,539.62. However, there was a payment out on 4 September of £4,400, leaving a balance of £3,139.62. We now know that that payment out was for rent in advance for an assured short-hold tenancy in Bournemouth. There were no further movements on the account that week.*

5. *On 28 December 2012 the Secretary of State refused the claimant's application for an extension of leave to remain. The Secretary of State stated that the claimant did not have an established presence in studying in the UK within the meaning of paragraph 14 of Appendix C to the Immigration Rules. That was because her leave had expired on 13 September -- a day before she made the application. Thus she*

did not have leave at the time of the application. Since she did not have an established presence and was studying outside inner London, she was required to show that she had the necessary funds to cover the fees for the first academic year and £820 per month for 9 months for herself, some £7,200. If she did have an established presence then she would have only had to demonstrate that she had £800 for two months for herself.

6. *Under Paragraph 1A of Appendix C to the Immigration Rules, the applicant also had to demonstrate that she had this sum in her account for 28 days prior to the date of the closing balance of her most recent bank statement. In her case this was 28 days prior to 9 September 2012 -- the date of the bank statement. However, as I have said, because of the payment out on 4 September, the claimant was not able to demonstrate that she had that amount in the account. In the circumstances the Secretary of State concluded that the claimant did not satisfy the requirements of the Immigration Rules. She also stated that there was no reason to exercise her discretion to grant leave outside the rules. The application was therefore rejected. The letter stated that the applicant did not have right of appeal since her application was made when she did not have leave. However, she could make a further application for an extension of leave from abroad.*

7. *The claimant then wrote to department in January 2013 explaining the mistake on the part of OSSC.*

8. *Paragraph 245AA of the Immigration Rules provides:*

> *"(a)Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).*
>
> *(b) If the applicant has submitted specified documents in which:*
>
> > . . .
> >
> > *(ii)A document is in the wrong format (for example, if a letter is not on letterhead paper as specified);*
>
> *the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request."*

Otherwise the rule contemplates that only documents submitted with the application will be considered.

9. *Paragraph 245ZX of the Immigration Rules provides:*

> *"To qualify for leave to remain as a Tier 4 (General) Student under this rule, an applicant must meet the requirements listed below . . . if the applicant does not meet these requirements, the applicant will be refused.*
>
> . . .
>
> *(d) The applicant must have a minimum of 10 points under paragraphs 10 to 14 of Appendix C."*

10. *Appendix C of the Immigration Rules provides as follows:*

> *1A. In all cases where an applicant is required to obtain points under Appendix C, the applicant must meet the requirements listed below:*
>
> *(a) The applicant must have the funds specified in the relevant part of Appendix C at the date of the application;*
>
> . . .

> *(c) If the applicant is applying as a Tier 4 Migrant, the applicant must have had the funds referred to in (a) above for a consecutive 28-day period of time;*
>
> *. . .*
>
> *(h) The end date of the 90-day and 28-day periods referred to in . . . (c) above will be taken as the date of the closing balance on the most recent of the specified documents (where specified documents from two or more account are submitted, this will be the end date for the account that most favours the applicant), and must be no earlier than 31 days before the date of application.*

11. *Table 11 of Appendix C states an the applicant has to have funds amounting to the full course fees for the first academic year of the course, or for the entire course if it is less than a year long, plus £820 for each month of the course up to a maximum of nine months.*

12. *In submissions on behalf of the claimant, Mr Mold advances two grounds. The first is the failure to apply paragraph 245AA. He contends that this was a case of a document that was in the wrong format, consequently the applicant should have been requested to submit it in the right format, in other words, a bank statement which would have finished its entries on 3 September such that the applicant could have demonstrated that she had the requisite £7,200 in the account. He quotes the decision of Simler J in R (on the application of Patel) v Secretary of State for the Home Department [2014] EWHC 1861 admin, that "format" means the way something is arranged or set out. In Mr Mold's submission the bank statement was in the wrong format in that it was dated 9 September. If it had been set out differently, the Immigration Rules would have been satisfied. The applicant could quite easily have obtained a further statement to satisfy the rules.*

13. *In my view this argument goes nowhere. To my mind this is a document which was not in the wrong format. The fact is that it did not contain the correct information. It had to contain information demonstrating that the applicant had at the date of the statement, 9 September, that she had £7,200 in her account. Unfortunately she had paid the rent, as we now know, which reduced the balance below. But the fact is that giving paragraph 245AA its natural and ordinary meaning, and in circumstances where a rigid application of the immigration rules is necessary -- a point underlined by the Court of Appeal in Miah v Secretary of State for the Home Department [2012] EWCA Civ 261 -- this ground fails; see in addition R (on the application of Gu) v Secretary of State for the Home Department [2014] EWHC 1634 at paragraphs 23 and 24.*

14. *Mr Mold's second point is that the evidential flexibility policy should have been applied in this case. If applied the policy would have led to the Secretary of State requiring the claimant to request a bank statement which showed the balance available up to 3 September. Because the application was late, the requirement that the applicant have £7,200 was triggered. This was an otherwise compliant application -- the only gap being the full amount was not in the account on 9th September. It was apparent, in Mr Mold's submission, that the missing document could be obtained.*

15. *In my view the evidential flexibility policy does not apply in this sort of situation. It is designed to address minor errors and omissions. The basic point is that there was no omission or minor error here. The fact is that the bank statement did not contain the requisite information.*

16. *The third point advanced by Mr Mold relates to legitimate expectation. It builds on the letter sent to OSSC on 18 September. He contents that if the application had been in time, only £1600 would have been required. The agents were told in that letter that the Secretary of State would afford them an opportunity to address this type of deficiency. Mr Mold referred to the leading authority Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2, see in particular at paragraphs 45, 46 and 50.*

17. *In my view the stumbling block here is that there is no evidence that the claimant ever saw this letter sent to her agent, OSSC, so it is very difficult to build a case of legitimate expectation on the back of it. In any event, that letter is in standard form, and no doubt designed to cover a whole range of situations. It did not contain the unequivocal representation to the claimant that it would permit the Secretary of State carry out the detailed check of the application form, so as to inform her that if she obtained a statement with a cover point from 3 September, all would be well.*

18. *As I said at the outset, this is a most unfortunate case, the claimant has been badly let down. It may seem to the outsider that it is very much an application of technical rules. For reasons given by the Court of Appeal, the technical rules are absolutely vital to the proper administration of immigration control. I dismiss the application.*

EK (Ivory Coast) v The Secretary of State for the Home Department [2014] EWCA Civ 1517 (26 November 2014)

http://www.bailii.org/ew/cases/EWCA/Civ/2014/1517.html

In this case the Appellant's College erroneously cancelled her CAS. Her application was refused. The Court of Appeal dismissed the appeal which was based upon a fairness challenge. Sales LJ gave the leading judgment although Floyd LJ dissented. The majority disapprove of the head note of *Naved (Student – fairness – notice of points)* [2012] UKUT 14 (IAC).

See my video on *EK*: http://youtu.be/p9oTGuiI9CE

Discussion

24. *The position in which the Appellant has been placed can, in a general sense, be said to be unfair to her. She obtained a valid CAS letter and made her application for leave to remain to continue her studies on the basis of that letter. She had a limited period of time in which she could make such an application on an in-country basis, granted to her by the Secretary of State to give her an opportunity to rectify the position which had arisen as a result of her first chosen college, Bliss College, losing its authorisation from the Secretary of State to issue CAS letters. She made her application within time. Unbeknown to her, as a result of an administrative error for which she had no responsibility, St Stephen's withdrew her CAS letter. As a result, after the period for making a fresh in-country application had elapsed, her application was dismissed by the Secretary of State. The Appellant will have to leave the United Kingdom and make a fresh out of country application if she wishes to continue her studies here.*

25. *However, in my judgment, there was no breach by the Secretary of State of her public law duty to act fairly in considering the Appellant's application for leave to remain. The Secretary of State is not responsible for the general unfairness which the Appellant has suffered. That is the result of actions and omissions by St Stephen's. There is no basis on which any of the decisions of the Secretary of State, the FTT and the Upper Tribunal can be impugned as unlawful.*

26. *The Secretary of State accepts, correctly, that the Immigration Rules do not exclude the general public law duty to act fairly which rests upon the Secretary of State in exercising her functions: see, e.g., Alam v Secretary of State for the Home Department [2012] EWCA Civ 960, [44]. The question, therefore, is whether that duty imposed an obligation on the Secretary of State, when she saw that the CAS letter on which the Appellant's application for leave to remain was based had been withdrawn, to adjourn any decision on the application to give the Appellant notice of the problem and an opportunity to rectify it. In my view, it did not.*

27. *It is well established that the precise content of the duty to act fairly varies according to the particular decision-making context in which it falls to be applied. I refer to the classic statement by Lord Mustill in a case concerning the procedure to be followed by the Secretary of State in setting tariff periods of mandatory imprisonment for prisoners serving life sentences, R v Secretary of State for the Home Department, ex p. Doody [1994] 1 AC 531, at 560D-G (in particular, principles (2), (3) and (4)):*

> *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards*

> *of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

See also Lloyd v McMahon [1987] AC 625, 702-703 per Lord Bridge:

> *"... the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."*

28. *The PBS is intended to simplify the procedure for applying for leave to enter or remain in the United Kingdom in certain classes of case, such as economic migrants and students. This is to enable the Secretary of State to process high volumes of applications in a fair and reasonably expeditious manner, according to clear objective criteria. This is in the interests of all applicants. It also assists applicants to know what evidence they have to submit in support of an application.*

29. *As Sullivan LJ observed in Alam, it is an inherent feature of the PBS that it "puts a premium on predictability and certainty at the expense of discretion" (para. [35]). Later, at para. [45], he said:*

> *"... I endorse the view expressed by the Upper Tribunal in Shahzad [Shahzad (s 85A: commencement) [2012] UKUT 81 (IAC)] (paragraph 49) that there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the rule under which he seeks leave. The Immigration Rules, the Policy Guidance and the prescribed application form all make it clear that the prescribed documents must be submitted with the application, and if they are not the application will be rejected. The price of securing consistency and predictability is a lack of flexibility that may well result in "hard" decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to conduct a preliminary check of all applications to see whether they are accompanied by all of the specified documents, to contact applicants where this is not the case, and to give them an opportunity to supply the missing documents. Imposing such an obligation would not only have significant resource implications, it would also extend the time taken by the decision making process, contrary to the policy underlying the introduction of the PBS."*

30. *These comments were echoed by Davis LJ in giving the lead judgment in Rodriguez, at para. [100].*

31. *This context informs the way in which the general public law duty of fairness operates in relation to the PBS. The duty supplements the PBS regime, but ought not to be applied in such a manner as to undermine its intended mode of operation in a substantial way. Application of the duty of fairness should not result in the public benefits associated with having such a clear and predictable scheme operating according to objective criteria being placed in serious jeopardy.*

32. *In my judgment, acceptance of the Appellant's submission that the general duty of fairness required the Secretary of State to postpone making a decision on her application in order to raise with her the cancellation of her CAS letter would undermine the benefits associated with PBS in a significant and inappropriate way. It may often be the case that a CAS letter is withdrawn between the filing of an application with the Secretary of State and the making of a decision on that application for reasons to do with the student (such as failing to attend the course or failing to pay the tuition fees), and in relation to which it would not be appropriate to grant leave to enter or remain. There is no way in which the Secretary of State can tell whether withdrawal of a CAS letter reflects that type of underlying situation or a situation in which some administrative error has occurred on the part of the sponsoring college in which the applicant is in no way implicated. It would be a serious intrusion upon the intended straightforward and relatively automatic operation of decision-making by the Secretary of State under the PBS if in every case of withdrawal of a CAS letter she had to make inquiries and delay making a decision.*

33. *I do not consider that an approach by the Secretary of State which involves a simple check whether an applicant has in place a valid CAS letter at the time the decision is made on their application, rather than seeking to inquire further into the background if it appears that a CAS letter has been withdrawn, involves any unfairness to an applicant for which the Secretary of State bears responsibility. The PBS places the onus of ensuring that an application is supported by evidence to meet the relevant test for grant of leave to enter or remain upon the applicant, and the Immigration Rules give applicants fair notice of this. The essence of the CAS element within the PBS is that the Secretary of State relies on a check on certification by approved colleges, and does not have to investigate further. It is inherent in the scheme that an applicant takes the risk of administrative error on the part of a college.*

34. *Standing back to make a general observation about the context, it can be said that an applicant deals directly with their college in relation to sorting out acceptance onto a course and the certification of that fact, and so has an opportunity to check the contract made with the college so far as concerns the risk of withdrawal of a CAS letter. If a college withdraws a CAS letter, the applicant may have a contractual right of recourse against the college. The fact that there is scope for applicants to seek protection against administrative errors by choosing a college with a good reputation and checking the contractual position before enrolling is of some relevance to the fair balance to be struck between the public interest in the due operation of the PBS regime and the interest of an individual who is detrimentally affected by it.*

35. *In my view, the circumstances in which the PBS applies are not such that it would be fair, as between the Secretary of State (representing, for these purposes, the general public interest) and the applicant, to expect the Secretary of State to have to distort the ordinary operation of the PBS regime to protect an applicant against the speculative possibility that a college has made an administrative error in withdrawing a CAS letter, rather than withdrawing it for reasons which do indeed indicate that no leave to enter or remain ought to be granted. The interests of applicants such as the Appellant are not so pressing and of such weight that a duty of delay and inquiry as contended for by the Appellant can be spelled out of the obligation to act fairly.*

36. *In that regard, the present context is to be contrasted with that in Doody. In that case, what was at stake was the liberty of the subject, since the decision of the Secretary of State regarding the tariff to be set for life prisoners would determine the time within which no application for release on parole could be made. It was by reason of that major significance for a prisoner of the decision to be made affecting him that the House of Lords found that the duty of fairness required the prisoner to be given notice of relevant information and an opportunity to deal with it by way of representations before a decision was made. In the present context, however, the PBS regime is intended to minimise the need for making sensitive and difficult evaluative judgments of the kind that fell to be made by the Secretary of State in Doody and the interests of applicants which are at stake are of far less weight.*

37. *Similarly, I do not consider that it is appropriate to draw any analogy with the operation of the duty of fairness in cases in which the imposition of a penalty is in issue, such as in a criminal or professional disciplinary context. In that sort of case, the importance of what is at stake (liberty, livelihood, good name etc.) and the evaluative nature of the decision to be made are such that fairness usually requires notice to be given of matters of concern and an opportunity for the individual in question to address those matters before an adverse decision is made in his case. In the present context, however, what is*

in issue is whether an applicant for leave to enter or remain can persuade the Secretary of State to grant them something in relation to which they have no prior right or expectation, in accordance with a simple and mechanistic points system.

38. *The authorities in which the general public law duty of fairness has been found to impose additional obligations on the Secretary of State in the context of the PBS have been materially different from the present case. It has been held that where the Secretary of State has withdrawn authorisation from a college to issue CAS letters, fairness requires that she should give foreign students enrolled at the college a reasonable opportunity to find a substitute college before removing them: Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC);Thakur (PBS Decision – Common Law Fairness) Bangladesh [2011] UKUT 00151 (IAC); and see Alam at para. [44]. But that requirement was found to arise where there had been a change of position of which the Secretary of State was aware, and indeed which she had brought about, in circumstances in which the students were not themselves at fault in any way, but had been caught out by action taken by the Secretary of State in relation to which they had had no opportunity to protect themselves. In the present case, by contrast, the Secretary had no means of knowing why the Appellant's CAS letter had been withdrawn and was not responsible for its withdrawal, and the fair balance between the public interest in the due operation of the PBS regime and the individual interest of the Appellant was in favour of simple operation of the regime without further ado.*

39. *In Naved (Student – fairness – notice of points), the headnote summary of the decision, drafted by the Upper Tribunal (Blake J and Upper Tribunal Judge Freeman), states "Fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known, failing which the resulting decision may be set aside on appeal as contrary to law ...". It might be said that on the principle as formulated in that summary, the Appellant in the present case should have been given notice of the problem with her CAS letter and an opportunity to deal with it.*

40. *If the Upper Tribunal intended to lay down a principle formulated in that bald way, I disagree with it. As a formulation, it leaves out of account the highly modulated and fact-sensitive way in which the general public law duty of fairness operates. It also pays insufficient attention to the issue which lies at the heart of the cases in this area, which concerns the fair balance to be struck between the public interest in having the PBS regime operated in a simple way and the interest of a particular individual who may be detrimentally affected by such operation. The public interest here, of course, includes the interests of the Secretary of State as administrator, of the taxpaying public (who fund the immigration system and would like it to run efficiently) and of the general body of applicants for leave to enter or remain (who have an interest in the PBS regime operating in a fair and efficient way, with a minimum of delay).*

41. *In fact, however, the situation which had arisen in Naved was again materially different from that in the present case. Naved concerned a decision by the Secretary of State to refuse leave to remain for a Tier 4 (general) student to commence a second course of study with a new college after his first course of study with another college (LCR) had come to an end. The Secretary of State refused leave on the grounds that the applicant had no "established presence" as a student in the United Kingdom. The applicant had duly produced a CAS letter from the new college, but had not been asked to produce documentary evidence that he completed his course at LCR. Despite this, the Home Office sought to verify his claim to an "established presence" by sending an email to LCR referring to the applicant, Mohammed Naved; a person, whose position with LCR was not stated, replied on behalf of LCR to confirm that someone called Naveed Ahmed had been enrolled with LCR but had not completed his course and had moved to another college. The Home Office assumed that this reply related to Mohammed Naved, notwithstanding the difference of name. It did not notify the applicant of the reply or ask for his comments. The reply had been sent in error. The applicant had in fact finished his course with LCR, and if the Home Office had asked the applicant about the LCR reply, he would have been able to send in satisfactory documentary evidence to show that he had indeed completed the course at LCR. If that had happened, he would have been granted leave to remain.*

42. *The Upper Tribunal held, on these facts, that the applicant's treatment in Naved had been "conspicuously unfair": para. [14]. The Home Office bore substantial responsibility for the error which occurred. Without warning to the applicant, it went behind the information given by him about*

his course with LCR, received a confusing response to its inquiry which it failed to read properly or check, and then failed to give the applicant an opportunity to adduce documentary evidence of a standard type (certificate of completion of the course etc) to resolve the dispute which appeared to have emerged about the history of his relations with LCR. In my opinion, nothing said in the judgment itself in Naved (as distinct from the headnote summary of it) is inconsistent with the conclusion which I have arrived at in the circumstances of the present case.

