HJT | TRAINING PROFESSIONALS

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Section 1: Developments and new legislation

Appeals

Important provisions of the **Immigration Act 2016** were brought into force on 1st December 2016, in particular the extension of the 'deport first, appeal later' power in **s.94B Nationality, Immigration and Asylum Act 2002**, which enables the Secretary of State to certify human rights claims by deportees, to a 'remove first, appeal later' power, which enables her to certify claims by overstayers and illegal entrants.

But this power to compel human rights appeals to be instigated from abroad, with the appellant unable to appear in person before the Tribunal, has received a severe setback from the Supreme Court in ***Kiarie & Byndloss* [2017] UKSC 42**., which found that, at present, there are almost insurmountable obstacles to the effective presentation of such an appeal from abroad. Although the Court was dealing specifically with deportees whose human rights claims had been certified, Lord Wilson made it clear that the same considerations apply to overstayers and others who are facing removal.

The argument against having to appeal from abroad is rather less cogent, however, if the claim has been certified as '*clearly unfounded*' under **s.94** rather than because removal would not be contrary to the Human Rights Convention under **s.94B**. An important strand in the Supreme Court's reasoning is that a claim which has not been certified as clearly unfounded must be an arguable claim, and that someone with an arguable claim should be given a proper opportunity to vindicate that claim on appeal.

As usual, citizens of the European Union are treated more favourably than people from the rest of the world. Unlike other "foreign criminals", EEA nationals are entitled to attend the hearing of their appeals in person, even if they have been removed from the UK. **Reg. 41** of the **Immigration (European Economic Area) Regulations 2016** (formerly **reg. 29AA** of the **2006 Regulations**) stipulates that they must be granted temporary admission to submit their case in person to the Tribunal, unless their "*appearance may cause serious troubles to public policy or public security*." It has been clarified in ***Gabor (Reg 29AA: interpretation)* [2017] UKUT 287 (IAC)** that 'appearance' means the appellant's presence in the UK.

In the wake of the **European Union (Withdrawal) Bill**, formerly known by the grander but inaccurate title of the Great Repeal Bill, another Immigration Bill is to be introduced. Perhaps the Government will take the opportunity to counteract this ruling from the Supreme Court by trying some other means than certification for ensuring that most human rights appeals have to be lodged from overseas. Certification can always be challenged by way of judicial review. But it is hard to think of a substitute that would be immune to challenge in the courts.

Bank accounts

In the meantime, the 'hostile environment' for people residing here without leave is getting more hostile. Under **s.40 Immigration Act 2014**, banks and building societies must not open a current account without first running a '*status check*' on the potential customer, to ensure that he is not a '*disqualified person*', i.e. someone who requires leave to enter or remain, but does not have it. Under **ss 40A-H**, inserted by the **Immigration Act 2016**, banks and building societies are further required to run '*immigration checks*' on all their existing current

accounts, and if they believe any of their customers to be '*disqualified persons*', they must notify the Secretary of State, who may then apply to a court of summary jurisdiction for a '*freezing order*'. Even if the account is not frozen, the bank or building society must nevertheless close the account if the Secretary of State confirms that the account holder is indeed a disqualified person.

These provisions will come into force in January 2018, and will affect all those migrants whose names appear on the list of disqualified persons supplied to banks by the Home Office via '*a specified anti-fraud organisation or a specified data-matching authority*'. It is likely that some of those on the list should not be on it, because they do have leave to remain. Others, who do not have leave, will be pursuing appeals or judicial reviews, but will find it harder to remain in the UK in order to do so.

Reporting conditions

After previously outsourcing the task to Capita plc, which misinformed many people that they had to leave the UK because they had no valid visa, the Home Office has now got its own teams working in Sheffield as part of **Immigration Enforcement** to trace and contact migrants who are here without leave. Where the Home Office has a phone number for them, those migrants will be telephoned by caseworkers at the **National Removals Command** to confirm their correspondence address. An **IS.96** notice will then be posted to that address, informing the recipient that he is liable to be detained, but granting him temporary admission, subject to reporting restrictions. (**Schedule 10 Immigration Act 2016**, replacing temporary admission with '*immigration bail*', is not yet in force.)

The covering letter tells the recipient that his "*first reporting event*" will be an opportunity to inform the Home Office why he cannot return to his own country, and will also enable the Home Office "*to ask questions regarding your personal and domestic situation*." Migrants often attend their first reporting event with considerable apprehension, fearing that they will be detained, but this does not usually happen. Nor, indeed, are they usually asked anything at all about their personal and domestic situation, or why they cannot go home.

But of course some migrants do get detained when they go to 'sign on'. This may happen after they have been signing on for weeks without any bother and have been lulled, as it were, into a false sense of security. They will be even more surprised to be told that **removal directions** have been set for the next day, or shortly thereafter.

They will have had some warning about this, however, as they should also have been served with a **RED.0001** form which tells them –

> "You will not be removed for the first seven calendar days after you receive this notice [*this is known as the 'notice period', which gives them an opportunity to challenge their removal*]. Following the end of this seven day period, and for up to three months from the date of this notice, you may be removed without further notice [*this is known as the 'removal window'. If removal has not been effected during those three months, the process has to start again.*]."

Can anything be done to prevent the removal? The obvious thing is to make an urgent application to the Upper Tribunal for an injunction, but that may not work. What <u>will</u> work is an indication that the detainee wishes to claim asylum or humanitarian protection, but it is not such a good idea in the long run. Unless the detainee does have a genuine fear of suffering

serious harm on return, the claim will be refused and certified as '*clearly unfounded*'. Any future application to come back to the United Kingdom is then likely to be refused under **para 320(11)** of the Immigration Rules, which includes "*making frivolous applications*" as one of the "*aggravating circumstances*" that cause an application for entry clearance or leave to enter to be refused – normally, at any rate.

If you try to avoid all that by not signing on at Lunar House or wherever when you are told to, that will not do you any good in the long run either. Not meeting "**reporting restrictions**" is another aggravating circumstance that may well stop you from getting back to the UK in future.

Section 2 : British Citizenship

Registration

There are several ways in which minors have an entitlement under the **British Nationality Act 1981** to register as British citizens, apart from the general discretion invested in the Home Secretary under **s.3(1)** to register any child whom she thinks fit. One such is set out at **para 3** of **Schedule 2** to the 1981 Act, which entitles a person born in the United Kingdom to be registered as a British citizen if he applies before he has reached the age of 22, if he has always been stateless, and if he has been absent from the UK for no more than 450 days during the five years ending with the date of his application to be registered.

In ***MK* [2017] EWHC 1365 (Admin)** a girl who was born here to Indian parents and had lived here for 5½ years applied for registration. The application was refused, and a claim for judicial review was transferred from the Upper Tribunal to the High Court (nationality is one of the matters that have not been delegated to the Upper Tribunal, but reserved for the High Court).

The Court accepted the Home Secretary's evidence that a child born outside India to Indian parents is entitled to Indian citizenship, which may be secured by registration at an Indian consulate. (Compare this with children born overseas to a parent who is British otherwise than by descent – they are British automatically, without needing to be registered. But if the parent is British by descent, the children do have to be registered.)

The child's entitlement to register as an Indian citizen was not determinative, however. The Court adopted the definition of statelessness given by the **Convention relating to the Status of Stateless Persons 1954**, under which a "*stateless person*" is a person who is not considered a national by any state under the operation of its law. This was the definition of statelessness adopted by the Supreme Court in ***Al-Jeddah* [2013] UKSC 62** and ***Pham* [2015] UKSC 19**, both of which were concerned with deprivation of British citizenship under **s.40 BNA 1981**. Their Lordships held that a person is a stateless person for the purposes of the 1954 Convention if at the present time he has no nationality. The fact that he can acquire a different nationality if he applies for it does not affect his entitlement to British nationality while he remains stateless. So this Indian child is entitled to registration under the **BNA 1981**.

Deprivation

A person can be deprived of British citizenship under **s.40 British Nationality Act 1981**, but can appeal against deprivation under **s.40A**. In ***Deliallisi (British citizenship: deprivation appeal: scope)* [2013] UKUT 439 (IAC)** the Upper Tribunal held that, in assessing the proportionality of deprivation, European Union law must be involved, because deprivation of British citizenship entails loss of Union citizenship as well. This finding was reached *per incuriam*, as noted now in ***AB (British citizenship: deprivation: Deliallisi considered) Nigeria* [2016] UKUT 451 (IAC)**. In the earlier case, the Upper Tribunal had not referred to ***G1 v SSHD* [2012] EWCA Civ 867**, in which Laws LJ explained that European law would only be applicable if there was a '*cross-border element*', i.e. if the British citizen had exercised Treaty rights in another Member State.

But ***Deliallisi*** followed the existing case law in holding that an appeal against deprivation is a full appeal on the merits, in which the appellate body can decide that the discretion to deprive should have been exercised differently. This principle has been confirmed in ***Al-Jedda*** **[2013] UKSC 62**, namely that an appeal against the decision to deprive a person of citizenship status is not confined to whether the Secretary of State had reason to be satisfied of the matters on which she relies under **s.40**, bur requires the appellate body to be satisfied, for example, that the person actually did obtain citizenship by deception or that deprivation actually would be conducive to the public good.

In ***AB***, the Tribunal held that the reasonably foreseeable consequences of deprivation had to be considered. If the appellant had a strong human rights case against removal, it was less likely that removal would be effected, and hence the consequences of deprivation would be less severe. That was relevant to the assessment of whether deprivation would be disproportionate.