6. Show me the Money: FtT & Costs

Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 59 (IAC) (28 January 2015)

http://www.bailii.org/uk/cases/UKUT/IAC/2015/59.html

The Tribunal, in a panel made up of the Presidents of both tiers, gives detailed guidance on the application of rule 9 of the FtT Procedure Rules.

[1] Rule 9 of the 2014 Rules operates in conjunction with section 29 of the Tribunals, Courts and Enforcement Act 2007.

[2] The only powers to award fees or costs available to the First-tier Tribunal (the "FtT") are those contained in Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "2014 Rules").

[3] Transitionally, Rule 9 of the 2014 Rules applies only to appeals coming into existence subsequent to the commencement date of 20 October 2014. It has no application to appeals predating this date.

[4] It is essential to be alert to the distinctions between the costs awarding powers contained in Rule 9(2)(a) and Rule 9(2)(b) of the 2014 Rules.

[5] Awards of costs are always discretionary, even in cases where the qualifying conditions are satisfied.

[6] In the ordinary course of events, where any of the offending types of conduct to which either Rule 9(2)(a) or Rule 9(2)(b) of the 2014 Rules applies, the FtT will normally exercise its discretion to make an order against the defaulting representative or party.

[7] The onus rests on the party applying for an order under Rule 9.

[8] There must be a causal nexus between the conduct in question and the wasted costs claimed.

[9] One of the supreme governing principles is that every case will be unavoidably fact sensitive. Accordingly, comparisons with other cases will normally be inappropriate.

[10] Orders for costs under Rule 9 will be very much the exception, rather than the rule and will be reserved to the clearest cases.

[11] Rule 9 of the 2014 Rules applies to conduct, whether acts or omissions, belonging to the period commencing on the date when an appeal comes into existence and ending on the date of the final determination thereof.

[12] The procedure for determining applications under Rule 9 of the 2014 Rules will be governed in the main by the principles of fairness, expedition and proportionality.

Presidential Guidance Note No 1 of 2014:

The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

https://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/upper/presidential-guidance-FtTIAC-procedure-rules-2014.doc

Wasted and unreasonable costs (or, in Scotland, expenses)

1. *The new Rules implement a power in the Tribunals, Courts and Enforcement Act 2007 to award wasted or unreasonable costs. The conferring of this power, however, carries with it considerable responsibility to ensure that its use is appropriate and that it is used fairly and judiciously. In nearly all instances the existence of the power should act as a restraint on the behaviour of parties and their representatives so that the power itself is rarely exercised.*

2. *The scope of rule 9(2) covers at part (a) wasted costs and costs incurred in applying for such costs and at part (b) costs if a person has acted unreasonably in bringing, defending or conducting proceedings. The Tribunal may make an order on an application or under its own initiative. An order may be made against a party, which may be the respondent, or against a representative (or both).*

3. *A test for unreasonable conduct was set out by the Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205 at 232 (quoted in R(LR) v FtT (HESC) and Hertfordshire CC (Costs) [2013] UKUT 0294 (AAC)), as follows:*

> *"'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."*

4. *The Upper Tribunal went on to point out that both the appellant and the respondent in tribunals are substantially dependent on representatives who present cases to the best of their ability, often very helpfully, and that is not something which it would be right to discourage merely because it has not gone smoothly on a particular occasion. A party being wrong or misguided is not the same as being unreasonable.*

5. *In circumstances where there has been a breach of a direction, for example, a failure to lodge documentary evidence, the offending party should always be given the opportunity to remedy the situation before any order for wasted costs is made. The issuing of a reminder to the party in breach should be a prerequisite before a wasted costs order is made. Even where a hearing has to be adjourned because of an avoidable omission by one party, such as inadequate preparation, it would not normally be appropriate to make an order for costs. Not only has the paying party the right to offer an explanation but it should be remembered that representatives have many demands on their time and are subject to a multitude of pressures, which may lead even in well-managed organisations to occasional lapses. The making of an order for wasted or unreasonable costs should be a very rare event.*

6. *Under rule 9(6) the Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations. Where an application for costs is made at a hearing it will be considered at the hearing, provided the paying party is present. Otherwise the application will be considered without a hearing unless the Tribunal is contemplating making an order when the application will be listed for hearing to give the paying party the opportunity to make representations. It is anticipated that the power to award costs will be rarely exercised.*

7. *A decision on costs is an "excluded decision" and is not subject to an appeal. (See the Appeals (Excluded Decisions) Order 2009, SI 2009/275 and also the Tribunal Courts and Enforcement Act 2007, s 12(4)(a).)*

8. *Where a costs order is made the amount of costs is assessed in accordance with rule 9(7) either by summary assessment by the Tribunal, by agreement, or by detailed assessment in accordance with rule 9(9).*

9. *The power to make a fee award is a separate power contained in rule 9(1). This remains the subject of existing guidance.*

INTERMISSION: Best-ever brownies

http://www.bbcgoodfood.com/recipes/1223/bestever-brownies

Ingredients

- *185g unsalted butter*
- *185g best dark chocolate*
- *85g plain flour*
- *40g cocoa powder*
- *50g white chocolate*
- *50g milk chocolate*
- *3 large eggs*
- *275g golden caster sugar*

Method

1. *Cut **185g unsalted butter** into smallish cubes and tip into a medium bowl. Break**185g best dark chocolate** into small pieces and drop into the bowl. Fill a small saucepan about a quarter full with hot water, then sit the bowl on top so it rests on the rim of the pan, not touching the water. Put over a low heat until the butter and chocolate have melted, stirring occasionally to mix them. Now remove the bowl from the pan. Alternatively, cover the bowl loosely with cling film and put in the microwave for 2 minutes on High. Leave the melted mixture to cool to room temperature.*

2. *While you wait for the chocolate to cool, position a shelf in the middle of your oven and turn the oven on to fan 160C/conventional 180C/gas 4 (most ovens take 10-15 minutes to heat up). Using a shallow 20cm square tin, cut out a square of non-stick baking parchment to line the base. Now tip **85g plain flour** and **40g cocoa powder** into a sieve held over a medium bowl, and tap and shake the sieve so they run through together and you get rid of any lumps.*

3. *With a large sharp knife, chop **50g white chocolate** and **50g milk chocolate**into chunks on a board. The slabs of chocolate will be quite hard, so the safest way to do this is to hold the knife over the chocolate and press the tip down on the board, then bring the rest of the blade down across the chocolate. Keep on doing this, moving the knife across the chocolate to chop it into pieces, then turn the board round 90 degrees and again work across the chocolate so you end up with rough squares.*

4. *Break **3 large eggs** into a large bowl and tip in **275g golden caster sugar**. With an electric mixer on maximum speed, whisk the eggs and sugar until they look thick and creamy, like a milk shake. This can take 3-8 minutes, depending on how powerful your mixer is, so don't lose heart. You'll know it's ready when the mixture becomes really pale and about double its original volume. Another check is to turn off the mixer, lift out the beaters and wiggle them from side to side. If the mixture that runs off the beaters leaves a trail on the surface of the mixture in the bowl for a second or two, you're there.*

5. *Pour the cooled chocolate mixture over the eggy mousse, then gently fold together with a rubber spatula. Plunge the spatula in at one side, take it underneath and bring it up the opposite side and in again at the middle. Continue going under and over in a figure of eight, moving the bowl round after each folding so you can get at it from all sides, until the two mixtures are one and the colour is a mottled dark brown. The idea is to marry them without knocking out the air, so be as gentle and slow as you like – you don't want to undo all the work you did in step 4.*

6. *Hold the sieve over the bowl of eggy chocolate mixture and resift the cocoa and flour mixture, shaking the sieve from side to side, to cover the top evenly. Gently fold in this powder using the same figure of eight action as before. The mixture will look dry and dusty at first, and a bit unpromising, but if you keep going very gently and patiently, it will end up looking gungy and fudgy. Stop just before you feel you should, as you don't want to overdo this mixing. Finally, stir in the white and milk chocolate chunks until they're dotted throughout. Now your mixing is done and the oven can take over.*

7. *Pour the mixture into the prepared tin, scraping every bit out of the bowl with the spatula. Gently ease the mixture into the corners of the tin and paddle the spatula from side to side across the top to level it. Put in the oven and set your timer for 25 minutes. When the buzzer goes, open the oven, pull the shelf out a bit and gently shake the tin. If the brownie wobbles in the middle, it's not quite done, so slide it back in and bake for another 5 minutes until the top has a shiny, papery crust and the sides are just beginning to come away from the tin. Take out of the oven.*

8. *Leave the whole thing in the tin until completely cold, then, if you're using the brownie tin, lift up the protruding rim slightly and slide the uncut brownie out on its base. If you're using a normal tin, lift out the brownie with the foil. Cut into quarters, then cut each quarter into four squares and finally into triangles. These brownies are so addictive you'll want to make a second batch before the first is finished, but if you want to make some to hide away for a special occasion, it's useful to know that they'll keep in an airtight container for a good two weeks and in the freezer for up to a month.*

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5. Saying *non* to the *al la carte* menu: Statutory Article 8 Considerations

Dube (ss.117A-117D) [2015] UKUT 90 (IAC) (24 February 2015)
http://www.bailii.org/uk/cases/UKUT/IAC/2015/90.html

The UT gives guidance on how the new statutory Article 8 considerations should be applied. See my YouTube video on this case: https://youtu.be/9afPkZouMy4

(1) Key features of ss.117A-117D of the Nationality, Immigration and Asylum Act 2002 include the following:

(a) judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to "have regard" to the specified considerations.

(b) these provisions are only expressed as being binding on a "court or tribunal". It may be that the Secretary of State will consider it in the interests of good administration and consistency of decision-making on Article 8 claims at all levels to have express regard to ss.117A-117D considerations herself, but she is not directly bound to do so.

(c) whilst expressed in mandatory terms, the considerations specified are not expressed as being exhaustive: note use of the phrase "in particular" in s.117A(2): " In considering the public interest question, the court or tribunal must (in particular) have regard— ".

(d) section 117B enumerates considerations that are applicable "in all cases", which must include foreign criminal cases. Thus when s.117C (which deals with foreign criminals) states that it sets out "additional" considerations that must mean considerations in addition to those set out in s.117B.

(e) sections 117A-117D do not represent any kind of radical departure from or "override" of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in Razgar [2004] UKHL 27. Sections 117A-117D are essentially a further elaboration of Razgar's question 5 which is essentially about proportionality and justifiability.

(2) It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.

4. Article 8 & the Rules

Singh v The Secretary of State for the Home Department [2015] EWCA Civ 74 (12 February 2015)
http://www.bailii.org/ew/cases/EWCA/Civ/2015/74.html

The Court of Appeal finally resolve the conflict between Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402 (02 April 2014) and Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558 (02 May 2014). Edeghill wins but is rendered largely irrelevant by subsequent changes to the rules. The Court of Appeal also give guidance on the two stage Article 8 consideration.

CONCLUSION ON ISSUE (A)

56. *The foregoing analysis has regrettably been somewhat dense, but I can summarise my conclusion, and the reasons for it, as follows:*

(1) When HC 194 first came into force on 9 July 2012, the Secretary of State was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. That is because, as decided in Edgehill, "the implementation provision" set out at para. 7 above displaces the usual Odelola principle.

(2) But that position was altered by HC 565 – specifically by the introduction of the new paragraph A277C – with effect from 6 September 2012. As from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE–276DH in deciding private or family life applications even if they were made prior to 9 July 2012. The result is that the law as it was held to be in Edgehillonly obtained as regards decisions taken in the two-month window between 9 July and 6 September 2012.

(3) Neither of the decisions with which we are concerned in this case fell within that window. Accordingly the Secretary of State was entitled to apply the new Rules in reaching those decisions.

. . .

64. *In my view that is a mis-reading of Aikens LJ's observation. He was not questioning the substantial point made by Sales J. He was simply saying that it was unnecessary for the decision-maker, in approaching the "second stage", to have to decide first whether it was arguable that there was a good article 8 claim outside the Rules – that being what he calls "the intermediary test" – and then, if he decided that it was arguable, to go on to assess that claim: he should simply decide whether there was a good claim outside the Rules or not. I am not sure that I would myself have read Sales J as intending to impose any such intermediary requirement, though I agree with Aikens LJ that if he was it represents an unnecessary refinement. But what matters is that there is nothing in Aikens LJ's comment which casts doubt on Sales J's basic point that there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules.*

65. *I turn to Ganesabalan, on which Mr Malik relies in support of his third ground. That was a case where the new Rules applied and where the Secretary of State in her decision letter had, as in Ms Khalid's case, rejected the claimant's application under article 8 simply on the basis that he could not satisfy the requirements of paragraph 276ADE or Appendix FM and had given no express consideration to whether he had an article 8 case outside those Rules. The claimant said that that was inconsistent with the guidance in Izuazu and Nagre. The Secretary of State argued that Sales J's observations at para. 30 of his judgment in Nagre meant that such consideration was unnecessary. Mr Fordham rejected that argument and quashed the decision. At para. 9 of his judgment he summarises the position in law as follows:*

> *"Where a person seeks leave to remain, relying on private life or family life or both, and relying on Article 8, and where the claim fails at the first stage by reference to the applicable Immigration Rules (Appendix FM and Rule 276ADE):*
>
> *(1) There is always a "second stage" in which the Secretary of State must consider the exercise of discretion outside the Rules and must be in a position to demonstrate that she has done so.*
>
> *(2) The extent of that consideration and the extent of the reasoning called for will depend on the nature and circumstances of the individual case.*
>
> *(3) In a case in which the consideration or reasoning is legally inadequate, and leaving aside cases in which there is a right of appeal to a tribunal, it is open to the Secretary of State to resist the grant of judicial review if she is able to demonstrate that the decision would inevitably have been the same."*

In connection with point (1), Mr Fordham, at paras. 21-30 of his judgment, conducts a careful examination of the relevant cases, including Nagre, with a view to establishing that, even where the decision-maker is entitled to conclude that a separate consideration of article 8 outside the Rules is unnecessary because all the issues raised have been dealt with at the first stage, a conscious decision to that effect is required.

66. *Point (3) in Mr Fordham's summary broadly reflects earlier authorities, though there is a fuller and more authoritative exposition in the judgment of Beatson LJ in Haleemudeen, at paras. 59-61. I would not disagree with either of points (1) and (2); but I am conscious of how practitioners in this field can sometimes seek to exploit even the faintest ambiguity, and I would accordingly wish to make three comments about point (1):*

(1) I should emphasise – though it is in truth entirely clear from the full judgment – that Mr Fordham's statement that "there is always a second stage" does not in any way qualify what Sales J says at para. 30 of his judgment in Nagre. Sales J's point is that the second stage can, in an appropriate case, be satisfied by the decision-maker concluding that any family life or private life issues raised by the claim have already been addressed at the first stage – in which case obviously there is no need to go through

it all again. Mr Fordham's point is that that is a conclusion which must be reached as a matter of conscious decision in any given case and cannot simply be assumed. I agree with both points.

(2) The statement that the decision-maker "must be in a position to demonstrate" that he or she has given the necessary consideration is simply a reflection of the ordinary obligation to record a material decision. If the decision-maker's view is straightforwardly that all the article 8 issues raised have been addressed in determining the claim under the Rules, all that is necessary is, as Sales J says, to say so.

(3) It may not be entirely apt to describe a decision as to whether article 8 requires that an applicant be given leave outside the Rules as an "exercise of discretion".

67. *In short, neither MM (Lebanon) nor Ganesabalan undermines the point made by Sales J in para. 30 of his judgment in Nagre, which in my view, together with his endorsement of the approach in Izuazu, remains good law.*

Agyarko & Ors, R (on the application of) v The Secretary of State for the Home Department [2015] EWCA Civ 440 (06 May 2015)

http://www.bailii.org/ew/cases/EWCA/Civ/2015/440.html

Sales LJ gives guidance on 'insurmountable obstacles' in the context of EX.1 and in the context of the wider Article 8 assessment. Sales LJ also considers the relevance of a *Chikwamba* argument outside of the rules.

20. *In my judgment, Mr Saini's first submission, based on section EX.1, should be rejected.*

21. *The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.*

22. *This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "insurmountable obstacles" has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34, para. [39] ("... whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them ..."). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).*

23. *For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in Jeunesse v Netherlands at para. [117]; also the observation by this court in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192; [2014] 1 WLR 544, at [49] (although it should be noted that the passage in the judgment of the Upper Tribunal inIzuazu v Secretary of State for the Home Department [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).*

24. *Secondly, the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it*

is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8: see paras. [29]-[30] below.