Contrary to the foregoing, the head note in the more recent case of ***Pirzada (Deprivation of citizenship: general principles)*** **[2017] UKUT 196 (IAC)** contains a rather surprising description of the Tribunal's powers when the Secretary of State is satisfied under **s.40(2) BNA 1981** that deprivation is conducive to the public good, or is satisfied under **s.40(3)** that registration or naturalisation was obtained by means of fraud, false representation or concealment of a material fact:-

> "There is no suggestion that a Tribunal has the power to consider whether it is satisfied of any of the matters set out in sub-ss (2) or (3); nor is there any suggestion that the Tribunal can itself exercise the Secretary of State's discretion."

These propositions flatly contradict ***Dellialisi*** and ***AB***, and indeed earlier cases on deprivation, such as ***Arusha & Demushi*** **[2012] UKUT 80 (IAC)**, which hold that the ambit of an appeal under **s.40A** is very wide, such that the Tribunal can decide for itself whether, for example, the appellant did in fact obtain citizenship by deception and, even if he did, whether the discretion to deprive him of that citizenship should have been exercised differently. The body of the determination in ***Pirzada*** contains no discussion from which the above passage in the head note could have been derived, and indeed the facts of the case would not seem to give rise to it.

There is perhaps some support for the ***Pirzada*** stance in ***Ahmed & ors (deprivation of citizenship)*** **[2017] UKUT 118 (IAC)**. Following the scandal in Rochdale and Oldham, where men of Pakistani origin had groomed and exploited teenage girls, the Home Secretary wanted to deprive the perpetrators of their citizenship, being satisfied under **s.40(2)** that deprivation was "*conducive to the public good*." On appeal, McCloskey P considered that this conclusion –

> "was reasonably open to her. This is <u>not</u> a question of fact. Rather, as the word '*satisfied*' indicates, it is a matter of evaluative judgment on the part of the Secretary of State."

The Home Secretary's decision could not be impugned, said the President, on grounds such as irrationality or failure to take account of material factors. He did not suggest that the Tribunal could substitute its own view of what was conducive to the public good for that of the Secretary of State.

Perhaps that limitation is confined to deprivation on '*conducive*' grounds. In the more recent case of ***Sleiman (deprivation of citizenship; conduct)*** **[2017] UKUT 367 (IAC)**, an asylum seeker pretended to be an unaccompanied minor, giving a date of birth nearly two years later than the true date. He was granted discretionary leave to remain ('**DLR**') and eventually, under the 'Legacy' programme, indefinite leave, leading to naturalisation. Then the deception about his true age came to light, and the Secretary of State sought to deprive him of citizenship under **s.40(3)** on the ground that it "*was obtained by means of fraud*."

UTJ Kopieczek focused on the phrase "*by means of*". A Home Office file note stated that the appellant was granted ILR under the Legacy programme because the application which he made on expiry of his DLR had been outstanding for so many years. "*The subject's age was irrelevant*", it added. Also, the Home Office's **Nationality Instructions** state at **55.7.3** –

> "If the fraud, false representation or concealment of a material fact did not have a direct bearing on the grant of citizenship, it will not be appropriate to pursue deprivation action."

In the present case, the Upper Tribunal held that the appellant's initial lie about his age did not have a "*direct bearing*" on the grant of citizenship, and that there was not such a direct link between the initial deception and the grant as to establish that naturalisation was obtained "*by means of*" fraud. So the appeal was allowed.

Although a considerable number of cases are cited in the course of the judgment, ***Pirzada*** is not among them. Perhaps ***Sleiman*** occupies a position half way between ***Pirzada*** and the ***Arusha & Demushi*** line of cases. The judge disagreed with the Secretary of State that citizenship had been obtained by means of fraud. But in reaching that conclusion, he relied on the Secretary of State's own Nationality Instructions.

Becoming British by birth

A child who is born in the United Kingdom to a father who is British or settled will automatically be British "*otherwise than by descent*", regardless of the mother's status and regardless (since 2006) of whether the father is married to the mother. But the Home Office believes that many children have been wrongly issued with British passports because their mothers, who are here unlawfully, have incorrectly named a British citizen as their father on the birth certificate, in order to enhance the prospects (for both mother and baby) of staying in the UK. So birth certificates are no longer sufficient evidence of paternity. DNA tests are being requested, to put paternity beyond doubt, before a British passport will be issued.

What happens if British citizenship has already been attributed to someone in error? Home Office practice has been, where someone has been wrongly recognised as a British citizen, to maintain that recognition if discretion could have been exercised to make him a citizen, e.g. by registration while a minor under **s.3(1) BNA 1981**. If it turns out that they were fathered by somebody else, who was not British, they are unlikely to be deprived of their citizenship if they have already got it.

Section 3: The Bureaucracy of Immigration Control

Entry clearance

Citizens of Kuwait, Qatar, the United Arab Emirates and Oman can buy an **electronic visa waiver** ('EVW') with which to travel to the UK, if they are coming for a visit of up to six months. It only costs £15, whereas a visit visa costs £89. For non-visa nationals coming to the UK for short periods of up to six months, the Home Office will be introducing an **electronic travel authority** ('ETA') to screen out passengers who may be refused entry on arrival. Passengers who are refused an ETA will then have to apply for a visa if they still want to come to the UK. They will be told why they were refused, so that they can address the issue in their visa application.

The ETA will, the Home Office admits, be largely "*a security product*". It is not aimed at speeding up entry or avoiding queues at the airport, unlike the **Registered Traveller Service**. People from a small number of developed nations outside Europe can join this scheme for a membership fee of £70, which entitles them to use the UK and EU passenger lanes and – if their passport has a 'chip' – the **ePassport** gate. They are also excused from filling in a landing card.

Increasingly, applications for entry clearance are being processed in Sheffield if they will be included in the net migration figures, e.g. applications for family reunion or under the Points Based System. But even applications for visit visas will be transferred there from some British posts, such as our Consulate-General in New York. Documents in support of the application, along with a print-off of the Visa Application Form (which will have been completed online) have to be taken to a local **Visa Application Centre** ('VAC') or **Application Support Centre** ('ASC'), run by a commercial partner such as Visa Facilitation Services ('VFS') or TLScontacts.

But in some countries, like the United States and New Zealand, the documents are now scanned from the ASC or VAC to Sheffield, rather than being posted there, and are then handed back to the applicants. In the USA the applicant's passport is handed back to him, but has to be taken again to the ASC if the application is successful and the passport needs to be endorsed. Arrangements vary from country to country. So, for example, in India applicants for a Tier 2 or Tier 4 visa used to get their documents scanned at the VAC and returned to them straight away, but now they have to be sent in the old-fashioned way to the **Visa Processing Centre**, from where they will be returned to the VAC along with the applicant's passport (endorsed if successful) once the application is decided.

Application fees

Overseas applicants who want to make enquiries from UKVI, or want to check the progress of their applications, must now do so by e-mail, at a cost of £5.48. The **International Contact Centre** service has been outsourced to a single supplier (formerly there were two) called Sitel UK, and is complemented by in-house UKVI teams who deal with escalations and queries. The Home Office would prefer people to find out for themselves, and wants to

"*encourage customers to self-serve using free to use digital channels such as www.gov.uk, which offers extensive information to prospective visa applicants.*"

This arrangement has come in for much criticism from ILPA, as the fees for visa applications, and indeed for leave to remain, now greatly exceed the unit costs to the Home Office on most routes. Some eye-watering examples for the year from 6th April 2017 are –

- Entry clearance with a view to settlement as a partner or child: £1,464
- Entry clearance as an adult dependent relative: £3,250
- Leave to remain in the UK on private or family life grounds: £993
- Indefinite leave to remain: £2,297
- Naturalisation: £1,282
- Registration as a minor under the British Nationality Act: £973

Some applicants accompany their application not with the fee, but with a request for the fee to be waived because they cannot afford it. If the Home Office is not minded to waive the fee, the application is simply rejected as invalid there and then, it being assumed that no money would be forthcoming if the applicant were given more time to pay it. People with discretionary leave outside the Rules are not entitled to benefits and, if they are working at all, are likely to be in low-paid jobs. They often have great difficulty scraping together the fee (£993 for each applicant in a family) when applying for an extension of their discretionary leave on the ten-year route, and may drop off the route simply for lack of funds.

For the great majority of applications, the fees are well above what it costs the Home Office to process the application. For example, entry clearance on the route to settlement as a family member costs £1,464, which is 3.5 times the processing cost, while the fee for indefinite leave to enter as an adult dependent relative is £3,250, nearly eight times the processing cost. The Home Office justifies these high fees because they "*help the Government reduce costs and ensure those who benefit directly from the UK immigration system make an appropriate contribution.*" The aim is to make the whole immigration system self-financing, so the annual **Immigration and Nationality (Fees) Order** will no doubt contain substantial increases for years to come.

Assisted applications

Given the above, it is nice to know that UKVI offers something for free, namely a UK-wide **Assisted Digital** service to support customers who need digital help to complete their application forms online. This support can be obtained in any of three ways –

- An advisor from **Migrant Help UK** can assist you over the telephone.
- You can go to certain public libraries, where a member of staff will help you to access and complete the form.
- A tutor from **We Are Digital** can visit you at your home, to help you complete the form.

This may be bad news for immigration lawyers, who are often paid to help people with their application forms!

NHS charges

On the other hand, the **National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017** extend charging from hospital treatment to secondary care outside hospital settings, save for GP surgeries and some other exceptions. Hospitals themselves will be under a legal duty to check whether potential patients are overseas visitors or irregular migrants, in which case they will have to pay an estimated bill up-front before they receive any treatment, unless it is "*urgent*" or "*immediately necessary*".

Consequently, apart from people who turn up at Accident & Emergency, everyone who wants to book in for an operation, or for the birth of a child, and so forth, will be asked to prove that they are entitled to free treatment, and are not "*health tourists*". But apparently they will just be asked whether they have been living in the UK for more than six months, rather than having to provide documentary evidence of their immigration status. So there may not be a tremendous boost to NHS revenues after all!