25. *The statement made in Mrs Agyarko's letter of application of 26 September 2012 that "she may be separated from" her husband was very weak, and was not supported by any evidence which might lead to the conclusion that insurmountable obstacles existed to them pursuing their family life together overseas. There was no witness statement from Mrs Agyarko or Mr Benette to explain what obstacles might exist. The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so.*

26. *In my view, the Secretary of State's assessment that there were no insurmountable obstacles to family life between Mrs Agyarko and Mr Benette continuing outside the United Kingdom cannot be said to be irrational or unlawful in any way.*

27. *Mr Saini's alternative submission is that leave to remain should have been granted outside the Rules, based on Mrs Agyarko's and Mr Benette's rights to respect for their family life under Article 8. This submission has two aspects. Mr Saini submits that the Secretary of State's decision to refuse her application violated Article 8 either: (i) simply because it was disproportionate to remove Mrs Agyarko in circumstances where her husband would have to follow her to Ghana if they wished to continue their family life together, especially when he is a British citizen; or (ii) because Mrs Agyarko would have to return to Ghana and make an out-of-country application for leave to enter which would inevitably be granted, so that her removal served no good purpose. In relation to the latter argument, Mr Saini relied in particular on Chikwamba v Secretary of State for the Home Department [2008] UKHL 40; [2008] 1 WLR 819.*

28. *So far as concerns Mrs Agyarko's claim under Article 8 for leave to remain outside the Rules, since her family life was established with knowledge that she had no right to be in the United Kingdom and was therefore precarious in the relevant sense, it is only if her case is exceptional for some reason that she will be able to establish a violation of Article 8: see Nagre, paras. [39]-[41]; SS (Congo), para. [29]; and Jeunesse v Netherlands, paras. [108], [114] and [122].*

29. *For Mrs Agyarko's case in relation to grant of leave outside the Rules, Mr Saini correctly pointed out that the "insurmountable obstacles" test in section EX.1 is not an invariable necessary precondition to a finding of violation of Article 8, even in a case involving precarious family life. For these purposes, Mr Saini relied upon my judgment at first instance in Nagre, at para. [47], where I sought to explain that under Article 8 an insurmountable obstacles test is not the sole and definitive test for disproportionality in precarious family life cases. Mr Sheldon, for the Secretary of State, did not dispute this. Mr Saini also referred to Izuazu v Secretary of State for the Home Department, paras. [53]-[59], and relied on Jeunesse v Netherlands as a recent authority which illustrates the same point. There, the circumstances of the applicant's case were found by the ECtHR to be exceptional even though there were no insurmountable obstacles for the family in that case to relocate and settle overseas: see paras. [117] and [122].*

30. *Thus it is possible that a case might be found to be exceptional for the purposes of the relevant test under Article 8 in relation to precarious family life even where there are no insurmountable obstacles to continuing family life overseas. This means that there is a gap between section EX.1 of Appendix FM and what Article 8 might require in some cases: see Nagre, paras. [41]-[48]. But this does not mean that the issue whether there are or are not insurmountable obstacles to relocation drops out of the picture where there is reliance on Article 8. It is a material factor to be taken into account: see Nagre, paras. [41] and [47]; Rodrigues da Silva and Hoogkamer v Netherlands, para. [39]; and Jeunesse v Netherlands, paras. [107] and [117]. In relation to precarious family life cases, as I observed in Nagre at para. [43], the gap between section EX.1 and the requirements of Article 8 is likely to be small.*

31. *In Chikwamba, the House of Lords found that there would be a violation of Article 8 if the applicant for leave to remain in that case were removed from the United Kingdom and forced to make an out-of-country application for leave to enter which would clearly be successful, in circumstances where the*

interference with her family life with her husband associated with the removal could not be said to serve any good purpose. It is possible to envisage a Chikwamba type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. But in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion.

See also:

R (Iqbal) v Secretary of State for the Home Department[2014] EWHC 1822 (Admin):

"37. …in Mr Mandalia's submissions it is accepted that the Chikwamba point is one of those potential issues relating to proportionality which is not covered by the drafting of the Rules but which nonetheless if it arises, as it does in this case, will need to be considered when the defendant assesses whether or not, as an exercise of residual discretion outside the Rules, allowing leave might be appropriate. There could therefore conceivably be cases where there were no insurmountable obstacles to the continuation of family life outside the UK, but the requirement to return to the applicant's country of origin to make an application for leave to enter the UK would be a disproportionate interference with their Article 8 rights. So much is, in effect, the submission made on behalf of the defendant by Mr Mandalia."

3. Article 8 & Entry Clearance

Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) (6 March 2015)

http://www.bailii.org/uk/cases/UKUT/IAC/2015/112.html

In this case the UT provide helpful guidance on Article 8 in entry clearance cases and in particular family visit visa cases where there is no right of appeal under the rules. See my YouTube video: https://youtu.be/VKSDWAVEHaE

In the case of appeals brought against refusal of entry clearance under Article 8 ECHR, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

21. In these circumstances the Entry Clearance Officer must justify the interference and satisfy us that the interference is proportionate. Subject to two sets of considerations we can see no justification for stopping a husband joining his wife when a Tribunal is satisfied that their circumstances satisfy the requirements of the Rules. The first relates to their candour. For example, if they had contributed to the application being refused by presenting inaccurate information or by omitting something material or committing some comparable misdemeanour. We can accept that it might be proportionate to refuse someone entry clearance whose application suffered from deficiencies such as these because good administration requires applicants to engage with the system and, further, we consider that there are duties of candour and co-operation on all applicants. There are no such failings here. The second set of considerations relates to the impact of refusal on the relationships that have to be promoted. Refusal of entry clearance will not always interfere disproportionately with such a relationship.

22. It follows that the First-tier Tribunal should have allowed the appeal not under the Immigration Rules but on Article 8 grounds. This is what we do.

23. We have considered carefully the effect that this decision could have in other cases. Plainly this will mean that the underlying merits of an application and the ability to satisfy the Immigration Rules, although not the question before the Tribunal, may be capable of being a weighty factor in an appeal based on human rights but they will not be determinative. They will only become relevant if the interference is such as to engage Article 8(1) ECHR and a finding by the Tribunal that an appellant does satisfy the requirements of the rules will not necessarily lead to a finding that the decision to refuse entry

clearance is disproportionate to the proper purpose of enforcing immigration control. However it may be capable of being a strong reason for allowing the appeal that must be weighed with the others facts in the case.

24. *It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. It would therefore be extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind of relationship would always attract the protection of Article 8(1) or that other kinds of relationship would never come within its scope. We are, however, prepared to say that it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. In the limited class of cases where Article 8 (1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8.*

The Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387 (23 April 2015)
http://www.bailii.org/ew/cases/EWCA/Civ/2015/387.html

In this judgment the Court of Appeal consider Article 8 outside of the Immigration Rules in entry clearance cases. The Court gives general guidance and considers *inter alia* the positive obligation under Article 8 and near miss cases.

29. *It is clear, therefore, that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional cases. However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious: see Nagre, paras. [38]-[43], approved by this court inMF (Nigeria) at [41]-[42].*

30. *Also, in the part of the Rules dealing with deportation of foreign criminals, the Rules themselves set out a test of "exceptional circumstances", and this court held in MF (Nigeria) that this rubric covered the application of Article 8 itself, so that no occasion would arise to say that Article 8 might apply outside the Rules: see [38]-[44] (though there was, in fact, no difference of substance even if it could do: see [45]-[46] and the further discussion below). On that interpretation of the "exceptional circumstances" rubric in the Rules (namely, that it is equivalent to a requirement to apply the proportionality test under Article 8: see para. [44]), it could be taken to cover quite a flexible and large category, if, in practice, application of Article 8 in that context would lead to the conclusion that LTR should be granted in a substantial number of cases. However, the court held that "very compelling reasons" would be required to outweigh the public interest in deportation of foreign criminals whose cases did not fall within the substantive provisions in paragraphs 399 and 399A of the Rules (see [43]), and clearly regarded this as an approach which is compatible with the requirements of Article 8. This is to be explained by reference to the weight to be given to the public interest in removal of foreign criminals, which is given expression in sections 32-33 of the UK Borders Act 2007 and paragraphs 399 and 399A of the Rules: see AJ (Angola) v Secretary of State for the Home Department [2014] EWCA Civ 1636, [35]-[41], andSecretary of State for the Home Department v MA (Somalia) [2015] EWCA Civ 48.*

31. *In other contexts, it cannot simply be assumed that a strict legal test of exceptional circumstances will be applicable when examining the application of Article 8 outside the Immigration Rules (or within the Rules themselves, where particular paragraphs are formulated so as fully to cover the applicability of Article 8, as in paragraphs 399 and 399A as interpreted in MF (Nigeria)). The relevant general*

balance of public interest considerations and individual interests will vary between different parts of the Rules. It is only if the normal balance of interests relevant to the general area in question is such as to require particularly great weight to be given to the public interest as compared with the individual interests at stake (as in the precarious cases considered in Nagre and the foreign criminal deportation cases considered in MF (Nigeria)) that a strict test of exceptionality will apply.

32. *However, even away from those contexts, if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, then, as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision. As Beatson LJ observed in Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558; [2014] Imm AR 6, at [40], the new Rules in Appendix FM:*

"... are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall, the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been."

Accordingly, a court or tribunal is required to give the new Rules "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (para. [47]).