Detention

After much criticism of detention under the Immigration Acts, particularly in a report by **Stephen Shaw** on the welfare in detention of vulnerable persons, a new post of '**Detention Gatekeeper**' has been introduced. His job is to scrutinise all proposed detentions independently of the arresting team. People can now only enter immigration detention with the authority of the Detention Gatekeeper, who will ensure that –

- there is no evidence of vulnerability that would be exacerbated by the detention;
- return will take place within a reasonable time; and
- any proposed detention is lawful.

In a recent judgment Mr Justice Ouseley, a former President of the Immigration Appeal Tribunal, has found that one particular group of vulnerable people had indeed been detained unlawfully by the Home Office. This group comprises people who have been tortured by '*non-state actors*'. Previously, Home Office policy was not to detain irregular migrants if there was medical evidence that they had been tortured. Then the policy was changed, so that only people who had been tortured by '*state agents*' (army, police, etc.) would be exempt from detention. Victims of torture by rebel groups, criminal gangs and so forth could henceforth be detained. In light of the High Court ruling, it is likely that many such victims will be seeking damages from the Home Office for unlawful detention.

Separately, '**Case Progression Panels**' have been introduced, so that all cases within immigration detention will be reviewed by a peer-led panel. These panels focus on ensuring that there is progression towards return for all detainees, and that their detention remains lawful. Of course, return to their own country is the last thing that many detainees want, and they make strenuous efforts to be allowed to stay. Detention becomes unlawful if there is no prospect of return being effected within a reasonable time.

A criticism of both the Detention Gatekeeper and the Case Progression Panels is that they rely for their information entirely on the Home Office caseworkers dealing with the (potential) detainees. There is no input from the detainees themselves or their representatives.

Detainees can be granted **temporary release** ('T/R') subject to restrictions such as reporting, or, during the first eight days after being detained, they can apply to a Chief Immigration Officer for **bail**. After those eight days, bail would have to be authorised by the Secretary of State. If bail is refused – or indeed without going through that stage – an application for bail can be made to the First-tier Tribunal. This used to be much faster, as the target for listing a bail hearing was three days, whereas it can take weeks for an application to the Chief Immigration Officer to be decided. Unfortunately, bail hearings at Immigration Removal Centres can now take two to three weeks.

No matter who is being asked to grant the bail, it will be subject to conditions as to residence and reporting similar to those imposed on people who are granted T/R, or who are granted **temporary admission** ('T/A') without having been detained in the first place. The difference with bail is that two **sureties** will also normally be required, who must be willing to forfeit a sum of money (a **recognizance**) if the person on bail absconds.

It should be noted that the provisions of the **Immigration Act 2016** which confusingly replace temporary admission and temporary release with '**immigration bail**' are not yet in force.

As for the removal of detainees, this will not take place while a statutory appeal is pending which has not been certified under **s.94** or **s.94B** of the **2002 Act**. What about cases where there is no right of appeal, and a judicial review claim has been lodged instead? That may also prevent removal, although there is a list of situations in which removal might go ahead anyway, to be found at **Chapter 60** of the **Enforcement Instructions and Guidance** for Home Office caseworkers.

But if an application for permission to seek judicial review has been refused by the Upper Tribunal 'on the papers' and has been refused again on oral renewal, an appeal to the Court of Appeal will, in the Home Office view, be no barrier at all to removal, and it will not avail the detainee to complain that he has a JR claim pending before the Court of Appeal. The authority for this is ***R (app. Ben Pharis) v SSHD*** **[2004] EWCA Civ 654**, which insists that the lodging of a notice of appeal with the Court of Appeal does not confer immunity to removal, and that an express application for a stay of removal must be placed before a judge of that court.

Section 4: European Free Movement

The Immigration (European Economic Area) Regulations 2016

These new regulations replaced the **2006 Regulations** from (mostly) 1st February 2017. The most significant differences are discussed below, along with some case law.

Reg. 2 "General interpretation"

Marriage
This regulation gives definitions for the first time of '*marriage of convenience*', '*civil partnership of convenience*' and even '*durable relationship of convenience*'. The Home Office normally expects a durable relationship to be established by two years' cohabitation. It might not be very convenient to have to live for two years with someone one does not really like, in order to obtain a residence card!

For the purposes of the Regulations, a 'marriage of convenience' is one entered into for the purpose of circumventing the immigration rules that would otherwise apply to non-EEA nationals, such as needing to be in the UK lawfully in order to get leave to remain as a spouse. In ***Sadovska & anr*** **[2017] UKSC 54** a Pakistani overstayer wanted to marry a Lithuanian woman who had been exercising Treaty rights long enough to acquire the right to reside permanently in the UK. The couple duly booked an appointment at the register office, but when they went there on their wedding day immigration officers were waiting for them. The bride and groom were interviewed separately, and as a result of discrepancies in their interviews they were accused of trying to enter into a marriage of convenience. The man was detained with a view to removal as an overstayer, while the woman was told that she too would be removed for abuse of Community rights.

That is quite a common scenario, as the Home Office is very suspicious when non-EEA nationals who are here unlawfully want to enter into a marriage that will entitle them to a residence card. A right of appeal to the First-tier Tribunal affords an opportunity for such a couple to demonstrate that their proposed marriage is <u>not</u> one of convenience – or so the judge thought in the instant case, when he dismissed the appeal. It was not until the appeal had worked its way through the system as far as the Supreme Court that Lady Hale explained that the burden is on the Secretary of State to prove that a marriage <u>is</u> one of convenience, not on the appellant to prove that it is <u>not</u> one of convenience.

The same principle had already been enunciated in two Court of Appeal cases (***Rosa*** and ***Agho***), although neither of them is mentioned in Lady Hale's fairly brief judgment. Her Ladyship added that for a marriage to be one of convenience it must be the predominant purpose of <u>both</u> parties to gain an immigration advantage for one of them. So if the non-EEA national is only doing it in order to get a residence card, but the EEA national is really in love and wants a lasting relationship, then the Secretary of State will not have discharged the onus of proof.

Nevertheless, 'third country nationals' who hope to get a residence card based on their marriage to a 'qualified person' are very likely to be invited, along with their spouse, to an interview (often in Liverpool) at which the genuineness of the relationship can be tested. It is even happening to third country nationals who were issued with a five-year residence card on

the basis of marriage and have now applied for a permanent residence card. If they are now estranged from their EEA national spouse, they may be summoned to an interview (along with their spouse, who might not be supportive of the application) to establish whether the marriage was one of convenience from the outset.

Right of appeal

Strikingly, an '*EEA decision*' giving rise to a right of appeal no longer includes the refusal of a family permit, a registration certificate or a residence card to an 'extended family member'. This is in keeping with the unexpected decision of a Vice-Presidential panel of the Upper Tribunal in ***Sala (EFMs : Right of Appeal)*** **[2016] UKUT 411 (IAC)** that extended family members cannot appeal against the refusal of such a document, although the Home Office and the Tribunal itself had always assumed that they could. The Regulations define an '*EEA decision*' to include a decision that concerns a person's '*entitlement*' to be issued with residence documentation. But an extended family member is not entitled to be issued with a residence document. The Secretary of State has a discretion under **reg.18** (formerly **reg.17**) to issue a residence card, but is not obliged to. Therefore a decision not to issue a residence card to an extended family member is not an '*EEA decision*' carrying a right of appeal.

The question whether that interpretation is correct has been referred by McCloskey P to the CJEU for a preliminary ruling under **Article 267 TFEU** in ***Banger (Unmarried Partner of British National)*** **[2017] UKUT 125 (IAC)**, a case which also raises several other questions for the European Court (see also **reg.9**). Since then, ***Sala*** itself has been overturned by the Court of Appeal (Etherton MR, Longmore and Irwin LJJ), with the result that many people who applied unsuccessfully for residence cards under the **2006 Regulations** and were told that they had no right of appeal against the refusal will be able to bring appeals after all.

This judgment does not, however, extend to applications made by extended family members under the **2016 Regulations**. In these, the Home Office, which had argued before the Upper Tribunal that extended family members do have a right of appeal, gratefully adopted the Vice-Presidential view that they do not, and specifically excluded the refusal of documentation to extended family members from the definition of '*EEA decision*'. It is one thing for the Court of Appeal to disagree with the Upper Tribunal's interpretation of the old Regulations, which did not expressly say that extended family members were excluded. Now that there is express provision for this in the new Regulations, any further challenge will have to be based on the argument that it is contrary to EU law to deny extended family members a right of appeal.

Reg. 8 "Extended family member"

The unmarried partner of an EEA national is treated as an 'extended family member', provided the couple are in a "*durable relationship*". Otherwise, to be an 'extended family member' of an EEA national, a person must be dependent upon the EEA national, or a member of his household, before coming to the United Kingdom. Under the **2006 Regulations**, the relationship could be through either blood or marriage, an extended family member being defined as "*a relative of an EEA national, his spouse or his civil partner*". But in the **2016 Regulations**, this has become simply "*a relative of an EEA national*".

What this means is that in-laws can go longer use this route to gain residence in the UK. Thus, a Union citizen will be able to sponsor her own brother, if he has been dependent on her and is not exercising Treaty rights himself in the UK. But she will no longer be able to sponsor her third-country national husband's brother, even if her brother-in-law has been dependent on her or a member of her household overseas. **Article 3.2** of the **Citizens Directive** enjoins Member States to facilitate the entry and residence of "*other family members*" who do not fall within **Art 2** (i.e. 'direct' family members), but does not define how widely that term should be understood. So it seems that the Home Office is not in breach of European law by excluding in-laws.

Unfortunately, the guidance notes for form **EEA (EFM)** on the GOV.UK website are still **Version 2.0** of December 2015, and tell the reader that relatives of the spouse or civil partner of an EEA national can apply. The form itself explains that such relatives can only apply if they already had EEA documentation before February 2017, but some applicants, particularly if filling in the form by themselves, and relying on the Home Office guidance, may not realise that their application is bound to be rejected.

This applies also to a relative who "*on serious health grounds, strictly requires the personal care of the EEA national*." The **2006 Regulations** said that the personal care could be provided instead by the spouse or civil partner of the EEA national, but this was actually more generous than the **Citizens Directive**, and has now been dropped.

Reg. 9 "Family members of British citizens"

This regulation embodies the ***Surinder Singh*** principle that where a Union citizen exercises Treaty rights in another Member State, and lives there with his spouse or civil partner who is not a Union citizen, the couple can take advantage of EU law when the Union citizen moves back to his own State. If that State is the United Kingdom, the spouse will not be subject to British immigration rules such as getting entry clearance and meeting a minimum income requirement.

The **2006 Regulations** only covered British citizens who were residing in another EEA State as workers or self-employed persons, but in line with the ruling by the Court of Justice in ***O & B*** **[2014] C- 456/12**, students and the self-sufficient are now included as well. There is a new requirement, however, for the residence of the British citizen and his family member in the host State to be "*genuine*". Factors relevant to determining whether this residence was genuine include –

(a) whether the centre of the British citizen's life transferred to the EEA State (in the earlier regulation, this was actually the principal requirement, rather than whether the residence was genuine);
(b) the length of the couple's joint residence in the host State (previously, it was just the length of the British citizen's residence);
(c) the nature and quality of the couple's accommodation (this was not a factor before), and whether this was the British citizen's principal residence;
(d) the degree of integration of <u>both</u> the British citizen <u>and</u> the family member in the EEA State (previously, it was just the British citizen);
(e) "*whether F's first lawful residence in the EU with BC was in the EEA State*."

The initials 'F' and 'BC' in the new **reg. 9** stand for 'family member' and 'British citizen'. (Much use is made of such initials in the **2016 Regulations**.) The question in (e) is new, and it is hard to see what difference the answer to it would make to determining whether the family member's residence in the EEA State was genuine. There also seems to be confusion between the EEA and the EU, which are not the same. If Norway was the EEA State in which F and BC had resided, and F had never resided in any other EEA State, then F would never have resided in the EU at all, lawfully or otherwise!

Applications for residence cards by family members who have resided with their British sponsor in another Member State have often been refused on the basis that the whole point of living abroad for a while was to circumvent our domestic immigration laws. In ***Akrich* [2004] Case C-109/01**, however, the Court of Justice held that the motive for exercising Treaty rights is irrelevant, and should not be used to deny the advantages flowing from free movement.

It is also made explicit in the new **reg. 9** that an extended family member cannot take advantage of a British citizen's free movement, but only 'direct' family members as listed in **reg. 7**. The question whether this is correct has been referred by the Upper Tribunal to the Court of Justice of the European Union in ***Banger*** (see also **reg. 2**).

Overall, the changes to this regulation are calculated to make it harder for British citizens to take advantage of European law in order to gain rights of residence for their family members. Unlike the rest of the **2016 Regulations**, which came into effect on 1st February 2017, the criteria in the new **reg. 9** have been applied to all decisions made on ***Surinder Singh*** applications since 25th November 2016. The Home Office was keen to tighten up this route as quickly as possible.

There is certainly evidence that the ***Surinder Singh*** route is being abused. An *exposé* by the Radio 4 programme 'File on Four' in January 2017 revealed an expensive but almost foolproof scam whereby people could be set up with a job, a house, a bank account and so forth in the Republic of Ireland, while continuing to live and work in the United Kingdom. In due course they were able to prove that they had transferred the centre of their lives to another Member State for long enough to enable their spouses to be issued with a family permit under the **EEA Regulations**. Home Office caseworkers are now particularly suspicious of applications from the spouses of people who claim to have lived and worked in Ireland!

Reg. 16 "Derivative right to reside"

Incorporating the ***Zambrano*** principle, this was previously reg. 15A, with the title "**derivative right of residence**". Another minor change is that the business about someone not being able to reside in the UK if someone else "*were required to leave*" has now become "*if the person left the United Kingdom for an indefinite period*." On the other hand, a primary carer can bring in a British child who has been residing outside the EU, and then they can both stay here : see **reg.11(5)(e)** and ***MA & SM (Zambrano: EU children outside EU) Iran* [2013] UKUT 380 (IAC)**.

The recent judgment of the CJEU in ***Chavez-Vilchez & ors*** (**Case C-133/15)** will make it rather easier for the third country national parent of a British child to acquire a derivative

right even if the other (British) parent is able and willing to take on the role of primary carer. The crucial thing, the Court stresses, is the relationship of dependency between the non-EU parent and the child. If it is so strong that the child really will leave if the parent has to go, the availability of the other parent will not be determinative.

The Home Office view has been that if the other parent has a right to reside in the United Kingdom, then there is no need for the child to leave, even if that parent says he is not able and willing to look after the child. If the British citizen is an adult rather than a child, it is even harder to persuade the Home Office and the Tribunal that the departure of the carer will force that citizen move to a country where the welfare provision and medical facilities may be greatly inferior to those in the UK. As UTJ Jordan observes in ***Ayinde & Thinjom (Carers – Reg.15A – Zambrano)*** **[2015] UKUT 560 (IAC)**, "*elderly adults can more readily survive without a family member to act as their carer if there are adequate support mechanisms in existence to provide them with alternative care to an appropriate standard*." The headnote reads :

> "The Tribunal is required to examine critically a claim that a British citizen will leave the Union if the benefits he currently receives by remaining in the United Kingdom are unlikely to be matched in the country in which he claims he will be forced to settle."

Reg. 17 "Issue of registration certificate"

Formerly reg.16, the new version makes it explicit for the first time that a registration certificate ceases to be valid if the holder ceases to have a right to reside under the **EEA Regulations**, and was invalid *ab initio* if the holder turns out never to have had such a right in the first place. Many Union citizens assume, wrongly, that their registration certificate, issued for five years, is proof that they are entitled to reside in the UK throughout those five years, even if they stop exercising Treaty rights for whatever reason.

Union citizens who apply for a registration certificate using an online form may now be offered the **European Passport Return Service** whereby, for a small additional fee, they can attend a local authority office to have their passport checked, copied and returned to them while they wait. This is much more convenient than posting one's passport to the Home Office and then having to ask for it back. Requests for the "urgent" return of EU passports are supposed to take no more than ten working days to process, but frequently take longer because of the surge in applications for residence documentation.

Reg. 27 "Decisions taken on grounds of public policy, public security and public health"

This important regulation was formerly reg. 21, and is nearly all the same, with the addition of an extra principle governing such decisions : "*the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person*." There is also an addition reminiscent of **Part 5A Nationality, Immigration & Asylum Act 2002**, which gives statutory guidance to judges deciding Article 8 cases, in that courts and tribunals "*must (in particular) have regard to the considerations contained in Schedule 1*", which include "*the fundamental interests of society*." This addition is controversial.

It has always been the case, however, that Union citizens may be deported on public policy grounds if they represent "*a genuine, present and sufficiently serious threat to the*

fundamental interests of society." The old ECJ case of ***Bouchereau*** **[1978] QB 732** held that a particularly serious criminal offence could be enough to meet that test, without there being a risk of re-offending, and this was followed by the Court of Appeal in ***Marchon*** **[1993] Imm AR 384**. But as pointed out in ***Arranz (EEA Regulations – deportation – test)*** **[2017]**, these authorities have been displaced by ***Nazli*** **[2000] C-340/97** and the **Citizens Directive** and are no longer good law. There must be a propensity to re-offend, although – as we have seen above – to this has been added the prevention of first-time offending.

Section 5: Points Based System - Work and Study

As long ago as March 2016 the Government announced that it would simplify the Immigration Rules for work categories, removing the "outdated" terminology of Tiers and points-scoring. That is not the first time that a promise has been made to simplify the Rules. So far, nothing has happened.

Tier 2 (General) and Tier 2 (Intra-Company Transfer) Migrants

As part of the Government's aim to reduce net migration to the tens of thousands, the Migration Advisory Committee ('MAC') was asked to see what could be done to reduce the numbers in Tier 2. The Government accepted the majority of MAC's recommendations, and introduced them in two stages, from 24th November 2016 and 6th April 2017 –

- The minimum salary threshold for Tier 2 (General) will be kept at £20,800 for 'new entrants' to the workforce, but went up initially to £25,000 for 'experienced workers', and rose again to £30,000 in April 2017. But Tier 2 Migrants who were already sponsored before 24th November 2016 will not have to meet the new thresholds when they apply to extend their leave.
- The high earnings threshold for exemption from the Resident Labour Market Test has gone up from £155,300 to £159,600.
- Because of recruitment difficulties, certain occupations will be exempt from these higher salary thresholds until July 2019 : nurses, medical radiographers and paramedics, and secondary school teachers in Mathematics, Physics, Chemistry, Computer Science and Mandarin. But Chemistry is being taken off the Shortage Occupation List, to be replaced by Combined Science (where this includes Physics).
- Nurses are being retained on the Shortage Occupation List. If a job is on that list, the employer does not have to carry out a Resident Labour Market Test. But rather inconsistently, one might think, a Resident Labour Market Test <u>will</u> have to be carried out, before a nurse is assigned a Certificate of Sponsorship.
- More Graduate Trainees will be encouraged to come through the Intra-Company Transfer route, by reducing their minimum salary threshold from £24,800 to £23,000, and by increasing the number of trainees that an employer may bring to the UK from 5 to 20 per year.
- On the other hand, the Skills Transfer subcategory has been closed to new applicants from 24th November 2016, while the minimum salary for Short Term transferees has been raised to £30,000. The subcategory itself has been closed to new applicants, however, from 6th April 2017.