33. *In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ.*

34. *What, then, should be the position in relation to applications made by family members outside the United Kingdom for LTE to come here to take up or resume their family life? Mr Payne, for the Secretary of State, submitted that since a person actually in the United Kingdom who formed a family life knowing that they had no right to be here could readily be expelled (see the discussion of Nagre, above), so by parity of reasoning no claim for grant of LTE outside the Immigration Rules in Appendix FM could succeed under Article 8 save in truly exceptional circumstances. On the other hand, Mr Drabble, in submissions adopted on behalf of all the respondents, pointed to the fact that the part of Appendix FM which deals with LTR (unlike the part that deals with LTE) contains section EX.1 (exceptions to certain eligibility requirements for leave to remain as a partner or parent), which makes the LTR Rules more generous for applicants than the LTE Rules. Section EX.1 provides for grant of LTR in certain cases where the applicant has a genuine and subsisting parental relationship with a child whom it would not be reasonable to expect to leave the United Kingdom or if the applicant has a genuine and subsisting relationship with a partner in the United Kingdom who is a British citizen or otherwise settled in the United Kingdom and there are "insurmountable obstacles to family life with that partner continuing outside the UK". Mr Drabble submitted that the omission of section EX.1 from the part of Appendix FM dealing with LTE showed that there was a substantial gap between what Article 8 required in an LTE context and the Immigration Rules themselves, so that a court or tribunal should not accord the LTE Rules significant weight in the Article 8 balancing exercise. Mr Drabble contended that, with respect to the LTE Rules, it was inevitable that in many cases there had to be recourse to the Secretary of State's residual discretion under the 1971 Act to grant LTE outside the Rules, and that therefore the tribunals in the present cases were justified in attaching little weight to the Rules themselves.*

35. *In our judgment, the correct legal approach lies between these extremes. This is because the position in relation to the LTE Rules is different from that in relation to the LTR Rules in two distinct ways.*

36. *First, cases involving someone outside the United Kingdom who applies to come here to take up or resume family life may involve family life originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls (as in the type of situation discussed in Nagre). Thus the ECtHR jurisprudence addressing the latter type of case, which was the foundation for the approach in Nagre, will not always be readily applicable as an analogy. A person who is a refugee in the United Kingdom may have had a family life overseas which they had to abandon when they fled. A British citizen may have lived abroad for years without thought of return, and established a family life there, but then circumstances change and they come back to the United Kingdom and wish to bring their spouse with them.*

37. *On the other hand, if someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come there (an extreme example of this would be the case of a so-called "mail-order bride"), the relationship will have been formed under conditions of known precariousness which will make the analogy with the Strasbourg case-law reviewed in Nagre a close one (see also Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471 at [68]). In that sort of case, it will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant LTE outside the Rules.*

38. *Secondly, however, what is in issue in relation to an application for LTE is more in the nature of an appeal to the state's positive obligations under Article 8 referred to in Huang at para. [18] (a request that the state grant the applicant something that they do not currently have – entry to the United Kingdom and the ability to take up family life there), rather than enforcement of its negative duty, which is at the fore in LTR cases (where family life already exists and is currently being carried on in the United Kingdom, and family life or any private life established in the United Kingdom will be directly interfered with if the applicant is removed). This means that the requirements upon the state under Article 8 are less stringent in the LTE context than in the LTR context. It is not appropriate to refer to the LTR Rules and the position under Article 8 in relation to LTR, as Mr Drabble does, and seek to argue that Article 8 requires that the same position should apply in relation to applications for LTE.*

39. *In our judgment, the position under Article 8 in relation to an application for LTE on the basis of family life with a person already in the United Kingdom is as follows:*

    i) A person outside the United Kingdom may have a good claim under Article 8 to be allowed to enter the United Kingdom to join family members already here so as to continue or develop existing family life: see e.g. Gül v Switzerland (1996) 22 EHRR 93 and Sen v Netherlands (2001) 36 EHRR 7. Article 8 does not confer an automatic right of entry, however. Article 8 imposes no general obligation on a state to facilitate the choice made by a married couple to reside in it: R (Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621, para. [42]; Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471, [68]; Gül v Switzerland, [38]. The state is entitled to control immigration: Huang, para. [18].

    ii) The approach to identifying positive obligations under Article 8(1) draws on Article 8(2) by analogy, but is not identical with analysis under Article 8(2): see, in the immigration context, Abdulaziz, Cabales and Balkandali v United Kingdom, paras. [67]-[68]; Gül v Switzerland, [38]; and Sen v Netherlands, [31]-[32]. See also the general guidance on the applicable principles given by the Grand Chamber of the ECtHR in Draon v France (2006) 42 EHRR 40 at paras. [105]-[108], summarising the effect of the leading authorities as follows (omitting footnotes):

    "105. While the essential object of Art.8 is to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to abstain from such interference: there may in addition be positive obligations inherent in effective "respect" for family life. The boundaries

between the State's positive and negative obligations under this provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph, "in striking [the required] balance the aims mentioned in the second paragraph may be of a certain relevance".

106. "Respect" for family life ... implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally. The Court has held that a state is under this type of obligation where it has found a direct and immediate link between the measures requested by an applicant, on the one hand, and his private and/or family life on the other.

107. However, since the concept of respect is not precisely defined, states enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

108. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."

iii) In deciding whether to grant LTE to a family member outside the United Kingdom, the state authorities may have regard to a range of factors, including the pressure which admission of an applicant may place upon public resources, the desirability of promoting social integration and harmony and so forth. Refusal of LTE in cases where these interests may be undermined may be fair and proportionate to the legitimate interests identified in Article 8(2) of "the economic well-being of the country" and "the protection of the rights and freedoms of others" (taxpayers and members of society generally). A court will be slow to find an implied positive obligation which would involve imposing on the state significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the state in the public interest, a matter which usually calls for consideration under democratic procedures.

iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child (1989): see In re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27; [2012] AC 144, at [26]. However, the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; see In re E (Children) at [12] and ZH (Tanzania) v Secretary of State for the Home Department[2011] UKSC 4; [2011] 2 AC 166, at [25] (under Article 3(1) of the UN Convention on the Rights of the Child the interests of the child are a primary consideration – i.e. an important matter – not the primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.

v) If family life can be carried on elsewhere, it is unlikely that "a direct and immediate link" will exist between the measures requested by an applicant and his family life (Draon, para. [106]; Botta v Italy (1998) 26 EHRR 241, para. [35]), such as to provide the basis for an implied obligation upon the state under Article 8(1) to grant LTE; see also Gül v Switzerland, [42].

40. In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in

relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.

41. *This formulation is aligned to that proposed in Nagre at [29] in relation to the general position in respect of the new Rules for LTR, which was adopted in this court in Haleemudeen at [44]. It is a fairly demanding test, reflecting the reasonable relationship between the Rules themselves and the proper outcome of application of Article 8 in the usual run of cases. But, contrary to the submission of Mr Payne, it is not as demanding as the exceptionality or "very compelling circumstances" test applicable in the special contexts explained in MF (Nigeria) (precariousness of family relationship and deportation of foreigners convicted of serious crimes).*

42. *In our view, it is a formulation which has the benefit of simplicity. It avoids the need for any excessively fine-grained approach at the level of decision-making by officials and tribunals. It should thus help to avoid confusion when cases arise, as they sometimes do, where an application for LTE is made in parallel with an application for LTR: see, e.g., PG (USA) v Secretary of State for the Home Department [2015] EWCA Civ 118.*

'Complete code'

43. *We should say something about the notion of a "complete code", which has been deployed in argument in some cases (see, e.g., MM (Lebanon) at paras. [131]-[132] in the judgment of the Court of Appeal). Tribunals and courts should not attach undue weight to this concept, which is capable of giving rise to confusion if not properly understood. In truth, it does not have a significant impact on the proper legal approach to be deployed in any of the types of case to which we have referred.*

44. *The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to be entitled to LTR or LTE within the Rules) and to assess the force of the public interest given expression in those rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provisions of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf Nagre, para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8.*

45. *Sometimes, the latter stage of the analysis will be covered by the text of the Rules themselves, as in relation to the Rules governing deportation of foreign criminals reviewed in MF (Nigeria). Those Rules laid down substantive conditions which, if satisfied, would lead to the grant of LTR, but also stated that LTR might be granted "in exceptional circumstances" if the substantive conditions were not satisfied in a particular case. Where the Rules take this form, it can be said that they form a "complete code", in the sense that both stages of analysis are covered by the text of the Rules. But this does not take one very far, since under the "exceptional circumstances" rubric one still has to allow for consideration of any matters bearing on the application of Article 8 for the purposes of the second stage of the analysis: see, e.g., AJ (Angola), above, at [46] and [55]. This is the basic point made by this court at paras. [44]-[46] of its judgment in MF (Nigeria).*

46. In other contexts under the Rules, such as in the sections of the Rules dealing with LTR and LTE, the Rules lay down substantive conditions for grant of leave, but do not themselves say that leave should also be granted in other cases where there are "exceptional circumstances". Where the Rules take this form, they do not constitute a "complete code" in the sense in which that term is used in MF (Nigeria) at [44], since the Rules themselves only cover the first stage of analysis referred to above, and the second stage is left to be covered under the general law by the Secretary of State's residual discretion, as governed by her obligations under section 6(1) of the HRA. But just as in the "complete code" case, the second stage of the analysis will be relevant in this class of case too, and any matters germane to the question whether there would be a violation of Article 8 should be brought into account at that stage.

47. Therefore, as the court said in MF (Nigeria) at para. [45], it is a "sterile question" whether one is dealing with a "complete code" case or a case falling to be addressed in the context of a part of the Immigration Rules which does not constitute a "complete code". The basic, two-stage analysis will apply in both contexts.