The Migration Advisory Committee has now been given the much bigger task of drawing up a report on the effect of EU migration on the British economy. This must be ready by September 2018, just six months before Brexit. In the meantime, the following changes to Tier 2 have also taken effect from April 2017 –

- For the remaining subcategory of Intra-Company Transferees, i.e. Long Term Staff, there will be a minimum salary threshold of £41,500. Hitherto, Long Term Staff who want to stay for longer than five years (the maximum is nine) have had to be earning at least £155,300, but from 6th April 2017 this has been reduced to £120,000. The one year's experience required of working for the sponsor's linked entity overseas has been removed for applicants earning more than £73,900.
- Having been exempt from the outset, all Intra-Company Transferees will be required to pay the Immigration Health Surcharge. The exemption for citizens of Australia and New Zealand has already gone, ending in April 2016.
- From 6th April 2017, under the **Immigration Skills Charge Regulations 2017**, an Immigration Skills Charge will be levied on Tier 2 employers at a rate of £1,000 per Certificate of Sponsorship per year. A reduced rate of £364 will apply to small and charitable sponsors, while the levy will not be payable at all in respect of three categories : PhD level occupations, Graduate Trainees, and migrants switching into Tier 2 from the Tier 4 route. A Certificate of Sponsorship will be considered invalid if any applicable charge is not paid in full. The actual amount payable will depend on how long the CoS is assigned for. Thus, if the CoS is for 2½ years, the charge for a large employer will be £1,000 X 2½ = £2,500.

The **Immigration Act 2016** had paved the way for the 'immigration skills charge' by inserting a new **s.70A** into the **Immigration Act 2014**, which allows regulations to be made in respect of "*persons who make immigration skills arrangements*", i.e. sponsors who employ overseas workers. The money raised will go into a general Government fund for apprenticeships, so as to reduce the need for firms to employ overseas workers.

Tier 1 Entrepreneurs and **Tier 1 Investors** have had to produce an overseas criminal record certificate as part of their entry clearance application since September 2015. They must produce a certificate from any country in which they have lived for more than twelve months during the past ten years. This requirement has now been extended to **Tier 2 General** applicants who intend to work in the education, health and social care sectors.

Tier 4 (General) Students

TOEIC/ ETS

Between 2013 and 2015 around 33,000 students had their leave curtailed because of the assumption by the Home Office that overseas students who had passed the Test of English for International Communication ('TOEIC') administered by the American company Educational Testing Services ('ETS') had obtained their English language certificates by fraud, following an *exposé* by BBC's Panorama in February 2014. This view was at first widely shared by both the public and the judiciary.

The trend was reversed, however, by ***SM & Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 225 (IAC))**. The President of the Upper Tribunal, McCloskey J, was here very critical of the Home Office, concluding that the evidence adduced by the Secretary of State was insufficient to discharge the legal burden of proving that the TOEIC certificates awarded to the two appellants were procured by dishonesty (though he did not go so far as to say that the evidence did not prove that TOEIC certificates in general were procured by dishonesty). However, the generic evidence relied on by the Home Office in all ETS cases was shown to suffer from "*multiple shortcomings and frailties*."

This evidence did, however, discharge the evidential burden of showing that the appellants had a case to answer. Answer it they did, with their oral evidence at the hearing and expert evidence from Dr Harrison, a phonetician. The 'generic' evidence relied on by the Home Office consisted of reports by two Home Office officials, Peter Millington and Rebecca Collings, who had no expertise whatever in this field, and were simply recycling what they had been told by ETS. The appellants' evidence was therefore preferred to the respondent's evidence, and the respondent accordingly failed to discharge the legal burden of proving fraud.

Subsequent cases have completely changed the picture. Another expert, Professor French, has countered the opinion of Dr Harrison, while the technicalities have become better understood. ETS have an Automatic Speaker Recognition system, the results of which are checked by a "human verification process" known as "trained listener pair confirmation", i.e. trained listeners at ETS, working in pairs, who can confirm that the same person is speaking in voice recordings which are supposed to have been made by numbers of different individuals. In other words, a proxy has been used on the speaking part of the English language test. For its part, the Home Office has a "Look-up Tool", a system under which ETS testing analyses are matched to the person with the name, date of birth and nationality of the certificate holder. This enables caseworkers to reject applications for leave to remain by individuals who have used such certificates in the past, or to curtail their existing leave.

All this is explained in ***R (app. Nawaz) v SSHD (ETS: review standard/evidential basis)* [2017] UKUT 288 (IAC)**. Judge Freeman held that this evidence provided a reasonable basis, on ordinary judicial review principles, for the findings of deception made by the Home Office. This was especially so when the individuals concerned had been offered the opportunity of checking out their own voice recording and getting it analysed by an expert, but had not taken that opportunity.

Net migration

The TOEIC/ ETS brouhaha has reinforced a trend which began when Theresa May became Home Secretary in 2010, namely a reduction in the number of overseas students wanting to come to the United Kingdom – although there has been an increase in the numbers applying for the more prestigious Russell Group of universities. Except for those on short courses of less than a year, international students are included in the net migration figures, and in order to reduce those figures from the hundreds of thousands to the tens of thousands, the number of international students has to come down. The fact that thousands of students and former students have had their leave curtailed, or have been refused further leave to remain, because of perceived deception in English language tests, will not have encouraged applications from abroad.

Continuing the trend begun by her predecessor, the current Home Secretary, Amber Rudd, has pledged to introduce tougher visa rules for "lower quality" universities and courses, and has asked the **Migration Advisory Committee** to report on the impact which overseas students have on the UK job market and on the economy more generally. It is all a far cry from the early days of Tony Blair's administration, when the doors of 'Cool Britannia' were flung open in order to promote the 'UK Education Brand' around the world!

Section 6: Admission of Family Members

Minimum Income Requirement

The requirement for a couple to have a minimum gross income of £18,600 per annum, with extra amounts for any children who are not British or settled, has been controversial since it was introduced in July 2012. A challenge to its lawfulness finally reached the Supreme Court, but in ***MM (Lebanon) & ors [2017] UKSC 10***, handed down in February this year, their Lordships ruled that the requirement is acceptable in principle. What was of great interest to judges and practitioners was the scope allowed by this judgment at the 'second stage' of an appeal to go beyond the Immigration Rules and determine whether the refusal of entry clearance or leave to remain was a disproportionate interference with **Art 8** rights, if the only reason for the refusal was a failure to meet the minimum income threshold.

In calculating the income available to a couple, the Rules did not allow 'third party support' to be taken into consideration, or the potential earnings of the overseas spouse. But at the 'second stage', an appellate tribunal could judge for itself whether such alternative sources of income would realistically be available. As the Supreme Court put it, this was part of "*the careful evaluative exercise required by article 8*." So the result of ***MM (Lebanon)*** was that it would be perfectly possible for a family case to fail under **Appendix FM**, which was expressly intended by the Government to comply with **Art 8**, but to succeed under **Art 8** outside the Rules, because there would in fact be enough money to support the couple and any children without recourse to public funds.

The Supreme Court indicated that the Immigration Directorate Instructions needed revision in order to take account of alternative sources of funding, and indeed that the Rules themselves might need to be amended "*to ensure that decisions are taken consistent with the duties under the Human Rights Act.*" The Rules also needed to make it clear that the '**section 55 duty**' must be taken into account in family reunion applications.

In the months following the judgment, cases falling for refusal because of the minimum income requirement were put on hold, and a considerable backlog built up while the Government wondered what to do. In the end they plumped for changing the Immigration Rules, and a new **GEN.3.1** has been inserted into **Appendix FM** from 1st August 2017 to deal with applications where the financial requirement cannot be met from the sources specified by the existing rules. Thus, where –

> "it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 … because such refusal could result in unjustifiably harsh consequences for the

applicant, their partner or a relevant child, then the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE."

The new **para 21A** of **Appendix FM-SE** lists three general sources which will be taken into account "*in exceptional circumstances*" –

(a) a credible guarantee of sustainable financial support to the applicant or their partner from a third party;
(b) credible prospective earnings from the sustainable employment or self-employment of the applicant or their partner; or
(c) any other credible and reliable source of income or funds for the applicant or their partner, which is available to them at the date of application or which will become available to them during the period of limited leave applied for.

"*The onus is on the applicant*", the new rule continues, "*to satisfy the decision-maker of the genuineness, credibility and reliability of the source of income, financial support or funds relied upon, on the basis of the information and evidence provided*." To this end, **para 21A** proceeds to set out a long, but not exhaustive, list of factors to which regard must be had. Some highlights of those are –

- A guarantee of third party support should be drawn up in a document signed, dated and witnessed.
- The decision-maker should assess the likelihood of the guaranteed financial support continuing for the period of the limited leave applied for, as well as the likelihood of a change in the third party's financial situation or of a change in his relationship with the applicant or the applicant's partner.
- An offer of employment should be on headed notepaper signed, dated "*and witnessed or otherwise independently verified*", and should include a signed or draft contract of employment.
- To assess the reliability of an offer of employment, the decision-maker will look at things like whether the job was advertised, whether the applicant has done that kind of work before, whether he is qualified to do it, whether he has English language skills if those are necessary, and whether the size of the workforce and the turnover of the business are such that the employer really needs an extra pair of hands.
- Where the proposed employer is a friend or relative, the likelihood of his falling out with the employee at some point during the next 2½ years must be considered.
- Verifiable documentary evidence of all other sources of income or funds must be produced, and the likelihood of the income or funds being available for the duration of the leave applied for must be assessed.

The old **Part 8** of **HC 395** required only that maintenance and accommodation would be "*adequate*", and permitted account to be taken of third party support and the prospective earnings of an applicant coming from overseas. Immigration judges were well used to assessing whether such sources of future income were genuine and realistic. There was inevitably a degree of subjectivity in such assessments, with common sense and experience underpinning the careful evaluative judgment involved.

For the benefit of Home Office caseworkers faced with a similar task (and a great many entry clearance applications for settlement are now decided in Sheffield), **para 21A** goes into

enormous detail about the kind of things to look out for. These include some rather bizarre features, such as forecasting the likelihood of the relationship between the couple and the person offering third party support, or between the applicant and an employer who is a relative or friend, breaking down during the 2½ years of limited leave being applied for. And it seems most odd that a letter containing an offer of employment should be "*witnessed*".

Before any of this kicks in, there is an initial hurdle of "*exceptional circumstances*" caused by "*unjustifiably harsh consequences*" to be crossed. How high a hurdle is that likely to be? A pretty high one, according to the latest **Immigration Directorate Instructions** ('IDIs'), which emphasize that if an applicant cannot meet the **Art 8** requirements encapsulated within the Rules, it will only exceptionally be the case that refusal of the application is nonetheless contrary to Article 8.

The guidance to caseworkers then makes a distinction between '*exceptional circumstances*' in **GEN.3.1**, in which refusal "*could result in unjustifiably harsh consequences*", and '*exceptional circumstances*' in **GEN.3.2**, in which refusal "*would result in unjustifiably harsh consequences*." The threshold is said to be not quite so high in the former as it is in the latter, since **GEN.3.2** sets the '*ultimate test*' – namely that, whatever rules the applicant is unable to meet, not just the financial threshold, it will still be contrary to Article 8 to refuse the application.

The distinction between different degrees of exceptionality may cause some head-scratching among the caseworkers in Sheffield, where most of these applications will be decided. The whole thing seems a very grudging response to the judgment in ***MM (Lebanon)***, and can hardly be what the Supreme Court had in mind. If the only thing preventing a spouse and children from joining their sponsor in the UK is a failure to meet the minimum income requirement, and that requirement can be met by third party support or a job for the overseas spouse, why should it be necessary to show that the consequences of refusal would not only be harsh, but "*unjustifiably harsh*"? It will be hard enough for applicants to show that the alternative sources of funding are genuine and reliable. The real hurdle to be overcome ought surely to be the provision of enough documentary evidence to satisfy the ECO of the requisite genuineness and reliability.

Adopted children

Many Commonwealth countries whose adoption orders used to be recognised in the United Kingdom are not included in the **Adoption (Recognition of Overseas Adoptions) Order 2013**, because they have not ratified the *Hague Convention on Intercountry Adoption*. Nigeria is one of those countries. In ***Mr & Mrs W v SSHD*** **[2017] EWHC 1933 (Fam)** a Nigerian child was refused a visa under **para 319H** of the Immigration Rules as the child of a Relevant Points Based System Migrant because he was not regarded as the adopted child of his Nigerian parents, a Tier 2 Migrant and his wife. He had been adopted by the order of a court in Nigeria, but that country is not on the list appended to the 2013 Order.

One way round this – and one not widely known about – was to invoke the inherent common law jurisdiction of the High Court and ask for an order recognising the foreign adoption. Mrs Justice Pauffley set out the four criteria which must be satisfied –

(i) The adoptive parents must have been domiciled in the foreign country at the time of the foreign adoption.
(ii) The child must have been legally adopted in accordance with the requirements of the foreign law.
(iii) The foreign adoption must in substance have the same essential characteristics as an English adoption.
(iv) There must be no reason in public policy for refusing the adoption.

Her Ladyship found all four criteria to be satisfied, despite the intervention of the Home Secretary, and accordingly recognised the adoption at common law. In the alternative, even if she was wrong about the second criterion being met, she found that the denial of a visa was a breach of the **Article 8** right to family life of the child and his parents.

In the past, the Article 8 route has been the one which adoptive parents have tried when the adoption has taken place in a country whose adoption orders are not recognised in the UK : see, for example, ***Pawandeep Singh v ECO, New Delhi*** **[2004] EWCA Civ 1075**. The success of Mr and Mrs W in the present case may encourage others to try the little-used common law route.

It is possible, if one of the adoptive parents is related to the child through blood or marriage, for an application to be made under **para 297(i)(f)** of the Immigration Rules if there are "*serious and compelling family or other considerations*" which make exclusion of the child undesirable. But this is a high hurdle to cross, especially if the child is being well taken care of abroad, and even more so if the child is within a year or two of attaining its majority.

Section 7: Asylum and humanitarian protection

Dublin Convention

Under **art 28** of the **Dublin III Regulation**, a person who has made a claim for international protection may only be detained if he presents a significant risk of absconding. This means the existence of reasons in an individual case, based on objective criteria defined by law, to believe that a person who is undergoing the transfer procedure to another Member State may abscond.

In ***Al Chodor* Case C-528/15** the ECJ ruled that, for a risk of absconding to be "*defined by law*", there had to be a binding provision in the Member State's legislation, and that "*settled case law confirming a consistent administrative practice … cannot suffice*." It was just such practice which governed the use of detention in this country, so the Home Office speedily drew up the excitingly-named **Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding) Regulations 2017**.

The criteria for establishing a risk of absconding, set out in the new regulations, will be very familiar to judges who hear applications for bail by immigration detainees. They include things like previous deception, previous absconding or failure to comply with conditions attached to a previous grant of temporary admission or release. One criterion peculiar to these regulations is reasonable grounds to believe that the person is unlikely to return voluntarily to the Member State deemed responsible for considering his application for asylum.

Resettlement of refugees

The government pledged in November 2014 to resettle 20,000 refugees from Syria over a five-year period via the **Vulnerable Persons Resettlement Scheme**, while in April 2016 a commitment was made to resettle a further 3,000 vulnerable children and family members from other parts of the Middle East and from North Africa via a **Vulnerable Children's Resettlement Scheme**. In addition, under **s.69 Immigration Act 2016**, '*The Secretary of State must … make arrangements to relocate to the United Kingdom and support a specified number of unaccompanied refugee children from other countries in Europe*." Local authority support has to be made available under **Schedule 12** to the **2016 Act**, but not many local authorities stepped up to the plate, and the number of children admitted has turned out to be much smaller than expected, much to the disappointment of Lord Dubs, who campaigned for the admission of 3,000 children from Europe.

From 1st July 2017, however, people arriving under the other resettlement schemes will be granted refugee status and five years' limited leave. Previously they have been granted humanitarian protection, but refugee leave is more advantageous. For example, with humanitarian protection three years' residence is needed in order to qualify for student loans, whereas those recognised as refugees qualify immediately. People who already have humanitarian protection will be able to upgrade their status.

Section 8: European Convention on Human Rights

Article 8 and Appendix FM

As well as relaxing the rules on the financial threshold that must be crossed by family members seeking settlement in the United Kingdom (see **Section 6** on this), the Home Office in **HC 290** has also acted on the declaration made by the Supreme Court in ***MM (Lebanon)* [2017] UKSC 10** that the Immigration Rules and the Immigration Directorate Instructions were unlawful in not giving direct effect to the duty under **s.55 Borders, Citizenship and Immigration Act 2009** to safeguard and promote the welfare of children.

Therefore a new paragraph **GEN.3.3** in **Appendix FM** stipulates that in cases where there might be exceptional circumstances rendering refusal of entry clearance or of leave to enter or remain a breach of **Art 8** – whether because the applicant cannot meet the normal financial requirements or indeed cannot meet the requirements of any other immigration rule – "*the decision-maker must take into account, as a primary consideration, the best interests of any relevant child*."

The same adversion to the '*section 55 duty*' now appears at **EX.1(a)**, where an applicant has a genuine and subsisting parental relationship with a child and "*it would not be reasonable to expect the child to leave the UK*." To this has been tacked on "*taking into account their best interests as a primary consideration*".

The Home Office has actually gone further and has purported to bring "*the test of proportionality under Article 8 into the Rules*". Of course, they said the same thing when the Rules were changed in 2012 with the introduction of **Appendix FM** and **para 276ADE**. But it was soon accepted that even if an application did not succeed under the new rules, the test of proportionality under **Article 8** could be applied at the 'second stage' of an appeal on human rights grounds. Now, the Explanatory Memorandum to **HC 290** claims that the changes made "*mean that the Immigration Rules now provide a complete framework for the Secretary of State's consideration on Article 8 grounds of applications under Appendix FM by a partner, child, parent or adult dependent relative*."

The reference to "*a complete framework*" reminds one that the immigration rules on deportation, **paras 396-400 HC 395**, were once characterised by the Court of Appeal (in ***MF (Nigeria)***) as "*a complete code*", a characterisation disapproved by the Supreme Court in ***Hesham Ali* [2016] UKSC 60**. The 'two stage' approach survived that misdescription, and no doubt there will still be a 'second stage' in human rights appeals which do not succeed under the new version of **Appendix FM.**

At all events, the references at section **GEN** of **Appendix FM** to entry clearance or leave being granted "*outside the rules on Article 8 grounds*" have all been deleted. What we have instead is **GEN.3.2**, which stipulates that "*where an application … does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider … on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 … because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8*

rights it is evident from that information would be affected by a decision to refuse the application."

This test was previously in the Immigration Directorate Instructions published in August 2015, and was approved by the Supreme Court in ***Agyarko* [2017] UKSC 11**. As the Press Summary of that case puts it –

> "The Instructions state that exceptional does not mean unusual or unique, but means circumstances in which refusal would result in unjustifiably harsh consequences for the individual, such that refusal of the application would not be proportionate. This is an application of a test of proportionality, consistent with the references to exceptional circumstances in European case law, and cannot be regarded as incompatible with article 8."