48. What does matter, however – whether one is dealing with a section of the Rules which constitutes a "complete code" (as in MF (Nigeria)) or with a section of the Rules which is not a "complete code" (as in Nagre and the present appeals) - is to identify, for the purposes of application of Article 8, the degree of weight to be attached to the expression of public policy in the substantive part of the Rules in the particular context in question (which will not always be the same: hence the guidance we seek to give in this judgment), as well as the other factors relevant to the Article 8 balancing exercise in the particular case (which, again, may well vary from context to context and from case to case).

49. A further word of explanation is in order, before we leave this section of the judgment. The Secretary of State has issued instructions to officials regarding the approach to be adopted to granting leave outside the Rules, in a paragraph (para. 3.2.7d) entitled "Exceptional circumstances". This is a potential source of confusion. For clarity, two points should be made about it. First, this guidance is not part of the Immigration Rules themselves, and so does not make the LTR and LTE sections of the Rules into a "complete code" in the sense given that term in MF (Nigeria) – but nothing turns on this, as we have explained. Secondly, the text of the instructions makes it clear that the term "exceptional circumstances" is given a wide meaning in the context of the instructions, covering any case in which on proper analysis under Article 8 at the second stage it would be disproportionate to refuse leave. The importance of this was highlighted in Nagre at [13]-[14] and [49]. Thus, the cases covered by the "exceptional circumstances" guidance in the instructions to officials will fall within a wider or a narrower area in line with the changing requirements of Article 8 across the gamut of cases it covers, depending on the context in which the cases arise and their particular facts. As we have sought to explain above, the "exceptional circumstances" contemplated by the instructions are not always as narrowly confined as in the foreign criminal context discussed in MF (Nigeria) and the precarious relationship context discussed in Nagre.

The evidence rules: Appendix FM-SE

50. The present appeals concern not only the LTE Rules in Appendix FM which set out the substantive conditions which have to be satisfied in relation to the minimum income requirements for a sponsor, but also the Rules in Appendix FM-SE which stipulate the form of evidence required to substantiate claims that the substantive financial requirements under Appendix FM have been met. Appendix FM-SE deals with matters such as the types of bank statements, payslips, income, savings and so forth which will be regarded as acceptable. In addition, section A1.1(b) states, "Promises of third party support will not be accepted", and stipulates the highly circumscribed forms which support from third parties is required to take.

51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.

52. This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then

becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.

53. *Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8: compare AJ (Angola), above, at [40], and Huang, above, at [16] ("There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; … the need to discourage fraud, deception and deliberate breaches of the law; and so on …"). Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare Stec v United Kingdom, cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that.*

'Near miss' cases

54. *At the hearing, there was debate about the proper approach to be adopted in 'near miss' cases, for example if the sponsor of an applicant for LTE could provide evidence of an annual income a little less than the £18,600 required or could provide evidence which might be regarded as similar to (but not the same as) that required under Appendix FM-SE. Mr Payne, for the Secretary of State, made submissions to the effect that 'a miss is as good as a mile' and that the fact that one is dealing with a 'near miss' case should be irrelevant to the Article 8 balancing exercise required. The general position of the respondents, on the other hand, was that great weight should be attached to the fact that there was a 'near miss' by an applicant in relation to the requirements of the Rules.*

55. *In our judgment, the true position lies between these submissions. Contrary to the argument of the respondents, that fact that an applicant may be able to say that their case is a 'near miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the Rules. A good deal more than this would need to be shown to make out such a case. The respondents' argument fails to recognise the value to be attached to having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgment of the Secretary of State, as expressed in the Rules, regarding what is needed to meet the public interest which is in issue. The 'near miss' argument of the respondents cannot be sustained in the light of these considerations and the authority of Miah v Secretary of State for the Home Department [2012] EWCA Civ 261, especially at [21]-[26].*

56. *However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater.*

57. *In certain of the appeals before us, the respondents said that improvements in the position of their sponsors were on the horizon, so that there appeared to be a reasonable prospect that within a period of weeks or months they would in fact be able to satisfy the requirements of the Rules. They maintained that the Secretary of State should have taken this into account when deciding whether to grant LTE outside the Rules. In our judgment, however, this affords very weak support for a claim for grant of LTE outside the Rules. The Secretary of State remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed. This reflects a fair balance between the interests of the individual and the public interest. The Secretary of State is not required to take a speculative risk as to whether the requirements in the Rules will in fact be satisfied in the future when deciding what to do. Generally, it is fair that the applicant should wait until the circumstances have changed and the requirements in the Rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the Rules in advance.*

58. *In this context, there is a relevant feature of the legal framework governing these immigration appeals which should be referred to. By virtue of section 85(4) and (5) of the Nationality, Immigration and Asylum Act 2002, read with section 85A(2) (which were the applicable provisions in these cases: the statute has since been amended), an appeal against a decision refusing LTE is to be heard by the FTT by reference to the evidence and circumstances which applied when the matter was considered by the Entry Clearance Officer. Section 85A(2) provides that "the Tribunal may consider only the circumstances appertaining at the time of the decision [i.e. the immigration decision taken by the Officer]". Changes in circumstances are not to be brought into account on the appeal: if there is a significant change of circumstances, a new application can be made to the Entry Clearance Officer, and that will be the proper course for an applicant to take who wishes to rely on such change of circumstances, even though a new application fee will be payable. When the Upper Tribunal or this court reviews the lawfulness of a decision of the FTT, it obviously will likewise do so having regard to the evidence and circumstances to which the FTT was obliged to have regard, without bringing into account later materials. Accordingly, it will be irrelevant on an appeal to the FTT and on any further appeal that what was as yet an unrealised possible future compliance with the Rules at the time the application for LTE was first considered by an Entry Clearance Officer and rejected may have matured as the applicant hoped so that, by the time of the appeal, the requirements of the Rules are satisfied. An applicant is not entitled to apply for LTE at a time when the requirements of the Rules are not satisfied, in the hope that by the time the appellate process has been exhausted those requirements will be satisfied and LTE will be granted by the appellate tribunal or court. This would be an illegitimate way of trying to jump the queue for consideration of the applicant's case and would represent an improper attempt to subvert the operation of the Rules. Sections 85 and 85A(2) prevent consideration of an application for LTE in this way.*

2. Best Interests of Children

JO and Others (section 55 duty) Nigeria [2014] UKUT 517 (IAC) (1 December 2014)

http://www.bailii.org/uk/cases/UKUT/IAC/2014/[2014]_UKUT_517_iac.html

The President of the UT gave guidance on the assessment of the best interests of children. The decision maker must be properly informed of all relevant matters and ask herself the correct question. The UT stressed the duty to consider the statutory guidance and found the decision 'not in accordance with the law'

See my video update 'Best Interests of Children Immigration Update': http://youtu.be/3TzkTcJjLyQ

(1) The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.

(2) Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.

(3) The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision.

MK (section 55 – Tribunal options) [2015] UKUT 223 (IAC) (15 April 2015) http://www.bailii.org/uk/cases/UKUT/IAC/2015/233.html

The President of the UT gives guidance on whether Judges should remit the consideration of section 55 BCIA 2009 to the Home Office or decide the matter for themselves. The President also outlines some of the outstanding issues in respect of Article 8, the new Act and the new rules which will need to be resolved in due course.

(i) Where it is contended that either of the duties enshrined in section 55 of the Borders, Citizenship and Immigration Act 2009 has been breached, the onus rests on the appellant and the civil standard of the balance of probabilities applies. There is no onus on the Secretary of State.

(ii) As regards the second of the statutory duties [the need to have regard to statutory guidance promulgated by the Secretary of State], it is not necessary for the decision letter to make specific reference to the statutory guidance.

(iii) The statutory guidance prescribes a series of factors and principles which case workers and decision makers must consider.

(iv) Where the Tribunal finds that there has been a breach of either of the section 55 duties, one of the options available is remittal to the Secretary of State for reconsideration and fresh decision.

(v) In considering the appropriate order, Tribunals should have regard to their adjournment and case management powers, together with the overriding objective. They will also take into account the facilities available to the Secretary of State under the statutory guidance, the desirability of finality and the undesirability of undue delay. If deciding not to remit the Tribunal must be satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of any affected child.

49. In considering and giving effect to the new provisions of the Immigration Rules, we have not found it necessary to attempt to resolve any of the interesting and potentially complex issues relating to the interplay between the 2002 Act, as amended and the Rules. Furthermore, we are mindful that we have not received argument on any of these issues. The consideration that a significant regime has been introduced by primary legislation and how this is to interact with a different species of legal regulation, namely the Immigration Rules, raises a number of questions. The Rules, per section 1(4) of the Immigration Act 1971, are designed to give expression to "the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode". Is there any disharmony between the primary legislation and the Immigration Rules? What is the starting point for Tribunals? What is the correct sequence in the analysis? Are any of the new provisions of the Rules ultra vires the parent legislation? And are the new Rules a complete Article 8 code? If so, how are Tribunals to give effect to the provisions of primary legislation? Are Tribunals not the arbiter of what considerations other than those specified in sections 117B and 117C can permissibly be taken into account, having regard to the language of section 117A(2)? The Tribunal is, after all, the ultimate arbiter of proportionality. The new statutory provisions are replete with exercises in fact finding and evaluative judgment to be performed by tribunals. Furthermore, there may

be conflicting definitions of "foreign criminal": see section 117D(2), paragraph 378 of the Immigration Rules and section 32 of the UK Borders Act 2007. And what is to be done if a person "succeeds" under the 2002 Act, but not the Rules, or vice versa? We would add that this is not intended to be an exhaustive menu.