The information on which a finding of unjustifiably harsh consequences may be based must come from the applicant. There is no duty on the Home Office to make enquiries beyond that. It was once mooted that the Tribunal should make its own enquiries into the best interests of children where this was an issue, but the idea was scotched as wholly impractical. **GEN.3.3** relieves the Home Office of any such duty in relation to the best interests of a child when it states that it must be evident "*from the information provided by the applicant*" that the child would be affected by the refusal of the application.

The addition of '*exceptional circumstances*' into **Appendix FM** at **GEN.3.2** is reminiscent of the stipulation at **para 398** that it will only be in exceptional circumstances (now replaced by "*very compelling circumstances*") that deportation can be avoided because of factors other than those provided for in the Rules. It will, of course, be possible on appeal to look at information which was <u>not</u> provided to the decision maker by the applicant, to determine whether there are exceptional circumstances. So the '*second stage*' survives, come what may!

Those fortunate enough to be granted entry or leave to remain as a partner or parent under **GEN.3.1** (see **Section 6** on this) or **GEN.3.2** will go on the ten-year route to settlement, with no recourse to public funds unless, as laid down by **GEN.1.11A**, there is satisfactory evidence that the applicant is destitute or that "*there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income*." If they can subsequently meet the normal requirements of Appendix FM, they can apply to enter the five-year route.

Section 9: Deportation/ Removal

The public interest

In ***Hesham Ali [2016] UKSC 60***, Lord Reed has confirmed that the "two-stage" approach in deportation appeals is correct, and that the Court of Appeal were right in ***MF (Nigeria) [2013] EWCA Civ 1192*** to suggest that '*very compelling reasons*' would be needed for allowing an appeal under **Art 8** when the foreign criminal did not meet the provisions of **paras 399-399A** of the Immigration Rules. The Court had explained that '*exceptional circumstances*', which was the wording of the Rules at that time, meant no more than that great weight should be given to the public interest in deporting foreign criminals who did not come within paras 399-399A. It was not an '*exceptionality*' test, but denoted a departure from the general rule. His Lordship also approved of Laws LJ's view in ***SS (Nigeria) [2013] EWCA Civ 550*** that, at the second stage of a deportation appeal, a human rights claim would have to be '*a very strong claim indeed*'.

Lord Wilson agreed with all that, and was also with Lord Reed in pointing out '*an insignificant but unfortunate error*' made by the Court of Appeal in ***MF (Nigeria)*** when they described **paras 396-400 HC 395** as a '*complete code*' in which both stages of a deportation case could be determined. This had led to a misunderstanding in some later cases, that the Rules, and the Rules alone, governed appellate decision-making. Rather, the test at the "second stage" was whether there were factors of a compelling nature which would outweigh the public interest in the deportation of foreign offenders who could not avail themselves of the human rights considerations set out in the Rules.

Lord Wilson made another correction, this time to himself, by resiling from what he had said in ***OH (Serbia) [2008] EWCA Civ 694*** about one of the factors to be weighed on the public interest side of the proportionality balance being "*an expression of public revulsion at serious crimes*". This was too emotive a term. But two other factors which he mentioned at the time, namely the deterrent effect of deportation orders and the building of public confidence in the system of dealing with foreign criminals, should, insisted his Lordship, still be given weight on the public interest side of the balance.

This prompts the question whether a tribunal, when weighing up the public interest side of the balance in a deportation appeal, commits an error of law if it does <u>not</u> explicitly mention deterrence and public confidence as factors going into that side of the balance. ***OH (Serbia)*** was decided at a time, well before the introduction of **paras 396-400**, when the Immigration Rules did not purport to reflect **Art 8**, and well before the statutory guidance for judges at the second stage of the two-stage test given by **Part 5A Nationality, Immigration and Asylum Act 2002**. There is no mention in **s.117C** of deterrence or "*building public confidence in the treatment of foreign citizens who have committed serious crimes*". Arguably, a tribunal which makes clear in other ways that it is according great weight to the public interest will not be falling into legal error if it fails to mention deterrence and public confidence.

Indeed, a remark of Burnett LJ (as he was then; he is now Lord Chief Justice) in ***EA [2017] EWCA Civ 10*** may be apt here :

> "Decisions of tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the F-tT has failed to mention *dicta* in a series of cases in the Court of Appeal or elsewhere will rarely prosper."

On the other hand, Burnett LJ reverts to Lord Wilson's expressions when criticising the First-tier Tribunal's assessment of the public interest in the case before him :

> "[T]he F-tT refers only to the public interest in the prevention of disorder and crime without any reference to the great weight to be attached to removal in the public interest. That is a dimension which stretches far beyond narrow questions of deterrence and future risk. It is the moral dimension referred to by Laws LJ in ***SS (Nigeria)***. It captures the public revulsion at serious offending by those who are, in one sense, guests in this country."

Precariousness

The disapproval of criminality by people who are "*guests in this country*" leads to a query about who exactly the people are whose status in this country is "*precarious"*. When discussing the Strasbourg jurisprudence in ***Hesham Ali***, Lord Reed draws a distinction from the ***Boultif*** line of cases between settled and non-settled migrants. For the latter, a factor counting against them will be whether their family life "*was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious.*"

Lord Wilson also refers to the Strasbourg jurisprudence (***Rodrigues da Silva, Hoogkamer v The Netherlands*** and ***Jeunesse v The Netherlands***) which makes it "*likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8*" when his immigration status renders his continued residence precarious.

Precariousness in the Strasbourg sense pertains only to non-settled migrants, and seems particularly directed at those with irregular immigration status. It features in our domestic law in two important ways. First, among the Immigration Rules relating to deportation, **para 399(b)(i)** benefits a potential deportee if his relationship with a British or settled partner was formed at a time when his immigration status was <u>not</u> precarious. Secondly, and not just in deportation cases, **s.117B NIAA 2002**, which sets out the public interest considerations applicable in all **Art 8** cases, requires at **(5)** that "*Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious*."

Precarious immigration status is distinct from unlawful presence in both the Rules and **Part 5A** of the 2002 Act, and the Upper Tribunal have given it a very wide ambit. An immigration status that was lawful but precarious suggested to some that it meant being on 'temporary admission', or on 'statutorily extended' leave under **s.3C Immigration Act 1971**, after one's ordinary leave would otherwise have expired. But in ***AM (Malawi) [2015] UKUT 260 (IAC)*** a Vice-Presidential panel of the Upper Tribunal gave the term a much wider interpretation:

> "Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is 'precarious' if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. In some circumstances it may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is 'precarious', either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. In such circumstances the person will be well aware that he has

> imperilled his status and cannot viably claim thereafter that his status is other than precarious."

This very wide interpretation has since been adopted in, for example, ***Forman [2015] UKUT 412 (IAC)***, in which a migrant who had lived lawfully in Scotland for seven years, first as a student and then on the Tier 1 (Post-Study Work) route, was held by a Presidential panel of the Upper Tribunal to have passed the entirety of his private life in the United Kingdom during a period when his immigration status was precarious. It could not therefore be accorded more than slight weight.

On the other hand, McCloskey P seems to have taken a more generous approach subsequently. Thus in ***Treebhawon & Others (NIAA 2002 Part 5A – compelling circumstances test)*** **[2017] UKUT 13 (IAC)**, the headnote says this –

> "The Parliamentary intention underlying Part 5A of NIAA 2002 is to give proper effect to Article 8 ECHR. Thus a private life developed or established during periods of unlawful or precarious residence might conceivably qualify to be accorded more than little weight and s.117B(4) and (5) are to be construed and applied accordingly."

The strictness of the earlier Upper Tribunal approach has also been tempered somewhat by Lord Reed who, at paragraphs 49-53 of his judgment in ***Agyarko [2017] UKSC 11***, emphasizes a passage in the IDIs instructing Home Office caseworkers that it is people who put down roots in the UK "*in the full knowledge that their stay here is unlawful or precarious*" who should be given less weight in the Article 8 balance. His Lordship can envisage circumstances in which "*people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate*."

Lord Reed also reminds us of the ***Chikwamba*** point, i.e. there might be no public interest in removing a person, even one residing in the UK unlawfully, if he would be sure to get entry clearance on an application made from abroad. (Perhaps the ***Chikwamba*** point is not so strong nowadays, as prior unlawful residence may well provide a reason for refusing an application for entry clearance as a spouse, if there are "*other aggravating circumstances*" – see **para 320(11) HC 395**.) His Lordship reminds us too of the ***EB (Kosovo)*** point, i.e. that "*the weight to be given to precarious family life is liable to increase if there is a protracted delay in the enforcement of immigration control*."

The Home Office instruction, which is cited with approval by Lord Reed as consistent with the case law of the ECtHR, actually says:

> "Family life which involves the applicant putting down roots in the UK, in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK."

This clearly differentiates lawful presence (which would include limited leave) from a precarious stay (which is not unlawful, but is presumably a lesser status than 'ordinary' leave). That is very different from the Tribunal's case law, which views limited leave, and potentially indefinite leave, as a precarious status. Lord Reed himself expands "*unlawful or precarious*" into "*whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily*." It is not clear, however, precisely what the latter expression

means. Does it include someone with five years' leave as a Tier 2 (General) Migrant, who can apply for settlement at the end of that period, or is it rather for people like visitors, who cannot normally get an extension to their current leave?

A clue to that has been provided by Sales LJ in ***Rhuppiah* [2016] EWCA Civ 803**. Harking back to ***Jeunesse v Netherlands***, his Lordship observes that –

> "A person would know from the outset that there would be precariousness in relation to the persistence of family life if he was given limited leave to enter or remain in the host state, where it was clear that he would have to leave at the end of a set period of time in the not far distant future."

In ***Rhuppiah*** itself the appellant was given leave to enter as a student in 1997, followed by successive grants of leave to remain until 2009, but Lord Justice Sales rejected an argument that she was on "*a route to settlement*".

> "For each individual grant to the appellant of leave to enter or remain, the period of the grant was specifically limited to the comparatively short and clearly delimited period required for the completion of a course of study … On the occasion of her application in each case, she may have had a hope that her leave might be extended when it came to an end if she could find another study course, but she had no guarantee that she would be able to do so and no guarantee that the same Immigration Rules would be in place when she made her further application. The hope, if she had any, of possibly eventually being in a position to apply for ILR was still more remote and tenuous."

The student route does not lead in itself to settlement, and is normally limited to a maximum of eight years. So it is a precarious immigration status for the purposes of **s.117B(5)**. But routes that do lead to settlement, such as the five-year route for spouses and Tier 2 (General) Migrants, are surely not 'precarious' in the same sense. True, something could happen which would prevent an individual from completing five years on the route. The marriage might break down, or a sponsoring employer might lose his Home Office licence. But that is different from knowing at the outset that one will have to leave the UK at the end of a set period of time in the not far distant future. Those on "*a route to settlement*" provided by the Immigration Rules ought arguably to have more weight accorded to private or family life ties established while on such a route, than those who are not.

Reasonableness

EX.1(a) of **Appendix FM** can come to the rescue of a partner or parent who does not meet the normal requirements of the Immigration Rules, if he has a genuine and subsisting parental relationship with a child who is British or has lived here for seven years, and "*it would not be reasonable to expect the child to leave the UK*." If a human rights appeal (in a non-deportation case) gets to the 'second stage', **s.117B(6) NIAA 2002** tells judges that the public interest does not require the appellant's removal if those same two conditions are satisfied.

In ***Treebhawon & ors [2015] UKUT 674 (IAC)*** McCloskey P held that the language of the statute was unequivocal, and that someone satisfying those conditions would avoid removal. The other subsections of **s.117B** would not have to be considered. Another Presidential panel carried out "*a more elaborate and comprehensive exercise*" applying **s.117B(6)** in ***PD & Ors (Article 8 – conjoined family claims) [2016] UKUT 108 (IAC)***, but with the same result.

In ***MA (Pakistan) & ors [2016] EWCA Civ 705***, however, the Secretary of State argued that all potentially relevant public interest factors, including the rest of **s.117B**, should be taken into account when determining whether it would "*not be reasonable to expect the child to leave*." The conduct and immigration history of the parents would be relevant factors, so that the stronger the public interest in removing the parents, the more reasonable it would be to expect the child to leave.

Lord Justice Elias could see no justification for reading the concept of reasonableness in this way, rather than focusing purely on what was reasonable for the child. But he felt bound by the authority of ***MM (Uganda) & anr [2016] EWCA Civ 617***. The Court was there looking at what was meant by the effect of his parent's deportation being "*unduly harsh*" on a child, under **s.117C(5) NIAA 2002**. Although that subsection too was a free-standing provision, in the same way as **s.117B(6)**, it was held that wider public interest considerations must be taken into account when applying the "*unduly harsh*" criterion. It seemed to Elias LJ that this must be equally so with the "*reasonableness*" criterion.

All the same, the fact that a child had been here for seven years had to be given significant weight when carrying out the proportionality balancing exercise. This indeed was the guidance given in the Immigration Directorate Instructions, which state that once the seven-year residence requirement is satisfied, there need to be "*strong reasons*" for refusing leave. But his Lordship did not accept a submission that if it is in the best interests of the child for him to stay, that necessarily resolves the reasonableness question. There is nothing intrinsically illogical in the notion that, while the child's best interests are for him to stay, it is not unreasonable to expect him to go!

It remains to be seen whether the recent addition of taking account of the best interests of the child to the consideration at **EX.1(a)** of whether it would be reasonable to expect a child to leave the United Kingdom, will make any difference to the assessment of '*reasonableness*'.

Undue harshness

Since 28th July 2014 both the Immigration Rules and the 2002 Act have provided for a 'foreign criminal' to avoid deportation (unless he has been sentenced to four years or more in prison) if it would be "*unduly harsh*" for his partner or children either to live in the country to which he is to be deported, or to remain in the UK without him; see **para 399** and **s.117C(5)**. Naturally, there has been some uncertainty as to how the expression is to be interpreted. Initially, the Upper Tribunal took the view in ***MAB (USA) [2015] UKUT 435 (IAC)*** that the impact of deportation upon the innocent family member should be the focus, to the exclusion of the gravity of the foreign criminal's offence. In ***MM (Uganda) & anr [2016] EWCA Civ 617***, Laws LJ took the opposite view.

The meaning, he explained, is coloured by its context, and the context here invites emphasis on two factors – (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with **Art 8** rights. "*Accordingly*", continued his Lordship, "*the more pressing the public interest in [*an offender's*] removal, the harder it will be to show that the effect on his child or partner will be unduly harsh*." All the circumstances must be taken into account, not merely the impact on the child or partner, and those circumstances "*certainly include the criminal's immigration and criminal history*."

If anything, this approach has now hardened. It was expanded in ***IT (Jamaica) [2016] EWCA Civ 932***, an appeal against the refusal to revoke a deportation order. Lady Justice Arden concluded that "*the undue harshness standard in section 117C of the 2002 Act means that the deportee must demonstrate that there are very compelling reasons for revoking the deportation order before it has run its course*." She explained that "*the harshness brought about by the continuation of the deportation order must be undue, i.e. it must be sufficient to outweigh that strong public interest. Inevitably, therefore, there will have to be very compelling reasons.*"

Such an approach seems tantamount to lifting 'undue harshness' out of **Exception 2** at **s.117C(5)**, which is for foreign criminals who have not been sentenced to four years or more in prison, and aligning it with "*very compelling circumstances, over and above those described in Exceptions 1 and 2*" at **s.117C(6)**, which is for those sentenced to a least four years.

Zambrano

The ECJ's landmark judgment in ***Case C-34/09 Ruiz Zambrano*** has featured regularly in cases where the parents of British children are facing removal or deportation. The Home Office IDI of August 2015, headed "**Family Life as a Partner or Parent and Private Life, 10 year Routes**", gives guidance to caseworkers – in cases not involving serious criminality – on when it would be unreasonable to expect a British child to leave the UK, in terms of **EX.1(a)** of **HC 395.** The guidance is said to reflect ***Zambrano*** when it states:

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

That may seem a rather generous way of putting it, but the guidance does also explain that the effect of the parent's removal must not be to force the British child to leave the EU. Put that way, the IDI is consonant with current case law. Indeed, in ***SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC)*** a Vice-Presidential panel applied this guidance when deciding that it would be unreasonable to expect a British child to leave the UK with his mother and siblings.

But earlier case law caused a serious misunderstanding. In ***Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 48 (IAC)***, a Presidential panel stated at #5 of the head note:

> "Case C-34/09 *Ruiz Zambrano* now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so."

This was actually a concession made in the course of proceedings by the Secretary of State, who accepted that "*it will not logically be possible to argue*" that it would be reasonable to expect a British child to move to a country outside the EU in order for the family unit to remain intact. This notion was taken up in many subsequent appeals before the First-tier Tribunal. For example, in ***IT (Jamaica)*** *(supra)* the FtT held, following ***Sanade***, that it was

not possible to require the appellant's wife and child, both British citizens, to relocate with him outside the European Union, and that the only way to avoid an Article 8 breach was for the appellant to be readmitted to the UK.

In ***VM (Jamaica) [2017] EWCA Civ 255*** it was actually the Upper Tribunal which applied ***Sanade*** in allowing an appeal against deportation. But when the case reached the Court of Appeal, Sales LJ deprecated the concession made in ***Sanade***, and welcomed the fact that counsel for the Secretary of State was now for the first time explicitly resiling from that concession. That was in April 2017 – more than five years after ***Sanade*** was promulgated!

Lord Justice Sales went on to explain that ***Case C-356/11 Dereci*** rather than ***Zambrano*** was applicable to the facts of the instant case, in which the children could remain in the UK with their British mother, if she chose to stay here rather than follow her husband to Jamaica:

> "Rather than a legal impossibility of remaining in the UK, the family would face a difficult practical choice whether to separate (with the mother and children remaining in the UK, in which case there would be no infringement of their EU citizenship rights) or to leave and go to Jamaica as a family unit. This is the situation addressed in *Dereci* and in domestic authority."

Private life/ Integration

In looking at the private life of a deportee at the 'second stage' of an appeal, courts and tribunals are told that the public interest does not require deportation if '**Exception 1**' applies. Three criteria are listed in **s.117C(4) NIAA 2002**, and all three must be satisfied. One of them is that, in respect of the foreign criminal ('C'), "*there would be very significant obstacles to C's integration into the country to which C is proposed to be deported*." This is actually the same test as the one at **para 399A** of the Immigration Rules (the 'first stage'), and it is virtually the same test at **para 276ADE(1)(vi)** for people facing removal as overstayers or illegal entrants, except that they are being "*required to leave the UK*" rather than being deported.

In ***SSHD v Kamara [2016] EWCA Civ 813*** Lord Justice Sales gave a broad definition of '*integration*' –

> "It is not confined to the mere ability to find a job or to sustain life while living in the other country … The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

It is laid down by **s.117B(5)** that "*little weight*" should be given to a private life established at a time of precarious immigration status, but that is not the same as 'no weight'. As acknowledged in ***Trebhawon & ors (NIAA 2002 Part 5A – compelling circumstances test) Mauritius*** **[2017] UKUT 13** and ***Kaur (children's best interests/ public interest interface)*** **[2017] UKUT 14**, there is a spectrum in the quantity of weight to be ascribed. A similar point is made in ***Rhuppiah*** **[2016] EWCA Civ 803** –

"for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character."