1. A Shot Across the Bow: JR, Strike Out, Wasted Costs & Pleadings

SN, R (on the application of) v Secretary of State for the Home Department (striking out – principles)(IJR) [2015] UKUT 227 (IAC) (23 April 2015) http://www.bailii.org/uk/cases/UKUT/IAC/2015/227.html

In this case, which had a horrific procedural history, the President gives guidance on striking out applications for Judicial Review. The President also makes a wasted costs order against both solicitors and counsel. Within the judgment there is also practical guidance on the drafting of JR grounds.

(i) Rule 7(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 empowers the Upper Tribunal to take such action as it considers just, which may include striking out a party's case under rule 8, where there has been a failure to comply with a requirement of the rules, a practice direction or a tribunal direction.

(ii) Under rule 8 proceedings are automatically struck out in the event of failure to comply with an order or direction which specifies that non-compliance will attract this sanction, viz an "unless" order. In other cases the power to strike out is discretionary.

(iii) In considering whether to exercise its discretionary strike out power under rule 8, the main factors which the Upper Tribunal will weigh are the interests of the administration of justice; whether there has been a prompt application for relief; whether the failure was intentional; whether there is a good explanation for the failure; the number and importance of multiple failures; whether the failure was caused by the party or his legal representative; whether the trial date will be jeopardised by the grant of relief; the effect on every party of the relevant failure; and the effect on every party of granting relief. Further, the interests of the administration of justice will be weighed and applied.

(iv) In addition, the Tribunal will apply the following principles: public authorities and private litigants are to be treated alike; excessive work burdens will rarely excuse a defaulting solicitor; and the mere factor of a party being unrepresented does not constitute good reason. In asylum and humanitarian protection claims, particular care must be taken to ensure that appeals are not frustrated by a failure on the part of a party's legal representative to comply with time limits.

(v) In considering the exercise of its discretionary strike out power under rule 8, the Tribunal will be mindful of the draconian nature of such orders and will take into account the availability of any other appropriate and adequate sanction such as a wasted costs order under rule 10(3). Repeated defaults will almost invariably be considered more serious than a single act of non-compliance. In every case the Tribunal will consider the question of whether its process is being misused.

(vi) In an application under rule 8(5) to reinstate a struck out case, the main factors to be considered are the reason for the failure which gave rise to the strike out order, whether there has been any undue delay in applying for reinstatement and whether reinstatement would prejudice the other party.

(vii) *The values of efficiency and expedition will be promoted and due observance of the overriding objective will be enhanced by adherence to the principles and standards of pleading rehearsed in [28] – [32].*

(viii) *In judicial review cases, applications to amend so as to enable a new or later decision to be challenged must be made proactively and timeously. Such applications will be determined on their merits and giving effect to the overriding objective.*

…

Pleadings In Judicial Review

29. *Having regard to events in the present case, it is appropriate to emphasise the importance of the written pleading in all judicial review cases. Further, I venture to highlight the main standards and principles to be observed.*

30. *Every application for judicial review consists of four basic, interlocking elements:*

(i) The impugned act or omission of the Respondent.

(ii) The public law grounds on which this is challenged by the Applicant.

(iii) The remedy sought.

(iv) The asserted facts, to include all material documentary evidence and, where appropriate, witness statements.

In the Judicial Review Claim Form (T480) and any attachment each of these elements should be formulated with appropriate clarity and particularity. The pleading should be such that it is possible to identify on a relatively quick perusal the target of the Applicant's challenge, the public law misdemeanour/s said to have been committed by the Respondent, the core elements of the latter and the remedy claimed.

31. *It is good practice, in every case, to list the public law misdemeanour/s said to contaminate the target of the Applicant's challenge in a single paragraph, divided into subparagraphs where appropriate. In this format, the public law misdemeanour/s asserted should be succinctly stated. Next, the author should be satisfied that the grounds as a whole contain adequate particulars and sufficient supporting evidence. A clear distinction must be made at all times between the alleged facts (on the one hand) and the asserted public law misdemeanours, duly particularised (on the other). The claim must be formulated with the duty of candour owed to the court foremost in the minds of the practitioners and litigant.*

32. *Where, for example, it is contended that the impugned decision is unlawful by virtue of having taken into account certain immaterial considerations, these should be succinctly expressed. Ditto where it is contended that there was a failure to take into account some obligatory fact or factor. Where the ground of challenge is illegality, the relevant legal rule or rules in play and the asserted breach or breaches thereof should be crisply expressed. A bare pleading that the impugned decision is unlawful, unreasonable and irrational, or one framed in comparable terms, is never acceptable. The judge should not have to forage, dig and mine in order to identify the essentials of the Applicant's case. The mischief of prolixity is strongly discouraged. Attention should be paid to the overriding objective from the outset of the proceedings*

33. *As regards the Acknowledgement of Service and summary grounds of defence, the main duty imposed upon the Respondent in every case can be encapsulated in a sentence. These must always be framed so as to convey clearly and with sufficient particularity the grounds upon which it is contended that the Applicant's case should not succeed. Care must be taken to ensure that, in the discharge of the Respondent's duty of candour to the court, all relevant documentary evidence is provided. Increasingly, this may include the paper form or manifestation of electronic or on line materials which are not routinely generated in decision making processes or for hard/paper filing purposes but are capable of being reproduced from computer systems.*

34. *I would highlight one particular feature of asylum and immigration cases, familiar to all. It is not uncommon that a decision is followed by a later decision. This frequently alters the target, as the later decision often supersedes the first. In some contexts, there may be several successive decisions. In some cases, this phenomenon occurs subsequent to the initiation of judicial review proceedings. In these circumstances, the Applicant's representatives must always be alert to the consequences of such developments and, in particular, the need to seek amendment of the judicial review application in appropriate cases. I would caution that the perpetuation of a challenge to a superseded, historic decision is rarely appropriate.*

35. *Where amendment is pursued, it normally takes the form of substituting the later decision as the new target of the Applicant's challenge. Amendment of the grounds will also be necessary, to reflect the advent of this new fact and to incorporate any appropriate additional facts. Furthermore, there will inevitably be supplementary evidence in the form of the new decision and, possibly, other materials, such as correspondence and written representations bearing on the new decision made. The Respondent's consent to amend and the Court's permission to amend must be sought proactively and timeously in every case. It should only rarely be necessary to convene an interlocutory or case management hearing for this purpose.*

36. *The Upper Tribunal recognises that, in the real world of contemporary litigation, events and developments such as those described above may render compliance with directions difficult or impossible to achieve. Where this occurs, the Respondent's consent to and the Tribunal's authorisation of a revised timetable should be sought proactively and timeously. Inertia will be unacceptable.*

37. *It is appropriate to add that, whatever the reasons and circumstances, the outcome of an application to amend a judicial review claim should never be taken for granted by the moving party. Every such application will be considered and determined on its particular merits and giving effect to the overriding objective. I refer to the decisions in R v SSHD, ex parte*

Turgut [2001] 1 All ER 719, Schiemann LJ considered that where the Respondent is given permission to adduce evidence that a new decision has been made, it will generally be convenient to substitute the subsequent decision as the target of the Applicant's challenge. However, in that case, the new decision of the Respondent was based on evidence filed by the Claimant in the proceedings and it simply reaffirmed the original decision. This issue was considered more fully in Rathakrishnan [2011] EWHC 1406 (Admin)where, following a successful renewed application for permission, the Secretary of State withdrew the decision under challenge and made a fresh decision purporting to address the issues stimulating the grant of permission, together with some further evidence. In refusing the Claimant's application to amend in order to challenge the fresh decision, Ouseley J confined the decision in Turgut, stating at [9]:

> *"It would be a wholly exceptional case in which a Claimant could postpone the effective quashing of the decision which he sought to have quashed in order that he might at some later stage bring a different challenge in respect of a different decision based on different evidence without having to go through the necessary applications including the payment of fees for the purpose of challenging that further decision and should thereby evade the filter mechanism and simply take his place on a seemingly adjourned renewal application ……..*
>
> *It is too often that these cases have come before the Court at a point where the hearing is no more than an interruption in the process of the exchange of correspondence between the Secretary of State and the Claimant. This makes for a wholly unsatisfactory process of litigation."*

While the Court of Appeal decision in R v SSHD, ex parte Al Abi [1997] WL 11059, may suggest a more laissez-faire approach, my analysis of it is that it does not have the status of binding precedent. Furthermore, in any event it belongs to an earlier era, preceding the major civil justice reforms and the advent of the overriding objective. Finally, as the above passage makes clear, while every claimant is under a duty to initiate proceedings promptly, the improper invocation, that is to say misuse, of the process of the Upper Tribunal must be studiously avoided.

See also: Sultana, R (on the application of) v Secretary of State for the Home Department (mandatory order – basic principles) (IJR) [2015] UKUT 226 (IAC) (20 April 2015)
http://www.bailii.org/uk/cases/UKUT/IAC/2015/226.html

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